



**THE COURT OF APPEAL**

**Edwards J.  
McCarthy J  
Kennedy J**

**Record No: CA202/2018**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**MARTIN CONROY**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 14th day of October 2019 by  
Mr. Justice Edwards**

**Introduction**

1. The appellant came before the Circuit Criminal Court sitting in Castlebar, County Mayo, on the 30th January, 2018, and pleaded guilty to both counts on an Indictment laid against him; the first being an offence of burglary contrary to s. 12(1)(b) and 12(3) of the Criminal Justice (Theft and Fraud Offences) Act 2001; and the second being the offence of impersonating a member of An Garda Síochána contrary to s. 60(1)(a) of the Garda Síochána Act, 2005. The maximum sentences which can be imposed for such offences are imprisonment for up to 14 years and for up to 5 years, respectively.
2. On the 12th June, 2018, the trial judge imposed a sentence of five years imprisonment on Count No 1, with the final eighteen months suspended for a period of eighteen months on condition that the appellant should, upon his release, undergo a residential treatment course, to be arranged by the Probation Service, to address his alcohol abuse, and further that he should submit to the supervision of the Probation Service for the duration of the suspended period. Count No 2 was taken into consideration.
3. The appellant now appeals against the severity of the sentence imposed on him.

**Background Facts**

4. On the 12th December, 2016, Mr Padraig Boland, a man in his seventies and the sole occupant of a residential property 104 Chestnut Grove, Castlebar, County Mayo, arrived home at around 6 p.m. to find the front door ajar and a sitting room window pane shattered. Mr Boland could see the appellant through the window, wearing a high visibility jacket. The appellant stated: "It's alright Sir, I'm a Garda". After asking for identification which was not produced, Mr Boland repaired to a neighbour's house to request that the real gardaí be telephoned. Mr Boland then witnessed the appellant walking away from the house and attempted to follow him but was unsuccessful in pursuing him as the appellant broke into a run.
5. Gardai quickly arrived on the scene, and the investigating member, Garda Noelle Barrett, spoke to Mr Boland on their arrival. It appeared that nothing of monetary value had been taken from the property. Gardai ascertained that an independent eye witness had

observed the appellant leaving the scene, followed initially by Mr Boland, and that this witness had recognised the appellant as being her friend's father's friend.

6. Gardai then went to a dwelling house at a nearby address and searched the property with the consent of the occupant. During this search Garda Barrett located the appellant hiding in a dog kennel at the rear of the house. The appellant was arrested on suspicion of burglary and was taken to Castlebar Garda Station where he was detained under s. 4 of the Criminal Justice Act 1984 for the proper investigation of the offence for which he had been arrested. He was interviewed while in detention and made full admissions to the offences with which he was subsequently charged and to which he ultimately pleaded guilty.

#### **Impact on Victim**

7. While nothing of monetary value was taken during the incident, Garda Barrett informed the sentencing court that Mr Boland, who lived alone, was very anxious after the incident and that he continued to suffer from anxiety.

#### **Appellant's Personal Circumstances**

8. The appellant was born in England on the 28th October 1973, and moved to Ireland in 2003, sometime after the deaths of his parents. The appellant has been a heavy drinker since he was in his early twenties. He is now in his mid-forties and unfortunately he suffers from Cirrhosis of the liver. He is estranged from his wife due to his alcohol issues and has a 12 year old daughter.
9. As regards the appellant's previous convictions, the sentencing judge was informed that he had 50 various convictions relating to burglary, public order, disorderly conduct, failing to appear in court, theft, trespassing, dangerous driving, criminal damage, and drink driving, all of which were dealt with in the District Court. His most recent convictions were at Castlebar District Court on 15/11/2017 in respect of four burglaries to business premises. He received sentences of three months on each, with the second third and fourth sentences, all to be served consecutively. The appellant was also sentenced for three burglary offences on the 26th September 2013 for which he received sentences of six months imprisonment, four months imprisonment and four months imprisonment to be served consecutively. However, the present case represents his first time before the Circuit Court on indictment.
10. It is apparent that much of the appellant's past criminality can be attributed to some extent to his alcoholism, a condition which began in his early twenties and steadily worsened after the age of 28, aggravated by the death of his mother. Although he acknowledges that he has a problem and has in the past made some attempts at recovery, these attempts can only be described as limited.
11. The sentencing court was in receipt of a Probation Report concerning the appellant, which categorised him as being at high risk of re-offending should he not address his risk factors, namely homelessness, unemployment, family factors and alcohol addiction. He was not suitable for Community Service as his issues with alcohol had not been addressed. He had previously been the subject of a Community Service Order but had

failed to adhere to the conditions on which it was granted. The report indicated that while probation supervision could support him, for it to be successful would necessitate a serious effort on his part to address his drinking. This could only be gained through a period of time in residential treatment. He had been referred to the Addiction Services within the prison where he was serving his sentences for the four burglaries in respect of which he was sentenced on 15/11/2017, for assistance and with a view to eventually accessing a place in residential treatment. The report records that the appellant has expressed readiness to address his drinking through a residential treatment program and that it is his hope that he will be offered the opportunity to do so following his release. It states, inter alia, that:

*"He is also concerned due to health issues, that unless he addresses his use of alcohol he will not get to see his daughter grow up. He mentioned that he has been diagnosed with Cirrhosis of the liver and this has been an eye-opener to him in terms of his future".*

12. A Prison Governor's report handed in to the sentencing judge indicated that he was receiving enhanced privileges, had not been the subject of any negative reports and was engaging well in work and education.

