



THE COURT OF APPEAL

[208/2019]

**Birmingham P.
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

OWEN KIRWAN

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 29th day of June 2020 by Mr. Justice McCarthy

1. This is an appeal against severity of sentence. The appellant entered a plea of guilty to counts no. 1 and 2 on an indictment, count no.1 being burglary contrary to s.12(1)(a) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and count no.2 being threat to cause criminal damage, contrary to s.3 of the Criminal Damage Act, 1991. The appellant was sentenced in the Circuit Criminal Court, Clonmel, on July 24th 2019 to seven years imprisonment in respect of the burglary offence, with the final two and a half years suspended, and to five years imprisonment for the criminal damage offence, both sentences to run concurrently; we refer to the latter sentence again below.
2. At the sentencing hearing on July 24th 2019, Detective Garda Brosnan gave evidence to say that on May 13th 2018, at approximately 1.15 a.m, the appellant along with two others entered the stables of Mr Miguel Gunn, which was situated beside his private dwelling house in a rural area outside Mullinahone, Co. Tipperary. Mr Gunn had two mares in foal at that time. He had set up a couch in a tack room and was lying down. He recalled a male who he had never seen before, who was not the appellant, entered the tack room and shouted "Jesus lads, there's loads of bits in here". It appeared that when the men entered they did not see that Mr Gunn was present. When the male saw Mr Gunn lying on the couch he said "There's somebody here" and he ran out and Mr Gunn immediately gave chase and he caught the appellant and dragged him back into the tack room. The other two men escaped. Mr Gunn rang his wife and told her to call the Gardaí, and a Garda Fitzpatrick who lived nearby. Mr Gunn recalled that the appellant said to him that "the easiest way is to let me off or 20 lads will be back here to burn you out". Mr Gunn was holding a pitchfork in self-defence, he said he felt outnumbered as he feared the other two men would return. The appellant said that he would stick a pitch fork in him. Mr Gunn described the appellant lunging at him for the pitch fork and on cross

examination it was acknowledged that Mr Gunn had control of the pitch fork at all times. Following this, Mr Gunn's brother and son, along with Garda Fitzpatrick arrived. Garda Shane O'Neill then arrived at the scene at 1.45 a.m., and he arrested Mr Kirwan on suspicion of burglary. He was then conveyed to Clonmel Garda station and detained under s.4 of the 1984 Act. The first interview took place at 9.30 a.m. At interview, the appellant was initially more or less non co-operative. During the second interview, he said that the reason he was in the area that night was that he was lamping rabbits, and stated that he was dragged into the barn by the owner who located him in a field near his property. However, after a voicemail was played to him which recorded the encounter with the injured party, the appellant made full admissions and acknowledged making threats to damage Mr Gunn's property. The appellant admitted to Gardaí that he had observed tools in the barn a number of weeks prior to the burglary while out lamping and this set the wheels in motion for the burglary. Detective Garda Brosnan explained that the stables are 50 to 100 yards from the dwelling house where Mr Gunn's family resided and the tack room was a further 50 yards from the house. The appellant stated at interview that "I'd never burn him out. I'm sorry for it" and also said "tell him I'm very sorry, sorry for anything I said. There will be no retaliations or anything. At the end of the day we all have families to look after".

3. The appellant has 56 previous convictions. He has 13 previous convictions for burglary. Two of those convictions are for entering a building with intent to commit an offence, and he has 10 for theft *simpliciter*, and two for handling stolen property. He also has a conviction for possession of an article for the commission of an offence under the Theft Act, and he has three previous convictions for criminal damage. Prior to the imposition of the present sentence on the 12th of February 2019, a term of imprisonment of three years, one of which was suspended, was imposed for the offence of burglary, the sentence to commence on that date. The appellant was before Kilkenny Circuit Court on July 9th 2019, having pleaded guilty to three counts of burglary and related offences (committed on one night in a shopping centre, but in respect of three different business premises), and was sentenced to three and a half years imprisonment with the final eighteen months suspended. The present offences were committed while the appellant was on bail in respect of the latter.
4. The appellant apologised to Mr Gunn for "any stress or pain I caused you and your family" and wrote that he was "truly and deeply sorry for what I did on the night of the 13th May '18". A Victim Impact Statement was produced in court and it is undoubtedly the case that significant upset and distress, which is ongoing, was caused to the Gunn family.
5. The appellant was 26 years of age at the time of sentencing. He is married and has two young children. A Probation Report and Psychiatric Report which had been prepared at the time of sentencing, on July 9th 2019 were also relied upon in the present case. Both reports indicate a long history from an early age of alcohol abuse and controlled drugs. It is noteworthy that Garda Brosnan said that the appellant had "drink taken" on the night in question. There was no suggestion of heavy consumption or the use of drugs on that occasion. It was submitted that the offending generally was associated with drug debts

