



THE COURT OF APPEAL

[275/19]

**Birmingham P.
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

RICHARD BOURKE

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 13th day of November 2020, by Mr Justice McCarthy:

1. This is an appeal against severity of sentence. The appellant entered a plea of guilty to all counts on an indictment against him *viz*- count 1, Criminal Damage contrary to s.2 (1) and (4) of the Criminal Damage Act, 1991, count 2, Criminal Damage contrary to s.2(1) of the Criminal Damage Act, 1991, count 3, theft contrary to s.4 of the Criminal Justice (Theft and Fraud) Offences Act, 2001 and count 4, also an offence of criminal damage.
2. Sentencing took place on the 22nd of November 2019. A sentence of eleven years imprisonment was imposed on the appellant in respect of count 1, with a concurrent sentence of eight years imposed on count 2. Each sentence was back-dated to the 28th of February 2019. The final three years of the sentence on count 1 was suspended on conditions. Counts 3 and 4 were taken into consideration. The headline sentence arrived at by the trial judge was of one of eleven years in respect of count 1, and the mitigating factors were taken into account by way of suspension. The focus, obviously, has been on the sentence for the arson of the home of the Griffin family (count 1).
3. An initial sentencing hearing took place on the 8th of October 2019. Inspector Gavin Ross gave evidence that Mr John Griffin, a member of An Garda Síochána was at home when he and his wife were awoken by the activation of a smoke alarm and flames were seen outside the front door area. Mr Griffin and his wife were able to extinguish the flames. Outside their home Ms Kathleen Griffin saw a car with a single occupant- the appellant. A smell of petrol was detected at the hall door area and smoke and fire damage were noted. At the time Mr Griffin was on sick leave. The appellant was later seen by two Gardaí in a car on Sycamore Road. He told them he had had an argument with his girlfriend and was sleeping in his car. The Gardaí later received a report of a car on fire at 64, Hampton Wood; it belonged to Mr Raymond Trapp. The Gardaí then received a report that at a petrol on Glasnevin Avenue a driver had driven away without paying for a measure of

petrol to the value of €30.00. Finally, on the 27th of February 2019 a vacant house known as Swan's Cottage was damaged by fire. CCTV footage later linked the car which carried the man to the Cottage to the offence at Detective Garda John Griffins home and to the theft of petrol. On the 28th February 2019 it was parked outside 28, Sycamore Road, when on foot of a warrant, the Gardaí arrived at that address. The appellant was arrested and taken to Finglas Garda Station where he was interviewed on four occasions.

4. In the first interview, the appellant said that an initial attempt to set a small fire was followed by his return to the door with petrol which exploded when thrown on the flames. He said he had been driving about with little or no sleep and that because of drink he had a blurred memory of the days in question. He asserted that he had been sober in the months prior to the offence but had suffered health issues and been hospitalised. He told interviewing Gardaí he had "gone back on drink", a number of days before the offences. He was also quoted as saying he had taken too much cocaine. He explained that he had been acquitted of a murder charge in which Detective Garda Griffin had been a witness years earlier. He also asserted that he had no intention of harming anyone and that he did not know what he was doing. He stated that, effectively, if sober he would not have acted as he did and that his conduct was out of character. He claimed he had been a "few minutes" at the house but in fact the whole event had taken longer than that given that he had returned to it. He further claimed that it was in drink that he was brazen enough to drive by it again. In the second interview the appellant referred again to alcohol. In the third, he explained how he had been told some time before that a Mr Trapp had stolen something from his partners home at the Sycamore address and that this explained the attack on Mr Trapp's car. At his final interview the appellant was shown CCTV footage. He identified himself and the car which he was driving outside the Griffin's home. He stated that "he didn't realise how quickly the fire would go up". With regard to the vacant premises when shown CCTV footage he admitted the offending.
5. The appellant has 54 previous convictions, 23 for road traffic offences. His most recent conviction was one under s.2 of the Criminal Damage Act 1991 on the 10th of January 2019. He received a €250 fine in the District Court. He has one conviction under s.15 of the Misuse of Drugs Act dating from the 8th of July 2014 when he received a three-year suspended sentence at the Dublin Circuit Court. He has fourteen convictions under s.4 of the Criminal Justice (Theft and Fraud Offences) Act dating from the 10th of November 2011 when he had again received a three-year suspended sentence at the Dublin Circuit Criminal Court. He has one conviction under s. 13 of the Criminal Justice Act 1984 dating from the 13th of July 2006, in the District Court, where he received the benefit of the Probation of Offenders Act, and one under s.3 of the Non-fatal Offences Against the Person Act 1997, on the same date at the same court similarly dealt with. He has one conviction also under section 9(1) of the Firearms and Offensive Weapons Act 1990, dating from the 26th of March 2002 when he received a three-month suspended sentence in the District Court. He also has a number of convictions for offences under the Criminal Justice (Public Order) Act, 1994 in respect of which various fines were imposed and community service orders made , and finally, one under the Larceny Act ,which was taken into consideration on an unidentified date .

