THE COURT OF APPEAL

Edwards J.
McCarthy J.
Donnelly J.

Record No: 40/19

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

RESPONDENT

V

DANIEL DELANEY

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 30th day of January, 2020 by Mr Justice Edwards

Introduction

1. On the 22nd of February 2019, the appellant appeared before the Dublin Circuit Criminal court for sentencing, having pleaded guilty to counts of burglary (with some other offences to be taken into consideration) on three separate bills of indictment. The appellant was also before the court for sentencing on the same occasion in respect of a s.15 drugs offence. After hearing the relevant evidence and submissions from both sides, the sentencing judge remanded the appellant on bail to the 1st of March 2019, on which date she imposed upon him the following sentences:

    I. On Bill No: 557/17, in respect of count no 2, charging burglary (with a theft count taken into consideration) - 3 ½ years' imprisonment;

    II. On Bill No: 1165/17, in respect of count no 1, charging burglary (with a count of possession of a controlled drug contrary to s.3 of the Misuse of Drugs Act 1977 taken into consideration) - 1 ½ years imprisonment consecutive to the sentence on Bill No: 557/17;

    III. On Bill No: 500/18: in respect of count no 1, charging burglary - 3 years imprisonment consecutive to the sentence imposed on Bill No: 1165/17;

    IV. On Bill No: 1123/18: charging possession of drugs with intent to supply contrary to section 15 of the Misuse of Drugs Act 1977 - 1 ½ years' imprisonment to be served concurrently with the sentence on Bill No: 557/17.

2. The resulting overall sentence was one of 8 years imprisonment, of which the final year was suspended for a period of two years. The appeal relates to the sentences imposed on Bills Nos: 557/17, 1165/17 and 500/18 only, in respect of which recourse was had to consecutive sentencing. There is no appeal in respect of the sentence on Bill No: 1123/18, but it has been necessary to refer to it as it is a relevant contextual detail.

3. The appellant now appeals against the severity of the sentences imposed on Bills 557/17, 1165/17, and 500/18.

Background Facts

4. The sentencing judge heard the following evidence in respect of each count respectively:

Bill No: 557/17:

5. Garda Megan Fury gave evidence that on the 8th of January 2017, gardaí received an account of a break in by two men into the Clonsilla Inn, a public house in Blanchardstown. The manager of the premises reported that at approximately 9.30 – 10 pm, he went to the rear of the establishment, which was not accessible by the general public. He heard a noise which sounded like something falling and considering this to be strange coming from an area which nobody should be, continued outside and around the side of the pub as far as the back yard. Once there, he noticed that a side gate – normally locked – was in an open position, and this was disconcerting. Re-entering the premises and making his way to the kitchen, he encountered two men, one of whom was later identified from CCTV as the appellant. The manager recounted that the men ran towards him, and in doing so, the appellant appeared to reach for his pocket. In a state of panic, the manger pushed a microwave oven towards the men in an attempt to secure his own safety. The two men ran out of the premises.

6. Garda Fury confirmed that the men had in fact rammed the side gate leading in to the back yard with a yellow Renault Megane, which they left behind. This car had also been used during the theft of petrol amounting to approximately €20 in value by the appellant at an Applegreen Service Station on the 12th of January, and of which there was CCTV footage that was later provided to the gardaí. This was the basis of the theft offence taken in to consideration.

7. In the CCTV footage from the Clonsilla Inn the appellant can be seen entering the office at the back of the premises and attempting to open to a cash safe. Upon realising the futility of his efforts, the appellant hastily grabbed several envelopes which contained nothing but wage slips. After the burglars had left, the employees were instructed to check their personal belongings. One employee, upon doing so, claimed that €290 in cash had been stolen from her purse. It could not be confirmed which of the men had taken it, but this was considered immaterial in circumstances where they were acting in concert.

