



THE COURT OF APPEAL

Record No.: 241/20

**Edwards J.
Donnelly J.
Ní Raifeartaigh J.**

BETWEEN/

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

RESPONDENT

-AND-

SEAN EVERITT

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 28th day of March, 2022 by Ms. Justice Donnelly

Introduction

1. This is an appeal against severity of sentence brought by the appellant in respect of two separate bills of indictment. Although he pleaded guilty to these offences on separate days, the sentencing in relation to both was heard together. The first offence in time concerned possession of a controlled drug for the purpose of sale or supply contrary to s. 15A of the Misuse of Drugs Act, 1977 (as amended) ("the 1977 Act") on the 12th May, 2019. The appellant was on bail for that offence when he committed the offence of aggravated burglary in a private home on the 24th September, 2019. The sentencing for both bills of indictment were dealt with together on the 16th November, 2020.
2. The appellant was sentenced to four years' imprisonment for the s. 15A offence. He was sentenced to four and a half years' imprisonment with the final twelve months suspended in respect of the aggravated burglary offence. The other counts on that indictment were taken into consideration. The second sentence is to be served consecutive to the first sentence. He was therefore sentenced to a total of 8 and a half years imprisonment with the final 12 months suspended. The appellant has no previous convictions and was 19 years of age at the time of the commission of the offences and was 20 years of age at the date of sentencing.

Background

3. In relation to the s. 15A offence, on the 12th May, 2019, evidence was given that the gardaí recovered cocaine and cannabis to the value of €35,863 in the appellant's bedroom in a house that he was renting with other tenants who were unconnected with him, on foot of a

search warrant under s. 26 of the 1977 Act. The appellant was away at work for the day. A number of items were recovered, including a black rucksack containing cannabis herb, and a block of cocaine was found on the floor. There were eight small bags of powder hidden behind the TV and two small digital weighing scales that were found beside those eight bags.

4. The appellant was later arrested at work and during the course of his interview, he told the gardaí that he knew the drugs were there but did not know how much. He said that he was giving them to a store and indicated that he was too scared to name the persons involved. He told the gardaí how he met an individual and the drugs were handed to him in an open space and that he did this as he owed money and there were threats to petrol bomb his grandmother's house. The appellant's debt amounted to €1,500 as a consequence of his smoking of cannabis. The Court were told that he acquired this addiction when he went into foster care and was spending between €200 to €300 per week. His drugs supplier of this material had made this requirement of him. He had to weigh the material and pass it on. The appellant stated that his debt was so high due to his use of cocaine also. The Court was told that at the time of his interview, the appellant indicated that he felt threatened and concerned for his safety, that he was sorry, and described himself as being in a state of terror.
5. The second offence which occurred on the 24th September, 2019 while the appellant was on bail. The appellant committed the offence at a home occupied by a family in Louth. The victim arrived home to the house from Dundalk at lunchtime and noticed something was out of the ordinary. Her husband was in bed as he was working a night shift. The victim heard shouting "where's the safe? Where's the f...ing safe?". The victim described the two men coming into the room wearing balaclavas/masks and gloves. One was wielding a wheel brace. After telling the men that there was a CCTV camera, she and her husband chased the two men out of the house. Four men altogether were involved, the two other men did not enter the premises and were in the get-away vehicle. Nothing was taken from the property.

Victim Impact Report

6. A victim impact statement was prepared by the householder. She outlined how she wished to do so for three reasons (1) so that the judge could hear first-hand the devastating impact on her and her family (2) so that the perpetrators of this crime can hear how their decision to break into her home had taken so much away from them, not material things, but the precious gift of peace of mind and, (3) so that, hopefully, other victims might feel a little stronger to do the same thing as it is only by making these statements that things will change.
7. The victim went on to outline in a very succinct and clear way just how the burglary had such a devastating impact on their peace of mind and had fundamentally changed the way her husband and herself lived their lives. Their sanctuary had been taken from them and she hoped they would recover in time. The sentencing judge described the victim impact report as powerful.

