



THE COURT OF APPEAL

Record Number: 280/19 & 281/19
Neutral Citation Number: [2021] IECA 125

Birmingham P.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

ROBERT DEVINE AND LEE KELLY

APPELLANTS

JUDGMENT of the Court delivered on the 26th day of April 2021 by Ms. Justice

Isobel Kennedy.

1. The appellants appeal against sentence where they each pleaded guilty to a count of burglary contrary to section 12 (1)(a) of the Criminal Justice (Theft and Fraud Offences) Act 2001 and two counts of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997. Robert Devine received an aggregate sentence of twenty years' imprisonment with the final eight years suspended on terms and Lee Kelly received an aggregate sentence of seventeen years' imprisonment with the final ten years suspended on terms.

Background

2. On the 17th December 2017 the appellants, Robert Devine and Lee Kelly, entered the home of PJ O'Reilly and his son Brian O'Reilly. PJ O'Reilly's wife was also home at the time. It seems that Brian O'Reilly owed €50.00 to Mr Devine. The previous day Mr Devine had phoned Brian O'Reilly looking for the money and PJ O'Reilly had informed him that he would not be getting any money and hung up the phone.

3. The appellants entered the house in the early hours of the 17th December 2017. PJ O'Reilly and his wife woke up and heard their son shouting. Brian O'Reilly ran into the bathroom and Lee Kelly smashed a golf club against the door. A panel was knocked out from the door and Mr Kelly pushed a knife through the space, stabbing Brian's hand.

4. PJ O'Reilly grabbed one of the men and recognised him as Robert Devine. When asked what he wanted Mr Devine indicated that he wanted his money. PJ O'Reilly hit Robert Devine in the face and as he bent down Lee Kelly hit him with an object. Mr Kelly continued to hit him on his leg as he grappled with Mr Devine in order to stop him hitting him with his hammer. Mr O'Reilly felt a prodding action on his leg but it was only after the incident that he realised it was a stab wound. Mr O'Reilly was hit repeatedly on the ground and he was struck by Mr Devine with a hammer to the side of the head. During this time Mr Devine was shouting "Finish him, finish him. Where is the money?"

5. Mr Kelly pulled Mr Devine away from Mr O'Reilly and said to Mr Devine that they needed to get out of there. At that stage, Mr O'Reilly was struck a blow to his left ankle as the men were leaving. The gardaí arrived at the scene and Mr O'Reilly was able to positively identify the men. In terms of injuries, Brian O'Reilly suffered lacerations to his hands. PJ O'Reilly suffered multiple injuries including lacerations to his hands, stab wounds in the area around his cruciate ligament which has resulted in loss of mobility and balance and a blow to the head that has resulted in continuous sleeplessness and residual headaches.

6. Following their arrest and detention both appellants made certain admissions and accepted that they were in the house although Mr Devine initially stated that he was acting in self-defence.

Personal circumstances of the appellants

7. Robert Devine is the father of Lee Kelly. He has 35 previous convictions including a conviction for manslaughter before the Central Criminal Court, two convictions for criminal damage, convictions under the Theft and Fraud Offences Act, convictions under the Forgery Act, a conviction for escape from lawful custody, a conviction under the Domestic Violence Act, a conviction for possession of firearms and ammunition, two convictions for minor assaults and one conviction for possession of a flick knife. A governor's report outlined that the appellant had conducted himself well during his time in custody and he is engaged in addiction counselling.

8. Lee Kelly was 18 years old at the time of offending. He has 42 previous convictions, all of which are summary matters and which include seven convictions for offences under the Theft and Fraud Offences Act, six convictions for possession of drugs, seven convictions for criminal damage offences, 16 convictions for public order offences, three convictions for minor assaults, two convictions under the Firearms and Offensive Weapons Act and one conviction for trespass. It was the view of the gardaí that on the night in question Mr Kelly was acting under the influence of his father. In his plea in mitigation, counsel for the appellant outlined that Mr Kelly is an accomplished boxer and was a member of the Irish boxing team. A prison governor's report outlined that the appellant has used his time in prison well and has engaged with addiction counselling.

