



THE COURT OF APPEAL

**Birmingham P.
Edwards J.
McCarthy J.**

Record No: 240/2019

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

RESPONDENT

V

ROMEO STANESCU

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 9th day of March 2020 by Mr Justice Edwards

Introduction

1. On the 10th of October 2019, the appellant came before Kilkenny Circuit Criminal Court, and pleaded guilty to one count of burglary, contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. On the 29th of October 2019, the appellant was sentenced to three years imprisonment.
2. The appellant now appeals against the severity of his sentence.

Background Facts

3. The sentencing court heard evidence that on the 11th of June 2019, at around 11.30 a.m., gardaí arrived at the Playwright bar in Kilkenny City following a call notifying them of a burglary there. Upon arrival, the gardaí were informed by the manager of the premises, a Ms Frisby, that €3,500 had been stolen by an intruder from an office in the private staff area of the premises a short time previously. The private staff area was monitored by a CCTV system, and there was a good quality recording which was shown to gardaí. The recording showed a male entering the staff office, opening filing cabinets, and then emptying numerous bundles of banknotes from a cupboard on to a desk and placing those banknotes inside his jacket. On leaving the staff office he entered another part of the private staff area and attempted unsuccessfully to gain access to a safe and a number of locked cabinets before finally exiting the building.
4. Ms Frisby told the gardaí that at around 9.40 a.m., shortly after the premises had opened, a man had come into the bar. She asked him if he was all right and received a mumbled, unintelligible reply, before the man turned around and walked back out the door. Approximately an hour and a half later she witnessed the same man coming down the stairs. She again asked him if he was alright, to which he replied that he was looking

for the toilet. She then said: "No, you're not because you were in here already this morning." "You were definitely upstairs. I'm going to ring the gardaí". The man promptly made his exit. It was then discovered that the private staff area of the premises had been burgled, prompting Ms Frisby to immediately report the crime to the gardaí.

5. After examining CCTV footage from the premises, the gardaí were able in due course to identify the man as the appellant, with an address in Dublin City. Subsequently a warrant was obtained for the arrest of the appellant which was executed on the 3rd of July 2019. The appellant was taken to a garda station where he was detained and interviewed while in detention. He was co-operative and admitted his involvement. However, the stolen money was not recovered. He was subsequently charged with burglary and remanded in custody.

Appellant's Personal Circumstances

6. The appellant had no previous convictions and pleaded guilty at an early stage. When questioned by gardaí, he made full admissions and asked for the staff of the premises to be told, "Sincerely I am sorry". Having been remanded in custody since the date of his arrest of the offence, he was not able to offer restitution to the affected business.
7. The appellant is 30 years old and is originally from Romania. He had no formal education and had to teach himself how to read and write his own national language. He had been in Ireland for around two months prior to the committing of the offence and has very limited English. He had been to Ireland twice before, working for six-month periods on building sites to support his 6-year-old daughter and partner living in Romania.
8. The appellant claimed through his counsel at the sentencing that the offence was an opportunistic one; he had been invited by a friend to travel from Dublin to Kilkenny on the promise of work, which did not materialise upon his arrival. He maintains that he had been depending on getting work as he was down to his last €100. He claimed that having suffered the disappointment there was no work for, he decided to have a coffee before starting his journey back to Dublin. He maintains that he entered the Playwright seeking only a coffee but that while there he saw, and succumbed to, an opportunity for theft when he noticed the apparent lack of staff.

Sentencing judge's Remarks

9. In sentencing the appellant, the sentencing judge stated the following:

"The Garda has outlined the facts; I don't propose to repeat them. It was theft from a pub of €3,500, which has not been recovered, and it is said that there was no element of premeditation. I'm not entirely comfortable necessarily with all of that because the whole idea of him being -- or the whole explanation for him being in Kilkenny, given that he was residing in Dublin, is fairly thin, to be honest, and I don't really accept that he just came down to see if he could get a labouring job, didn't speak to anybody at all about the labouring job, apart from this "friend". So it all strikes one as pretty thin and one would reasonably come to the conclusion that he came to Kilkenny to carry out stealing and to engage in crime.

