



**THE COURT OF APPEAL**

**Record No: 186/2020**

**Edwards J.  
McCarthy  
Kennedy J.**

**Between/**

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

**RESPONDENT**

**V**

**Martin Butchart**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 23rd day of November, 2021 by  
Mr Justice Edwards.**

**Introduction**

1. The appellant the subject of this appeal appeared before Judge Berkely for sentencing in the Dublin Circuit Criminal Court on the 29th of July, 2020 on one signed plea of guilty from the 27th of March 2020, relating to an offence of robbery contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, committed on the 9th of November 2019.
2. The appellant was sentenced to four years imprisonment with the final year suspended on condition for 18 months. The sentence imposed was made consecutive to a five year sentence imposed on the 4th of December 2019 in the Central Criminal Court, in relation to 14 sexual assault offences.
3. A mandatory consecutive sentence arose under s.11(1)(b) of the Criminal Justice Act 1984 where the appellant breached the terms of his bail conditions after being sent forward for trial on an unrelated matter and failed to appear in court. A bench warrant was issued for his arrest on the 9th of May 2018 and the trial continued in his absence where he was found guilty of 14 sexual assault offences and sentenced to five years imprisonment. Release date was set for 8th of February 2025.
4. The consecutive nature of the two sentences requires the appellant to serve nine years imprisonment with the final year suspended for 12 months.
5. The appellant now appeals against the severity of his sentence.

**Factual Background**

6. The court heard evidence from Garda Joseph Berell in which he outlined the circumstances of the offence.

7. On the 9th of November 2019 the victim Ann Smith was walking to her place of work in Dublin City centre at 6.20am, as was her usual routine each morning, having parked her car on North Circular Road, Dublin. Having worked in a particular shop for 20 years this practice of walking the final portion of her journey had become her routine.
8. As Ms. Smith was walking along Fitzgibbon Street she noticed a man coming from a road on her righthand side. When she was opposite the garda station on Fitzgibbon Street, both she and the man were level with each other.
9. The man then made a grab for her shopping bag and her personal handbag and tried to pull them away from her. Ms Smith tried to hold onto her bags and during the struggle the man punched in the head twice. The strap on the handbag also broke during the struggle.
10. Ms Smith began screaming and was heard by the gardaí inside the garda station who could see the struggle live on CCTV cameras positioned in the station.
11. The gardaí ran outside to assist Ms Smith by which time the man had already begun to run away with the handbag. Garda Berell gave chase and caught up with him on North Great Charles Street, approximately 250 metres away from where the offence had taken place. The man was identified as the appellant.
12. The appellant who appeared intoxicated was arrested and cautioned by Garda Berell. The appellant's reply to being cautioned was to say "I'm sorry". While being put in the patrol car following his arrest and caution he said "I'm sorry, it's not like me. I don't know why I did it. Tell that woman I'm sorry, please."
13. Garda Berell continued with his evidence by telling the court that while in the patrol car the appellant started headbutting the seat in front of him and saying over and over that he was stupid and that he was sorry.
14. While detained at the garda station he was deemed by a doctor as unfit for interview for a period of six hours during which time the footage of the incident was down loaded from the CCTV and was deemed relevant to the investigation.
15. Ms Smith who was shaken and crying was brought inside the garda station and, following treatment by a doctor in Mountjoy Garda station for a cut above her eye, had her bag returned to her with all the contents accounted for. The only damage to the bag was the broken strap.
16. The appellant was interviewed in the garda station at 2.40pm on the 9th of November 2020 in which he answered the questions put to him. He stated that he had no recollection of the incident because he had been drinking and smoking "weed" in Tallaght the evening before. He had no recollection as to how he got into town and that the only thing he remembered was being in the back of the patrol car.

17. During the garda interview the appellant didn't like looking at the footage of the incident from the CCTV which was played to him. The footage made him feel uncomfortable with him stating "*I am assuming it must be me if you're showing it?*"
18. The appellant was charged with the offence and remanded in custody, where he remained until the date of his trial, following which he was sentenced to four years imprisonment with the final year suspended.