The sentences imposed

9. In assessing the sentences to be imposed the judge considered the many aggravating factors, including the severe impact upon the victims both in regard to their physical injuries

and psychological injuries. All of the members of the household present that evening have suffered anxiety and fear as a result.

10. The judge took account of the premeditated element of the offending. The appellants planned and executed the operation while the victims were asleep and they brought weapons including a hammer and a knife. The sentencing judge further refers to the level of violence used and the previous convictions of the appellants.

11. The judge placed the burglary and the assaults at the upper end of the range. In respect of Robert Devine a headline sentence of twelve years was nominated for the burglary and four years for each assault, each count imposed on a consecutive basis resulting in a total sentence of twenty years. In respect of Lee Kelly, a headline sentence of nine years in respect of the burglary was identified as a pre-mitigation sentence together with four years for each assault, imposed consecutively, resulting in a total sentence of seventeen years.

12. Taking account of mitigation in respect of each appellant, being the guilty pleas, the apology through counsel and the personal circumstances, the final eight years of Robert Devine's sentence were suspended for a period of ten years and in respect of Lee Kelly, the judge suspended the final ten years of his sentence.

The Appeal

13. In submissions and in oral hearing on appeal, counsel on behalf of the respondent, Mr Heneghan SC accepted that the judge erred in imposing the sentences on a consecutive basis, however, the respondent contended that the net sentence for the respective appellants of twelve years in the case of Robert Devine and seven years for Lee Kelly was proportionate in the circumstances of such grave offending.

14. In those circumstances, this Court proceeded to hear arguments in respect of the appropriate sentence for each appellant.

Submissions on behalf of Robert Divine

15. Mr Monroe SC for Robert Devine says that in identifying a headline sentence of twelve years, the Court placed the burglary offence slightly over the midpoint of the upper range. He takes no issue with the headline sentence nominated of twelve years in light of the gravity of the offending. However, he argues the public interest in rehabilitation would only be met by suspending a portion of the ultimate sentence. Mr Munroe says that there is an evidential basis for this contention in that a positive Prison Governor's report was before the sentencing judge, that between 2017 and 2019, the appellant availed of addiction counselling and education facilities while incarcerated. That he is a man with no previous convictions for burglary and that he attended a college between 2016 and 2017 and achieved qualifications, thus demonstrating that he is capable of availing of a structured release.

Submissions of Lee Kelly

16. Ms Leader on behalf of her client, takes no issue with the headline sentence of nine years. However, she argues that there are two specific features which distinguish this appellant from his father, being that the appellant was led to the attacks by his father and that he intervened at one point during the attack by pulling Robert Devine from his victim.

17. The appellant further submits that the sentencing judge did not have adequate regard to the mitigation present including the admissions, remorse and apology. The appellant submits that there was no distinction drawn by the sentencing judge as to the nature of the previous convictions of the appellants despite that all of Mr Kelly's convictions took place when he was a minor and were dealt with in the District Court and that he had the prospect of leading a better life with the right influences.

18. Finally, Ms. Leader says that the appellant has been of good behaviour in custody and has engaged with services.

Submissions of the respondent

19. The respondent submits that the placement of the offence as falling in the high range of burglary offences is correct as the offence was aggravated by the assaults and underlines the severity of the offending of Robert Devine which included the use of a knife and refers to *The People (DPP) v. Mahon* [2019] 3 IR 151 where Charleton J. commented that the introduction of a weapon is a substantial aggravating factor.

20. It is said that the burglary offence falls within the highest range and merited a pre-mitigation sentence in the range of nine to fourteen years. The respondent refers to *The People (DPP) v. McGrath, Dolan and Brazil* [2020] IECA 50. Although *McGrath* was concerned with the statutory regime concerning assaults, the following comments of the Court may be useful in considering the principle that the maximum sentence in respect of the lesser offence is open to judges in an appropriate case, at para 24:-

“It is in the nature of things that there may be cases where the decision to charge with s. 3 or with s. 4, or to accept a plea to s. 3 if s. 4 has been charged, will be finely balanced. There will be other cases which will be identified as borderline s. 3 or s. 4. In such cases, a starting point or pre-mitigation sentence of five years may be appropriate. Certainly, judges should not operate on the basis that a starting point of five years is not generally available and that it should only be considered, if it be ever considered, in exceptional circumstances.”