8. The gardaí, having identified the appellant from CCTV footage, obtained a search warrant for his home address. The appellant was subsequently arrested at his home and several items were seized. He was detained under section 4 of the Criminal Justice Act 1984; during which he was interviewed but nothing of evidential value emerged. The appellant was charged on the 9th of February 2017 and released on bail.

9. Garda Fury agreed under cross-examination, that neither of the burglars made a serious attempt to disguise their identities. It was agreed that the manager was frightened by the encounter, and had been afraid of the possibility that the men may have been armed. It

was agreed that no weapons were produced, and that while they did run towards the manager, no physical contact was made, and that this was the only direction in which they could leave. Garda Fury agreed speculated: "I'd say they got as much of a fright as he did, yes". It was agreed that no effort had been made to force the manager to open the safe.

10. The accomplice, a Mr. Howard, was also prosecuted and received a sentence of 5 years imprisonment with the last 18 months suspended in respect of this bill within a larger structured sentence. It was agreed that while the appellant had nothing in his background approaching the seriousness of the s.15A matter for which Mr. Howard had also been sentenced at the same time as being sentenced for this burglary, the two men presented broadly similar circumstances, being of the same age and having similar numbers of previous convictions.

11. The appellant pleaded guilty on the trial date, but it was agreed that he had indicated an intention to do so well in advance.

12. Certain cash seized from the appellant's house in relation to Bill 1123/18 was never claimed. While a forfeiture order was applied for in respect of it, a portion of the monies forfeited was by agreement applied by the court below to compensate the victim who lost €290 in the burglary charged on Bill No: 557/17.

Bill No: 1165/18:

13. The court heard evidence from Garda Brian Morrissey that on the 21st of May 2017, the gardaí were alerted to a burglary at the Siam Thai Restaurant in Malahide. Upon arriving at the scene at approximately 11.40 pm, the gardaí were informed by the restaurant owner that the storeroom had its door forced open and €3,000 worth of alcohol had been taken from within. The appellant was identified from CCTV footage, accompanied by another man and leaving in a black BMW car. A search warrant was obtained in respect of the appellant's family home, and on the 26th of July, the appellant was arrested there. He was then charged with the burglary offence in Swords garda station and was released on bail.

14. Under cross-examination, Garda Morrissey agreed that the appellant had made no real effort to disguise himself beyond donning a baseball cap, and the gardaí were able to identify him without difficulty. The storeroom was quite separate from the restaurant itself, being closer to the underground carpark; and it was agreed that the chance of someone encountering the burglars was minimal – an encounter would only have occurred if a staff member was collecting stock for the restaurant. In total, the men took six kegs and numerous bottles of alcohol. None of the property was recovered.

15. While being interviewed the appellant agreed he was not alone when he carried out the theft, but he would not say anything about the other person. The appellant also agreed that a distinctive cap recovered at the scene was his, and that he was wearing it when he entered the premises. The appellant was willing to make admissions concerning his own

role in the matter once he realised he could do so in a manner which would not implicate anyone else.

16. The state was informed well in advance that the appellant would be entering a plea.

Bill 500/18:

17. Detective Garda James McNeill gave evidence that on the 29th of January 2019, gardaí were alerted to occurrence of a burglary of the Monkstown Rugby Club in Sandymount. Garda attended at the scene at approximately 7.15 am and were informed by the bar manager that €1,600 in cash had been taken from the strong room. The bar manager also told gardaí that several doors had been broken, and that there was also damage to multiple locks, security camera wiring, the bar shutter, and part of the roof. Computer equipment, bar stock (kegs of Guinness) and some builders hand tools were stolen. The total cost of damage caused to the premises was said to amount to approximately €2,000. The manager of the club prepared a victim impact statement which provided valuations for some of the property stolen, including personal computers (valued at €500), further computer equipment and peripherals (valued at €3200), and three barrels of Guinness (valued at €560).

18. A black Saab car had been used to facilitate the burglary, the registration number of which was recorded on CCTV. Both this, and CCTV footage of the appellant himself, enabled his identification.

