



THE COURT OF APPEAL

Appeal No: 75/2023

**Birmingham P.
Edwards J.
McCarthy J.**

Between/

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

Respondent

V

NOEL O'SHAUGHNESSY

Appellant

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 29th of January 2024.

Introduction

1. Before this Court is an appeal brought by Mr. Noel O'Shaughnessy (i.e., "the appellant") against the severity of the sentence imposed on him by the South Western Circuit Criminal Court sitting in Tralee on the 14th of March 2023. On that date, the court below sentenced the appellant to an total cumulative term of 6 years' imprisonment, with the final 12 months thereof suspended on certain terms and conditions, in respect of the following offending on Bill No. KYDP0008/2023:

- Count No. 1: Possession of stolen property contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (i.e., "the Act of 2001");
- Count No. 9: Attempted burglary, contrary to common law;
- Count Nos. 12 and 13: two counts of burglary contrary to s. 12(1)(b) and (3) of the Act of 2001;
- Count No. 14: Entering the curtilage of a building with intent to commit an offence contrary to s. 11 of the Criminal Justice (Public Order) Act 1994, as amended by s. 22 of the Intoxicating Liquor Act 2008.

2. By Notice of Appeal dated the 15th of March 2023, the appellant has advanced the following ground in support of his appeal against severity of sentence. This sole ground complains: *"The sentence imposed in respect of the abovementioned offence is excessive and unduly severe in all the circumstances"*.

Factual Background

3. On the 6th of March 2023, the appellant, who was originally indicted on a total of 14 counts, was arraigned on count nos. 1, 9, 12, 13, and 14 on the indictment, and entered guilty pleas in respect of same. These pleas were acceptable to the prosecution on the basis that evidence would be given on a full-facts basis. In circumstances where the defence was not in a position to proceed with a sentencing hearing, the matter was adjourned to the 14th of March 2023, on which date a Detective Garda Finbarr O'Donovan (otherwise "D/Garda O'Donovan") gave evidence in relation to the factual background to the appellant's offending.

Count nos. 1-8, inclusive

4. D/Garda O'Donovan was an investigating member in relation to these series of offences. He averred that in July of 2022, an American couple, comprising a Mr. Steven Beliakoff and his partner, were renting a homestay apartment property off Main Street, Killarney, where they were staying while on a visit to Killarney town and its environs. In the course of the morning of the 10th of July 2022, the couple left for a walk, and on their return they discovered that their personal property had been interfered with, and that certain items were missing, to wit an Apple iPhone, headphones, and a credit card. D/Garda O'Donovan stated that the appropriation of this property had occurred at some time between 10:00 and 16:00 that day.

5. Shortly thereafter, the credit card that had gone missing from the American couple's accommodation was recorded as having been used in a number of transactions. D/Garda O'Donovan detailed those transactions as follows: the purchase for €22.80 of Amber Leaf tobacco and Rizla rolling papers at a local Gala store; the purchase for €5.40 of a pint of Coors Light at a local hotel bar; the purchase for €9.55 of a chicken meal at a local takeaway; the purchase for €15.60 of three further pints of Coors Light at a different hotel bar, and; the purchase for €4.00 of lottery tickets at a local bookshop. There was CCTV footage capturing the appellant making these purchases with the credit card in question. In total, the transactions described were valued at €57.35.

6. Count no. 1 on the indictment, the possession of stolen property count, related to the appellant's possession of the stolen credit card; count nos. 2 – 8 on the indictment, which were simple counts of theft, related to those individual transactions involving the use of the said credit card.

Count nos. 9-11, inclusive

7. Count no. 9, that is the attempted burglary count, deals with another premises in Killarney, namely a fish shop on Hill Street owned by a Mr. Pádraig McCarthy. On Saturday the 9th of July 2022 at 13:00, Mr. McCarthy's shop closed for business and did not reopen until 9:00 on Monday the 11th of July 2022. When reopening the premises for business, Mr. McCarthy observed that the keypad control for the electronic shutter door had been the subject of interference and was damaged. The screw of the said keypad had been removed, and the keypad itself was found on the ground. Mr. McCarthy further observed that the metal security door in front of the premises' side PVC door was bent out of shape, and he also observed that the lock of this door had been interfered with. Accordingly, the damage to Mr. McCarthy's shop was to the keypad control unit, the side security door and gate.