Where does it lie on the normal scale? I think it's probably at the lower end of the mid scale. The money has not been recovered. As I say, my view would be that there is no real excuse for this and there is certainly some element of premeditation about it and described by counsel as a blatant crime. So I'm going to say it lies at the lower end of the mid range, given the amount involved, and it seems to me that the headline sentence would be five years.

So is there anything that should mitigate that? Well, the early plea of guilty is clearly of use to the state. I appreciate he was caught on CCTV and all of that, but he has co-operated with the guards and he has no previous convictions and I think the early plea should result to his benefit to some extent. I have to take into account the fact the money has not been recovered, so the element of co-operation is limited to that extent. There is an apology, for what it's worth, and there's very little else that one can say about him. He came into this country apparently just a couple of months before the commission of this crime and nonetheless committed the crime. So I think applying the largest element of mitigation is the early plea of guilty and the co-operation to the limited extent that I have described with the police and the fact that he has no previous.

Taking these into account, I will reduce the sentence to one of three years, which will be backdated to the date he went into custody, which is the 9th of July 2019 I am informed. I don't really see much by way of any reason why I should suspend a portion of the sentence. There's nothing really that I can put my hand on to say that he ought to be encouraged with rehabilitation. Sometimes it's very difficult because you get various different judgments from above, some say rehabilitation is a good idea, some are more dismissive, and the problem is there has to be some sort of rational basis for rehabilitation. This man is not connected with this country. When he is released it is very likely that he will leave the country rather than anything else and it's not a drug case, it's nothing of that sort that one can point to treatment or something of that nature, it's just an opportunistic theft. So I don't really see much point in introducing an element of suspending the sentence for purposes of rehabilitation. That's my judgment on it anyway. So I'll just leave the sentence of one of three years backdated to the 9th of July 2019. That will be the sentence of the court."

Grounds of Appeal

10. The appellant seeks appeal on the following grounds:

- I. The trial judge erred in ruling that the offence fell in the low end of the mid-range of seriousness;
- II. The trial judge erred in ruling that the appellant was not entitled to any of his sentence suspended due to his nationality and perceived likelihood of him leaving the jurisdiction upon his release in any event.

Submissions of Appellant

11. It was submitted that the sentencing judge was in error in placing the offence in the mid-range in circumstances in which there were but few aggravating factors and certainly no egregious aggravating factors. The sentencing judge had identified the amount of the loss and the fact that there was some element of premeditation as being the most significant features of the case. He rejected the notion that the appellant had journeyed to Kilkenny in search of work, instead inferring that he had travelled to Kilkenny with the intention of stealing and engaging in crime. The court therefore nominated a headline sentence of five years. It was submitted that while the sentencing judge was entitled to reject the appellant's explanation for his reason for being in Kilkenny, there was no evidential basis for the suggestion that he had travelled to Kilkenny with the intention of stealing and engaging in crime. It was therefore submitted that the trial judge was in error in holding that the offence was premeditated in that sense.
12. We were referred by counsel for the appellant to the *People (DPP) v Casey* [2018] IECA 121 [2018] 2 I.R. 337, (a case with very different facts) expressly for the purpose of distinguishing it. Relying on the Casey jurisprudence, counsel for the respondent had suggested in his submissions that this case exhibits several aggravating factors such as would put this burglary in the mid-range for sentencing purposes. The Casey judgment had referred to factors such as :
 - "(i) A significant degree of planning or pre-meditation;
 - (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;
 - (v) Taking or damaging property which had a high monetary value or high sentimental value."
13. The court further added relevant previous convictions to its list of circumstances which could be described as aggravating. The court had commented that an offence in the mid-range would attract a sentence of four to nine years.
14. In the instant case it was submitted that (i) there was no evidence from which significant planning and pre-mediation could be inferred; (ii) the appellant was alone; (iii) the premises was not a residential property and was not in a rural area; (iv) there was no targeting of a residential property; (v) the property was not damaged although €3,500 was stolen; and (vi) the appellant had no previous convictions. It is submitted that, as only one of the criteria (the amount of money stolen) was present, the court was in error in identifying the case as lying on the mid-range of offending.
15. Counsel for the appellant commended several cases to us as being relevant comparators. In our view they represent an insufficient sample to be indicative of any solid trend. Nevertheless, bearing that caveat in mind, we have received them *de bene esse*.

