



THE COURT OF APPEAL

[117CJA/22]

Neutral Citation No: [2023] IECA 12

**The President
McCarthy J.
Ní Raifeartaigh J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

DAVID FOLEY

RESPONDENT

JUDGMENT of the Court delivered on the 26th day of January 2023 by Birmingham P.

1. This is an application brought by the DPP pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review a sentence on grounds of undue leniency. The sentences sought to be reviewed were sentences that were imposed on 20th May 2022 in Waterford Circuit Criminal Court. At the outset, it might be said that the legal principles applicable to reviews such as these were not in dispute between the parties and those principles have not really been the subject of controversy since the first such case, that of *DPP v. Byrne* [1995] ILRM 279. The sentences now sought to be reviewed were imposed in respect of counts that had appeared on three bills of indictment, the details of which are as follows:

Bill 1: Trespass with a weapon of offence contrary to s. 10 of the Firearms and Offensive Weapons Act 1990, committed on 19th April 2020. The sentence imposed was two years and three months imprisonment.

Bill 2: Aggravated burglary contrary to s. 13(1) and (3) of the Criminal Justice (Theft & Fraud) Offences Act 2007, committed on 11th March 2020. A sentence of three years imprisonment with two years and three months suspended was imposed. This sentence was made consecutive to the sentence under Bill 1.

Bill 3: Possession of drugs for the purpose of sale or supply contrary to s. 15A of the Misuse of Drugs Act 1977, as amended, committed on 23rd May 2020. A sentence of four years with the final three years suspended was imposed. The sentence was made consecutive to Bill 1, as it was required to be by law, having been committed while on bail for the offence under Bill 1. It was made concurrent to the offence under Bill 2. As such, the aggregate effective sentence was one of three years and three months.

2. The grounds of appeal are as follows:

- (i) The sentencing judge erred in principle in imposing an effective three years and three months custodial sentence on the respondent for three very serious offences, which sentences were unduly lenient in all the circumstances.
- (ii) The sentencing judge erred in failing to have regard to the aggravating factors in the aggravated burglary offence on Bill 2, in particular:
 - (a) the serious and violent nature of the offence, in that the respondent had armed himself with a serious weapon before breaking into the victim's house with the express intention of attacking him;
 - (b) the attack was premeditated;
 - (c) the defendant attended with an accomplice;
 - (d) the protracted physical attack on the victim and the injuries sustained;
 - (e) the offence took place in the context of a feud; and,
 - (f) the previous convictions of the respondent.

- (iii) The sentencing judge erred in law and in fact in placing the aggravated burglary offence at the upper end of the low range and setting a headline sentence of four years.
- (iv) In relation to the offence of aggravated burglary, having regard to the aggravating factors that were present and the very limited mitigating factors, the sentencing judge erred in law and in fact in suspending two years and three months of the three-year sentence, and imposing an effective custodial sentence of nine months.
- (v) The sentencing judge erred in law and in fact in how he structured the sentenced imposed for the aggravated burglary count and the trespass with a weapon of offence count where the offences involved significant aggravating factors, including serious violence and planned violence perpetrated at the home of the victim on two occasions just over one month apart.
- (vi) The judge erred in law and in fact in suspending the final three years of the four-year sentence imposed on the defendant for the s. 15A offence, leaving an effective custodial sentence of one year, which, having regard to the aggravating factors and the extremely limited mitigating factors that were present, was unduly lenient in all the circumstances.
- (vii) The sentencing judge erred in law and in fact in the manner in which he structured the sentences imposed, including the mandatory consecutive elements thereof.
- (viii) The sentencing judge had undue regard to the limited mitigating factors and the application of the totality principle which did not warrant the leniency of the sentences imposed.

- (ix) The sentencing judge erred in relation to the sentences imposed for what were three separate serious offences. The effective custodial sentence of three years and three months, which involved, by operation of law, an automatic consecutive sentence element, failed to have regard to the societal need for a serious, general and specific deterrent element to the sentences that were imposed.

