



THE COURT OF APPEAL

Record Number: 68CJA/2021

**McCarthy J.
Kennedy J.
Donnelly 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 -

JOHN MCDONAGH

RESPONDENT

JUDGMENT of the Court delivered (ex tempore) on the 12th day of July 2022 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency. The respondent pleaded guilty to counts 1 and 6 on the indictment; an offence of aggravated burglary contrary to s. 13(1) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and an offence of burglary contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The respondent was sentenced to five and a half years' imprisonment with the final two years suspended in respect of count 1 and three and a half years' imprisonment in respect of count 6, to run concurrently. The sentence imposed in respect of count 1 was imposed taking counts 2,3,4 and 5 into consideration. The sentence imposed in respect of count 1 is the subject of this application.

Background

2. On the evening of the 17th January 2020, 20 year old Ms. Hurd was preparing for a night out with work colleagues in Sligo town. She was renting accommodation and had arranged for three of her work colleagues to stay with her after the night out.
3. At approximately 5:00am in the morning of the 18th January 2020, the group returned to the house and Ms. Hurd's three colleagues fell asleep. Ms. Hurd was preparing to go to bed when she heard what sounded like knocking on the front door but transpired to be the respondent and his co-accused gaining entry to the house. When she realised this, she tried to push the men out, but they forced the door against her, hitting her with the door and causing her to fall back on the hall floor. The respondent and his co-accused were known to her as the respondent had been her neighbour for a period of time.
4. Both men wore tracksuits bottoms and hoodies and blue latex gloves. The respondent was armed with a long-bladed knife with a black handle and his co-accused had an orange Stanley knife. The respondent ran past Ms. Hurd up the stairs and his co-accused went into the sitting room.
5. One of the men staying in the house described waking to find the two armed men in his room. They demanded his wallet, but he was unable to find it. After a search of his bags, the respondent took his wallet and a bottle of whiskey.
6. Ms. Hurd told the two men that they could take whatever they wanted but to leave the house, the respondent told her to shut up and that if she called the Gardaí they would do to her what happened to "that lad in Cork." Ms. Hurd described being petrified and scared and thinking that she was going to be killed by these two men.
7. The respondent and his co-accused proceeded to slash mattresses, kick in doors and smash holes in the wall. Ms. Hurd described that they "trashed the place." The men pointed their knives at Ms. Hurd and another occupant of the house and ordered them to go downstairs and they then ordered all occupants of the house to go outside.
8. The respondent went into the living room and stabbed the screen of the television with his knife, causing it to smash. Ms. Hurd observed that the couches in the sitting room had been slashed open with a knife. Before exiting the house, the respondent took the kettle from the kitchen and the keys of a car that belonged to a man who was not present in the house.
9. While outside, Ms. Hurd was crying hysterically and the respondent pushed her to the ground, pointed the knife at her and told her to shut up. The respondent then waved his knife at all four victims and told them not to call the Gardaí "or they would be dead."
10. The respondent used the stolen keys to gain access to the car. He kicked the car and hit it with the kettle which he had stolen from the house and then, with the help of his co-accused he slashed all the tyres of the car.

11. Further threats were uttered to the occupants of the house and the respondent and his co-accused left on foot. At approximately 9:30pm Gardaí arrested the respondent in his driveway. At interview he made no admissions and denied his involvement in the offences.

The sentence imposed

12. In formulating sentence for the offence of aggravated burglary, the sentencing judge had regard to relevant paragraphs of this Court's judgment in *The People (DPP) v Casey* [2018] 2 IR 337.
13. He identified a headline sentence of seven years' imprisonment. This was reduced by six months to six and a half years in recognition of the respondent's early plea of guilty made at the height of the Covid-19 pandemic where it would have been difficult to hold a jury trial. The judge noted that the offending was "replete with aggravating features."
14. In acknowledgement of the respondent's guilty plea and sentences served since his remand in custody, the sentencing judge made a discount of one year. In the interests of rehabilitation, the final two years of the sentence were suspended, leading to an ultimate sentence of five and a half years with two years suspended.

Grounds of appeal

15. The Director appeals the sentence on two grounds:
 - "1. The learned sentencing Judge erred in principle by fixing the headline indication at a point on the spectrum which was inconsistent with the gravity of the offence and was inconsistent with the sentencing principles set out by this Honourable Court in *The Director of Public Prosecutions v. Casey* [2018] 2 IR 337.
 2. Further, or in the alternative, the learned sentencing Judge erred in principle in the manner in which he ordered that the sentence would be backdated to encompass periods during which the Respondent was serving prison sentence for unrelated matters."

