



THE COURT OF APPEAL

Record No's. 82/2020 & 83/2020

**Birmingham P.
McCarthy J.
Murray J.**

BETWEEN/

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

RESPONDENT

-AND-

NIALL FITZPATRICK

-AND-

JERRY O'LEARY

APPELLANTS

**JUDGMENT (*ex tempore*) of the Court delivered on the 21st day of December 2020 by
Mr. Justice McCarthy**

1. These are appeals against severity of sentences. Mr Fitzpatrick pleaded guilty to three counts on the Indictment before Cork Circuit Court on the 24th of April 2020. The substantive Count was Number 7, namely burglary contrary to s.12 1(a) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and two associated summary road traffic offences. He was sentenced on that day to seven years' imprisonment on the burglary (the only count relevant to this appeal) backdated to the 18th of October 2019 being the date when he entered custody. The second appellant, Mr O'Leary, similarly pleaded guilty to a count of burglary on the same Indictment and a sentence of seven years was similarly imposed on him.
2. At the sentencing hearing, Detective Garda O'Sullivan gave evidence that on the 17th of October 2019 he had received intelligence that Mr. Fitzpatrick and Mr. O'Leary with a third person not before the Court were planning a burglary of an elderly person's home in rural County Cork. Surveillance Gardaí on duty on the morning of the 18th of October at 6 a.m. at Mr. Fitzpatrick's home in Cork City and at 6.50 a.m. he left using a rented car. He was disqualified from driving at the time. He drove to Mr. O'Leary's home and they collected a third person and they drove sixty kilometres out of the city towards Liscarroll, County Cork, where they switched drivers. They went into the woods and near a farmhouse in or near

Freemount where they stayed for approximately four hours in wet weather staking out the home of an elderly couple who were 88 and 86 years of age respectively.

3. Gardaí took up surveillance on the appellants again on the following day suspecting that they would target the couple at mass time. Gardaí went to the home of the couple and told them what they believed was going to happen and they agreed to let them occupy the house while they went to Saturday mass.
4. At 4.00 p.m that Saturday evening Mr. Fitzpatrick having hired another or second car again collected Mr O'Leary who was carrying with him a change of clothes. They collected the "third person". They drove out again to Freemount, again switched drivers and the appellants went back into the woods.
5. As arranged, the Murphy's set off and went to mass at 5.45 p.m. As they did so they were immediately followed by the hired car which was a Ford Focus as they made their way to mass.
6. Within five minutes the appellants came out from their place of hiding. They went to back window of the house where they prised the bathroom window open. Mr Fitzpatrick climbed in while Mr O'Leary was on the phone with a screwdriver in his hand and standing at a gable end. When Mr. Fitzpatrick made his way in, covered up, he went into the hallway where he was met by armed Gardaí. They were arrested and brought to the Garda Síochána station and detained. The car was searched and the change of clothes found.
7. They were questioned for some two days but did not engage in the interviews relying on their right to silence. Certain so called inference provisions were invoked in respect of both of them. After they were charged subsequent applications for bail were refused and they both entered pleas of guilty as outlined.
8. Mr Fitzpatrick has seventy previous convictions. His latest convictions are many for road traffic matters. He was a disqualified driver at the time in consequence of a conviction for driving without insurance on the 16th of July 2019. On the 17th of October 2013 he had been convicted of four counts of handling stolen property. He received a sentence of nine months' imprisonment at Cork District Court on the 12th of March 2003. At Bandon District Court he escaped from lawful custody while before that Court in connection or awaiting trial for an armed robbery committed on the 13th of December 2001 at Farran Post Office. He received an eight year prison sentence for that on the 10th of March 2003 and was also convicted of unlawful possession of firearms and ammunition with intent to endanger life, obviously in the course of the robbery. On the 4th of March 1999 at Cork Circuit Criminal Court he had received a term of imprisonment of five years for unlawful taking of a mechanically propelled vehicle and for criminal damage. These were reviewed on the 8th of February 2001 when the remaining portion of the sentence was suspended and Mr Fitzpatrick was bound to the peace. His sentence was reactivated on the 15th of February 2002 in consequence of the robbery.

