



THE COURT OF APPEAL

Unapproved

Record Number: CJA 115/23

Bill Number: MHD 83/2020 & MHD 56/2020

[2024] IECA 79

Birmingham P.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC

PROSECUTIONS

APPLICANT

-AND-

MICHAEL POWER

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 15th day of April 2024 by Ms.

Justice Ní Raifeartaigh

1. This is an appeal brought by the Director of Public Prosecutions on the ground that the sentences imposed were unduly lenient. At a sitting of the Trim Circuit Criminal Court on 27th February 2023, the sentencing judge imposed consecutive sentences of three years in respect of a count of robbery, with possession of an article taken into consideration, and three years and six months in respect of a count of burglary. The sentences were suspended in full.

Evidence of offences

2. On 16th June 2022, the sentencing court heard evidence from Garda Paul Rushe in respect of the robbery offence, Bill Number 83/2020. This concerned an incident which took place on the 22nd March 2020 at the Circle K garage on the Navan Road in Trim. At 7.10pm two individuals entered with their faces covered. One, who was later identified as the respondent, approached the cash desk while carrying the triangular end of a car jack, or a wheel brace, and demanded the opening of the tills including the Lottery till but was told there was no such till. At one point he slammed the car jack on the counter. He took the contents of the tills, took packets of cigarettes, and said “sorry about the robbery, give me five mins before you ring it in”. The total loss was approximately €200.

3. The second individual went to the alcohol section and stole three trays of Heineken. The third individual filled the car with some petrol and remained with it for the duration of the robbery. All three got into the car and left the scene at speed.

4. Gardaí viewed CCTV of the incident and located the vehicle from the registration number. The respondent was arrested at approximately 8pm that evening. In garda interview the respondent initially denied having been involved in the robbery but later admitted his role and said it had been spontaneous and that he was under pressure with drug debts. He

apologised for his part and spoke about his mother not taking it well and her having dementia. The respondent was charged with robbery the following day.

5. There were two victim impact reports. One was from a male employee who spoke about feeling edgy and nervous of people entering the store he works in. The incident had occurred towards the beginning of the Covid period and he said that, because of the incident, people wearing masks during Covid made him even more nervous. He had been working there for seven years before the incident and never felt that. He has a young family, and he is quite anxious that a similar incident will happen in the future. The other victim impact statement was from a female employee who spoke about being scared, upset, and worried about the anger and threats involved in the robbery. She was anxious about returning to work but had done so the evening after the incident and she said 'I am still not the same after'.

6. On 30th October 2020 the sentencing court heard evidence in respect of the burglary offence, Bill Number 56/2020. The incident took place at an address on Watergate Street, Navan, on 9th June 2020, and therefore took place after the robbery described above (although the evidence concerning the robbery was given much later in time). The respondent was on bail for the commission of the robbery offence at the time.

7. The address was a B&B type premises with five bedrooms all on the same floor, which facilitated long-term or semi-long-term stays rather than overnights. Mr M was living there with his wife and young child of 17 months old while they were renovating their home. At about 8 or 9am, the residents woke up to hear a banging noise. One of the residents looked out of his window to the back of the building and could see four men, one of whom shouted 'I could climb up there and get in that window'. The men went around to the front of the building and there was a quick press of the doorbell and then the front door was kicked in. They ran up the stairs shouting a lot and looking for 'Graham'. Mr M came out of his room

to see what the commotion was. The men were shouting in his face and another resident saw one of them punch Mr M, who, it should be said, was not Graham. The latter woke up on the floor; dizzy, unstable, with his lip bleeding and swollen. The four men took flight immediately and the whole event was ‘very quick’.

8. Gardaí were able to identify the four men from CCTV footage around the premises. The incident took place during a Covid lockdown and by happenstance other gardaí had stopped the men moments before the incident and they could also identify them by their dress and in particular the fact that one of the four was wearing a blanket on his shoulders. The respondent was arrested later that day. He was conveyed to Navan Garda Station and questioned, but nothing of probative value emerged from the interview.

9. There was a victim impact report from Mr M. He said that on the day of the incident he had heard noise and went out to investigate. The whole incident happened so quickly that he did not even realise he had been punched – he thought he had been electrocuted by switching the light. His wife told him that people had punched him and ran away. He said that since the incident he gets irritated and scared when he hears unusual sounds and loud bangs and that his life had become ‘a little disturbed’.

10. The respondent told the probation officer that the intention in entering the premises was to find a person with whom one of his party had a grievance. That person was not present and a co-accused assaulted a man who ‘confronted them and said the person they were looking for wasn’t present’.

11. The appellant entered a guilty plea in respect of the robbery on the 30th April 2021 and in respect of the burglary on the 11th September 2020.

Personal circumstances of the respondent

12. The respondent had thirty-one previous convictions at the time of the first bill and thirty-three at the time of the second. They ranged from 2005 to 2020 and were all imposed by the District Court. The offences included burglary, assault, criminal damage, offences against the Public Order Act, drugs, and road traffic offences.

13. After serving an initial five months on remand, the respondent attended the residential drug treatment programme for six months in Coolmine from January 2021 and attended aftercare thereafter, completing the full course in January 2022.