Background to the Offences

3. The background facts relating to the individual offences were as follows. So far as the aggravated burglary of 11th March 2020 is concerned, the position is that Gardaí received a 999 call that a stabbing incident had occurred at Apartment 14, The Mews, 26 William Street, Waterford. There were three individuals there as Gardaí arrived on the scene – Ms. CK, Ms. AK and Mr. RO’H – one of whom, RO’H, had significant injuries consistent with being struck with a sharp object. Gardaí learned that the respondent, along with another individual, Mr. JF, had broken into the apartment, where the door was kicked in. The respondent was armed with a retractable sawblade and proceeded to strike RO’H with it repeatedly. In the course of the incident, there was reference to an earlier assault-type incident wherein a Ms. SP had been the victim, with a suggestion of involvement in that incident by RO’H and another person. It is said that that incident acted as a catalyst for the offending. Gardaí who attended the scene noted the presence of a large amount of blood. Photographs of the scene and injuries were taken, and this evidence was available in due course for the Court. The photographs taken included one showing a large gash wound to the head of RO’H. A foldable sawblade, which was bloodstained, was located close to the scene.
4. So far as Bill 1 is concerned, the trespass with a weapon of offence, this count related to events on 19th April 2020, approximately five weeks following the aggravated burglary

offence. On this occasion, the respondent, along with three others, entered the same apartment complex where the earlier offence had been committed, and the group was equipped with weapons, including an axe and a wooden pole. On this occasion, RO'H and CK barricaded themselves into the apartment, and after a short time, those who had arrived, including the respondent, left the complex, not having entered the individual apartment. During that day, there had been interaction between two groups, one including the respondent and the other group including RO'H. It was apparent that there was a disagreement, which could be categorised as a feud, involving these two groups, and that provides the background to these offences.

5. The third offence with which the Court was dealing was the count on Bill 3 which occurred on 23rd May 2020 during a Covid-19 lockdown, and at a time when the respondent was on bail for the offence of trespass with a weapon of offence. In that case, Gardaí stopped a vehicle that had been seen driving at speed in the direction of the city centre. The respondent was a rear seat passenger. A search was conducted under s. 23 of the Misuse of Drugs Act 1977, as amended, and 11,700 alprazolam tablets were located. These are benzodiazepines which are prescribed for depression and anxiety. When interviewed, the respondent accepted ownership of the tablets and stated that he intended to sell them in Kilkenny. The value of the tablets was €23,400.

6. As indicated, the Director's position is that the aggregate sentence of three years and three months was unduly lenient, and that if individual elements of the aggregate sentence are addressed, then it is clear that the sentence was inappropriate. In that regard, the Director points to an effective nine-month sentence for aggravated burglary, and to an effective 12-month concurrent sentence for the s. 15A offence.

The Judge's Approach to Sentencing

7. The judge's approach to sentencing was to set the headline for aggravated burglary on the basis that the offence was at the upper end of the low range. In relation to the s. 15A offence, the judge felt there was a basis for departing from the presumptive minimum. A somewhat unusual feature of the case is that, while the aggravated burglary was first in time, the trespassing offence was processed more quickly, and the result of this was that the s. 15A offence was committed when the now respondent was on bail for the trespass offence, but at a time when he had not yet been charged for the aggravated burglary offence.

8. In terms of the respondent's background and personal circumstances, he was born in April 1982. According to the probation report, he had 49 previous convictions over a 16-year period, 38 of which were under the Road Traffic Acts, while four were under s. 3 of the Misuse of Drugs Act 1977, five were for alcohol-related public order offences, and two were for theft. The Court heard the respondent had a long history of substance abuse and that he experienced long-standing mental health issues.

9. It appeared that the judge initially had in mind to make the s. 15A sentence consecutive to the aggravated burglary sentence, and to regard the aggravated burglary as the most serious offence. However, when it was pointed out to him that the s. 15A sentence, by statute, had to be consecutive to the trespass sentence, he changed direction and proceeded to impose the sentences set out above. The result of this was that a somewhat anomalous situation was arrived at, whereby a more significant sentence was imposed on the trespass offence than on the aggravated burglary offence, even though, by some distance, the aggravated burglary would seem to have been the more serious offence. While not expressly so stated by the sentencing judge, the sense one has is that he decided first on a total or aggregate sentence, then addressed the individual offences with a view to imposing sentences on them which would achieve the aggregate or overall sentence that he had in mind.