The parties submissions to the sentencing judge on the sentencing range for the aggravated burglary offence

8. The DPP offered the view that the aggravated burglary was in the mid-range of offending.
9. The appellant submitted that this offence was at the lower end of the range albeit at the top the lower end.

Sentencing Remarks

10. Having heard the evidence and submissions, the sentencing judge put the matter back for a further Probation Report, one having already been prepared which only related to the s. 15A offence. At the sentencing stage she had both Probation Reports, a Governor's Report, a letter from the appellant and a letter from the appellant's drug counsellor before her.
11. The sentencing judge noted that the two offences were separate and distinct from each other and that the core of his offending came from his involvement with drugs. The sentencing judge noted the young age of the appellant and his difficult background and being in residential care and then getting an education at Drogheda Institute in order to get a trade. The sentencing judge noted that the appellant had no previous conviction and gave an early guilty plea. However, the sentencing judge stated:-

"...the unfortunate thing at this juncture is that he now presents before the sentencing court with two very serious offences. And not only are they serious, but they were committed whilst on bail."

12. In relation to the s. 15A offence, the appellant's father and younger brother was in court to support him. The sentencing judge noted that the appellant has a close relationship with his grandmother, who was the subject of a number of threats. The sentencing judge stated:-

"Having regard to the maximum penalty as provided by law, which is life, the scale of offending is at the upper end of the mid-scale of offending. And noting the mitigation present and the various factors that are to his credit present, I am satisfied that having regard to the provisions of the legislation in this particular instance, that I can depart from the presumptive minimum in the interest of justice, noting his early plea and his substantial cooperation in terms of his responsibility and role and the lack of previous convictions. Having then acknowledged that, I can depart from the presumptive minimum. I turn to the mitigation in this instance, and having heard all that's been said on his behalf and having carefully considered all of the documentation pertaining to his own apology, which was provided today in letter format and from his drugs counsellor, there is progress, and noting the content of the probation reports. Having acquired this drug addiction and leading a chaotic lifestyle, as I noted, he only acquired previous convictions once he reached the age of 19. And he had been in a position to hold down employment, and that is all to his credit. The early plea, as I've already indicated, and all that comes with that in terms of the weight and in relation to the timing of the plea. The fact that he has sought to deal with all matters that are before the courts, in relation to dealing with both matters during this pandemic, and having dealt with that and dealt with his

rehabilitation -- or having taken those initial steps in terms of his rehabilitation. He was arrested at work, with the result he lost that job, a job that he clearly gave time and effort to in relation to employment while dealing with his drug addiction, and then gave substantial assistance thereafter. Noting his age at the time and his role in acknowledging the drugs and taking responsibility in the plea, as I've said already, that is to his credit, as it absolved others who were living in the house from further prosecution or from any prosecution. He's had addictions of his own, and I've had the reports, but of concern is the probation officer indicating that he still remains at a high risk of reoffending. Having carefully considered all that's been said on his behalf and noting his own letter and matters raised today, the sentence in respect of count five is one of four years' imprisonment."

13. In relation to the aggravated burglary offence, the sentencing judge noted that the appellant's role was essentially that of giving assistance but that it is common design. The sentencing judge noted that there were four individuals in a car that came to the victim's house. She noted that the appellant was one of the two males who got out and climbed the wall and went into the house, threatening with balaclavas and wearing gloves "clearly to intimidate and frighten the occupants." The sentencing judge noted that:-

"I'm told he has instructed counsel to unreservedly apologise, and I accept that apology as genuine, and there's a number of mitigating factors that are present. Of course, the house wasn't damaged, nor was there any property stolen. I'm told his remorse is genuine in terms of the apology that he's tendered, and in relation to his culpability."

"I'm entitled to also have regard to the effect on the injured parties and place this offence in the mid-range and nominate a sentence of seven years' imprisonment. As I've already made reference to the principles of sentencing in terms of incorporating proportionality, deterrents and rehabilitation amongst others, and having considered all that has been said on his behalf in terms of this particular matter, noting what's been said already in terms of the section 15a matter, his age in time, and he was here found in the company of older men. Again cognizant of this global pandemic, where the plea was entered early and is of assistance, thereby sparing parties the ordeal of having to come to court. And thereby also noting that the weight of the plea is also something to have regard to, noting the fact that there was no DNA and they were wearing disguises. So, it would have been a matter in relation to circumstantial evidence. So, credit can be given in that regard also."