6. Three Victim Impact Statements were read to the trial court. Garda John Griffin stated that he reared his family of three children at 193, Jamestown Road. He outlined the adverse effect on him, which is long term. Security devices have rendered his home a fortress. He regards the attack as one on him due to his occupation. The family now feels less safe. His daughter is fretful of allowing her children stay over. He needed to change his work assignment. He suffered additional discomfort to his knee (his sick leave was for treatment to it) because he rushed to the fire seat. He was prescribed anti-depressants. He attended cognitive behaviour therapy. He stated he had no bitterness towards the appellant. Mrs Kathleen Griffin, upon whom the offence has similarly had grave ill-effects, outlined the drastic effect of the offence on her family life and her disbelief that an event twenty years before could result in what occurred. She too regretted the extra security measure taken at the home. She explained that the street in which the appellant's home is located can be seen from her back garden. She is now cut off from her neighbours. Her sleep is upset. She regrets the loss of visits and sleepovers with her grandchildren. Finally, Ms Karen Griffin set out that she had been bullied as a child as her father was a Garda and now she fears for her safety.
7. At the sentencing hearing the appellant's status in prison was described as enhanced. He had no "P19s" (reports pertaining to ill-discipline). A comprehensive Probation Report was presented to the trial court. This deals with the appellant's family and personal history-factors which were ultimately relied upon in mitigation. References are made in it to the appellant's history in terms of mental health, his addiction issues and what was characterised as his unresolved childhood trauma. He was subject to violence by both parents and ultimately after their deaths when he was thirteen he went to live with his maternal grandparents. The death of his partner and his grandmother had serious effects upon him. His drug use apparently began when he was fifteen years of age and apart from alcohol extended to cocaine and ecstasy (consumption thereof were relevant to the events of the night in question). There is no doubt that having regard to his upbringing, which appears to have been utterly dysfunctional, and his addiction issues that he is someone who made great progress in life, extending to the fact that he appears to have been a good family man (he has five children), has a good history of employment and took what was effectively a third level qualification as a fitness instructor. He is to be commended for his efforts but equally he has shown quite extensive disregard for the criminal law as evidenced by his previous convictions and accordingly the mitigating factors in this case do not extend to previous good character.
8. The Report confirms he had completed 240 hours of Community Service Order requirements in a satisfactory way on at least three occasions in 2004 and 2006 and the Probation Officer noted "he had demonstrated an ability to engaged in therapy as a means of gaining greater empathy for self and in turn others". His grandparents helped him to cease diamorphine abuse. However, he then moved on to alcohol, cocaine and so called ecstasy. He had, he reported, attended an alcohol awareness course at the Stanhope Centre, staying sober for four months. He related his offending to drug abuse. He also spoke of an episode of self-harm requiring stitches. He referred to bi-polar disorder and that he was receiving medication three times daily. The death of his partners

and later his grandmother had a significant impact on him. The Probation Officer noted he demonstrated a good level of awareness into his thought progress and actions at the time of offending. He acknowledged the need to abstain from intoxicating substances and to adhere to prescribed medication. He expressed an interest in engaging in therapy. The Officer states he needed to deal with his childhood trauma and the appellant agreed to put his name down for therapy as so recommended.

Grounds of Appeal

9. The appellant submits that the headline sentence set by the learned sentencing judge in respect of count number 1 was excessive and was based on a finding that the act was pre-meditated by the appellant which the appellant disputes;

And;

that the sentences ultimately imposed on the appellant in respect of counts 1 and 2 were excessive in all of the circumstances.

The issue accordingly is whether there was an error of principle by the trial judge because the sentences were excessive, and of course the imposition of an excessive sentence can itself constitute such an error. A number of factors are of course relevant to that issue, as contended in the submissions.