19. A search of the appellant's home carried out by gardai on the 23rd of September 2017 was fruitful in that the car in question was found parked adjacent to it and was seized. The stolen builder's hand tools were found in the car, as well as €50 in coins. The fingerprints of the appellant were recovered from the steering wheel of the car. The appellant was arrested and conveyed to Irishtown garda station, where he was charged with burglary.

20. Under cross-examination, Detective Garda McNeill agreed that the appellant had purchased the vehicle the previous day, readily offering up his own name. It was agreed that the appellant had been readily identifiable on CCTV footage, and that he left his fingerprints and items from the burglary in the vehicle, which was found 'a 30 second walk' from his house.

Appellant's Personal Circumstances

21. The appellant did not complete his Leaving Cert, and after leaving school, he attended FAS for a year, and has FETAC certificates in first aid. The appellant is said to have used his time in custody during earlier sentences productively in acquiring new skills, but that he had spent his weekend release time with older peers who, it was submitted, had had a negative influence on him, a factor which contributed to his reoffending.

22. It was said that upon leaving prison, following an earlier sentence, the appellant had secured a job, initially as a mechanic, and that he had then worked in a pallet warehouse.

He later lost that job due to issues with drug use. This was approximately seven months prior to his sentencing in the present case.

23. Garda Fury stated she was aware that the appellant has a 2 ½ years old autistic son, in respect of whom he pays maintenance. She accepted that the appellant had a close relationship with his son, seeing him every day and taking custody of him on weekends.

24. The appellant admitted to usage of cocaine and cannabis, and further admitted to having a problem with regard to tablets. There was evidence that the appellant had self-referred to the Ana Liffey Drug Project in early December 2018, and a letter was provided to the court below confirming this. This letter asserted that the appellant had been making significant progress and that the Ana Liffey Drug Project was willing to continue working with him in custody.

25. Garda McNeill confirmed that the appellant has 128 previous convictions. Of these, eleven were listed as being prosecuted in the Circuit Court. Four of these are for burglary, seven for theft, eleven for criminal damage, one for the offence of robbery, four for possession of drugs for personal use, two for possession of drugs for sale or supply, six for trespass, five for assault, seventeen for offences under s. 112 and s. 113 of the Road Traffic Act, six for public order offences, two for obstruction of a peace officer, one for possession of a knife or other article, one for demanding money with menaces, three for offences committed in prison, three for nuisance offences under the Dublin Police Act 1842 involving the throwing of missiles, and fifty four for Road Traffic offences (other than offences under s.112 and s.113).

26. In terms of his previous prison sentences, in October 2010 he received four years with one year suspended for s.112 offences. In July 2012 he received four years from the circuit court for offences involving criminal damage, theft, s. 113, assault, s. 112, theft, and robbery.

27. Detective Garda McNeill agreed that many of his convictions were accrued in the Children's Court. The appellant was 26 years old at the date of sentencing. It was further agreed that from February 2014 up to 2017, the time of the present offences, there was a break in offending.

Sentencing Judge's Remarks

28. In sentencing the appellant, the sentencing judge made the following remarks (inter alia):

> *JUDGE: "Okay. All right, so the facts have been rehearsed previously in detail and there's no need to repeat them in such detail but I'll deal with the main matters as I go through. So, in relation to bill number 557/2017, the offence date was the 8/1/2017 and the accused was charged on the 9/2/2017. This relates to burglary to which there is a penalty of a maximum of … 14 years."*
>
> *"Okay. So, bill number 557/2017 deals, relates to theft in a commercial premises. The accused came into the contact with staff member. There was no overt specific threat made by the staff -- to the staff member. Staff member was unaware of*

what was going to happen as the accused and his co-accused ran towards him and passed him out the door. There's reference to the back gate having been rammed and there was an attempt to gain access to the safe in the cash office but they were disturbed. The accused was identified from CCTV by gardaí and I'm told that the co-accused, whose circumstances were very similar to that of this accused, received a sentence of five years with 18 months suspended. And I'm told that the plea was indicated well in advance of the trial date."

