



THE COURT OF APPEAL

Court of Appeal Record No. 73/2021

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

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

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

APPLICANT

-AND-

DONAL LEE

RESPONDENT

**JUDGMENT (*ex tempore*) of the Court delivered on the 15th day of November 2021 by
Mr. Justice McCarthy**

1. This is an application pursuant to section 2 of the Criminal Justice Act 1993 for a review on grounds of undue leniency of the sentence imposed on one count of burglary contrary to section 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001, the subject of one indictment (Bill No: MH12/2020). Sentencing was dealt with by Meath Circuit Criminal Court on the 9th of March 2021 and a post mitigation sentence of three years, suspended for three years, was imposed.
2. On the 1st of December 2018, Donal Lee, a resident of Laytown, Co. Meath broke into a pharmacy in the same town with a third-party intruder. The burglary occurred late into the night on the 1st of December 2018 and access was gained via the roof, a modus operandi of the respondent when committing a number of previous offences of burglary. The only item stolen from the pharmacy was the safe, which contained approximately €2,800 of which approximately €340 was coinage and the rest was in paper notes. A number of cologne bottles were also taken and placed in a paper bag; however, these broke during the intruders' departure and were left behind.

3. Detective Garda Robert Leavy outlined what was compelling evidence against the respondent. He and the third-party intruder were identified by him and a number of his colleagues from CCTV of the incident. The respondent and that intruder were also identified on CCTV from a supermarket in Laytown in the days following the incident having sought notes for loose coins. Furthermore, the respondent was identified on CCTV having entered the pharmacy some days prior to the burglary; this indicated pre-planning. A search in the locality located the safe in the vicinity of the respondent's home and he was arrested on the 21st of December 2018.
4. At interview the accused initially gave an alibi to the effect that he had been in The Dunes Bar in Bettystown, Co. Meath on the night in question, obtaining a taxi home from a local taxi firm at approximately 2:30am. However, enquiries led to this alibi unravelling as one without any merit; his lies in that respect strengthened the case against him. The respondent was sent forward for trial on the 28th of January 2020 – thereafter he first appeared before the court on the 11th of February 2020. The matter was adjourned intermittently given that the respondent indicated that a jury was required, and the matter was listed for trial in September on two occasions. Nevertheless, the respondent eventually pleaded guilty on the 20th of November 2020 when the matter was again listed for trial. The respondent then came before the court on the 9th of March 2021 for sentencing. This was not an early plea accordingly.
5. The appellant had been before this Court in *DPP v Lee* [2017] IECA 152, on an appeal against severity of sentence and that is relevant. That appeal pertained to three sentences of five years, two years whereof were suspended and to be served concurrently. These were two offences of burglary and one of attempted burglary. This Court dismissed that appeal. They had been the subject of Bill No: MH5/2016 of County Meath. Since the offence before this court now was committed during the period of suspension on the application of the DPP pursuant to section 99(11) of the Criminal Justice Act 2006, the Circuit Court judge reactivated those earlier sentences to the extent of one year each. He suspended in its entirety the sentence imposed on this present offence for a period of three years.
6. The accused was correctly described in the earlier appeal as a "prolific burglar" – the characterisation of him by the judge who sat on the trial of the accused in March 2016. At that stage, the accused had 88 previous convictions, 43 of which were for burglary. By the stage of sentencing for the matter before us, the respondent had increased this amount to 93 previous convictions, including 43 for burglary.
7. In any event, the judge in sentencing the respondent had this to say: -

"Now the accused apparently has arrived at a moment in his life where he believes - where it is believed, or hoped, I suppose, more than believed, that he will make efforts to change his offending behaviour. And I am persuaded by counsel that perhaps a third and final opportunity ought to be given to him. So what I propose to do in relation to that three-year sentence of imprisonment is to suspend the final two years for a period of three years, but it's on condition, on a number of conditions. Firstly, the accused is to enter into a bond in the sum of €200 to keep the peace, be

of good behaviour and not to come to garda attention in that time. Secondly, he's to place himself under the Probation and Welfare Services and to undergo a -- and receive rehabilitative treatment, vocational training with a view to gaining gainful employment. He's to comply with all requirements of the Probation and Welfare Service and he's to undergo whatever treatment that he may be advised to deal with his addiction issues."

Grounds of Appeal

8. The applicant summarised their grounds of appeal as follows: -

- I. The headline sentence failed to reflect the circumstances of the offence and the aggravating features.*
- II. Excessive discount was applied to the headline sentence having regard to the mitigation present.*
- III. The sentence imposed failed to provide any deterrence to the respondent or the public at large.*

Having regard to the considerable overlap amongst them we will deal with them together.

