THE COURT OF APPEAL

[202/19]

The President
McCarthy J
Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JOHN REILLY

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 19th day of November 2020, by Mr Justice McCarthy

1. This is an appeal against severity of sentence. That under appeal is one of ten years imprisonment, backdated to 14th March 2019, with the final two years suspended, imposed on July 30th 2019 in respect of the offence of aggravated burglary which occurred on January 18th 2018 at approximately at 3.30am at a family home in Fethard, County Tipperary. On that occasion, the appellant arrived in a highly intoxicated state. He commenced to knock and bang on the front window and doors. Initially no answer was received; the residents, Mr and Mrs Pattison and their 25 year old son Niall were asleep. The appellant armed himself with a hedge cutter-type implement which he acquired from a garden shed. One of the householders, Mr. Neil Pattison, then opened the door slightly to speak to the appellant with a view to requesting him to leave. The appellant wedged his foot in the front door opening and proceeded to try to forcibly enter while shouting that he wanted to speak to "the rat", referring to Niall. A disturbing feature of the case is that it appears it was motivated by a desire on the part of the intruder to take revenge against him because he had reported an alleged offence of burglary by the appellant to the Gardaí.

2. Mrs Pattison informed the appellant that she recognised him and that she was contacting the Gardaí. The appellant, at one point, was unable to prevent the householder securing the front door. The appellant then went into what was described as a completely frenzied attack on the property. He was observed using the hedge cutter to break all the windows in the front of the house and all the glass surrounding the front door. He then went to the rear of the house where he continued his attack, breaking all the windows at the rear and at the side. Thereafter he returned to the front of the house where he turned his attention to the householder's motorcar. Having smashed all the windows at the rear he walked into the kitchen. He was asked on numerous occasions by the householder to leave, but,

instead, he assaulted Mr Pattison by punching him with a closed fist to the right-hand side of his head, causing a cut. When he emerged from the kitchen into the hallway he was armed with a steak knife but apparently failed to make contact with it with Mr Pattison, despite attempts to do so. The entire event took between 20 and 30 minutes. He shouted repeatedly "nine months for criminal damage and I'll be back" which is something that has given rise to ongoing fear of the appellant by the Pattison family.

3. The monetary value of the damage to the house and car came to some €12,500. As is to be expected, the householders have been traumatised by this incident. We do not set out *in extenso* the evidence in that regard but we think it appropriate to refer to the fact that Mr Pattison not only suffered physical injuries which give rise to treatment would that he has also suffered psychological and psychiatric ill effects. He is particularly concerned about the fact that the appellant threatened to return to the house and the fact that his motivation was one of revenge. He feels that if the appellant again intruded he might not be, as he describes it, as lucky as on the present occasion in terms of suffering injury. He suffers from flashbacks especially at night. At the time of producing a Victim Impact Statement he was in not in a position to visit his elderly mother in Scotland because his wife is fearful of being on her own, though of course she is supportive of such visits. Mrs Pattison refers to the fact that she has similarly suffered psychological and psychiatric effects and has received treatment. She describes herself as being paranoid about locking doors to the extent that she has arguments between herself and her husband. Prior to the incident she and her husband never locked their doors and were always accustomed to people coming and going but this is no longer the case. She remains in great fear since the incident and she describes the event as having had a huge effect on her. For the first six months after the incident difficulties were encountered in their marriage. Mr Pattison was desirous of selling their home but she does not wish to do so given that she still happy there. She refers to the fact that her husband could have been killed since the appellant sought to jab him with the knife.

4. As to the appellant's background and personal circumstances, he was born on 16th July 1987. He is the father of two children, a six-year-old and a three-year-old. He was a member of the Travelling community. He had 79 previous convictions. 25 of these were for road traffic matters, including six for driving without insurance and one for an offence contrary s. 113 of the Road Traffic Act (interference with the mechanism of a mechanically propelled vehicle), and there were 37 public order convictions, six of which resulted in custodial sentences. Of the rest, the most significant were offences of assault contrary to s. 3 of the Non-Fatal Offences against the Person Act 1997 dealt with in the Circuit Court in March 2011 in respect of offences committed in October 2008. Also of note was a burglary conviction from 2009 and an assault contrary to s.2 of the 1997 Act. It does not appear to be in doubt but that the appellant has had has a traumatic life and history. He was one of ten siblings, his father was an alcoholic and subjected him, his siblings and his mother to violence daily. The trauma was such that he and his siblings (he at the age of eight at the time) were removed to foster homes and unsurprisingly he suffered significant feelings of loss and rejection as a result. He remained in foster care until the age of fifteen. His behaviour, however, and, in particular, his violent behaviour,