"In relation to bill number 1165/2017, the offence date was the 21st of May 2017 and the accused was charged on the 26th of July 2017. This related to a charge of burglary, again a maximum of 14 years and section 3 drugs, simpliciter, possession and this is to be taken into consideration. This related to the burglary of a Chinese restaurant. Alcohol in the sum of €3000 was taken and again, CCTV was used to identify the accused. At the time of this offence the accused was on bail for bill number 557/2017 which was also for burglary.

In relation to the fourth matter, bill No. 500/2018 related to burglary of a rugby club in Monkstown. This occurred on the 20th of September 2017. He was charged on the 28th of September 2017. Damage to the value of €7690 was caused to the premises. Again, the accused was identified by virtue of CCTV footage and there was also fingerprints taken from a car which the accused had used. A plea was entered on the 29/01/2019 and at the time of the commission of this offence, the accused was on bail for each of the earlier burglaries.

The accused has 128 previous convictions, 11 of which are Circuit Court matters and included in that 128, there were four for burglary, one for robbery, seven for theft, and counsel will be aware that the DPP v. Casey says that such previous convictions should be seen as an aggravating factor where they are present, as on this occasion.

In October 2010 or since October 2010 the accused has served two four-year serving, two four-year sentences. The accused is now 26 years old and I'm told that since these matters, he has come to the attention of the gardaí, however he is clearly entitled to the presumption of innocence in relation to those matters.

The aggravating factors in this matter are the seriousness of the offences in and of themselves, the fact that two bills the offences in two bills occurred while on bail for one and two other bills, and the fact that the accused had previous convictions for burglary.

The mitigating factors are the pleas of guilty in the circumstances which have been outlined, where CCTV was used to identify the accused and there was fingerprint evidence in relation to one of the offences. The fact that he is the father to a very young child and that he is engaged with the upbringing of this child, who I believe has special needs. In relation to number 3, a positive he has been a positive contributor to society between the years 2014 and 17 and has garnered skills that

can again be put to good use in the future. In relation, I note the submissions of counsel that no violence to persons was used in the course of these burglaries, notwithstanding significant property damage occurred in two of the bills. The acceptance of a drug addiction by the accused and his stated wish to rehabilitate is noted. The express wish to gain education while in custody is also noted. And the engagement of the accused with drug addiction services, if only belatedly in December 2018 is also noted.

The Court cannot avoid being of the view that the accused in this case had absolutely no regard for the rule of law given that the offences carried out by him in bill number 1165/17 on the 21st of May 17 and bill number 500/18 on the 20/09/17 were done while on bail for offences already charged. The suggestion that he had not taken steps to avoid recognition on CCTV is clearly not a mitigating factor, but in the Court's view rather speaks to the brazen nature of his criminality. The Court is also to note that at 26 years of age, the accused has 128 previous convictions; a significant number of those relate to road traffic matters and of which 11 of them are Circuit Court convictions. Four of the total previous relate to burglary. The fact that these took place in commercial premises as opposed to residential premises is noted, but this does not lessen the fear in the mind of the innocent party confronted by the accused and his accomplice in bill 557/17.

I have had regard to the documentation handed in and the victim impact report which details the damage done to the rugby club in Monkstown and the effect that it had had on staff. The Court considers the offending to be of mid-range. In the absence of mitigation, the appropriate sentence in relation to bill 557/17 is five years. The count of theft to be taken into account.