Whilst the home was entered through an unlocked door, I'll note that there was no criminal damage in order to gain criminal access, but that's not to his credit. His probation officer has identified limited insight in terms of his offending, and he is clearly a work in progress with initial work. But I'm cognizant of his difficulties in life and the fact that he has spent a substantial period of custody at this stage in relation to matters. And note the content of the governor's report in respect of matters. And that is to his credit, and also on today's date having received the counsellor's report,

note that also. That he has insight insofar as he realises he must address these difficulties. Now in terms of his cooperation, there were no admissions save for his guilty plea, but that guilty plea was entered in at an early stage. So, in that regard, I'm going to impose a sentence in respect of count one on the indictment and given the appropriate weight in that respect, of being four and a half years' imprisonment."

14. The sentencing judge then moved on to consider the principles of totality and proportionality. In applying these principles, the sentencing judge suspended the final 12 months of the aggravated burglary sentence on condition that he keep the peace and be of good behaviour and remain under the supervision and direction of the probation services for 12 months post-release and to provide a urinalysis at the request of his probation officer.
15. After the sentencing judge had imposed sentence and dealt with the issue of backdating therefore, counsel for the DPP said in respect of the first bill of indictment regarding the s. 15A matter, that there are outstanding counts, "if you'd mark them as taken into consideration." Counsel for the defendant objected on the basis that the other counts appeared to be alternate counts and that there should be a *nolle prosequi* entered. The judge said she would take all counts into account as no issue had been raised on that at the time the plea of guilty was entered.

Grounds of Appeal

16. In essence, the appellant's grounds of appeal are as follows:-

- a) *The sentencing judge failed adequately to apply the principal of totality in circumstances where the sentences were to have consecutive effect;*
- b) *The sentencing judge erred in placing the s. 15A offence into the upper end of the mid-scale and failed to identify a headline sentence and did not have consideration for the appellant's efforts to rehabilitate and failed to consider imposing a non-custodial element and/or community sanction; and*
- c) *The sentence imposed in respect of the aggravated burglary offence was excessive in all the circumstances.*

Submissions

Taking into consideration the other s. 15 offences

17. Although not brought up expressly as a ground of appeal or as part of the written appeal, counsel for the appellant submits that this was a matter which went to the issue of whether the sentencing judge had made an error in principle and in particular had breached the principle of totality. It is submitted by the appellant that these were alternative counts and that no jury would have been asked to convict on these offences if they were proceeding to convict on the s. 15A offence.
18. It should be said that the indictment had included 3 counts alleging an offence contrary to s. 15, one regarding the cannabis, one regarding the cocaine and one regarding the combined drugs. A section 15 offence is one of possession with intent to sell or supply the drug to another.

19. The DPP submits that it was the practice on the particular Circuit to ensure that all counts were "dealt with", in so far as there had been agreement to do so. Here, there was an express statement that the counts were to be taken into consideration and there was no demur from that. The DPP submits that in the present case it did not affect the sentence.

Failure adequately to apply the totality principle

20. The appellant submits that the court was asked to give the appellant credit for the manner in which he dealt with his offending and to be cognisant of his young age. While being fully advised on the ramifications of s. 11 of the Criminal Justice Act, 1984 ("the 1984 Act"), counsel for the appellant asked the Court to afford him some light at the end of the tunnel when considering the totality principle and invited the Court to suspend part of the sentence to be imposed to incentivise rehabilitation.
21. The appellant in written submissions said that while it has always been accepted the appellant was liable to consecutive sentencing, there had been a confusion on the part of the judge which indicated difficulty with respect to the totality principle. The sentencing judge handed down the sentence and the appellant submitted that confusion arose with respect to the concurrent/consecutive nature of the sentencing and relies on the following remark of the sentencing judge:-

"So, I should say in terms of the sentence, this sentence in respect of bill 23/20 [the aggravated burglary offence] in respect of Count 1, that it is to run concurrent to the sentence that's imposed on count 5 on bill 1/20 [the s. 15A offence]."