9. Counsel for the applicant referred to *DPP v. Casey* [2018] IECA 121, which addresses the factors relevant to a judgment as to where on a scale of seriousness a given offence of burglary falls. The following factors are indicative of an offence in the mid-range as outlined therein: -

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

10. Furthermore, in *Casey*, factors placing offences in the highest range were identified as: -

- (a) Ransacking a dwelling;*
- (b) Entering during the night at dwelling, which was known to be occupied, especially if the occupier was alone;*
- (c) Violence used or threatened against any person, whether the occupier or anyone else in the course of the burglary; and*

(d) *Significant injury, whether physical or psychological, or serious trauma caused to a victim of the burglary.*

11. The applicant added that relevant previous convictions, a given modus operandi in respect of a number of offences and use of weapons are also relevant.

12. In determining where to place an offence on the spectrum of offending, there Birmingham P. said: -

"If a number of the factors to which reference is made are present, this will place the offence in the middle range at least, and usually above the midpoint in that range. The presence of a considerable number of these factors or, if individual factors are present in a particularly grave form, will raise the offences to the highest category. Cases in this category will attract sentences, pre-application of mitigation, above the midpoint of the available scale, i.e. above seven years' imprisonment and often significantly above the midpoint."

13. We think that having regard to the facts, it can be stated that the latter factors pertaining to the highest end of the spectrum are not met in this instance. However, counsel for the applicant argue that the premeditated nature of the offence, the presence of more than one participant, and the fact that the offence occurred during the suspensory period on the earlier sentence not long after the respondent had been released places this offence in the midrange. Counsel for the DPP rightly stressed the very significant aggravating factor of an extraordinary number of convictions for burglary. It is therefore the applicant's position that a headline sentence of 5 or 6 years would have been more appropriate, and the sentence of three years was unduly lenient.

14. In response to this, counsel for the respondent argue that in arriving at a sentence of 3 years, the judge clearly had the Casey factors in mind and further submit that, in any event, only two factors were met; therefore, this sentence was appropriate as the offence should be default be only considered in the mid to low range.

15. A number of mitigating factors were brought to the trial court's attention during the respondent's plea in mitigation. It might be noted that the material placed before it included – a letter from the respondent's mother which has not been furnished to us, a psychological report of a Dr Ian Gargan, information from Coolmine Treatment Centre and the Camino Project. A letter from the Respondent's mother was also furnished to the judge but we have not seen it. That court was also referred to the earlier judgment of this Court. Annexed to the copy of that judgment handed in to us is a report of a Dr Kevin Lambe but the latter was not before the Circuit Judge.

16. The psychological report shows a long history of issues stemming from his childhood. The respondent's father moved out of the family home and started to drink heavily; the respondent was also aware that his father had been smoking cannabis from a young age and he himself took up using cannabis at eight years of age. This was a matter of which his mother became acutely aware and had him tested for substance misuse. The respondent

asserts that he developed a drugs addiction at this young age largely as a way of coping with a serious traumatic event suffered at age four and half; the information about it before the Circuit Court was vague, as it is here. He had never received counselling or treatment in relation to that incident and his period within the regular schooling system appears extremely problematic.

17. The respondent was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Attention Deficit Disorder (ADD) at six years of age but medication therefor had adverse side effects and exacerbated symptoms associated with Anxiety Disorder. He attempted other medications, but these negated his appetite, caused memory loss, and cannabis appeared to be the only substitute that was able to help him sleep and manage his behaviour. It is said that this diagnosis may have in part contributed to his subsequent cannabis addiction.
18. The offence in question is a serious one; there was, to quote a number of the factors in *Casey*, a degree of planning and premeditation, and two participants. Furthermore, there was damage to the premises and the offence was committed during the suspensory period of a sentence for prior similar offences, and above all, is aggravated by the previous record of the accused. We cannot set out here in extenso the judgment of the Circuit Court, but it is plain that all the mitigating factors were considered. However, we think that the Circuit judge fell into errors of principle by failing to give due weight to the aggravating factors including the prior convictions and the principle of general deterrence. We think that having regard to the facts and such aggravating factors, the offence in this case fell within the middle range and accordingly we quash the sentence of the Circuit Court. We think that a headline sentence of five years is more appropriate.
19. On the basis of the mitigating factors of a plea of guilty (to which limited weight can be attached) and the totality principle, we think that a sentence of four years would be appropriate but having regard to the fact that we are now resentencing the respondent to a lengthier period of imprisonment on a Director's appeal, we will, in accordance with the jurisprudence of the court, impose a sentence of three years, consecutive to the reactivated sentence as aforesaid.