In relation to bill 1123/2018 in relation to section 15 is three years, and that is to be concurrent to bill number 557/17. With regard to bill 1165/17 relating to burglary, while he was on bail for 557/17 the appropriate penalty is three years. This is to run consecutive to bill 557/17. And in relation to bill number 500/18 relating to burglary, the appropriate sentence is four years and this is to run consecutive to 557/17 and 1165/17. The Court wants to mark the seriousness of not alone the individual offences, but the wanton disregard shown by this defendant for the property, which included business premises and community focused facilities, made all the more aggravating that he committed not one but two offences on bail, which in and of itself is an aggravating factor. Bail is a right afforded to those presumed innocent while they await trial. It ought not to be viewed as a window of opportunity to engage, as in this case, engage in further burglaries while awaiting trial. One might have thought that this time could be used to demonstrate the capacity to rehabilitate and therefore afford a mitigatory platform before the Court on this occasion. This defendant has taken the opportunity to communicate a wilful blatant disregard for not alone the Court, but more disturbingly, for the community at large and its social facilities. Taking mitigation into account, the appropriate sentence in relation to the bills are; bill

557/17, three and a half years; bill 1123/18, one and a half years concurrent the second bill concurrent to the first. Bill 1165/17, one and a half years consecutive to bill 557/17; and bill 500/18 three years, consecutive to bill 557/17 and bill 1165/17.

But for the arguments advanced by Mr Le Vert on the accused's behalf I would be slow to suspend any part of these sentences. However, I am bound by the appellate jurisdiction which mandates, and correctly so, that I temper the sentence that I impose today. Having regard to the totality and proportionality principles and the age of the accused, to incentive rehabilitation given his recent engagement in drug rehabilitation services, I will suspend the final 12 months of the sentence for a period of two years on the basis that the accused keeps the peace and be of good behaviour and follows all directions under the supervision of the probation services. In coming to its conclusions, the Court has had regard to the DPP v. Casey 26/04/2018; the DPP v. Culhane 27/02/17; and the DPP v. Daly 24/06/06."

Grounds of Appeal

29. The appellant puts forward the following grounds for appeal:

I. The sentencing judge erred in law in failing to exercise her discretion to apply the principles of sentencing set out in *DPP v Yusuf* [2008] IECCA 37

II. The sentencing judge erred in law in failing to fully and adequately apply the principles of proportionality and totality

III. The sentencing judge erred in law in failing to take full and proper account of the personal circumstances of the appellant

IV. The sentencing judge erred in characterizing the appellant's failure to disguise himself as a reflection of his brazen disregard for the law, rather than being a manifestation of his drug abuse

V. The sentencing judge erred in law in placing too much emphasis on the fact that these matters were committed whilst on bail to each other without recognizing that the offences were committed by a person struggling with a drug habit

VI. The sentencing judge erred in law in failing to fully recognize the appellant's past success at rehabilitation

VII. The sentencing judge erred in law in failing to fully recognize the progress which the appellant had made in recent times in addressing his drug difficulties

VIII. The sentencing judge erred in law in failing to fully give credit for other mitigating factors

IX. The sentencing judge erred in law in placing too much emphasis on aggravating factors

X. The sentencing judge erred in law in imposing a sentence which was unduly severe given the circumstances of the offence

30. However, in oral argument before us, counsel for the appellant agreed that his complaints could be conveniently summarised as being: first, that the sentencing judge had, notwithstanding being referred to *People (DPP) v Yusef* decided to impose a consecutive sentence upon a consecutive sentence, and secondly that the sentencing judge had not made a sufficient downwards adjustment to the aggregate of the post mitigation sentences on each individual bill of indictment, to reflect totality leading to a situation where the ultimate overall figure was disproportionate both the gravity of the offending conduct viewed as a whole, and having regard to the appellant's personal circumstances. It was suggested in regard to proportionality that when recourse was had to *The People (DPP) v Casey* [2018] IECA 121 as a comparator, his client had fared worse than the respondents in the Casey case, notwithstanding that their offending had been more serious in his contention. The sentence was also said to be out of kilter with those imposed in the other two cases to which the sentencing judge had referred, namely *The People (DPP) v Culhane* [201 IECA 59 and *The People (DPP) v Daly* [2016] IECA 257. That said, counsel for the appellant accepted that he could not, and indeed was not, making any complaint with respect to the individual sentences imposed on each of the three bills with which we are concerned. His case was confined to the sentencing judge's decision to have recourse to a consecutive sentence upon a consecutive sentence, and to his claim of inadequate adjustment for totality.