16. In *People (DPP) v O'Sullivan* [2019] IECA 310, the appellant was sentenced to four years with the final year suspended for a burglary in a restaurant. Jewellery, a phone, cash and cards were taken from the bag of a member of staff. The appellant had 178 previous convictions including 78 theft and 8 burglaries. She had previously served four years for burglary. The sentence was upheld. This involves the same level of incarceration as the instant case but a radically different history of offending.
17. In *People (DPP) v Alan Judge* [2017] IECA 148, the appellant committed the offence of burglary on two unoccupied business premises. The appellant was seen on CCTV committing the offences. Damage was done to the properties valued at just under €2,000.00 but no money was taken from either. The appellant had 40 previous convictions, of which approximately 30 were for burglary and related theft-type offences. He was a drug addict. It was accepted by gardaí that he was cooperative with the investigation. The sentence of four years' imprisonment was found to be excessive. On re-sentencing, the court nominated a headline sentence of five years, and reduced it by one year to reflect mitigation and suspended a further year so as to incentivise rehabilitation. This involves the same period of imprisonment but with one premises and no previous convictions.
18. In *People (DPP) v William FitzGerald* [2018] IECA 330, the appellant was sentenced to a burglary relating to the theft of €300 from a cash register in a coffee shop called 'The Flaky Tart'. He was sentenced to four years' imprisonment with the final suspended, the court having nominated a headline of six years. The appellant had a history of addiction. He had 109 previous convictions for various offences including robbery, theft and burglary (13). The court commented that the sentencing judge was in error placing the offence on the mid-range and said it was on the low range. The court nominated a three-year headline sentence. This was reduced to two years and the final six months were suspended.
19. The appellant further complains that the court erroneously foreclosed on any possibility of suspending the appellant's sentence, either in whole or in part. It was acknowledged that the court had discounted from the headline sentence of five years to three years to reflect mitigation. This was a 40% reduction, and it is conceded by the respondent as being not inappropriate given the significant mitigating factors in the case which included:
 - a. The early guilty plea;
 - b. The absence of any previous convictions;
 - c. The full admissions made;
 - d. The expression of remorse;
 - e. The appellant's personal circumstances;
 - f. The difficulty for a foreign national with no English spending time in an Irish jail.

Nevertheless, counsel for the appellant submitted, there was a basis for possibly going further in this case given the circumstances of the crime and the fact that the appellant was a first-time offender.

20. It was submitted that reform and rehabilitation represent core values in sentencing law. While there was no evidence that the defendant had any underlying issues (such as an addiction) which would warrant the court specifically intervening to facilitate and incentivise his recovery, the notions of reform and rehabilitation embrace a broader concept than simply treating or addressing a specific problem or adversity, and a suspension will sometimes be justified notwithstanding the absence of any need for a positivistic intervention. In that regard we were referred to this Court's judgment in *People (DPP) v Clive Kavanagh* [2020] IECA 13. There, a part-suspended sentence was imposed on a man in his 30s for money-laundering. A subsequent application for a review on the grounds of undue leniency was refused. Giving judgment for this Court, Edwards J. observed:

"Although the sentencing judge spoke in terms of rehabilitation, this was not in truth a case in which rehabilitation, in the positivist sense, was required. The respondent had no underlying condition, or addiction or problem which required to be treated or addressed and which if treated or addressed would enable him to avoid committing crime in the future. Rather, the sentencing judge's objective was to facilitate the reformation of the respondent in the interests of society, by imposing an appropriate prison sentence (3 years) to mark society's deprecation of what he had done, while at the same time suspending a significant proportion of that sentence (50%) so that only eighteen months of the indicative three year term needed to be actually served, so as to promote desistance and incentivise the respondent to stay out of trouble in the future in circumstances where there were grounds to be hopeful that if given a further chance to turn away from crime that he would do so.