Discussion and Decision

10. In our view, the aggregate sentence imposed was very clearly unduly lenient. Each of the three offences before the Court was an offence of significance, and by any measure, the aggravated burglary and the s. 15A offence had to be regarded as offences of very real seriousness. If one looks at the individual sentences that resulted in the aggregate sentence, the difficulty with the approach adopted emerges. A sentence of nine months for an aggravated burglary represents a substantial departure from the norm. So far as the s. 15A offence is concerned, which was committed while on bail, something which by statute had to be regarded as an aggravating factor, it is not self-evident that there was a basis for departing from the mandatory presumptive minimum. However, the point can be made that many individuals convicted of s. 15A offences, where the drugs in question were more valuable and of a more sinister kind than the drugs in issue in the present case, benefited from a departure from the mandatory presumptive minimum. However, even if there was a basis for a departure from the mandatory presumptive minimum, and the Director has not, either in written or oral submissions, contended that there was no basis for doing so, therefore we will approach the case on the basis that it is appropriate to depart. It was still a serious offence, and it is hard to see how it can be suggested that the seriousness of the offence was met by a sentence of 12 months imprisonment, a sentence which was itself ordered to be served concurrently with other sentences.

11. In summary, being of the view that the aggregate sentence was unduly lenient, and that two of the three individual sentences that went to make up the aggregate were unduly lenient, we are obliged to quash the sentence imposed in the Circuit Court.

12. At the conclusion of the appeal hearing, we were asked, before proceeding to consider the question of resentencing, to allow an opportunity for further information to be put before the court, including information on how the respondent has fared in custody. Since the appeal

hearing earlier this week, we have now received, by email, a report from the Governor, which was clearly positive in tone.

Resentencing

13. We have already indicated that we regarded the sentence imposed in the Circuit Court as unduly lenient, so we are obliged to address the question of resentencing. As we have indicated, we afforded the respondent an opportunity to put up to date information before the Court. He has availed of that opportunity, and we have considered that information. We now proceed to resentence as follows.

14. On the trespass matter, in imposing sentence, we are conscious that other sentences will extend the period that he is required to spend in custody, and that one other sentence is by statute required to be consecutive. For that reason, we propose to impose a sentence on the trespass matter less than we would regard as appropriate if sentencing by reference to this matter alone. In adopting this approach, we believe that we are addressing the totality principle in seeking to ensure that the overall sentence is one that is appropriate for the overall offending involved. We will impose a sentence of 12 months imprisonment to date from the same day as the sentences in the Circuit Court commenced.

15. So far as the aggravated burglary is concerned, we have already referred to the fact that this is an offence of a very grave kind. The fact that it was committed in the course of a feud, at one level, adds an additional dimension of gravity. However, on the other hand, unlike many aggravated burglaries, here there is not the situation of householders finding their dwelling entered and being absolutely shocked at the unexpected violation of the sanctity of their dwelling. In the circumstances, we will impose a sentence of six years and six months imprisonment in respect of the aggravated burglary. That sentence will commence

on the same day as sentences in the Circuit Court commenced and will be served concurrently with the trespass offence. We have considered whether the trespass offence and the aggravated burglary should be consecutive, since they involved separate incidents, but in circumstances where they arise out of the same dispute or feud, and where the more serious offence was first in time, these two sentences will be served concurrently.

16. The final element is the s. 15A offence. We acknowledge that the value of the drugs is at the lower rather than the higher end of the spectrum of drugs value that one sees in s. 15A cases, and we also have some regard to the nature of the drugs. However, it seems that this was deliberate and calculated offending. It was offending designed to make a profit and it was activity engaged in by somebody with a significant prior record, at a time when he was on bail. For that reason, the sentence will run consecutively to the trespass sentence, as required by statute. In the circumstances, we will impose a sentence of five years and six months imprisonment in respect of the s. 15A offence.

17. We have specifically addressed the question of whether the sentences that we have arrived at are appropriate or whether any further adjustment is required, including an adjustment to take account of the totality principle. We have concluded that no further adjustment is required, and in that regard, we have been conscious of the fact that we have imposed a very low sentence on the trespass offence, doing so in circumstances where another offence is required to be made consecutive.