



THE COURT OF APPEAL

207/2018

Peart J.  
McCarthy J.  
Kennedy J.

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**TEYMUR BABAYEV.**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 8th day of October 2019 by Ms. Justice Kennedy**

1. The appellant appeals against his sentence on a count of burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 to which he pleaded guilty and a sentence of three and a half years' imprisonment was imposed.
2. The offence took place in the early hours of the 15th June, 2014 when the injured party was asleep in her bed. She awoke just before 3am to feel a hand on her leg, she wrapped the duvet around herself and moved to the end of the bed whilst Mr. Babayev mirrored her movements. She tried to get him to leave the apartment and shouted at him and pushed him in pursuit of this objective, but to no avail. The injured party noted that the chain lock was fixed on the door and this unnerved her, as this was not something she was in the habit of doing. She described the appellant lunging towards her and her quilt fell down slightly. Ultimately he left, she was unable to get back to sleep and the following day she contacted the Gardaí. Two phones were taken in the course of the burglary.
3. The Gardaí attended the scene and fingerprint marks were found in the apartment, one of which matched those of the appellant. A warrant was obtained in respect of the appellant's home address. This was executed on the 16th June, 2014. During this search, two mobile phones belonging to the injured party were recovered from the appellant's car. The appellant was then arrested and taken to Rathmines Garda Station. He made no admissions during the course of his detention and he denied being present at the scene.
4. The appellant pleaded guilty to the burglary count at an early stage and he sought to vacate that plea but this application was refused.
5. Mr Dwyer S.C., on behalf of the appellant submits that there is a clear error in principle in respect of the sentence imposed on this count. The appellant had originally faced two counts on the indictment, one for burglary and the other for sexual assault. He contested the sexual assault matter and was convicted by a jury. On appeal the conviction was quashed. As a consequence, Mr Dwyer contends that there is now an error in principle in

that when the trial judge sentenced the appellant, he imposed three and a half years on the burglary count and he initially took the sexual assault count into consideration. Whilst he then imposed eighteen months on the sexual assault count, nonetheless, Mr Dwyer contends this is an error which necessitates the sentence to be quashed.

6. Ms. McGowan B.L. for the respondent contends that there is no error and that the judge imposed a discrete sentence on the sexual assault count. We cannot agree with the submission. During his sentencing remarks, the judge stated that the appropriate sentence, having taken all the factors into account including the mitigating factors, was a term of imprisonment of three and a half years on the burglary count and he stated his intention to take the sexual assault count into consideration. As the only matter now before this court is the sentence imposed on the burglary count given that the conviction in respect of the sexual assault count has been quashed by this Court, we are satisfied that there is now an error in principle through no fault whatsoever of the trial judge. In those circumstances we will quash the sentence imposed and we will move to re sentence the appellant as of today's date.
7. In this respect, we are satisfied to impose a post mitigation sentence in the same terms as the Circuit Court judge. We will now explain our reasoning for so doing. We have already set out the factual matrix surrounding the offending on the night in question. To that we add to the impact on the victim and we have considered the redacted impact report in this respect and it is clear that the intrusion into her dwelling has had an understandably serious impact upon her.
8. There are a number of mitigating factors which can be stated on behalf of the appellant and these include the fact that he pleaded guilty at an early opportunity although this is adversely affected to a modest degree by virtue of the fact that he sought to resile unsuccessfully from that plea.
9. He has no relevant previous convictions. We take into consideration the letters which were furnished to the court below on his behalf and we also take into account to a very limited degree, the fact that he is a non-national serving a sentence in this jurisdiction. He has however resided here since 2001 and his family are resident in this jurisdiction. We also note his progress whilst in custody.
10. In considering the aggravating factors, we refer to this Court's decision in *The People (DPP) v Casey and Casey* [2018] 2 I.R. 337 and we are satisfied that this case falls in the lower end of the mid-range of sentence.
11. The aggravating factors in this case were significant. The appellant intruded into the victim's home when she was asleep in her bed, it involved a verbal and physical confrontation with the unfortunate victim. His behaviour was particularly unpleasant, not only by virtue of the fact that he refused to leave the apartment when asked to do so, but he also taunted the injured party by mirroring her actions when she got up from her bed. There is also the issue of the chain being placed on the door which unnerved the injured party.

12. We are satisfied that the pre mitigation sentence is one of a five and a half years' imprisonment, taking into consideration the mitigating factors already identified, we will discount that sentence to one of three and a half years' imprisonment being of course the sentence which was imposed by the Circuit Court judge.