In addition to offering a positive incentive, such a sentence also has the effect of holding a Sword of Damocles over the offender for the duration of the period of suspension. It therefore seeks to achieve future behaviour modification primarily through incentive, but also to some extent through deterrence, while at the same time still requiring the offender to spend some time in custody both as censure and as punishment by way of hard treatment in the hope of inducing in him as a presumed moral actor recognition of the unacceptability of his conduct and that his punishment is deserved."

21. It was therefore submitted that the trial judge had erred in principle in discounting the possibility of a part-suspension of the sentence in the absence of any underlying issue on the part of the appellant.
22. It was further complained that in declining to consider part-suspending the sentence, the sentencing judge made reference to the appellant's lack of any ties to the jurisdiction. It was submitted that this was an irrelevant consideration in that regard. We were referred

to *The People (DPP) v Alexiou* [2003] 3 I.R. 513, which involved the imposition of a suspended sentence in relation to a s. 15A offence, the suspension being conditional upon the defendant leaving the jurisdiction and not returning. In relation to the condition, Murray J., giving judgment for the Court of Criminal Appeal, observed as follows:

"Different considerations arise where an accused, who, prior to his conviction, had little or no connection with this country and he is required, as a condition of a suspended sentence, to return to the country of which he is a citizen or in which he has been habitually resident. Although it may be a subsidiary part of the trial judge's considerations, such an order does have the advantage of further eliminating the risk that the offender might commit further offences in this country or be a further burden on the taxpayer. Of course all these matters depend on the circumstances of the case including any declared intention of an accused to return to his own country as soon as he is free to do so. It should be noted that the court is here considering the kind of condition and form of order which a court may make and it is not being suggested that a convicted person be given a suspended sentence simply because he is a non-national with no connections with this country. That, as explained earlier, depends on the gravity of the offence and the circumstances of the case."

23. We were also referred to the Criminal Justice (Mutual Recognition probation Judgements and Decisions) Act 2019 (the Act of 2019) which was commenced shortly before the appellant was sentenced. The Act gives effect to EU Council Framework Decision 2008/947/JHA of 27 November 2008 which provides for the mutual recognition of judgments and probation decisions and provides for the supervision of probation decisions. Prior to the promulgation of the 2019 Act Hunt J. had commented on the lack of implementation of the Framework decision in Ireland and the UK in *Minister for Justice and Equality v Teeling* [2015] IEHC 310:

"All successful probation arrangements result in the accrual of a dual benefit, to the individual supervised and to society in general, the possibility of which has now been lost in the case of the respondent. Furthermore, the taxpayer in the United Kingdom might have been spared the expense of further dealings with the respondent."

24. It was acknowledged that the Act of 2019 was not part of any submission made to the sentencing judge on behalf of the appellant, but we were referred to it in order to underline the sentencing judge's suggested error in having regard to the fact that the appellant is from another EU member state in declining to consider suspending or part-suspending the sentence imposed.

Submissions of the respondent

25. The respondent accepts that the sentence imposed is a severe one but contends that it is not excessive having regard to the seriousness of the offence and the culpability of the appellant. Counsel for the respondent submitted that there was no error to be found in the sentencing judge's reasoning, and in so far as the sentencing judge concluded that

there was some element of pre-meditation he was entitled to draw such reasonable inferences from the evidence as might arise.