Discussion and Decision

31. Having given the matter careful consideration, we are not disposed to uphold either of the complaints relied upon.

32. As counsel for the appellant accepted, it was a matter within the discretion of the trial judge as to whether, in giving effect to the mandatory consecutive sentencing requirement arising under s. 11 of the Criminal Justice Act 1984 (in circumstances where there had been offending whilst on bail, and more than one instance of such offending) to make the sentences for the second and third offences concurrent *inter se* but consecutive to the first offence in time; or alternatively to make the sentence for the second offence in time consecutive to that for the first offence in time, and then to make the sentence for the third offence in time consecutive to that imposed for the second offence in time, effectively imposing a consecutive sentence upon a consecutive sentence.

33. In our assessment the sentencing judge's recourse to the latter expedient was justified in the circumstances of this case. She was entirely justified in characterising the appellant's behaviour as communicating *"a wilful blatant disregard for not alone the court, but more disturbingly the community at large"*. The gravity of the offending conduct was significant both in its individual components and when viewed overall. Tellingly, there is no quarrel with the individual sentences imposed.

34. As to the overall gravity, there were numerous aggravating factors including confrontation in one instance with an occupier with resulting trauma to him; burglary committed at

night; the trashing and/or concurrent damaging of premises while committing burglary; commission of the offences on two of the three bills of indictment whilst on bail; having relevant previous convictions; the significant value of the property stolen in the two later incidents, none of which was recovered (save for the hand tools); clear pre-meditation and planning; the wide geographical range within which premises were targeted; the fact that in the case of the Monkstown burglary a community facility was targeted; and the fact of acting in concert with another, to name but some.

35. Cumulatively the circumstances were in our estimation sufficiently egregious as to justify the trial judge's decision to resort to imposing a consecutive sentence upon a consecutive sentence. We find no error of principle in her decision to do so. Indeed, failure to do so would have meant that the appellant could be perceived as having received something of a "free ride" in respect of one of the offences, because he would not serve a day extra on account of it. This was not a case of all of the offending being committed on the same day, or as part of a single episode or incident, or of being otherwise connected. These were discrete and separate instances of serious offending that merited being individually and separately punished.

36. It seems to us that the more significant issue raised by the appellant relates to proportionality and whether there was sufficient downwards adjustment of the aggregate post mitigation figure in application of the totality principle.

37. There is no reason to doubt that the sentencing judge was alive to the requirement to stand back and reconsider the aggregate post-mitigation figure in the light of the twin components of the proportionality consideration. She expressly refers to her obligation in that regard. Counsel for the appellant's complaint comes down to this: that she simply didn't discount by enough. We do not agree with him. The sentencing judge did discount by an effective 12.5% in suspending the final twelve months of her eight-year aggregate post mitigation sentence. While a 12.5% discount might not have been generous, and while some judges might have made a somewhat greater adjustment, it was in our view within the judge's legitimate margin of appreciation. This was after all a bad case and the sentencing judge was entitled to impose a severe sentence providing it was not disproportionately severe. We do not consider her ultimate sentence to have been disproportionately severe. We find no error of principle.

38. In conclusion we just wish to say that we were not impressed by the appellant's recourse to *The People (DPP) v Casey* and the two other cases mentioned as direct comparators. While there are some superficial similarities, the cases are clearly distinguishable on their facts. We have said many times that such direct comparisons are really not appropriate and are of little or no assistance. The correct use of comparators involves the presentation of a survey of a suitably representative sample of cases in which the courts have imposed sentences for a particular type of offence, as evidence in support of a suggested trend in sentencing. The value of *The People (DPP) v Casey* is not as a direct comparator but rather with respect to the guidance that it gives concerning the ranges

within which cases should fall in terms of headline sentences and how cases may be categorised having regard to their features with reference to those ranges.

39. We therefore dismiss this appeal.