Prosecution counsel clarified the position and the Court then corrected itself with respect to the imposition of the sentence, with the sentences to run consecutively. The judge expressly said she had made a mistake when she said concurrent.

22. The appellant submits that, in part, as a result of this confusion, that the seven and a half year sentence required to be served is excessive. The appellant relied on *The People (DPP) v. Farrell* [2010] IECCA 68 where the court held:-

"[16] The imposition of a consecutive sentence carries with it a particular obligation to ensure that what is described somewhat clumsily as the 'totality principle' is observed. It is a commonplace of many types of assessments that the consideration of the component parts risks sometimes missing or exaggerating the value of the whole. This observation applies in the context of sentencing because the construction of the sentence involves not just the identification of the harm to victims, but also an assessment of the culpability of the accused.

[17] In the field of sentencing, it is certainly the case that there is a principle of totality, which requires that when consecutive sentences are employed, a court must be careful to take account of the overall impact of the sentence, the moral blameworthiness of the accused and the prospect of rehabilitation, and therefore recognises that the total sentence in some cases should be less than the sum of the component parts."

23. The appellant also relies on *The People (DPP) v. McCormack* [2000] 4 I.R. 356 where the Court of Criminal Appeal emphasised the central importance of personal circumstances in the construction of a sentence. Further, the appellant relies on *The People (DPP) v. Broe* [2020] IECA 140 where this Court held at para. 74:-

"It is well established that a wholly suspended sentence is still a sentence, and in the case of a part suspended sentence both the portion required to be served in custody, and the suspended portion, together comprise the sentence. However, it cannot be gainsaid that where a court sees fit to suspend a sentence in whole or in part, it involves a more lenient sanctioning or punishment of the offender than would be the case where a sentence is required to be served in full. The imposition of the suspended portion still communicates society's deprecation of, and desire to censure, the offending conduct, while sparing the offender (providing he/she adheres to the conditions on which the sentence was suspended) the "hard treatment" that would otherwise have to be endured if the suspended portion were required to be served. Accordingly, suspending a sentence in whole or in part will often be an appropriate way of reflecting mitigating circumstances, particularly where amongst the factors which the sentencing judge wants to reward is progress towards rehabilitation or reform to date, and where he/she also wishes to incentivise continuation along that path. The reward for mitigating circumstances which require to be acknowledged including progress towards rehabilitation or reform to date, may be provided by the leniency associated with suspension, while the incentive to continue with rehabilitation or reform is provided by the conditionality associated with the suspension. Often, where this mechanism is used, the length of the suspended period may be somewhat greater than it would be if recourse was to be had to a straight discount, as an extra incentive towards future desistance having regard to the consequences of non-compliance with the conditions of the suspension."

24. The DPP relies on para. 5-27 of O'Malley, *Sentencing Law and Practice* (3rd Edn., Round Hall, 2016) and distils the principles elucidated therein as follows. First, the fundamental duty is to impose a sentence that fairly reflects the totality of the offending conduct, making allowances for mitigating factors and other relevant factors. The DPP submits that the criminal conduct in this case was appropriately punished by the combined effect of the consecutive sentences. Each count was marked with the appropriate headline sentence and appropriate reduction for mitigation, followed by an appropriate period of suspension.
25. The DPP submits that the appellant's submission that the sentencing judge uttering the word "concurrent" must be interpreted as meaning there was a lack of certainty in the judge's own mind, is to ignore the other references to consecutive sentencing which were a feature of the hearing.
26. The DPP then refers to the sentencing court's approach to the principle of deterrence. The DPP submits that O'Malley at para. 5-19 discussed how deterrence may be brought to bear on sentencing:-

"Courts are understandably anxious to respond effectively to apparent surges in certain kinds of crime within their localities. They may therefore be inclined to impose deterrent or exemplary sentences to signify their determination to stamp out the conduct in question. Indeed they are permitted to do so."

The DPP submits that there is of course an obligation not to be disproportionate to the gravity of the offence and the offenders' circumstances.