9. Mr Fitzpatrick was 53 years of age at the time of sentencing. He has a long term partner and five children. He has been involved as a carer to his children or so it was said on his behalf. He had been attending a prison psychologist on a weekly basis but there was no evidence as to why or the effects or benefits thereof although for what it is worth counsel said the psychologist indicated that she was willing to work with him and to try and further his education and employment. He had been attending school in prison but it appears that this had been curtailed due to Covid-19 restrictions in the prison.
10. Mr Fitzpatrick expressed remorse (for whatever that is worth) in writing for his actions in particular for targeting elderly persons an express to which the judge appears to have been sceptical about as he was entitled to be. He does not appear to have had any meaningful employment record.
11. Mr O'Leary has 48 previous convictions, eight of them for burglary; the last of these was on the 21st of November 2007. Of particular significance is that that offence was similar to that before us inasmuch as he and two others went to the home of two elderly women living in a rural area of North Cork but were confronted by Gardaí and ultimately on conviction the sentence of six years' imprisonment was imposed upon him for that offence. On the 23rd of February 2005 a sentence of five years' imprisonment had been imposed upon him. The last eighteen months had been suspended for burglary and that dating from 2007 was committed, or so it was said in evidence, when he was serving the that portion of the sentence which had been suspended. On the face of it, the evidence was unchallenged and one infers accordingly that such sentence may have been backdated. At Dublin Circuit Criminal Court a sentence of two years for burglary was imposed on the 2nd of March 1995 and there are other convictions for that offence, the earliest of which appears to have been on the 21st of March 1978; all were dealt with in the District Court. Details were not given but it was said in evidence that other convictions related to theft, larceny, some driving offences.
12. Mr O'Leary was 62 years of age at the time of sentence. He lived in the North side of Cork City for most of his life, is in a long term relationship and has 13 children. At the time of sentencing his youngest child was approximately six months old. He does not appear to have had an employment record but has had mental health difficulty.
13. At sentencing, the Circuit Judge has this to say:-

"What I'm dealing with here are two dedicated and committed criminals, one in his fifties, the other in his sixties, and their counsel tell me that these men are going to change. Such innocence is to be admired but I don't accept it. Nothing will change either of these men until they themselves decide that they've had enough and that they, of their own volition, they're going to give up.

...

As crimes go, the Court of Appeal has often said that burglaries are always serious but they vary in the level of their seriousness depending on their particular facts. It

is hard to see a burglary of greater determination or seriousness than this one. Much has been said about the fact -- and this is true -- that no violence was used, the householders were not confronted -- that is true -- and there was no equipment or items found on either of the accused -- again, that is true. But you see, that is to totally ignore the blatantly obvious fact, the most serious aggravating fact in this case is the level of organisation. The hiring of cars, the staking out of the area, the presentation at or near the locality in a wood for periods in, as I said, staking out the area. I mean, that level of preparedness, that level of dedication is unusual to see before the Court, but it puts this burglary onto a different plateau than the ordinary, let's say, occasional, opportunistic burglary. And I think the level of organisation is a particular aggravating factor. I mean, there were, I think, two cars involved. The place was staked out over a period of days and there was much changing of drivers, bringing of different sets of clothes. All of that has to be factored into the equation. And I'm at a loss to know how the case could be long and prolonged considering that they were caught red-handed. But it has to be acknowledged that a plea must always be looked at as a significant -- perhaps, the only really significant mitigating factor when dealing with crimes. I note that they didn't engage, either of them, with the guards once they were arrested, but that is not an aggravating factor; it's merely the history of what happened."

After considering the aggravating factors, the methodology, the planning involved, and the nature of the burglary, the sentencing judge determined a headline sentencing of nine years. The judge then made allowances for the pleas of guilty and the hardship of prison in the current circumstances, and imposed post mitigation sentences on the burglary counts of seven years imprisonment. The road traffic convictions need not concern us.

Grounds of Appeal

14. Both appellants advance the following grounds of appeal:-

- (i) That the sentence was excessive in all the circumstances;
- (ii) That the learned sentencing judge erred in principle in failing to afford sufficient weight to the mitigating factors in the case;
- (iii) That the learned sentencing judge erred in principle in placing the offence before the Court, being an offence of burglary contrary to Section 12 of the Criminal Justice (Theft & Fraud) Offences Act, 2001 on the higher scale of the sentencing range;
- (iv) The learned sentencing judge erred in principle in failing to give any or any adequate consideration to the prospect of structuring the sentence and suspending a portion thereof to allow for the appellants' rehabilitation;
- (v) That the learned Sentencing Judge erred in principle in imposing the within sentence in that sufficient weight was not afforded to the public interest in the appellants' rehabilitation.