**Impact on the victim**

19. Although there was no economic loss to the Ann Smith, she did sustain physical injuries in the form of bruising and a cut over her left eye, which was treated by the doctor in Mountjoy Garda station.
20. In relation to psychological injuries she stated,

*"I feel nervous all the time when I am alone in public and it is really bad when I have to walk to work."*

Explaining how the incident had a life changing impact on her she continued,

*"Sometimes I struggle to get out of my house to go to work. I should not have to feel this way every time I leave my home. Walking to work will never be the same again. I always enjoyed my walk to work in the mornings, it was an enjoyable start to my day. On the morning of the attack, I was punched in the head because I tried to hold on to my handbag. It was just my instant reaction at the time. After it was over I was sore and bleeding from my head. I was unable to continue my journey to work. The bruising around my left eye took over two weeks to heal. I had to spend extra time each morning covering it up with makeup. Since then I am very nervous when I am walking to work and very wary of people who walk close to me. Some mornings I would almost be in a panic. I am not going to let this control my life. I hope this will improve with time."*

**Personal circumstance of the appellant**

21. The appellant was born on the 27th of August 1993 and is from the Tallaght area. He attended secondary school and has previously done agency work in a number of different locations.
22. He has sisters and a brother in the background however, he had not been welcome in their homes for a significant period of time due to his substance abuse. He had difficulties from an early age with drugs and following the deaths of his sister through suicide in June 2017, which affected him badly, and his father from a heart attack in December 2017, he drifted back to homelessness. He was also homeless for approximately six months in the aftermath of his trial which he didn't attend
23. A governor's report from Midlands Prison was handed into the court which stated that the appellant worked in the prison laundry and had two P19's during his sentence to date. He

hoped to achieve enhanced prisoner status in August 2020 however, the advent of the COVID 19 pandemic caused a delay in the assessments and allocation of such status.

24. The appellant hopes to reengage with education and to sit his Leaving Certificate so that when he has served his sentence he can be a productive member of society.
25. On the 23rd of April 2013 the appellant was convicted of burglary contrary to s. 12 of the Theft Act 2000 in the District Court, receiving a 12 month conditional suspended sentence.

On the 2nd October 2014 he was sentenced by the District Court to 80 hours of community service following conviction for theft contrary to s. 4 of the Theft Act, 2000.

On the 16th of June 2016 he was convicted of handling stolen property contrary to s.17 of the Theft Act, 2000 with the District Court imposing a sentence of 180 hours of community service. Also on this date he was convicted for failing to appear on a date originally set and on another remand date, both of which were taken into consideration. He was also convicted of damaging property contrary to s. 2 of the Criminal Damage Act 1991 for which he received a probation order for 12 months.

The appellant has 14 convictions for an offence of sexual assault contrary to s. 2 of the Criminal Law(Rape)(Amendment)Act,1990 which occurred between 1st of January 2006 and the 31st December 2011. In his absence he received a concurrent sentence of five years imposed by the Central Criminal Court on the 4th December 2018. The appellant had breached the terms of his bail when he failed to appear in court during his trial and a bench warrant was issued for his arrest on the 9th of May 2018. This bench warrant was still live at the time of the offence the subject of this appeal.

#### **Remarks of the Sentencing Judge**

26. Prior to sentencing the trial judge established that the date of birth of the victim was the 25th of January 1958. He then continued to outline the gravity of the offence when stating,

*"In relation to the gravity of the offence and the spectrum of gravity factors that affect the culpability of the accused, the harm done, it appears there was a struggle, that this incident occurred early in the morning when this innocent lady was on her way to work and she was attacked and a struggle ensued and she received an injury to her head during the struggle. Fortunately, it was a minor enough injury, however, she does have emotional and psychological issues arising from the attack that occurred and she has difficulties going to work at a time of the morning that she wasn't suspecting at all. In relation to the accused, it appears that he'd had a mix of drugs and alcohol prior to the incident and didn't really recall what he had done, so the -- his behaviour was more than reckless and he didn't have any recall of the incident and the circumstances as outlined by Garda Berell. It's probably on the lower to mid on the scale of gravity for the offence on the range of legislation, so, in my view, the appropriate pre-mitigation headline*

*sentence is six years. Then having regard to his early plea, he indicated from an early time that he is very sorry, in fact when the gardaí arrested him, albeit it was somewhat red handed, he was captured on CCTV, but he immediately apologised, showed remorse and accepted responsibility for his actions."*