27. The DPP refers again to O'Malley where he states:-

"...further leniency may be withheld with a view to deterring conduct which is clearly harming the local community. Secondly, a court should be sure that the offence is in fact becoming more prevalent or that it is more prevalent in a particular locality than it is nationally."

The DPP concedes that this is not entirely on point in the present case, but the sentencing judge was in effect taking notice of a nationwide trend identified by her. In the present case, it is submitted by the DPP that there was no presumption, let alone articulation, that the prevalence was specific to any locality, let alone where, in that vague sense, where that locality may be. The DPP submits that it is in that context that a sentencing judge is entitled to take judicial notice of such factors and to allow for a deterrent element when handing down sentence.

28. The DPP refers to para. 2-12 to 2-17 of O'Malley and notes that deterrence may be general or specific in nature:-

"General deterrence is premised on the empirical assumption that punishment, is sufficiently severe, will dissuade people from committing crime.... The moral premise is that the State is justified in imposing such punishment, which may or may not be strictly proportionate to the offence, if it will deter offending by others and therefore makes society safer and more secure. Crime prevention is therefore the overarching goal."

The DPP submits that balancing this with the very significant rights which the individual enjoys, O'Malley offers the view that *"this does not necessarily entail the abandonment of all deterrent or other utilitarian objectives as long as the penalty remains proportionate to the offence."* The DPP submits that the sentencing judge was careful to correlate the personal circumstances of the appellant.

29. The DPP relies on *The People (DPP) v. O'Driscoll* [1972] 1 Frewen 351 where Walsh J. at p. 359 stated:-

"the objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the Courts to pass what are the appropriate sentences in each case having regard to the

particular circumstances of that case - not only in regard to the particular crime but in regard to the particular criminal."

The sentence imposed in respect of the s. 15A conviction

30. In written submissions, but not taken up further in oral submissions, the appellant submits that the sentencing judge fell into error in placing the offending in respect of the s. 15A offence into the upper end of the mid-scale. The appellant submits that the sentencing judge failed to identify a headline sentence for the offending and imposed a full custodial sentence of four years' imprisonment without any consideration of the appellant's efforts to rehabilitate.
31. The DPP's submission was that both sentences and the totality of the sentence imposed were correct and appropriate.

The sentence imposed in respect of the aggravated burglary conviction

32. The appellant submitted that the sentence imposed in respect of the aggravated burglary conviction was excessive in all the circumstances. The sentencing judge placed the nature of the offending into the mid-range and imposed a headline sentence of seven years. The appellant submits that in all the circumstances the offending falls within the lower range, albeit the higher end thereof for the reasons advanced before the sentencing judge. The reasons advanced in the lower court were that there was no violence used or threatened, no injury caused and the appellant had no previous convictions. The appellant relies on *The People (DPP) v. Casey and Casey* [2018] 2 I.R. 337 in so far as there is a distinct absence of the aggravating factors in that judgment. It is for this reason that the appellant submits that the starting point of seven years is excessive in all the circumstances.
33. A further point advanced before us was that the sentencing judge erred in how she treated the "aggravating" factor of the commission of the offence while on bail in the incorrect manner. It was submitted that she used it to increase the range from which the sentence may be assessed whereas it was submitted that one could not use it to identify the range of sentence but only to arrive at an appropriate sentence.
34. The DPP submits that the Court of Appeal has provided extensive guidance on sentencing in cases of aggravated burglary and relies in particular, on *DPP v. Casey and Casey* cited above, and *DPP v. Byrne* [2018] IECA 120. The DPP submits that when referencing the appropriate headline sentence in this case, it is necessary to set out the aggravating factors. These are, namely, the fact that it was a joint enterprise, weapons were brought to the home invasion, the evidence shows that this was a threatening occasion for the occupants. Further, the DPP submits that whether or not there was specific planning involving the choice of a rural location and the presence of a motor vehicle containing two significantly older persons for the purpose of escape suggest that such issues such as garda intervention while the offending took place was likely to be minimised. The DPP refers to para. 47 of *The People (DPP) v. Casey and Casey* which held that a confrontation with an occupant is an aggravating factor. The DPP submits that in all the circumstances, given the number and nature of the aggravating factors identified, the case is raised to the mid-range of

offending behaviour. The DPP refers to para. 40 of the judgment which states *inter alia* that:-