8. Gardaí were in a position to harvest CCTV footage from an adjoining premises, and this footage captured the full incident. What it showed was the appellant approaching the fishmonger's shop at about 15:05 with a large kitchen-style knife in hand. It was said that he had approached the premises using a laneway off the main street and, having arrived at the property, he there effected damage to the keypad. D/Garda O'Donovan described how the appellant had used the knife to remove the screws from the keypad, and that it was clear that what the appellant was attempting to do was to effect a break-in to the fish shop while it was closed. In the course of this interference with the property, the appellant damaged the keypad and the door. D/Garda O'Donovan further stated that it appeared from the CCTV footage that the appellant was disturbed while carrying out these acts by an employee of an adjacent restaurant who was on a cigarette break. When so disturbed, the appellant was said to have ceased his attempt to gain unlawful entry to the fish shop, to have concealed the knife in his possession, and to have promptly left the scene.

9. Count nos. 10 and 11 on the indictment, which were counts of criminal damage contrary to s. 2 of the Criminal Damage Act 1991, related to the damage caused by the appellant to Mr. McCarthy's premises. The financial cost incurred by Mr. McCarthy arising from this damage amounted to €1,500. Mr. McCarthy tendered a concise victim impact statement to the sentencing court, which was read into evidence by D/Garda O'Donovan. It stated *inter alia*:

"[...] I'm a small business owner. Having somebody break into or attempt to break into my premises is every business owner's worst nightmare. The attempted burglary cost me €1,500 to replace the door and the lock, which is a magnificent amount considering the financial hardship we've just experienced due to Covid. The incident also affected me emotionally. I'm constantly worried after trade hours that the same incident may occur again, or the same suspect will return to my premises to carry out the same act. The stress caused by this incident is something I could do without. [...]"

Count no. 12

10. Count no. 12 was a count of burglary contrary to s. 12 of the Act of 2001, and it relates to events that transpired at a business premises, namely a Turkish barber, situated on Old Market Lane, Killarney. These events happened the same evening as those the subject matter of count no. 13; but notwithstanding the sequencing of the counts on the indictment, the events the subject matter of count no. 12 did not precede those the subject matter of count no. 13. The barber shop in question had closed some time after 18:00 on Saturday the 20th of August 2022 and did not reopen until the morning of Monday the 22nd of August 2022 whereupon the business owner, a Mr. Asaleh, discovered that €925 in earnings had been taken from the shop's till. D/Garda O'Donovan averred that there was no evidence of forced entry; rather, there was some manipulation of the lock. CCTV footage harvested from inside the premises showed an intruder entering the premises at 23:57 on the 20th of August 2022, and there taking from the shop till its contents. Forensic examination of the crime scene yielded lifts of fingerprints which were a positive match with the appellant; it was further said that identification of the appellant was also available from CCTV footage. No victim impact statement was tendered by Mr. Asaleh to the court below.

Count no. 13

11. Count no. 13 is another count of burglary contrary to s. 12(1)(b) and (3) of the Act of 2001, and it relates to a burglary that occurred on the 20th of August 2022 at a tour coach business premises on New Street, Killarney. The said premises would have shut at around 20:00 that evening whereupon it would have been locked. CCTV footage harvested from a camera situated at the door to the premises captured what transpired. It showed the appellant entering the premises. D/Garda O'Donovan stated that gardaí did not know how the appellant effected entry; he stated that there was no forced entry, and that the working presumption was that the appellant had "*slipped*" the door's lock. CCTV footage taken inside the premises depicted the appellant forcing internal doors by breaking glass in the doorway, and further stealing property, to wit €600 in cash and an old coat. The said coat which the appellant stole from the business premises on New Street was described as having some sentimental value to the victim, in that it had previously belonged to his late father. D/Garda O'Donovan further described that DNA evidence taken from the crime scene, namely obtained from swabs of blood found on the one of the broken internal glass doors, was a positive match with the appellant. No victim impact report was tendered in respect of this particular instance of offending. The financial cost of the damage caused to the glass doors at the property was valued at €550.

Count no. 14

12. The final count, count no. 14, relates to events that transpired on Sunday the 21st of August 2022. These events occurred at the accommodation of the American couple referred to previously in the context of the offending the subject matter of count nos. 1-8, inclusive. There was no entry of the property on this occasion, but CCTV footage showed someone trespassing on the premises with an intent to interfere with the property. D/Garda O'Donovan stated that the appellant was captured on doorbell CCTV attempting to open the door of the property with what appeared to be a bunch of keys in his possession. The Garda witness further stated that the appellant was not staying at the property at this time. He said that a feature of the case was that in a number of properties which the appellant unlawfully entered, he had entered these properties by knowledge of the use of locks. On this occasion, he had tried to do the same, by using the keys in his possession, but he was unsuccessful in this regard, and he failed to effect entry to the property. A Mr. John Hurley, the owner of the property in question, tendered a victim impact statement to the sentencing court, which was read into evidence by D/Garda O'Donovan. On account of its shortness, it is transcribed below:

"For the past four years, I've been an Airbnb provider at 37 Main Street, Killarney, and have enjoyed great success. I've been rated an Airbnb super host, due to the thousands of glowing five-star reviews. On the 21st of August '22, I received a late-night notification on my Ring doorbell CCTV of a male attempting to gain entry to my apartment at [address redacted], Killarney. This notification caused me great distress and anxiety. The distress was based on my fear that the apartment was being targeted again. Noel O'Shaughnessy attempting to gain entry to my apartment at [address redacted], on the 21st of August '22 has had a powerful negative impact on me".