21. The respondent argues that the mitigation in respect of Mr Kelly was relatively minor and such was taken into account by the judge who imposed a significantly lesser sentence than in respect of Mr Devine.

Discussion

22. We are proceeding on the basis that the judge erred in imposing sentences on a consecutive basis. We therefore allow the appeal, quash the sentences imposed and proceed to re-sentence the appellants.

23. From the outset, it must be said that these are very grave offences indeed. The appellants pleaded guilty to the offence of burglary, where aggravated burglary was initially preferred. In general, insofar as burglary offences are concerned, most perpetrators hope to avoid detection, however, this burglary is of quite a different character. The appellants invaded the victims' dwelling for the specific purpose of engaging in a violent confrontation with the occupants. That alone places this offence within the upper range.

24. This was a savage and ferocious premeditated attack on the occupants of a dwelling with the appellants inflicting injuries of a serious order on the victims. Extraordinarily serious threats were made by Robert Devine urging his son to 'finish him off' with reference to Mr P.J. O'Reilly which threat amounting to an entreaty, in effect to kill Mr O'Reilly.

25. Mr P.J. O'Reilly sustained serious and long lasting injuries, he was stabbed six times in the area surrounding his cruciate ligament which resulted in loss of mobility and balance, he suffers from sleeplessness and residual headaches following blows to the head from the hammer and golf club. Understandably, the impact on him is of a severe and life changing order. His son was attacked with a weapon and sustained multiple injuries to his hands requiring stitches. The impact on this family cannot be overstated, they no longer feel secure in their own home.

26. We are entirely satisfied that the burglary and the assault offences fall with the upper range and indeed had the judge placed Robert Devine's offending at the top of that range, this Court would not have found fault with that assessment. He is a man with serious and relevant previous convictions. Insofar as Lee Kelly is concerned there are two factors which operate to extenuate his culpability. These are the fact that he was influenced and led by his father to commit these offences and that he intervened and pulled his father from Mr O'Reilly senior. However, we note that he is a person with two previous convictions for burglary.

27. In the circumstances a pre-mitigation sentence of twelve years in the case of Robert Divine and ten years in the case of Lee Kelly is appropriate.

28. In terms of mitigation, we acknowledge the pleas of guilty, the remorse expressed and the personal circumstances of each offender. We are also cognisant of Robert Devine's previous convictions which result in a progressive loss of mitigation. It has been urged on the part of Robert Divine that he is capable of being rehabilitated and we have considered his conduct while incarcerated as set out in the Governor's report in this regard. In those circumstances in order to incentivise his rehabilitation, we will suspend the final two years of his sentence on the usual mandatory term in the sum of €200.00 for a period of two years and on the condition that he remain under probation supervision and follow the directions of that service. It is also a condition of that suspension that he stay away from his victims in perpetuity.

29. The four-year sentence on each assault count remains but is imposed on a concurrent basis with the balance of the counts referable to this appellant to be taken into consideration.

30. Insofar as Lee Kelly is concerned, in light of the matters urged in mitigation, and again cognisant of his previous convictions resulting in a progressive loss of mitigation, we will reduce the headline sentence of ten years to one of seven and a half years. Furthermore, in order to incentivise his rehabilitation, we will suspend the final year of that sentence on the mandatory condition in the sum of €200.00 for a period of two years on the condition that he remain under probation supervision for that period and comply with the directions of that service. We impose a further condition that he remain away from the victims in perpetuity.

31. This limited reduction in this appellant's custodial sanction is justified given the significant intervention by this Court in significantly reducing the period suspended by the court below.

- 32.** As with his father, the four year sentence on each assault count remains but imposed on a concurrent basis with count 7 taken into consideration.
- 33.** The sentences are backdated as in the court below.
- 34.** The bonds may be entered into before the Governor or Assistant Governor of the prison, if any difficulty arises, liberty to re-enter before this Court.