Submissions of the applicant

16. The Director relies primarily on ground 1 and says that in *Casey*, this Court set out a number of aggravating factors which should tend to place offences of aggravated burglary in the mid-range or in the highest range, including; a confrontation with an occupant of a dwelling and evidence that an intruder equipped himself with a weapon while in the dwelling. The Court held that if a number of the factors are present this will place the offence in the middle range at least and if a considerable number of these factors are present this will raise the offence to the highest category. Cases in the mid-range are said to attract sentences pre-mitigation of between four to nine years and in the highest range, nine to fourteen years.
17. In light of the guidance of the Court in *Casey*, it is submitted that the sentencing judge erred by failing to find that there were sufficient aggravating factors present to warrant

placing this offence in the highest category and accordingly, to fix a headline sentence in excess of 9 years.

18. The applicant identifies the following aggravating factors as justifying this offence's inclusion in the highest bracket:

- The dwelling was ransacked as evidenced by the photographs;
- It was entered during the night and at a time when it was known to be occupied. Entry was forced despite Ms. Hurd's efforts to repel the intruders;
- Violence or the threat of violence was used against the four occupants and in particular against Ms. Hurd who was physically assaulted on two occasions; and
- Serious trauma was caused to the victims as was clear from Ms. Hurd's victim impact statement.

19. Factors relevant to inclusion in the mid-range were also identified, as follows:

- It was a premeditated offence involving the use of latex gloves;
- It involved two participants;
- A residential property was targeted but not in a rural area; and
- Significant damage was done to the house and to the car outside and all of this damage was entirely gratuitous.

20. It is submitted that, with regard to the guidance as set out in *Casey*, both offenders in the instant case were armed with lethal weapons and there were serious levels of confrontation with all four victims who had knives brandished at them and who were subjected to threats throughout the ordeal.

21. On the second ground of appeal, the applicant submits that the sentencing judge in structuring the said sentence, gave the respondent 7 months of extra credit in circumstances where he backdated the sentence to when the respondent first went into custody and thus encompassing periods during which the respondent was serving prison sentences for separate matters. It is submitted that, having served 7 months for other matters, the respondent's sentence was only extended by 2 years and 11 months for the aggravated burglary.

Submissions of the respondent

22. In response to the Director's first ground of appeal, it is submitted that the respondent knew that the occupants of the house were not elderly, otherwise vulnerable or alone persons and that the dwelling was selected for no other reason than its proximity and convenience.

23. It is the respondent's position that the damage was limited to internal walls, to a bed, to a downstairs couch and to the television. It is further submitted that there could not have been forced entry into the dwelling itself as the front door was unlocked at the relevant time.
24. It is further submitted that the sentencing judge was entitled to take the overall view that the offending was the result of "brazenness" and was not entirely planned.
25. In response to the second ground of appeal, the respondent states that this criticism of the sentencing judge "seems somewhat harsh" and submits that he sought to adopt a pragmatic approach which would still ensure that time served completing sentences for other unconnected offences would not be credited to the respondent.
26. The respondent says that the evidence which was led by the applicant before the sentencing judge was that six short sentences had been imposed on the respondent whilst he had been on remand, that it would be difficult to identify a date to which the sentence for the index offence could be backdated but that the prison governor could be "asked to give credit for any time spent in custody solely on remand for these charges." In this way, it is submitted that there was no express reference made to a cumulative total of seven months having been served by way of sentence at the same time as the respondent had been on remand.
27. It is submitted that the sentencing judge, in deducting by just a year from the starting point of six and a half years, discounted the effective headline sentence by one sixth or 12 months to 66 months. It is said that had he discounted from the effective headline sentence by one quarter, he would have done so by 19 months, or in other words, by an additional 7 months leading to a sentence of four years and eleven months before any question of suspending a portion of the sentence was considered. Accordingly, the respondent refutes the contention that he was given 7 months extra credit for time served to which he was not entitled.

Discussion

28. The jurisprudence relating to undue leniency appeals is well-settled at this point. This Court will not intervene in a sentence imposed unless it is satisfied that the sentence constitutes a substantial departure from the appropriate sentence.
29. Whilst reliance is placed by the Director on the *Casey* decision, it should be noted that this related to burglary offences and not specifically to aggravated burglary where the range of available penalty extends from that of a suspended sentence to one of life imprisonment.
30. Therefore, whilst the applicant argues that the judge erred in placing the headline sentence at 7 years' imprisonment and therefore within the mid-range identified in *Casey*, in fact, it could be said that the decision in *The People DPP v Leon Byrne* [2018] IECA 120 which concerned a review of sentence in respect of inter alia aggravated burglary offences is of more assistance.