Personal Circumstances of the Appellant

13. The appellant was aged approximately 55 years at the time of offending, and he was aged approximately 56 years at the time of sentencing.

14. He had 234 previous convictions which were outlined by D/Garda O'Donovan to the sentencing court. He had 33 previous convictions for burglary, of which 22 had occurred in the 11 years immediately preceding sentencing in respect of the present offending. The most serious of these burglary convictions, the burglary of a commercial premises, had resulted in the appellant receiving a 7-year custodial sentence, of which 4 years were suspended. The conviction in question was dated the 17th of June 2016. He had one conviction for robbery, for which he was sentenced to 2 years' imprisonment. He had three previous convictions for possession of stolen property; two in 2019 and one in 2014. He had 65 previous convictions for theft-related offences, 49 of which were dated within the 11-year period immediately preceding sentencing in the present case. He had spent "*considerable periods*" in custody.

15. D/Garda O'Donovan averred that the appellant has had various addiction issues, ranging from alcohol to gambling, and drug addiction. The details of the appellant's drug addiction were explicated in the course of the plea in mitigation. It was said that they arose originally from the prescription of Oxycontin in connection with his cancer treatment, following which he was supposed to have reduced his dosage but instead he had found ways of accessing the drug online or in person through illicit sources.

16. The appellant had no work history of which D/Garda O'Donovan was aware.

17. In cross-examination, D/Garda O'Donovan confirmed that the appellant had indicated a willingness to enter a guilty plea before the case was assigned a bill number in very early course. D/Garda O'Donovan further confirmed that this was of great assistance and benefit to any potential witnesses who were spared from having to attend court to give evidence. It was further said that whilst the appellant was taken into custody and had denied certain matters, he did make certain admissions in relation to the use of the credit card. D/Garda O'Donovan agreed with defence counsel's suggestion that the sums of money expended by the appellant using this credit card were "*modest*". D/Garda O'Donovan further agreed with defence counsel's suggestion that the offences the subject matter of the indictment were "*opportunistic in nature*" and were not indicative of a man who had put "*any great planning*" into them; and that the absence of the use by the appellant of any concealing clothing or gloves was conspicuous on CCTV, and was not typical of features ordinarily seen in the context of these crimes. D/Garda O'Donovan further confirmed that the appellant had not made threats or used violence in the course of the unlawful entries he had effected.

18. In cross-examination, the appellant's personal circumstances were further expounded. It was said that the appellant had throat cancer, was under the care of a hospital in Cork, and had had almost half of his tongue removed. It was said that his brother had died in 2022 from the same type of cancer and that the appellant would have been living with him during that time. The loss of his sibling was said to have "*aggravated*" the appellant's addiction issues. It was said in the course of the plea in mitigation that at the time of the present offending, the appellant was under financial pressure in that undertaker and funeral expenses in connection with his brother's funeral

were due, and that he had received letters in respect of those. It was further said that he was also trying to gain finances to pay for his own addiction difficulties.

19. The appellant had been in custody in respect of the present offending since the 23rd of November 2022. Counsel for the defence described the appellant as an “*enhanced prisoner*” and submitted in the course of the plea in mitigation that the appellant had been assigned to work in horticulture within the prison, had been attending a hairdressing course in the prison, was attending AA meetings twice weekly, and had been assigned a trauma counsellor.

20. In the course of the plea in mitigation, it was said that the appellant has three children, and four grandchildren.

Sentencing Judge’s Remarks

21. The sentencing judge’s ruling in the present case started with an identification of the aggravating factors at play in the case. The sentencing judge referred, in this regard, to the appellant’s 234 previous convictions, of which 49 occurred in the preceding 11-year period, and she further referred to the impact on the victims affected by the appellant’s offending.

22. In terms of mitigation, the following factors were identified by the sentencing judge as enuring to the appellant’s benefit: the guilty plea which was regarded as having been entered at an early stage; the appellant’s addiction issues; his enhanced prisoner status and his attendance at certain programmes and supports while in custody, and; that the appellant was under financial pressure to pay for his late brother’s funeral expenses.

23. The sentencing judge then proceeded to sentence the appellant. On count no. 1, which was on a full-facts basis encompassing counts nos. 2-8, the sentencing judge nominated 18 months’ imprisonment. The sentencing judge deducted 6 months from this headline sentence to account for mitigation and the appellant’s guilty plea, leaving a net sentence of one year’s imprisonment to be served on count no. 1.