10. The appellant submits that the President erroneously took the view that there was an element of premeditation in the offending. The appellant submitted that this was a spontaneous course of offending by a person who was highly intoxicated following a domestic argument with his partner. He had taken illicit drugs and alcohol and ceased taking medication for his bi-polar disorder. He made no effort to disguise himself or conceal the use of the car. Other than purchasing petrol in an obvious fashion no other acts on the part of the appellant can be seen as premeditated. His splashing of petrol on the fire at the Griffin household was *post facto*. The manner in which the offences were carried out might be described as disorganised and amateur.
11. The respondent submits that the appellant's own explanation in interview for attending at the Griffins home contradicts the submission that the offence was not premeditated. This evidence supported the finding of premeditation made by the sentencing judge particularly in respect of count no.1. This offence incident took place at approximately 3.00a.m. The Griffins first became aware of a fire when Mrs Griffin woke to the sound of the smoke alarm whereupon she noticed smoke coming from the downstairs area of her house. It is also significant that CCTV footage gathered as part of the investigation showed the car driven by the appellant pulling up outside the Griffin home and shortly thereafter a small fire is started; when it did not take, the appellant can be seen getting out of the car again and approaching the house with petrol whereupon there was 'a big fireball explosion at the front of the house'. In interview, when the appellant was asked about why he had gone to that address, he answered '*because I know John Griffin and I know he lives there*', when asked if he had something against Mr Griffin, the appellant answered '*he had me up on a murder charge*', asked if he felt bad about that he said

'honestly, no, it was over 20 years ago, and I'd been chatting to him in the Willows pub, I was found not guilty, I was over it, it was like a "fuck you"'. Further, the respondent submits that it is significant that CCTV footage showed that after the fire had started and the Griffins were trying to extinguish it, the appellant returned in his car and was staring at them before fleeing. The sentencing judge followed the accepted two-step approach to sentencing and in doing so identified the relevant aggravating factors whilst also giving credit for the mitigating factors present in the case. The sentence imposed reflected the very serious nature of the offences and took account of all of the relevant mitigating factors.

Discussion

12. It seems to us that on any view the offence of arson in relation to the Griffin family home was very serious. The first point, of course, is that it was just that – a family home. The offence took place during the small hours of the morning when the family were in bed. In the light of what was done it is obvious that they were placed at grave risk of serious injury or worse had the fire spread from the area of the front door throughout the dwelling. It must have been in contemplation that they were asleep. It was fortunate that there was a fire alarm which awakened Mrs Griffin – she smelt burning and when she went downstairs and saw the fire. Apart from the risk of serious injury or death, the intrusion into the home and the damage done, Mr Griffin is a Detective Garda and the damage was caused because of a direct link with the appellant in the course of his duty – he had been engaged in a criminal investigation of the appellant for a serious offence some twenty years previously. The families of a member of an Garda Síochána ought to feel secure, to say nothing of a Garda himself, in their own homes against any criminal conduct by someone who has had contact with a Garda in the course of his duties.

13. Various factors, sometimes conflicting, must be taken into account in the sentencing process. It goes without saying that major emphasis must be placed upon the principle of general deterrence and indeed retribution in respect of offences in such circumstances as here. It is plain from what the judge said that she weighed and considered the matter carefully and had due regard to any and all mitigating factors including the fact that the appellant had pleaded guilty at the earliest available opportunity (he came forward to the Circuit Court on a signed plea), his difficult childhood, the enormous progress he made notwithstanding that, his advancement to third level education, very good work record, mental health difficulties and a commitment to his family, as well as, it appears, difficulties with alcohol and drugs. The core issues (summarised by Mr Ray) which conduced towards a lower sentence were the plea of guilty the work record the fact that he was good family man, the fact that he had difficulties with alcohol and drugs and his personal history. Mr Ray said that whilst general deterrence was relevant a higher premium was placed upon it in the sentencing process then should have been the case; to put the matter in another way, he contended that the balance was wrong. He emphasised also the fact that in his contention the judge was wrong to come to the conclusion that there was premeditation and further submitted that it was one what one might describe as an “alcohol and drug fuelled” event.

14. We do not accept that there was any error on the part of the trial judge in identifying an element of premeditation inasmuch as the appellant seems to have held a grudge for many years against this Garda officer and on the night in question planned the matter at least to the extent of purchasing petrol. The trial judge also made provision for the appellants reintroduction into society and rehabilitation by suspending a portion of the sentence. The sentence is certainly one which could be characterised as lenient, if not unduly so. Were the Court to have held that the sentence on count 1 was excessive and we were re-sentencing we would have found it necessary to re-sentence on count 2 also, but in the event this is not so.

15. The issue has arisen of quashing the sentences and increasing the term of imprisonment, as we are entitled to do, but with some hesitation we have decided merely to dismiss the appeal.