31. In assessing an appropriate sentence for an offence in the *Byrne* case Edwards J. pointed to the spectrum of penalties available and in considering the penalty for a robbery offence he said at para. 60:-

“In this instance that spectrum ranged from non-custodial options up to imprisonment for life. On the basis that a life sentence is likely to be reserved for only the very worst and most egregious offences of this type, the practical reality is that the effective range of custodial penalties caps out at fifteen years, or thereabouts, for all but the most exceptional cases. An effective fifteen year range allows for a low range of zero to five years, a mid-range of six to ten years and a higher range of eleven to fifteen years.”

32. In the same decision, Edwards J. refers the decision of *Casey and Casey* which happened to be delivered on the same date as *Byrne* and pointed to the aggravating factors which may arise in burglary cases.

33. In the present case, the applicant refers to the sentencing judge’s remarks where he stated:

“And serious and all as what happened on the night, I don’t see this as a high-range offence as opposed to a mid-range offence. It does seem to me to be sufficiently chaotic, sufficiently unplanned and sufficiently, I suppose, almost brazen to the point of being irrational that it’s more appropriately considered a mid-range offence rather than a high-range offence, and I don’t believe it truly goes to the top end of the mid-range offences.”

34. Insofar as this Court is concerned, we are satisfied that the judge erred in nominating a headline sentence of 7 years’ imprisonment given the breadth and extent of the aggravating factors. Those factors, we have already stated the factors, but they include many of the factors identified in *Casey* including the use of a weapon, specifically a knife, threatening the occupants of a residential dwelling, entering the premises at a time when the premises were occupied, confronting the occupants causing injury to one of the occupants and causing significant damage to the property which involved damage to the television, to the walls, slashing a sofa and causing damage to a vehicle including the slashing of the tyres.

35. We do not disagree with the sentencing judge that there was not a prolonged or sustained ransacking of the dwelling, nonetheless the damage caused and the manner in which the damage was caused was entirely gratuitous.

36. The impact on the victims was understandably severe, entering onto a person’s dwelling during the night must be viewed in a very serious manner. The use of the weapon renders the offence even more serious. One can only imagine the horror of one of the occupants when he woke to find two intruders in his room and a knife to his throat.

37. In relying on the remarks of the sentencing judge, it is argued on behalf of the respondent that this was not a situation of the calculated targeting of the dwelling, and it certainly is the position that this is not the type of case of an organised venture involving the targeting of rural properties. However, there was an element of planning to the invasion of this house in that the culprits wore latex gloves, possibly in an effort to avoid forensic detection. Whilst they did not wear a balaclava or attempt to hide their identity, they threatened Ms. Hurd that if she rang the Gardaí, they would do to her what happened to "that lad in Cork", referring to the killing of a student. Whilst it seems that this was not apparent to her at the time, nonetheless she was petrified throughout this ordeal.
38. In our view, as stated, we are satisfied that the sentence is unduly lenient and consequently, we will now proceed to quash that sentence and impose sentence as of today's date.
39. In view of the aggravating factors and with regard to the spectrum of penalties available, we consider the appropriate headline sentence to be one of 10 years' imprisonment. This nominated notional sentence reflects the gravity of the offence and has regard to the respondent's culpability and the harm done.
40. In terms of the respondent's personal circumstances, he is a man who experienced difficulties in his childhood, he has addiction difficulties and he is attempting to address those difficulties. There are a number of incidents of self-harm, however, happily, his life improved with his marriage and the birth of his children. He has pleaded guilty to this offence. He is a man with 35 previous convictions and at the time of sentence he was 25 years of age. The previous convictions were of a summary nature and there are no relevant previous convictions which would serve to aggravate this offence.
41. We have heard as of today's date that he has enhanced prisoner status. He is engaging with the educational programme whilst in custody, he is also engaging with Merchants Quay and is awaiting a treatment bed. There are, as the sentencing judge pointed out, positive signs that he is taking the opportunities available to him in custody in an effort to turn his life around.
42. In the circumstances, therefore, we will reduce the sentence to one of 7 years' imprisonment and in order to incentivise his continued rehabilitation we will suspend the final 18 months of that sentence for a period of 2 years from the date of his release on the usual conditions and with the condition that he remain under the supervision of the Probation Service for that period and comply with all directions from that service.