was such that he was placed in institutional care from that age. He spent time in juvenile offender institutions and when he returned to the Portlaoise area aged about nineteen he fell into bad company and engaged in abuse of controlled drugs and alcohol. He has no contact with his children. While previously in prison it was conceived that participation in an anger management course might be of benefit, this was not found to be suitable for him. In 2015 he briefly sought treatment for his addictions and thereafter addiction counselling but none of this was successful. He has had episodes of poor mental health. The court had available to it a Probation Report and a psychologist's report. A personality disorder or disorders was or were diagnosed but he does not suffer from severe mental illness (as it was put). Such disorder may mean that it is difficult for the individual in question to sustain relationships (which is manifest from the life he has led) and can give rise to periods of transient paranoia especially while under the influence of controlled drugs. The appellant says that he believed at the time of the incident that this had had an adverse effect upon him. There is no doubt but that he has expressed remorse and it does not appear that there is any suggestion that this is not genuine. He pleaded at the earliest possible stage. The incident was characterised by counsel on his behalf as being, like his other convictions, "either drug fuelled, drug-related or alcohol-related."

5. The grounds of appeal are as follows:-

   i) The appellant submits that the learned trial judge erred in principle in determining the length of sentence by not considering, or not considering adequately, the particular circumstances of this offence, including the mitigating factors;

   ii) That the learned trial judge in reaching a headline sentence, focussed, unduly upon the aggravating factors, victim impact statements and erred in principal by placing the offence at the most serious end of the scale of offences;

   And:

   iii) The imposition of a ten-year sentence with the final two years suspended was unduly excessive in the circumstances of the case.

   We deal with all aspects together.

6. It is said that the judge may have been improperly influenced by a fear on the part of the female householder in particular, that the appellant had burgled the house on a previous occasion when there is no evidence that he was responsible for the earlier burglary. There was a very brief exchange with the judge about it from which no adverse inference of any kind could be drawn. Counsel for the appellant speculates that the judge may have wrongly taken the reference to a prior burglary (or the fact of the prior burglary, if it be a fact) as being an aggravating factor. There is no basis by counsel for this speculation - it is just that. There is nothing in the judgment which would suggest that the judge did so, and, if anything, one must proceed upon the basis that the judge did not since it would be inappropriate so to do. We can accordingly dispose of that aspect of the appeal at this stage.

7. It is said that the judge erred in determining the length of sentence, in that he did not have adequate regard to mitigating factors. In that regard, however, in the course of his sentencing remarks, the judge had referred to the facts of cooperation and of admissions when questioned by Gardaí, to the expressions of remorse during the course of interview and the fact that there had since been an apology followed by a very early plea which the judge said was greatly to his credit. He referred to the fact that the appellant had a chaotic and unfortunate childhood and to mental health issues which emerged from a psychologist's report that had been prepared.

8. It is further submitted that the headline sentence was too high. In particular it was submitted that the sentence so chosen, ten years, fell into the highest range, characterised by counsel as being nine to fourteen years. The judge suspended two years thereof obviously to encourage rehabilitation and by way of mitigation. Reference has been made by the appellant to a number of authorities with special reference to *Director Of Public Prosecutions V Popovici* (Unreported, Court of Appeal, January 23rd, 2017); in that case the headline sentence was fixed at nine years, and this is the crucial issue, this was not the post mitigation sentence since this will depend on the personal circumstances of the accused. The core facts are stated therein by Sheehan J. are as follows:-

> "*3. The facts are that in the early hours of the morning of the 26th September, 2013, the appellant and another man broke into the injured party's home at the foot of the Slievenamon Mountain in the vicinity of Carrick-on-Suir. The householders were alerted by the noise and the owner Mr. Quigly went to the kitchen area of his home where he was attacked by two men. He tried to arrest one of them, but the man whom he was endeavouring to arrest managed to get outside where he continued to violently resist. Mr. Quigly was further attacked. The appellant had a spanner and the co-accused an iron bar. During the course of the struggle the injured party held the appellant on the ground and when he did so his co-accused in trying to release him kicked Mr. Quigly in the stomach and hit him several times with the iron bar on the back and arm. At the time Mr. Quigly was barefoot and only wearing boxer shorts. The appellant took advantage of the beating which Mr. Quigley received and he escaped. However, Mr. Quigley followed him and detained him. The co-accused made good his escape, but in his effort to do so, broke his leg when falling over a wall.*"

and he then went on to say:-

> "*In considering the submissions made by both parties we have come to the conclusion that the learned trial judge erred in locating the headline sentence at twelve years imprisonment. We also conclude that while there were good reasons for distinguishing between the two co-accused in this case, the trial judge erred when he imposed a sentence in respect of this appellant which was twice that of the sentence imposed on his co-accused. The disparity in sentence was excessive and not warranted by the facts of the case.*

11. The divergence in sentence already significant was further widened when this Court reduced the sentence of the appellant's co-accused from six years imprisonment to four and half year's imprisonment.

