

UNAPPROVED

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THE COURT OF APPEAL

[107/20]

Neutral citation number: [2022] IECA 57

The President

Kennedy J.

Donnelly J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JASON DAVIS

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 10th day of March 2022 by Birmingham P.

1. Before the Court is an appeal against severity of sentence. The effective sentence appealed is one of seven years' imprisonment, with the final eighteen months suspended, imposed in respect of the offence of aggravated burglary contrary to s. 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Concurrent sentences of two and a half years' and two years' imprisonment were also imposed in respect of offences of criminal damage contrary to s. 2 of the Criminal Damage Act 1991. The sentences were imposed on 27th May 2020 in the Circuit Court in Dundalk. The criminal damage counts (counts 2 and 3) were committed on 1st January 2017, while the aggravated burglary count (count 7) occurred on 8th January 2017.

Background

2. The two criminal damage counts arose out of the same incident. The Court was told that on 1st January 2017, the principal injured party, Mrs. Jacinta Bird, was in her home at 29 Beechwood Avenue, Drogheda, when a panel in her front door was smashed by bricks that were thrown by the appellant and another. We will refer to this other individual as a co-accused. Thereafter, the appellant and the co-accused were seen smashing a car which was nearby with steel bars. This car belonged to another injured party, Mr. Craig Bell. It was estimated that as a result of these acts involving the car, the appellant and the co-accused caused some €600 worth of damage to the car.

3. So far as the aggravated burglary count is concerned, this was a separate incident which happened a week later on 8th January 2017, but on the same road as the first incident. This involved an entry into the home of Mr. Christopher Conlon Snr. and Mr. Christopher Conlon Jnr., at 35 Beechwood Avenue. Two assailants, one of whom was the appellant, smashed windows of the Conlon home and barged into the sitting room, and then into the kitchen. There was a struggle in the house as the Conlons sought to prevent the appellant and the co-accused from entering. Mr. Conlon Jnr. and some friends in the house were socialising there and they assisted in the efforts to exclude the intruders. Damage to the property came to some €1,589; this included damage to two front sitting room windows, a porch, a sliding door, glass from the front door, two upstairs windows, and a garden bench.

4. It was accepted that the co-accused was the more prominent of the two intruders. It was he who knocked Mr. Conlon Snr. to the floor, causing an injury to his elbow and shin. The co-accused had a knife in his possession. This was not used during the incident, but was seen at one stage in the hand of the co-accused. This co-accused was also seen to have brandished a golf club at one stage during the incident.

Personal circumstances of the appellant

5. In terms of the appellant's background and personal circumstances, he was 28 years of age at the time of the sentence hearing. He had 39 previous convictions recorded, of which eight were for criminal damage, ten were for assault, seven were for public order offences, four were for offences under the Misuse of Drugs Act 1977, and ten were for road traffic matters. The appellant's upbringing was a difficult one, in that he had started using drugs aged thirteen or fourteen and became dependent on them. At the time of the appellant's birth, his father was serving a significant sentence of imprisonment, and after his birth, his mother left the jurisdiction, leaving the appellant to be cared for by grandparents. The sentencing court was told that he had engaged with the Red Door Project in relation to his drug addiction.

Written grounds of appeal

6. The written submissions indicate that the grounds of appeal being advanced are:
- (i) That the headline sentence identified in respect of the accused was unduly harsh. This has particular relevance to the aggravated burglary count where the headline sentence was assessed at nine years.
 - (ii) That the sentencing judge failed to strike an appropriate balance between the aggravating and mitigating factors when deciding upon the appropriate sentence. The case is made that the judge had tended to treat the factors relied on by way of mitigation in a cursory fashion. The judge is further criticised for minimising the value of the plea which saved the injured parties, and in particular Mr. Conlon Snr., from having to give evidence. The judge is also criticised for not paying sufficient attention to the fact that the plea was

entered and sentence imposed during the course of a pandemic, and that this would impact in a very major way on the prison regime to which the appellant would be subjected. The judge is also criticised for appearing to take the view that the failure to make any effort to compensate the injured parties resulted in a loss of mitigation. There is further criticism of the trial judge for her treatment of the issue in relation to the knife and the golf club, due to the fact that there was no evidence that the knife had been used or brandished in the incident, and that it was the co-accused rather than the appellant who had possession of the knife. So far as the golf club is concerned, which was used to smash the windows, again, this was in the possession of and was used by the co-accused.

7. Overall, it is submitted that the sentence is unduly harsh, and that the issue of rehabilitation was not adequately addressed. While a suspended portion of eighteen months represented some incentive towards rehabilitation, it is contended to be inadequate and to have left in place a sentence that was disproportionate. It is contended that, particularly at the time of a Covid-19 pandemic, which would impact on the regime that would apply within the prison, the sentence was harsh and oppressive.

Disparity of treatment

8. However, when the matter was first listed for hearing, it became apparent that the major concern of the appellant related to a disparity of treatment and to the divergence between the sentence imposed on the appellant and the sentence imposed on the co-accused, Mr. Dean McKenna. Mr. McKenna had been sentenced on a different occasion by a different judge.