[40] *Moving from the particular to the general, she says that crimes such as these have many victims, the individuals whose property has been entered of course, but others living in the area or in similar circumstances may be frightened and may have their quality of life reduced. She suggests that factors that would put a burglary in mid-range, and more often than not at the upper end of mid-range, would include:-*

- (i) a significant degree of planning or premeditation;*
- (ii) two or more participants acting together;*
- (iii) targeting residential properties, particularly in rural areas;*
- (iv) targeting a residential property because the occupant was known to be vulnerable on account of age, disability or some other factor; and,*
- (v) taking or damaging property which had a high monetary value or high sentimental value."*

The DPP refers to para. 49 where the Court held that "*mid-range offences would merit pre-mitigation sentences in the range of four to nine years*" and submits that in the instant case the sentencing judge could not be criticised for coming to what was in essence, just above the middle of that mid-range.

Discussion and Decision

35. In the course of the written submissions much emphasis was placed upon the use of the word "concurrent" by the judge after she had articulated the full reasons for the sentences she was imposing in respect of each offence. The manner in which she corrected herself is important; this occurred when she was asked by prosecution counsel about the individual sentences. In doing so prosecution counsel did not use the word concurrent, consecutive or even refer to bail. He was simply teasing out the sentences. The sentencing judge herself said when she was asked was she "imposing four and a half years and you're suspending the final 12 months", said "[o]n that, and that is consecutive to the first bill". She then said "[h]aving regard to the principles of totality and proportionality". The judge was told "you said concurrent initially" and she replied "No, I didn't mean concurrent."
36. There can be no doubt but that the sentencing judge always intended these sentences to be consecutive. She had specifically adverted in the course of sentencing to the fact that they were on bail and had referred specifically in the course of sentencing to the principles of "totality and proportionality" in sentencing. By the time she clarified, on her own and without prompting, that this was a consecutive sentence it was perfectly clear that the use of the word "concurrent" had been a slip of the tongue that was correctly and properly clarified in open court prior to the sentence hearing concluding. There can be no doubt that the sentencing judge did not make an error in her approach to those principles of proportionality and totality because they were an afterthought. They were at the forefront of her mind. We reject this submission.

37. The appellant also relies upon the fact that the taking into account of the s. 15 offences somehow taints the sentencing process. It is also instructive to note how that matter arose after the sentence was imposed. The sentencing judge was "reminded" that this was something she ought to do because it had been said at the plea stage. The taking into consideration of the offence by the judge took place at that point.
38. We do not accept that this was a factor which in any sense affected the nature of the sentence that the sentencing judge imposed in this case. She was at all times clear in her sentencing remarks that she was focused on a s. 15A offence in which she was taking into account the totality of the drugs that were found and that she had to address the specific legislation which imposes a presumptive mandatory minimum of 10 years for a person (who is not a child) who commits such an offence. In no way could the fact that she might take into consideration those individual offences which concerned precisely the same drugs have affected her approach to the sentence on these matters. It might, and we do not consider we have to make a finding on this aspect, have been different if an offence of an entirely different character or related to a different time and place had occurred. Nothing like that arose in the present case and this was not a factor in her sentencing. It is probably no surprise that this ground did not form the basis of a ground of appeal or an aspect of written submissions. It is simply irrelevant to the considerations as to the severity or otherwise of the present sentence. For this reason, we do not consider it necessary to make any further comment on what may or may not be taken into consideration before the Circuit Court where no plea has been entered into in relation to a count that is on the indictment. There was no unfairness here and nothing occurred that relates in any way to the imposition of the appropriate sentence.
39. In so far as the appellant submits that the sentence imposed on the s. 15A offence in and of itself was excessive and had been made without identifying a headline sentence and without taking account of the appellant's efforts to rehabilitate, we reject that submission. The trial judge approached the sentencing of the s.15A offence in a careful and methodical fashion having regard to the legislative constraints she was under and had careful regard to all relevant matters. There is no error in principle in the manner she approached the sentence nor in the sentence actually imposed.
40. The next issue, the one that was significantly pressed by the appellant at the oral hearing, was that of the identification of the offence of aggravated burglary as being one which only merited a sentence in the lower end of the scale of offending. The law in this regard is to be found in the cases of *People (DPP) v Casey & Casey* and *People (DPP) v Byrne*. In the latter case the ranges were identified as attracting sentences of: low range, one to five years, medium range, six to 10 years and upper range, ten to 15 years with particularly egregious offences capable of attracting higher sentences.
41. In the present case, the court below was urged, as this court was, that this was not an offence of violence. We do not, and cannot, accept that. It was inherently threatening for a householder to be confronted by two masked burglars, one holding a wheel brace while shouting in a threatening manner "Where was the safe? Where was the f...ing safe?". It