and consumption of alcohol and controlled drugs. In November 2018, Mr Kirwan suffered a serious knife injury as a result of his drug debts. Counsel for the appellant outlined the appellant's background and drew attention to the probation report and psychiatric report which were before the Court. The appellant's low educational attainment and/or skills to find gainful employment due to drug addiction and depression and anxiety were also outlined to the court. Counsel for the appellant introduced a psychiatric report of Dr Kelly setting out the extensive nature of the appellant's historical and current mental health issues. The Judge was directed to paragraph 8 of that report which outlined the appellants past psychiatric history and serious suicide attempt in 2013. The report also referred to the appellant starting counselling with a local service prior to him being sentenced in February 2019. The future risk of reoffending which is addressed at paragraph 14.5 of the report was highlighted by Counsel and in particular the sentence which stated that "the risk [of reoffending] will be greatly mitigated should he be able to achieve complete abstinence from both alcohol and illicit or non-prescription substances and he claims that he is committed to achieving this and is currently seeing the prison addiction counsellor. This must be done in tandem with psychological therapy for his multiple bereavements and in particular the death of his brother when he was 14 years old". Counsel for the applicant also referred to a Probation Report dated 19th June 2019 which was prepared for the sentencing of an offence in of Kilkenny Circuit Court two weeks earlier on the 9th July 2019. The Court accepted the report and it was submitted for the purpose of providing background and addressing the risk of reoffending. The Probation Officer categorised the appellant as being at high risk of reoffending due to his substance misuse history, education and employment. Counsel for the applicant addressed the risk of reoffending in both the probation report and the psychiatric report and submitted that the appellant was dealing with his substance misuse for the first real time and he was doing very well with his addiction counsellor, he was also in education and had completed a manual handling course, a computer skills course and was hoping to undertake a building skills course and sit his leaving certificate. Finally, he had been working in the kitchen but had to leave the kitchen in order to undertake educational courses. Counsel submitted that the appellant was working hard to ensure that he had the skills to obtain gainful employment on his release. Finally, the appellant had engaged with the prison psychologist in order to deal with the multiple deaths which had affected him.

6. At sentencing, the judge stated that this is a case "replete with aggravating circumstances". The judge identified that Mr Kirwan had 56 previous convictions, 13 of which were for burglary. The offence was carried out while the appellant was on bail for other serious offences. The judge noted the impact the offence has had on the victim Mr Gunn and his family. There was a degree of pre-planning involved, as the appellant had seen the stables a few weeks beforehand. Further, there were three people involved. The judge placed the offence at the top of the mid-range. In mitigation, the judge identified the following factors: that the accused had entered a plea of guilty, and so the victims were spared the ordeal of giving evidence in court, that Mr Kirwan made admissions when interviewed, albeit only after recordings were played to him. The judge accepted that Mr Kirwan has had a good deal of tragedy in his life, including the death of his brother from a drug overdose. A psychiatric report was furnished to the court, detailing the accused's

experience with depression following deaths in his family and of his friends. The accused had been availing of a counselling service in Kilkenny to address this. He has apologised to the victims in this case and shown some remorse. The offence was not a 'professional' burglary, and unlikely to yield significant financial benefits. The judge noted that Mr Kirwan has the support of his wife and the responsibility of his children. The court had the benefit of reports from two different prisons and it appears that he has been using his time in custody positively.

The appeal

7. The appellant relies on the following grounds of appeal:-
 - i) That the trial judge imposed a headline sentence which was excessive in all of the circumstances;
 - ii) That the trial judge failed to give any or any adequate consideration to the accused's level of co-operation with An Garda Síochána, his admissions and his early plea of guilty;
 - iii) That the trial judge failed to give any or any adequate consideration to the personal circumstances of the accused / his vulnerability and / Failing to consider and /or ignoring the contents of the comprehensive probation report and psychiatric report which were before the Court;
 - iv) That the trial judge to give any or any adequate consideration to the mitigating factors outlined to the Court;
 - v) That the trial judge failed take into account the progress the Accused has made while in custody since the offence was carried out;
 - vi) That the trial judge failed to give proper consideration to the principle of totality;and;
 - vii) That the trial judge failed to give credit or failing to take into consideration the period of imprisonment served by the appellant on these offences.
8. We think it is appropriate to deal with all grounds together since they overlap. Effectively, three substantive grounds were relied on at the hearing of the appeal:-
 - a) That the offences were not so serious as to fall at the top of the mid-range of offences of this kind, and that in any event, the headline sentence of seven years was above the top of the mid-range;
 - b) That the judge failed to reduce the headline sentence to an appropriate degree to give proper account to the mitigating factors or give appropriate weight to them;

- c) That the cumulative period in custody was excessive and is in breach of the principle of totality.
9. The earlier sentences of the 12th of February and the 9th of July were to run concurrently whereby obviously only five additional months in custody arose as a result of the commission of the group of burglaries for which sentence was imposed on the 9th of July. The present offences were committed whilst the appellant was on bail and hence the judge was required to make the present sentences consecutive to the sentences imposed on the 9th of July. The cumulative effect of the sentences is that the appellant will serve a total period in custody of six and a half years from the 12th of February 2019. The judge explicitly referred to the application of the totality principle. We think that he took into account all relevant aggravating and mitigating factors. We think that the discount which he gave because of the pleas of guilty was generous since the appellant was caught red handed and that the total reduction from seven years of two and half years giving a custodial period of four and a half years was more than sufficient to reflect the mitigating factors.
10. We note that the parties are agreed that it was intended that the appellant serve four and a half years on the sentences under appeal, whereas the Order of the Circuit Court referred to a sentence of five years *simpliciter*, in respect of the offence under the Criminal Damage Act. For the avoidance of doubt, we suspend the last two and a half years of that sentence, which will be served concurrently with the sentence of four and a half years.
11. We are not persuaded that the trial judge fell into any error or principle and accordingly we dismiss this appeal.