26. Counsel for the respondent submitted that there is nothing in the Casey judgment to suggest that the list of matters which might potentially place offending in the middle and, more often than not, in the upper middle range on the spectrum of available sentences is in any way closed; nor is it necessary to have all factors mentioned present in a single act of burglary to place the offender within that range. In this case the sentencing judge specifically remarked that there was some element of premeditation and a significant sum of money involved. It is also submitted that in this case there were additional aggravating factors present such as the fact that it was a burglary in daylight of a business, or commercial premises; the fact of contact or confrontation with the bar manager in this case, and the invasion of the private staff areas which should be a place of privacy and security for the staff of the business.
27. The respondent has sought to distinguish the appellant's comparators on their facts. It is not necessary to engage with this in circumstances where we are disposed to attach little weight to the comparators in any event.
28. As to the failure to suspend any portion of the sentence to incentivise rehabilitation, the respondent says that this Court has made it clear that there must be some basis on the evidence to consider a suspension or part suspension of a sentence for the purpose of rewarding progress to date towards rehabilitation and/or incentivising future rehabilitation. The sentencing judge was unable to identify anything in the evidence to reward progress of the appellant in efforts of rehabilitation or incentivising future rehabilitation. The respondent says that the failure of the sentencing judge to suspend a portion of the sentence was a decision within his legitimate discretion where there was neither evidence of any rehabilitative work to date nor of any planned in the future.
29. It was submitted that in the instant case the trial judge did not decline to consider part suspending the sentence based on the lack of any ties by the appellant to the jurisdiction. It was clear in the comments of the court that this related to rehabilitation of the appellant when commenting on such matters. It was also said to be worthy of note that the appellant never stated that his intention would be to leave the jurisdiction if the court would give him the benefit of a suspended sentence on those terms.

Discussion and Decision

30. The respondent has acknowledged before this court that the sentence imposed is a severe sentence but contends that it is not excessive having regard to the seriousness of the offence and the culpability of the appellant. However, we do not agree. The intrinsic seriousness of burglaries of all types cannot be gainsaid, but they vary widely in their relative or ordinal seriousness. It is for that reason that the Oireachtas has provided a wide range of potential penalties. We do not consider that this instance of burglary was particularly aggravated.

31. We reject the existence of a number of suggested aggravated factors pointed to counsel for the respondent. It was suggested that the crime was aggravated by the fact that this was the burglary in daylight of a business, or commercial premises. We do not consider that the fact that it was a business, or commercial premises, was per se an aggravating factor, nor was the fact that the crime was committed in daylight. In Casey the converse circumstances were recognised as aggravating but for good reasons. A private dwelling enjoys a constitutional guarantee of inviolability. Such a guarantee does not extend to a business, or commercial premises. Moreover, the reason burglary of a dwelling at night is regarded as aggravating basic culpability is because it is inherent in a dwelling or home that it should provide sanctuary and refuge and be a place of safety particularly at night. The same consideration does not apply to a business, or commercial premises, such as a public house or restaurant, that is open to the public during business hours. As regards the impact of the burglary on the business, if the evidence had gone so far as to establish that the viability of business in question was threatened by virtue of sustaining the loss that was incurred, it would certainly have aggravated the offence. However, in this case, the evidence did not go that far. It was further suggested that the encounter on the stairs with Ms Frisby should be regarded as a confrontation with an occupier. We do not agree. The encounter with Ms Frisby was in an area of the premises to which the public routinely have access. There was no confrontation with any occupier in the private staff area.
32. We readily accept that the moral culpability of the offender was somewhat aggravated by what the sentencing judge saw as "some element of pre-meditation", however the evidence did not go so far as to establish a "significant degree of planning and pre-meditation" which was what was alluded to in Casey. It is also true that non-recoverable loss in the sum of €3,500 was caused, and this was not an insignificant sum. However, these two features on their own could not justify placing this offence in the mid-range, and for the sentencing judge to have done so was an error of principle.
33. We find no error of principle, however, in the sentencing judge's approach to the question of possible part suspension of the sentence. A sentencing judge has a wide margin of discretion concerning how to structure a sentence and concerning which objective of sentencing to prioritise. We consider that the complaint in that regard falls far short of establishing or indicating any error.
34. In circumstances where we are satisfied that there was an error of principle in the way gravity was assessed we will quash the sentence imposed by the court below and proceed to re-sentence the appellant. We assess the gravity of the offence as meriting a sentence in the lower one third of the available range of custodial sentences, and we therefore nominate a headline sentence of three years and six months imprisonment. We will discount from that by eighteen months to reflect the mitigating circumstances in the case, leaving a net post mitigation sentence of two years imprisonment.