27. In relation to sentencing the trial judge continued,

*"He has relevant previous convictions, insofar as he has burglary and theft previous convictions, so that they are somewhat relevant, and he was on a bench warrant at the time of his arrest, having not appeared before another court and awaiting sentence, as I understand it. The pre-mitigation headline sentence of six years I'm then going to mitigate it by taking into account, having considered the serious effect on the victim and the victim impact statement and the injuries she sustained, his culpability but then the mitigating factors; the early plea, discounting it for the early plea, his remorse, his accepting responsibility, his indication that he will do better and rehabilitate himself while in prison. Governor's report says that he is on a standard privilege level, he's had two instants of discipline while being in the prison, but he is, I'm told, determined to work towards having a drug-free and a better future. He has a sad past history in relation to his own personal circumstances, taking them into account as well, I'm going to adjust the sentence back to four years and suspend the last year. So, on his own bond. And I'm putting him -- I don't have a probation report, but I'm going to put him under the supervision of the Probation Services, so it's four years with one year suspended."*

The final 12 months of the sentence were suspended under the supervision of the Probation Service for 18 months. The sentence was to run consecutively to the five year sentence imposed on the 4th of December 2018.

#### **Grounds of Appeal**

28. The appellant complains that the sentence of 4 years imprisonment, albeit with the final year suspended but consecutive to the 5 year sentence he was already serving on Central Criminal Court Bill No CCDP0057/2017, was unduly severe and in breach of the principles of sentencing in that the sentencing judge failed to have any or any adequate regard to:

- (a) The social and domestic circumstances of the appellant.
- (b) The plea of guilty entered by the appellant.
- (c) The state of the appellant's intoxication at the time of the commission of the offence.
- (d) The expression of remorse made by the appellant as early as when he was carried in a Garda car from the scene of the offence.
- (e) The impact of the unsuspended sentence in light of it having to be a consecutive sentence.

- (f) The need for proportionality in the assessment of a sentence which had to be consecutive to a lengthy sentence being served by the appellant.
- (g) Such further and other grounds as may be relied on with the leave of the Court.

**Submissions.**

29. The Court received helpful written submissions from both sides for which it is grateful, and which we have taken into account.

**Analysis and Decision**

30. Notwithstanding the breadth of the grounds of appeal, the appeal was presented in a very focused way. In truth, counsel for the appellant was really pressing one main point. This was that in circumstances where a consecutive sentence was being imposed the sentencing judge had been under an obligation to apply the totality principle, and she had ostensibly failed to do so. A 5 year post mitigation sentence was being aggregated with a 4 year post mitigation sentence with the final year thereof suspended, to date from a date in late 2019. The court was told that without taking account of remission the appellant will not be due for release until the 10th of November 2029 and that with standard remission he could expect to be released on the 11th of May 2027. It was suggested that this represented a crushing total sentence and that there required to be an amelioration in the interests of totality.
31. Counsel for the respondent argued that the sentencing judge could be inferred to have taken account of totality in her synthesis of the mitigating circumstances in the case. She had stated that *"I'm going to adjust the sentence back to 4 years and suspend the last year"*. With great respect to counsel for the respondent we cannot accept her submission. The adjustment for totality takes place after a post mitigation sentence has been arrived at and a decision has been taken to make a sentence consecutive to another sentence. It is at that point that the court is required to stand back and consider whether the combined sentences represents the proportionate punishment for the totality of the offending conduct, or whether some downwards adjustment to the total is required to render it proportionate. We are not persuaded that this exercise was engaged in by the sentencing judge. We acknowledge that the appellant received a substantial reduction ostensibly to reflect the mitigating circumstances in his case and to incentivise his rehabilitation. However, the sentencing judge does not mention totality once during her sentencing remarks, and there is nothing in her remarks to indicate that she had any regard to the totality principle. We are reinforced in our view by the fact that we consider that the combined sentences do represent an aggregate punishment that could be considered "crushing" in the circumstances of the appellant's case.
32. We consider that the trial judge was in error in not applying the totality principle when having resort to consecutive sentencing. In the circumstances we will quash the sentence imposed at first instance and proceed to resentence the appellant.
33. We will impose the same post mitigation sentence (4 years imprisonment with the final 12 months suspended) as was imposed in court below. However, in circumstances where that must be made consecutive to the earlier 5 year sentence, we must consider the

proportionality of the overall aggregate figure. We think that it is excessive and feel that a downwards adjustment is required in the interests of proportionality. To ensure proportionality we are prepared to suspend a further 12 months of the 4 year sentence, so that there is an overall suspended period of 2 years. Accordingly, the aggregate sentence to be served is one of 4 years imprisonment with the final 24 months suspended (on the same terms and conditions as were imposed by the court below), which sentence is to be consecutive to the five-year sentence previously imposed on Bill No CCDP0057/2017.