9. The reaction of the Court members was to say that we had no information in relation to the sentence hearing involving Mr. McKenna, and that the long-standing practice of the Court was to require that the transcript(s) relating to the co-accused be put before the court if it was intended to canvass issues relating to parity or disparity. Against that background, there was a request by the appellant to adjourn the sentence appeal to allow the transcript of the sentence hearing relating to the co-accused be obtained. The sentence hearing transcript relating to Mr. McKenna of 17th May 2018 was received by the Court, and both sides made submissions by reference to it at the resumed hearing. We can say that, absent the issue as to parity, we would have had no difficulty in upholding the sentence, and would not have regarded the criticism of the sentence – in itself, or at this particular time – as being harsh or inappropriate as being of substance.

10. By reference to Mr. McKenna’s sentencing transcript, it is clear that the matters to which the appellant and Mr. McKenna pleaded guilty were not identical. However, having said that, we hasten to add that the matters to which Mr. McKenna pleaded guilty were, if anything, more wide-ranging and more substantial. Evidence was given as to the sentencing hearing in relation to the events on 1st January 2017 at 29 Beechwood Avenue. What the sentencing court heard in that regard accords with what the sentencing court heard in relation to this incident in the course of the Davis sentencing hearing.

11. However, significantly, the sentencing court also heard of his involvement in incidents at the same location (29 Beechwood Avenue) on 8th January. The sentencing court heard about what were described as two “visits” on that occasion. In the first incident, a car which had been unlawfully taken for the purpose of this offending was driven into collision with the front door of the house. The sentencing court heard that the householder would have stated that he saw the accused, Mr. McKenna, at another stage light a petrol bomb and throw it at the house. A second petrol bomb was thrown and hit the wall beside the door inside the

house. This was described as striking a runner being worn by Mr. Bell, who was at 29 Beechwood Avenue at the time. Another injured party, Mr. Sean Bird, who resided at the house in question, was described as having “got some fire on his back”, but the evidence as led by prosecuting counsel was that the “burn incidents” were dealt with quite quickly, and that the primary damage was to a wall inside the house.

12. The sentencing court also heard information in relation to the incident of 8th January 2017 at 35 Beechwood Avenue. Again, the account broadly mirrors the account given to the Davis sentencing hearing. There was reference to the fact that the two men left after a struggle, but that they came back a short time later, and that the accused then before the Court, Mr. McKenna, was described as smashing the back kitchen windows and breaking a metal garden bench in the process. There was reference to a “running incident” where “they” appeared to have left and returned again, and the accused before the Court was noted to have has a golf club in one hand and an “orange handled thing”, similar to a sharp carving knife, in the other. The account made clear that it was the accused before the Court, Mr. McKenna, who grappled with Mr. Conlon Snr. and threw him to the ground. The Court was told that the two properties where the incidents occurred were located about 200 metres apart, and a description was given of Gardaí “running between one property and another” on 8th January as they responded to the situation, with the investigating Garda observing “[w]e couldn’t really explain what happened and we didn’t get a full account of why it happened”.

13. The sentencing court in Mr. McKenna’s case was told that the accused was aged 23 at the time of the sentencing hearing. Details were given of eleven previous convictions, one under the Criminal Justice (Theft and Fraud Offences) Act 2001, four under the Road Traffic Acts, three under the Criminal Justice (Public Order) Act 1994, one for possession of an offensive weapon, two under the Criminal Damage Act 1991, and one for assault. The most significant matter in this regard was before the Circuit Court in Dundalk on 25th January

2017, where he was sentenced in respect of damaging property and assault causing harm, receiving a sentence of two and a half years' imprisonment, with the final twelve months suspended. In the instant case, the sentencing court imposed a sentence of three and a half years' imprisonment in respect of the aggravated burglary matter, the final eighteen months of which were suspended.

14. On behalf of Mr. Davis, it is said that there was no justification for him receiving a sentence more severe than that imposed on Mr. McKenna. On any view of things, it could not be said that his involvement in the incident at the home of the Conlon family involved a more significant role than that of his co-accused, Mr. McKenna; indeed, the exact opposite was the situation. It was Mr. McKenna who was in possession of a knife and it was Mr. McKenna who had the golf club. It was Mr. McKenna who returned after the intruders were excluded. Moreover, when the Court came to sentence in the McKenna case, it was sentencing in respect of three incidents: the incident on 1st January 2017; the incident at the Conlon family home (35 Beechwood Avenue) on 8th January 2017; but also the incident at 29 Beechwood Avenue on 8th January 2017 involving two "visits", and an act of arson.

15. In response, counsel on behalf of the prosecution draws attention to the fact that the appellant's record was more significant and he was the older of the two involved, being 28 years of age at the time of the sentence hearing. He had amassed 39 previous convictions, of which the last ten convictions were recorded while on bail in respect of the charges before the Court. He had a number of previous convictions for assault causing harm, and a conviction for assault causing serious harm, in respect of which a sentence of six years' imprisonment was imposed on 3rd May 2012.