Submissions

15. The appellants submit that sentencing judge erred in principle in placing the offence of burglary on the higher level of the sentencing scale. By reference to the factors elaborated in *DPP v Casey & Casey* [2018] 2 IR 337, it was submitted that in all the circumstances the pre-mitigation sentence of nine years was excessive and disproportionate. Factors such as damage to the property, physical confrontation, violence, the use of an implement, threats and sprees, which can place sentencing on the higher level of the scale for burglary, were not present in this case.
16. It is submitted that the trial judge failed to have any or any sufficient regard to the personal circumstances of the appellants. Mr Fitzpatrick was engaging with a psychologist whilst in prison, had written a letter of apology and expressed remorse and was seeking to engage with the prison services to improve his employment prospects on his release. Mr O'Leary has enhanced status as a prisoner and works as a painter. It is submitted that the discount of the headline sentence from nine years to seven years was insufficient as it represented a 22% discount from the headline sentence.
17. It is submitted that the sentencing judge did not afford sufficient weight to the prospect of rehabilitation of the appellants – the judge had said that "*In neither the case do I think either of them merit any suspension or other structure in the sentence.*" It is submitted that the judge should have structured the sentences in a manner that both reflected the public's interest in rehabilitating the appellants and motivated the appellants to turn away from crime by a partial suspension.
18. It is submitted also that the sentence was excessive and was unduly severe having regard to *DPP v Casey* and judgments that followed it; further, having regard to the mitigating factors put to the Court and in particular the appellants' ages, personal circumstances, engagement with prison services, remorse, letter of apology (in Mr. Fitzpatrick's case) and pleas of guilty the sentence was not an appropriate sentence in the overall circumstances of the case and that a portion of the sentence imposed should have been suspended.
19. The respondent accepts that the offence at issue in the within proceedings entailed no use or threat of violence, that no confrontation with the householder occurred nor were the appellants armed with offensive weapons beyond the screw-driver which was in Mr O'Leary's possession. It is accepted that the offending at issue did not constitute a 'spree' or campaign of offending. Nonetheless, it is submitted that a large number of the aggravating factors identified by this Court in *Casey* were present and serve to aggravate the offence for which the appellants were sentenced.
20. The respondent submits that the sentences imposed by the judge was measured, proportionate, appropriate and in accordance with jurisprudence. The judge had appropriate regard to the mitigating factors associated with the offence and the offenders and afforded proportionate and appropriate credit for same. While it is accepted that the plea of guilty avoided the time and expense of a trial the circumstances in which the appellants were apprehended rendered convictions against them near certainties and the weight of

credit to be afforded on the basis of the pleas fell to be considered in this light; such credit falls also to be considered in light of their lack of co-operation with the Garda investigation.

21. The respondent submits that it is clear the judge did not consider that rehabilitation was something which could have been encouraged or facilitated by way of a partially suspended sentence and that he was entitled to take that view on the evidence.

Discussion and decision

22. We should say first that as pointed out by Birmingham J., as he then was, in *DPP v Casey*, this Court suggested that mid-range offences of burglary would merit pre-mitigation sentences in the range of four to nine years and cases in the higher range nine to fourteen years. Equally, we need quote no authority for the proposition that there is no clear blue water so to speak between these categories or ranges and in the present case, for example, the learned trial judge chose a headline sentence at the bottom of the highest range or the top of the mid-range.

23. We think that, in truth, the core issue in this case is whether or not the headline sentence which was identified was correct in circumstances where the learned trial judge dealt with the matter on the basis that the offence fell within the highest range.

24. This Court has emphasised the serious nature of the offence of burglary on a number of recent occasions. Most significantly, as we know, in *Casey*, Birmingham J. as he then was, speaking for this Court, set out a number of factors which may aggravate the offence of burglary further. In the present case, the following factors have been identified:-

- (i) A significant degree of planning or premeditation;
- (ii) Two or more participants acting together;
- (iii) Targeting residential properties, particularly in rural areas;
- (iv) Targeting a residential property because the occupant was known to be vulnerable on account of age, disability or some other factor;
- (v) Taking or damaging property which had high monetary value or high sentimental value.

Birmingham J. also pointed out that relevant pre-convictions must be regarded as aggravating factors. Each of the appellant's have a number of relevant previous convictions for the offence of burglary which are aggravating circumstances. The mitigating factors were identified as the pleas of guilty, albeit at a last stage, the remorse expressed, the personal circumstances of each appellant, in particular the background of Mr O'Leary, about whom a Psychological Report has been furnished (referring to very difficult circumstances by reference to his childhood in a residential institution) and health difficulties. Mr O'Leary has convictions for burglary including an offence very similar to that which now brings him before us, and that whilst Mr Fitzpatrick does not have a conviction for burglary, he has convictions for robbery and possession of firearms and ammunition with intent to endanger

life which are offences of the upmost seriousness. Whilst we are conscious of Mr O'Leary's background as aforesaid, we are not persuaded that it can have any ultimate effect on the sentence in the grave circumstances of this offence.

25. The aggravating factors are the significant degree of planning or pre-meditation, the participation of three persons and the targeting of residential premises in a rural area, the residents of which were elderly, vulnerable and isolated. These, on any view, justify the conclusion that this offence fell at the very least the upper end of the mid-range or the bottom of the highest range – that is where the headline sentence was fixed. If there was any error in principle by the trial judge in his conclusion as to where on the scale of seriousness these offences lay having regard to the aggravating factors and insofar as precision is possible in sentencing we think that the trial judge arrived at a headline sentence which was right, though lenient.
26. It is plain that the principal mitigating factor in each case must be the plea of guilty. Both appellants have also expressed remorse but without oral evidence this, however, is of little significance. General deterrence is plainly of great importance in respect of offences of this kind and having regard to the records of the appellants respectively personal deterrence also; the mitigating factors under the pertinent circumstances were, in truth, modest; ample credit was giving for all mitigating factors by the judge when he reduced the sentences to seven years post- mitigation in this case.
27. The judge has been criticised for failing to suspend a portion of each of these sentences to encourage rehabilitation. The judge is under no obligation to do that and there is nothing in the evidence that would give rise to a criticism of him for not doing so.
28. We accordingly dismiss these appeals.