



THE COURT OF APPEAL

Record Number: 321CJA/18

**Birmingham P.
Edwards J.
Kennedy J.**

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

DAVID BERNEY

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 4th day of March 2021 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s.2 of the Criminal Justice Act 1993, seeking a review of sentence on grounds of undue leniency. A sentence of eighteen months' imprisonment, wholly suspended was imposed on the 30th November 2018 in respect of one count of burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
2. This Court heard the appeal on the 2nd March 2020 and, on that date indicated that the sentence imposed was unduly lenient, but as there was significant evidence that Mr Berney had availed of the opportunity given to him by the sentencing judge, we deferred re-sentence for one year. We now give reasons for our decision and will re-sentence Mr Berney accordingly as of today's date.

Background

3. On the 2nd of March 2018, the Centra Store in Kiltalown Way in Tallaght was the subject of a burglary. There were severe weather conditions at the time which included heavy snowfall. Gardaí became aware that persons were using a con saw to gain access through the shutters of the shop. Due to the weather conditions the gardaí had to procure the use of a jeep. They got a certain stage up the road when they had to abandon the jeep and proceed on foot. On arrival, there were approximately 15 to 20 people present, and there was a hole cut in the shutters. A number of people came out and ran away, there was a crowd shouting "garda, garda". The gardaí were met by a male in the shop wielding a sledgehammer. They went in towards the cash office where

they found the respondent and another man hiding in the cash office. The respondent didn't offer any resistance and he was arrested. CCTV outside the shop showed the respondent entering about a minute and a half before gardaí arrived. The respondent pleaded guilty to the count on the indictment on a full facts basis.

Personal circumstances of the respondent

4. At the time of sentencing the respondent was 36 years old. The Court heard that he has two children. The respondent has 29 previous convictions, several of which are road traffic convictions. Relevant to the present offence, he has a previous conviction for burglary from 2003 and a conviction for robbery in 2001. At the time of commission of the offence in question the respondent was on bail for another burglary offence.
5. The Court heard that the respondent had a history of substance abuse from a young age. A probation report was furnished to the court which indicated that the respondent displayed a willingness to work on his rehabilitation and has undergone drug treatment whilst in prison.

The sentence

6. The respondent was sentenced in respect of two burglary counts. On the first count, which does not form part of this appeal, a sentence of two years was imposed. On the second count, a sentence of eighteen months' imprisonment consecutive was imposed, this sentence was suspended in its entirety.
7. The judge identified the aggravating circumstances as follows:-

"It's aggravating that the accused was on bail on the on one offence when he committed the other. However, this is dealt with by imposition of a mandatory consecutive sentence, so I'm just noting it, but the mandatory consecutive sentence deals with that issue. I take into account the accused was in the cash office. He wasn't just running in grabbing some items of the shelf, he was in the cash office, but I take into account the person with the sledgehammer was in the leadership role and the accused had not completed any theft. In relation to whether there are any previous convictions for burglary there is one but it's of some antiquity and it was dealt with presumably by the District Court imposing a €200 fine, so I'm not attaching any weight to that."

In terms of mitigating factors, the judge noted the following:-

"The mitigating circumstances are I take into account his age, he's 36. His personal circumstances, he has a four-year-old son and a partner who is and they have another child on the way. In relation to bill 621/18, I take into account that was an early plea... I take into account the accused comes from a good family. His parents are in court. Mr Patrick Skelly, who has written letters, is in court. I take into account the behavioural and psychological problems the accused has faced. I take into account the positive aspects of the probation report. In mitigation... In relation to the burglary of the commercial premises, the shop, I take into account that that was unattended. The burglary of the Centra was opportunistic and the

accused didn't give any difficulties when he was arrested, and the arrest was in a situation where it was going to take a considerable time before transportation arrived and there were a group of people in the vicinity. I take into account the accused is drug free now. I take into account he was a drug addict at the time. He's completed his junior certificate in mathematics in prison. I take into account his letter of remorse, the letters from Coolmine. He's almost completed the Coolmine course. I take into account the letters from Karen Carter, Patrick Skelly, the certificates and the care after prison letter."

8. In placing the offending at the lower end of the range, the judge nominated a headline sentence of two and a half years' imprisonment which he reduced to a sentence of eighteen months, imposed on a consecutive basis. Having regard to the respondent's efforts to rehabilitate himself and in light of the content of the probation report he suspended the final eighteen months on terms.

Submissions of the parties

9. In essence, the Director says that while no issue is taken with the headline sentence or the reduction afforded for mitigation, the judge erred in wholly suspending the sentence. It is said he took account of factors in mitigation and again in suspending the sentence.
10. It is submitted that while the judge acknowledged that the respondent was on bail for another burglary offence when he committed the within offence and stated that this would be reflected by a mandatory consecutive sentence, this was undermined by the suspension of the consecutive sentence and therefore there was no real acknowledgement of this aggravating factor.
11. Reference is made to the dicta of Edwards J. in *The People (DPP) v. Byrne* [2017] IECA 97 where several factors were considered in the context of a wholly suspended sentence.
12. The applicant contends that the judge failed to properly consider the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender.
13. In relation to the circumstances of the offender, the applicant accepts that there were a number of positive factors but there were also negative factors including the respondent's previous convictions and the fact that the offence was committed while on bail.
14. It is accepted on behalf of the Director that the judge was entitled to consider again the rehabilitation of the respondent and the comments in the probation report but it is said that the judge afforded excessive weight to those factors.
15. In reply, it is said that the judge gave appropriate consideration to all of the factors and found reason within the mitigating factors both to reduce the pre mitigation sentence and to suspend it on conditions promoting rehabilitation.
16. The respondent submits that the criticism that the imposition of a suspended sentence does not amount to an adequate recognition that the offence was committed while on bail

is misplaced. It is in the analysis of the headline sentence rather than the final sentence imposed that one must consider whether the judge assigned sufficient weight to this aggravating factor.