14. In a probation report dated 27th October 2022, the respondent's personal history was set out. He is now about 37 years old and a member of the Traveller community. He has a long term partner and they have two children. He started using cannabis at a very young age, and moved to cocaine, heroine and benzodiazepines by age 17. He was using heroin and crack cocaine daily by the age of 22. He has therefore had a chronic, long-standing addiction problem. The initial probation report placed him at a high risk of re-offending in the next 12 months because of his history, long standing addiction issues, lack of education, association with a negative peer group, and a lack of insight. He accepted responsibility for his actions but lacked full insight into the consequences and impact on victims. He was willing to engage with the probation service and they indicated that they could work with him should the court be willing to consider suspending sentence.

15. At the time of the sentencing on 27th February 2023, he had been employed for six weeks as a general labourer. The respondent had been convicted of driving offences in July 2021 and had been given community service in respect of them.

The sentencing judge's remarks

16. Judge Martina Baxter delivered sentence on the 27th February 2023.

17. In relation to the burglary, she described the facts and noted that four men were present in a small location, that there was confrontation, that Mr. M's wife came on the scene, that the whole house had been woken, and that it was the people's home. She noted the victim impact reports, the injury to Mr. M, and the damage to the front door lock. She nominated it as mid-range and identified a seven year headline sentence.

18. In mitigation she noted the early plea, that the respondent was currently in employment, his long-standing polysubstance addiction, and that he was at the time of first sentence hearing in initial stages of rehabilitation and showing some insight.

19. In relation to the robbery she described the facts, noting that the offence was committed while on bail, in the company of others, and using a weapon, at the beginning of Covid and with a degree of "brazenness" because of the existence of a lockdown. She again nominated it as mid-range and she identified a headline sentence of six years.

20. She noted the respondent's previous convictions and that he had come to adverse garda attention since the offences but that there had been no similar behaviour, at least in respect of which he had been convicted. She noted that he had completed the residential programme and that there had been guilty pleas in both cases.

21. She reduced the seven years to four and a half years suspended in respect of the burglary. She reduced the six years to three years suspended in respect of the robbery. She made the sentences consecutive and given the principles of proportionality and totality further reduced the sentence for the burglary to one of three and a half years. Having regard to the previous convictions she suspended the sentences for a period of seven years. The

conditions of suspension were that he would remain under the supervision of the probation service for two years. He would attend all appointments and undertake victim awareness work with them, he would engage with addiction support and treatment as directed, he would provide urinalysis on request, and he would attend any other appropriate services as directed by the probation service.

Submissions on appeal

22. The Director takes no issue with the headline sentences or the reductions for mitigating factors, but submits that the suspension of the entirety of both sentences was unduly lenient. She submits that by suspending the entirety of the sentence for the burglary offence, she set at nought the provisions of s.11 of the Criminal Justice Act 1984 concerning consecutive sentences. She submits that the judge gave the respondent “double credit” for his mitigation, and provided for a too-long supervision period, having regard to the fact that he was already struggling to maintain good behaviour during the period following his initial release on bail. It is a period of five full years after the Probation and Welfare Service supervision has ended.

23. The respondent submits that the long period of suspension provides incentive for the accused to continue with his progress towards rehabilitation. Counsel submits that the sentencing court took into account the significant efforts the respondent made to change his life as a whole, even obtaining employment for the first time in ten years. Counsel notes that the respondent spent a period in custody prior to securing bail in relation to the burglary offence during which time he was an enhanced prisoner. Counsel submits that the significant and special mitigating factors and personal circumstances of the respondent meant that the sentencing judge made no error in suspending the sentences in full. He also submits that it is wrong to consider it fully suspended, given that he served some period of time in custody pending sentence and also attended the residential treatment programme in Coolmine. He

also observes that the respondent was under close scrutiny by the court throughout the 19-month period June 2020-February 2023. He also commented on the particularly long period of suspension (seven years).

Court's decision

24. The Director has no real difficulty with the headline sentences of six years and seven years respectively and the Court agrees that these were appropriate headline sentences.

25. The Director also accepts that significant reduction was due by reason of the guilty pleas and the probation report. However, the generous reduction to three and three and a half years and then to suspend both sentences fully is what the DPP takes issue with, suggesting that the aim of rehabilitation was wrongly allowed to eclipse all other sentencing considerations entirely.

26. The nub of the issue for this Court is whether or not it was appropriate to fully suspend both sentences. There is no doubt that it was a very unusual step for the judge to take and one which would be warranted only in the most exceptional of circumstances given the gravity of the offences. We do note however that, as counsel for the respondent pointed out, the respondent in fact spent five months in custody while awaiting sentence, and also attended Coolmine residential treatment course and thereafter completed the remainder of the programme. The completion of the residential treatment programme is no small matter for a person who has had a long-standing polysubstance addiction difficulty. We also see some force in counsel's submission that the respondent was under the watchful eye of the Gardaí and the court during the entirety of the period between June 2020 and February 2023.

27. There are some unusual cases where a sentencing judge is entitled, having regard to the previous history of the offender, the root causes of their criminal behaviour, and the steps

they have taken to move towards a prosocial life, to allow rehabilitation to become the predominant aspect of the sentence imposed. This sentencing judge was a very experienced sentencing judge who kept a close eye on developments and read the reports carefully. She ultimately decided to take a chance on the respondent, although she took care to underpin that chance with a relatively substantial sentence of six and a half years which would be activated if he re-offended. Having regard to the material which was before her, we are of the view that the sentencing judge was entitled to take the view that this was an exceptional case where the interests of society would be better served by suspending the sentence and allowing the offender to continue progress towards a crime-free life. While it was lenient, it was rational and grounded on the evidence and the Court does not consider that it was unduly lenient by reason of the particular circumstances pertaining to this offender.

28. The Court dismisses the appeal.