12. In view of these findings it is unnecessary to consider the other grounds of appeal. In proceeding to a fresh sentencing hearing, we note the Governor's report to the effect that the appellant received one P19 in September 2015 but that he is now well behaved and currently working as a staff mess cleaner.

13. This was a serious burglary offence which violated the constitutional protection of his home which Mr. Quigley was entitled to and both he and his wife suffered serious adverse consequences as a result of this burglary. It was also an offence in which the appellant used serious violence on Mr. Quigley when he tried to make good his escape. We do however, note that the appellant travelled to the scene of the burglary by bus, which is somewhat unusual, and also that he may have been of the view that the house would be empty when he got there.

14. Bearing these matters in mind we hold that the appropriate headline sentence is nine years imprisonment."

No reference was made therein to the terms of years relevant to aggravated burglaries in the higher range. It is a decision with no direct assistance to us, since the ultimate sentence referred to in the judgment was the post-mitigation sentence.

9. Reference was also made to *DPP v Gleeson* (Unreported, Court of Appeal, 26th of April 2018), even though it was a case of burglary simpliciter. There the core facts were set out by Edwards J. as follows:-

> *"The circumstances of the offence were outlined to the Court by Garda Gerald Doolan on 14th July 2016 who advised the Court that on the evening of 4th of May 2015, the injured party, Mr. Paul Kelly attended a local pub where the appellant was also present. The appellant had been drinking from early in the day and had consumed a considerable amount of alcohol in the hours preceding this. The appellant appeared to be staring at Mr. Kelly and following a brief exchange of words, Mr. Kelly left and went home. He retired to bed just before 10.00pm. Shortly after 10.00pm, the door of the house burst open and the appellant entered in a very aggressive state, calling out that Mr. Kelly was a "bastard" and saying he was going to kill him. He searched about the house, eventually locating Mr. Kelly in bed where the appellant proceeded to assault him violently. Mr. Kelly was then dragged from the bed and the assault continued by way of continuous punches and kicks. Mr. Kelly bled profusely and in fact slipped a number of times in his own blood as he attempted to stand up.*
>
> *5. Mr. Kelly's wife attempted to intervene and she was threatened that she would be killed and the house burned if she called the Gardaí. Mrs. Kelly managed however to discretely alert her sister in law, Mrs. Conroy, who came to the scene, observed*

the appellant's van outside and removed the keys from it. Mrs Conroy then entered the house and almost immediately the appellant left the house. However, very shortly thereafter the appellant returned again looking for his keys, and while present assaulted Mr. Kelly a second time. Following this he left once again and the two women barricaded the door, which they were unable to lock as a result of it having been kicked in, with a couch and furnishings to prevent him re-entering again pending the arrival of the Gardaí and the emergency services.

6. *According to medical evidence Mr. Kelly (aged 59 at the time) suffered extensive facial injuries comprising multiple comminuted and depressed fractures particularly involving maxillary sinuses with herniation of the subcutaneous fat, more so on the right side, and fractures of the floors of the orbits without obvious extraocular muscle herniation. A filling was knocked out of one of his teeth. Following a CT scan haemorrhagic fluid was detected in the sphenoid sinus. In layman's language he had suffered two fractured eye sockets, a broken nose, two fractures to his jaw and damage to his teeth. He was referred to the maxillofacial injuries unit at St. James's Hospital, Dublin for further specialist surgical treatment. He required extensive surgery involving several operations to address his facial injuries.*

7. *Following the incident, the appellant went to ground for a number of days but was eventually located and was arrested. Initially in interview, the appellant indicated that he didn't really remember the events of the night in question but didn't dispute Mr. Kelly's account. As interviews progressed he recounted that Mr. Kelly had been a drinking associate of his (i.e. the appellant's) father. The appellant and his father had had a very unhappy history. According to a psychological report submitted on behalf of the appellant, his father had been physically and emotionally abusive towards him from his early childhood. The father had died in a tractor accident when the appellant was seven years old, but the appellant remains psychologically damaged to this day on account of the abuse that he suffered. His situation was seemingly compounded when he was later subjected to further physical abuse, as well as sexual abuse, while he was in care in St Lawrence's Institution.*

8. *he appellant stated to the Gardaí that on the evening in question Mr. Kelly had reminded him of his father but that Mr. Kelly was "a nice man." In answer to the question "who did you think you were hitting?", the appellant replied in interview, "my father." In the course of being interviewed he expressed remorse for what he had done, and Garda Doolan accepted in his evidence that this remorse as genuine."*

The case was held to fall into the highest range for burglary and a headline sentence of twelve years was imposed. The highest range was identified as being between nine and fourteen years. Having regard to the fact that the maximum was fourteen years rather than imprisonment for life, as is the case with aggravated burglary, it is not of direct assistance to us. Apart from the fact that these are decisions on their own facts, they seem to us to give rise to little comfort for the appellant.