16. It does not seem to us that there can be any real doubt about the fact that Mr. McKenna was not only as culpable as Mr. Davis, but that, objectively, his culpability was significantly greater. Had both men been dealt with by the same judge on the same occasion,

the likelihood is that Mr. McKenna would have received the greater sentence, and certainly, it is hard to imagine how, in that situation, Mr. Davis could have emerged with a longer sentence. However, they were not dealt with on the same occasion and were not dealt with by the same judge.

17. It is not particularly unusual for co-offenders to become separated and to end up being dealt with on different occasions by different judges, but what was perhaps unusual on this occasion is that neither side provided any information to the judge about what had occurred when the co-offender was before the Court, and nor did the judge ask for the information. The only reference to the proceedings involving the co-accused was that, at one point, when roles in the aggravated burglary were being attributed by reference to the taller (Mr. McKenna) and shorter (Mr. Davis) intruders, there was a passing reference to the fact that the taller had been sentenced, but no further information was provided.

Discussion and decision

18. The starting point for consideration is that co-offenders should ordinarily receive the same, or certainly similar, sentences unless there are appreciable differences in levels of culpability or in terms of their personal circumstances. It has long been recognised that, absent that happening, an accused receiving a longer sentence than his co-offender may be left with a sense of grievance, and in some cases, that may be a justifiable sense of grievance. However, as far back as the case of *People (Attorney General) v. Poyning* [1972] IR 402, it has been recognised that the fact that an unduly lenient sentence was imposed on one defendant does not of itself justify interfering with a longer sentence imposed on another where the latter sentence is otherwise appropriate. In the case of *DPP v. Daly* [2011] IECCA 104, the point was made that the foremost consideration has to be the imposition of an appropriate sentence. Parity, it was pointed out, is a laudable aim, but there will exist

circumstances where two sentences cannot be reconciled and parity has not been achieved. In such a case, parity will sometimes have to yield and appropriateness will have to prevail.

19. In this case, the offences that the Circuit Court judge was called on to address were offences of real seriousness. By definition, aggravated burglary is a serious offence, though it might be said this particular offence did not have all the elements of a classic aggravated burglary. That said, here, the judge was dealing not only with the aggravated burglary, but with the offences from a week earlier which were themselves matters of some significance. For the aggravated burglary, the judge nominated a headline sentence of nine years' imprisonment, but that was then reduced to seven years, and, as the judge put it, to incentivise and encourage the accused's "tentative steps towards full rehabilitation", she proceeded to structure the sentence by suspending the final eighteen months of it. It seems to us that an effective sentence of five and a half years for the aggravated burglary, where there was a confrontation with the householder, with concurrent sentences imposed in respect of the offences from a week earlier, could not by any standards be regarded as a particularly severe sentence.

20. It seems to us that it is a sentence which ordinarily would be regarded as falling well within the discretion of the judge called on to sentence Mr. Davis. However, the divergence between the way in which the two co-accused were dealt with does give rise to concern. We have made the point that it is hard to see any basis on which the appellant would have been treated more severely than Mr. McKenna, but what actually happened was that a much more severe sentence was imposed on Mr. Davis. If one focuses just on the custodial elements of the sentences, as distinct from the part-suspended sentences, Mr. McKenna received an effective sentence of two years' imprisonment, while Mr. Davis received a sentence of five and a half years' imprisonment.

21. The extent of the divergence creates a real dilemma for an appellate court. In our view, the sentence imposed on the appellant now before the Court was not an inappropriate one, and was one that fell within the available range. An attempt to achieve, or even move close, to parity, would result in this Court imposing an inappropriate sentence, one that would likely meet the criteria for being regarded as unduly lenient. In *DPP v. Cunningham* [2015] IECCA 2, it was stated:

“However, an appellate court, in adjusting a sentence to attempt to remove what it has found to be an unjustified disparity, cannot alter the sentence imposed on the appellant to such an extent that the new sentence would itself meet the criteria for undue leniency. To take such a course of action would be to displace one potentially unjustified approach with another equally unjustified sentence.”

The Court has asked itself the question, what would the response of the sentencing judge have been if her attention had been drawn to the details of the sentence imposed on the co-accused, as should have happened? Certainly, one possibility is that she would have concluded that it would not have been possible to impose the same, or even a similar sentence. However, she might have taken the view that it would have been possible to impose a somewhat lower sentence than the one under contemplation, which would still fall within the available range, but would be fixed at a level so as to reduce the extent of the divergence.

22. It seems to us that the extent of the divergence that has emerged gives rise to such a degree of disquiet that an intervention is required. We propose to deal with the matter by reducing the effective sentence to be served from five and a half years to four and a half years. We will adopt a similar approach to structuring the sentence as did the sentencing judge. Accordingly, we will impose a sentence of six years imprisonment on the aggravated burglary count, as distinct from the seven years imposed, but like the sentencing judge, we will suspend the final eighteen months of the sentence. We feel that such an approach will see

an appropriate sentence imposed, one that would have been available to the trial judge, and will reduce, though not eliminate, the disparity.