Discussion and Conclusion

17. While the respondent relied on the written submissions, Mr Cole BL for the Director emphasised three points in oral hearing. Firstly, the contention of double discounting on the part of the sentencing judge, secondly, the issue of general deterrence and, thirdly, whether, in suspending the entire sentence, the judge had regard to the fact that committing an offence on bail is an aggravating factor and one for which the Oireachtas has mandated a consecutive sentence. Therefore the Director says that a wholly suspended sentence does not reflect the intention of the Oireachtas.
18. The Director's case is that notwithstanding the mitigation present, the respondent should have been required to serve some time in custody, and that to suspend the sentence in its entirety constitutes a substantial departure from the norm.
19. Firstly, we do not accept that the judge engaged in double counting in suspending the sentence. In considering the second stage of the sentencing process in the context of a suspended sentence Edwards J. observed in *The People (DPP) v. Byrne* [2017] IECA 97:-

"In that situation a subsidiary issue arises for consideration within the second stage of the overall process, namely whether the suspension of the entirety of the sentence could be appropriate at all in the circumstances of the case, and some issues already considered in the first stage may again become relevant in the context of that subsidiary issue."
20. In the Court's view, this was a crime born of the opportunity which presented itself. Undoubtedly Mr Berney engaged fully with that opportunity, being found in the cash office of the building. The offence was committed while he was on bail for another burglary offence which constitutes a significant aggravating factor. The respondent also has a previous conviction for burglary, albeit of some antiquity.
21. In those circumstances, while the Director does not impugn the pre-mitigation sentence of two and a half years nominated by the judge, it is our belief that the headline sentence nominated does not adequately reflect the aggravating factors. Nor does it serve to operate to deter others from committing similar offences. While the respondent was certainly making efforts towards his rehabilitation at the time of sentence, and the need for specific deterrence may have lessened as a consequence, nonetheless the need for a sentence sufficient to serve as a general deterrent to such offending remained.
22. Insofar as the Director contends that as the offence was committed while on bail, and the fact that the respondent did not serve a single day for the offence does not reflect appropriately the provisions of s.11 of the Criminal Justice Act, 1994, it must be noted that a suspended sentence is nonetheless a sentence and therefore the terms of s.11 are not circumvented.

23. There were mitigating factors present for which the judge reduced the sentence downwards, in light of the factors present, we do not find an error in the reduction afforded.
24. Insofar as suspending the sentence in its entirety is concerned, in light of the considerable efforts made towards rehabilitation and the success of those efforts when sentence was imposed, we do not find an error in the judge's approach. The judge was entitled to exercise his discretion to structure the sentence so as to further the respondent's rehabilitation. The efforts made by the respondent while in custody serving the two-year sentence imposed on the first burglary count and from his release in November 2019 were considerable. He completed many courses while incarcerated and on release continued in his rehabilitation.
25. However, we are of the view that the judge erred in the headline sentence nominated and that the sentence did not mark the serious nature of the offending and the aggravating factors identified.

Decision on Undue Leniency

26. Therefore we are persuaded that the sentence imposed was a significant departure from the norm and consequently is unduly lenient. We will now quash the sentence imposed and proceed to re-sentence the respondent from today's date.
27. When the matter first came before this Court on the 2nd March 2020, we indicated that the sentence was unduly lenient, but in light of the rehabilitative efforts on the part of the respondent, we were of the view that it was in the interests of society and the respondent to defer the imposition of sentence for a period of one year to enable him to continue with his efforts.

Re-sentence.

28. We are gratified to see that by deferring this matter for a year, the respondent has indeed availed of the opportunity given to him. We have been informed that Mr Berney has not come to the adverse attention of the gardaí in the interim. Moreover, the probation report furnished to the Court is positive, however, there are some residual concerns. Prior to sentence in 2018, he had availed of supports to address his addiction issues, and while incarcerated continued with this process. On release, however, he availed of four of six counselling sessions, but it is concerning that he has yet to complete the remainder. Moreover, he has not followed through on the request to undergo urinalyses, due, it is said, to his concerns in encountering negative peers.
29. However, he was referred to the Tallaght Probation Project in February 2020 and was linked in with the Training and Employment Officer leading to his attendance with a Jobs Expo in March, resulting in training. He has now been offered full time employment. This is very positive indeed.
30. Sadly, the respondent's mother passed away in early 2021 and while this would previously have caused him to relapse into drug use, he did not do so.

31. He is a man who, in the probation officer's view, is genuinely remorseful for his criminal activities and drug abuse. Notwithstanding the absence of urinalyses, his probation officer is satisfied that he is making progress.
32. There is no doubt but that Mr Berney is making considerable progress in his rehabilitation and this Court is concerned to ensure that he continues to do so. In those circumstances we re-sentence him as follows.
33. In our view the appropriate pre-mitigation sentence is one of four years' imprisonment, we will afford a downward reduction of twelve months in light of the mitigating factors. The sentence is imposed on a consecutive basis. In light of his considerable and continuing efforts to rehabilitate himself and in order to ensure those efforts continue, we will suspend the three-year sentence in its entirety on the usual condition in the sum of €200.00 for a period of three years from his release date on the same conditions imposed by the court below save that he continue in employment and, should that come to an end, that he continue to engage with the probation service for the purpose of seeking re – employment.