was accepted that the evidence disclosed there had been a confrontation with the householders. While thankfully there was no injury, nonetheless there was a confrontation by this accused and his accomplice with the female householder which only seemed to fully resolve when her husband woke up and came down the stairs.

42. We agree with the DPP's submission above that there are a number of factors present in this case which bring the offence within the mid-range of offending. This was a joint enterprise, a weapon was brought into the premises, that weapon was used in a threatening manner against the occupant of the dwelling who was confronted by the accused. The identification by the trial judge was that this as an offence in the mid-range. She nominated a headline sentence of 7 years, which was in fact a sentence below the very middle of the mid-range. We see no error in principle on that identification. This was a planned burglary using a car for that purpose, on a residential property in a rural area, where a female occupant was confronted in a threatening manner by masked men who shouted at her while one held a wheel brace. A headline sentence of 7 years was not an error in principle.
43. We have also considered whether there was a breach in identifying the correct sentence by the sentencing judge with regard to the fact that she was obliged to impose a sentence that was greater than she might otherwise have imposed because it was committed on bail.

Section 11(4) of the Criminal Justice Act, 1984 as inserted by s. 10 of the Bail Act, 1997 states that "Where a court –

- (a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail, and
 - (b) is required by subsection (1) to impose two or more consecutive sentences, then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor."
44. The sentencing judge did not specifically advert to the fact that she was imposing a larger sentence for the offence of aggravated burglary because it had been committed on bail. She did however state that it was committed on bail in the course of listing factors which appear to be the factors she was considering as aggravating factors for the purpose of identifying the range in which this offence lay.
45. We do not accept that this was an error in principle. The fact that an offence was committed while on bail aggravates the culpability of the particular offender who has carried out that offence. It is inherently a matter which goes to the gravity of the offence. Indeed, our experience has been that sentencing judges will usually approach the matter in such a way. The other manner in which this could be approached would be to carry out the usual approach of identifying the gravity of the offence and indicating a "headline" sentence, then

considering the mitigating factors and then indicating the sentence arrived at; at the end of this a judge ought then to impose a greater sentence than so stated unless there are exceptional circumstances not justifying it. We do not think however such an approach would, when properly applied, provide for a sentence that would be different than if the "aggravating factor" was treated as increasing the headline aspect of the sentence.

46. More particularly in the present case, we are of the view that no matter how this process was approached there was no error in principle in the trial judge reaching her decision that a sentence of four and a half years for this appellant, having regard to his particular circumstances and to the fact that it was an offence committed on bail, was a sentence that amounted to an error in principle.
47. Finally, we have had regard to the overall sentence imposed. The sentencing judge, taking on board the principles of totality and proportionality, said that she was "prepared to encourage him to continue his rehabilitation and suspend the final 12 months" on certain terms. We have considered whether that sentence of eight and a half years imprisonment with one year suspended is a sentence which is a crushing one on this young man who had not been convicted of any offence prior to these offences. Unfortunately for this appellant, his earliest involvement in criminality has been with two serious offences and which, as indicated, were carried out in circumstances where the second offence was committed while on bail for the first offence. The sentence, while long, is not disproportionate or crushing in circumstances where the offending has been so serious.
48. The appeal is therefore dismissed.