24. On count no. 9, which was on a full-facts basis encompassing count nos. 10 and 11, the sentencing judge noted that the appellant had acted alone, that the offending concerned a business premises, that there was no violence involved, and that it was not planned. The sentencing judge situated the appellant’s offending in the lower range, nominating 3 years’ imprisonment as the headline sentence. From this, she deducted one year to account for the appellant’s guilty plea and mitigation, leaving a net sentence of 2 years’ imprisonment to be served on count no. 9.

25. On count no. 12, the sentencing judge noted that the proprietor of the barber shop would have worked very hard to have amassed the €925 cash that the appellant had stolen from the shop till. The sentencing judge further recognised that the property was a business premises and not a dwelling, and that there was no violence involved. Again placing the appellant’s offending in the lower range, the sentencing judge nominated 3 years’ imprisonment as the headline sentence, which was reduced to 2 years’ imprisonment because of the appellant’s plea and mitigating circumstances.

26. The same headline sentence was nominated in respect of count no. 13, and similarly one year was deducted from that to leave a net sentence of 2 years’ imprisonment to be served on that count.

27. On count no. 14, the appellant was sentenced to 4 months' imprisonment, which sentence represented two-thirds of the maximum custodial sentence. This sentence took account of the fact that the offence involved an attempted trespass, that it had a devastating effect on the victim, and that it marked the second occasion on which the victim's property had been interfered with by the appellant. The deduction of 2 months from the maximum sentence was made to account for mitigation.

28. The sentencing judge then ruled as follows:

"I note in the case of [People (DPP) v. Casey & Casey [2018] IECA 121], I have to have regard to the multiple offences committed in the course of the spree, effectively, and I must take into account the overall gravity of that. And for those reasons, in my view, the sentence on count 12 should be consecutive to the sentence on count 9, and the sentence on count 13 should be consecutive to the sentence on count 12. And count 14 is to be taken into consideration.

To allow for some rehabilitation, six months [it should be noted that this was subsequently revised upwards by the judge to 12 months] of the final sentence on count 13 is to be suspended under supervision of the probation service for a period of one year, and on the bond of €100, for a period of two years".

29. Accordingly, the appellant was sentenced to a total cumulative sentence of 6 years' imprisonment, with the final 12 months thereof suspended.

The Court's Analysis and Decision

30. Counsel for the appellant submitted that the trial judge had erred in her approach to the sentencing of this appellant by failing to apply the totality principle and to ensure that the ultimate sentences imposed were proportionate. In making that case she sought to distinguish the circumstances of this case from those of *People (DPP) v. Casey & Casey*, previously cited, on the basis that, for the most part, the offending behaviour did not involve residential premises and, moreover, that the present offences had been opportunistic and not significantly premeditated.

31. We do not agree. An adjustment in application of the totality principle is not automatically required in every case in which a consecutive sentence is imposed. It is only necessary to make an adjustment if the total cumulative or aggregate sentence would amount to a crushing sentence in all the circumstances of the case. We do not think that for a person with 234 previous convictions, a very large number of which were for relevant offences such as burglary (33 convictions), theft (65 convictions), possession of stolen property (3 convictions) and robbery (1 conviction), and who had been engaged in two separate sprees of offending on different dates and involving five different premises and five different injured parties, the appellant could reasonably have expected to have had any lesser sentences imposed upon him, or that they might have been structured differently. We certainly do not regard the ultimate sentence as one that would have had crushing effect on him, or that it was disproportionate in the circumstances.

32. There was a high level of culpability on the part of the appellant in respect of all of the offences notwithstanding that they may not have been meticulously planned or premeditated. In respect of at least some of the offences there was the use of an implement to assist him in gaining access, and so he had come prepared. Moreover, there was significant harm done to the injured

parties. In the case of the tourists, their holiday was blighted and impacted, and there was the aggravating factor that their dwelling, albeit that it was a temporary residence, was violated by the appellant. In the case of the small business operators, they were caused significant stress and anxiety and financial loss. These were not just nuisance burglaries committed by somebody who had a need to feed a habit.

33. We accept that this accused has a history of substance abuse, and that he has an unfortunate medical history and is a cancer survivor. However, no nexus has been demonstrated between the offences that were committed by him on the two dates in question and these circumstances. They were put before the court below, and again before us, on the basis that he was at a low point, and that he was entitled to have them taken into account on that basis. However, the existence of such circumstances only takes him so far.

34. We are satisfied that the sentencing judge properly took all of the relevant circumstances into account and that her sentence was justified. We find no error of principle in how she assessed gravity or structured her sentence. Moreover we satisfied that appropriate regard was had to the appellant's personal circumstances. We find no basis on which to criticise the sentence, and we accordingly dismiss the appeal.