10. In *DPP v Casey & Anor* [2018] IECA 121, this Court was concerned with four offences, three of which were burglary simpliciter, and to that extent, as in the case of Gleeson, its relevance is limited. There, the Court referred with approval to the submissions of the Director Of Public Prosecutions as to the factors which should be taken into account in determining the seriousness of the offence of burglary simpliciter as follows:-

"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 midrange, would include:

(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.

41. She identifies factors as would tend to place a burglary in the highest range of gravity as including:

(i) ransacking a dwelling;

(ii) entering during the night a dwelling which was known to be occupied, especially if the occupier was alone;

(iii) violence used or threatened against any person, whether the occupier or anyone else in the course of the burglary;

and

(iv) significant injury, whether physical or psychological, or serious trauma caused to a victim of the burglary."

The President went on to say:-

"46. The Director, as quoted earlier in the judgment [quoted above], in the course of submission listed some factors which would tend to place offences in the mid-range or in the highest range. In addition to those listed by the Director, the Court would add the presence of clearly relevant previous convictions. This Court's experience of dealing with burglary cases, whether appeals against severity or undue leniency

reviews, is that it is not unusual for those coming before the Court to have relevant previous convictions. Such convictions should be regarded as aggravating. In appropriate cases, the prosecution should be able to provide information to the sentencing judge. If a burglary is recorded, was it a burglary of a domestic dwelling? If there are a number of dwellings recorded, was there a consistent modus operandi?

47. A confrontation with an occupant of a dwelling will be an aggravating factor. The more aggressive the confrontation, the greater the aggravation. Evidence that an intruder equipped himself with a weapon while in the dwelling will be a serious aggravating factor. This will be particularly so if the item availed of has the obvious potential to be a lethal weapon, such as a carving knife or a meat cleaver."

We think that reference to these factors is also appropriate in the case of aggravated burglary, since the element which makes it a separate and more serious offence is, an entry into premises associated with the possession or use of weapons or explosives.

11. Of particular direct relevance *DPP v Leon Byrne* [2018] IECA 120 where this Court (per Edwards J.) delivered judgment on April 26th 2018. That case involved a number of offences, including one of aggravated burglary, and for the present purpose it suffices to say that offences of both robbery and aggravated burglary are largely equated where the ranges of sentences are concerned. Those arrived at in relation to both classes of offence are sentences of up to five years in respect of offences in the lower range, five to ten, in respect of the mid-range, and ten to fifteen in respect of the upper range, here in will be seen accordingly, that the sentence was at the top of the mid-range or bottom of the upper range.

12. In the present case the aggravating factors are as follows:-

i) The fact that the premises was a dwellinghouse;

ii) The fact that the premises was occupied, as most have been in the contemplation of the appellant,

iii) The motivation for the entry, namely, revenge;

iv) The extensive damage to the premises,

v) The terrifying nature of the event;

vi) The incident lasted 20 to 30 minutes;

vii) The fact that a number of persons were rendered into a state of terror;

viii) The fact that two weapons were procured and used, albeit one was makeshift weapon, namely, a hedge cutter when access was sought via the front door and the other was a knife procured after the appellant had entered via a smashed window,

the latter used for the purpose of trying to stab Mr Pattison (the fact that the appellant did not do so was not due to any forbearance, but by chance);

ix) The long term adverse effects on both Mr and Mrs Pattison and the immediate consequences of the offence;

x) The fact that the incident must have been premeditated.

13. The mitigating factors were relatively modest, namely: the undoubtedly traumatic background of the appellant, his mental health difficulties, his addiction to alcohol and controlled drugs, the fact of the plea of guilty at an early stage, his remorse (which does not appear to be in question), his cooperation with the Gardaí after an initial difficulty with his arrest by making admissions.

14. As appears from the judgment of the trial judge, he took all relevant factors, mitigating and aggravating, into account. Major aggravating factors identified in the authorities were present and the judge was right to place it at bottom of the highest range: since exactitude is impossible, this might on an alternative view be regarded on the top of the middle range, but whether or not, the headline sentence was correct. He might indeed have taken the view that in the upper range a longer sentence might have properly have been imposed. We are of the view there was no error in principle in fixing the headline sentence and that he properly had regard to rehabilitation and necessity for giving credit for mitigation by suspending the last two years of the sentence.

15. We accordingly dismiss this appeal.