#### **Sentencing Judge's Remarks**

13. In passing sentence on the appellant, the sentencing judge commented:

*"In my view all burglaries are serious and they're particularly serious when the occupier, the owner, the inhabitant is at home or comes home as was the case in this situation. This elderly man whether he was at home or came home to be confronted by this man, the accused in his high vis jacket that is a seriously aggravating fact in and about the circumstances of this case. And it wasn't Mr Conroy's first effort at burglary. He has a considerable history and it's not to be undermined or gainsaid in any way by the fact that those convictions were in the District Court. He's 44 years of age and he has a history of going into premises that he shouldn't be on and that has to stop. And his response since he's been in prison, he may be an excellent prisoner but his response to the Probation Service either now or previously has been poor and he seems to lack, whether it's because of the drinking or otherwise, I don't know, he seems to lack real insight into his own situation. I mean for him to suggest that the way out at this stage would be to go to England and live with his sober uncle suggests that he's really not at the pitch of the game at all. So, there is a serious lack of understanding, lack of insight which is undoubtedly inhibiting the man's ability to rehabilitate himself. That may all be due to his alcohol abuse or it just may be due to general attitude to life. I don't know. But, this is a serious matter and his response to the Probation Service has been poor. So, I would measure a sentence in view of the aggravating factors of the person being present and having to meet, now admittedly there was no confrontation, but to be in your own house and to be met by an intruder is an appalling fact and it shouldn't happen to anybody. So, on those factors I would measure a sentence of five years. Now, the mitigating factors are there has been a*

*plea, there was no effort to confront or affront the householder and the accused has certain deep seated alcohol related problems which will have to be sorted out and he is resistant so far to having them sorted out. He hasn't really completed any of the courses he was sent on. He's moved, when he was sent to one centre he moved on. He never really stuck the course up to date. So, what I'll do is I will suspend the final 18 months of the sentence on condition that on his release he will be placed by the Probation Service in a suitable residential treatment facility for alcohol abuse and he will remain there until he completes the course otherwise he will be under the care of the Probation Service for that 18 months, keep the peace and be of good behaviour. And the sentence is backdated to the 17th of January this year".*

### **Grounds of Appeal**

14. The appellant appeals his sentence on the following grounds:

- i. The sentencing judge erred in law and in fact in imposing a sentence which in all circumstances is excessive and disproportionate. The sentencing judge failed to identify an appropriate and proportionate pre-mitigation starting point in sentencing the appellant.
- ii. The sentencing judge attached too much weight to the fact that the appellant has previous convictions for similar type offences.
- iii. The sentencing judge erred in law and in fact in assessing the gravity of the offence and failing to place the offence on a scale.
- iv. The sentencing judge erred in law in failing to give any or the appropriate weight to the mitigation put forward on the appellant's behalf and failed to balance adequately the mitigating factors against the aggravating factors. In particular the sentencing judge attached too much weight to the fact that the injured party was "confronted" in his home.
- v. The sentencing judge erred in law and principle in failing to place adequate value on, or give adequate credit or weight to the appellant pleading guilty at the first available opportunity.
- vi. The sentencing judge was excessive and/or unduly severe and/or disproportionate in imposing the sentence that he did. The sentencing judge erred in law in imposing a sentence solely for punitive and deterrent purposes

### **Submissions**

15. The Court has received detailed written submissions from both sides for which it is grateful, and these have been amplified in oral submissions.

### **Discussion and Decision**

16. The appellant has submitted that the sentence he received is disproportionate considering the gravity of the offence and his personal circumstances. We do not agree that the sentence was disproportionate in either respect.

17. To deal first with the assessment of gravity, we are inclined to accept that the headline sentence of five years was towards the severe end of what was permissible in terms of the sentencing judge's legitimate range of discretion, but we do not believe that it was outside of that range.
18. It is accepted on behalf of the appellant that any burglary of a home is a serious offence. However, he submits that the court over-assessed the gravity of the offence. Although the court did not specify where on the range of offences this case would fall, the headline sentence nominated indicates that the sentencing judge placed it towards the lower end of the mid-range.
19. Counsel for the appellant has referred us to a great many comparators, of which we have taken note, and has also sought to distinguish the appellant's case from the main guideline judgment on sentencing in burglary cases, namely *The People (DPP) v. Michael Casey & David Casey* [2018] IECA 121. It bears commenting upon that almost all the numerous cases put forward as comparators predate the Casey judgment, which served, in offering the guidance which it does, to recalibrate the approach to the sentencing of burglars prosecuted on indictment. To that extent, we regard the usefulness of the comparators put forward as being limited.
20. In *The People (DPP) v. Michael Casey & David Casey* [2018] IECA 121 we stated that the DPP had contended, and we agreed, that:

*“. . . factors that would put a burglary in mid-range, and more often than not at the upper end of mid-range, 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.*

*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*"

21. We went on to observe:

*"If a number of the factors to which reference is made are present, this will place the offence in the middle range at least, and usually above the mid-point in that range. The presence of a considerable number of these factors or, if individual factors are present in a particularly grave form, will raise the offences to the highest category. Cases in this category will attract sentences, pre-application of mitigation, above the midpoint of the available scale, i.e. above seven years imprisonment and often significantly above the midpoint. In considering the significance of a particular aggravating factor identified as present, it is necessary to view the significance of that matter in the context of the particular case".*

22. The appellant submits that none of the factors cited in Casey are present in the current offence; there was no degree of planning, the appellant was acting alone, it was not a targeted property in rural Ireland, the residence was not targeted as it was known the occupier was vulnerable, nothing of monetary or sentimental value was taken (although a window was broken). The dwelling was not ransacked, the dwelling was not entered knowing there was an occupant in the building and there was no violence threatened against the occupant. Counsel has submitted that in the absence of such aggravating factors to have selected a headline sentence of five years imprisonment was an error. It was submitted that this case involved offending conduct that was in the low range, and that, but for the appellant's previous convictions, it was one that could have been prosecuted in the District Court rather than on indictment.

23. We do not agree. Yes, it is true that many of the more egregious aggravating factors mentioned in the Casey judgment were not present in this case. However, there were several aggravating factors, as counsel for the respondent has pointed out. This was a burglary of a dwelling house, not of a business premises or a storage facility or other type of non-residential premises. One's dwelling is expressed in Article 40.5 of the Constitution as being "inviolable", and that it shall not be forcibly entered save in accordance with law. The premises were occupied in the sense that it was Mr Boland's residence, and the occupier was vulnerable elderly man living alone. While the break-in occurred during Mr Boland's temporary absence from the premises, it was ongoing when Mr Boland returned, and he was subjected to the traumatic and upsetting experience of finding that his dwelling was in the course of being violated. This gentleman is left with continuing anxiety and a sense of insecurity. It is true that nothing was stolen, presumably because the appellant was disturbed while effecting this burglary, but damage was caused to a window. While it is also true that there was no threatening confrontation, there was nevertheless an interaction between the occupier and the intruder. A serious aspect of the matter was that the intruder was wearing a hi-vis jacket and purported to claim that he was a Garda. This itself was a criminal offence and was the subject of Count No 2 on the Indictment. It was taken into consideration. For it to have been meaningfully taken into

consideration would have meant that the offender would not get a free ride but would receive a sentence somewhat higher than he might otherwise have received for the principle offence. This most likely explains why the headline sentence in this case was towards the severe end of the judge's range of discretion.

24. By far the most serious aggravating factor, however, was the appellant's numerous previous convictions for burglary, seven in all, coupled with his conviction for other crimes of dishonesty such as theft. His record apart from that would have meant that he was not entitled to put forward previous good character as a mitigating factor. With 50 previous convictions he would have lost any entitlement to mitigation for being of good character by application of the progressive loss of mitigation principle. However, it is by now well established that previous convictions for the same or a similar/related type of offending should be treated as an aggravating factor. In so far as burglary is concerned this offender is a recidivist with three previous convictions going back to 2013, and a further four previous convictions in 2017. He also has a previous conviction for theft. The sentencing judge was correct to treat these as a significant aggravating factor.
25. Taking the circumstances of the crime, including the aggravating factors that we have listed, and the fact that Count No 2 was going to be taken into consideration, we do not consider that a headline sentence of five years was inappropriate, and we find no error of principle.
26. The appellant also complains that he did not receive a sufficient discount for mitigation and, in particular, there was insufficient recognition of his resolve to reform and of his efforts at rehabilitation to date.
27. It was suggested that given the positive aspects of the Probation Report and the appellant's progress in prison indicating genuine reformatory effort, that the sentencing judge should have more effectively facilitated his continued rehabilitation. It was submitted that the sentencing judge erred in law and in fact insofar as he failed to sufficiently recognise the efforts made by the appellant towards rehabilitation, as well as the difficulties faced by the appellant.
28. Whilst the appellant concedes that his previous attempts at rehabilitation were lacklustre, he disagrees with the conclusions reached as regards the extent of his failures. He claims that after attending one AA meeting he concluded that it was not right for him, and that his residential treatment in White Oaks in Donegal on a previous occasion was complicated due to his lack of medical card. It was submitted that the sentencing judge was wholly mistaken in inferring that the appellant had not completed any of his courses, and that he moved after being sent to a centre. On this basis the appellant has submitted that the sentencing judge took matters into account which were not before the court.
29. It was further submitted that the sentencing judge failed to acknowledge that the appellant had felt pressured by his health issues to seek treatment, and that the sentencing judge erred in principle in disregarding the punitive and rehabilitative nature of a larger suspended sentence, as well as failing to have adequate regard to the

influence a residential treatment programme would have on the appellant in the immediate future.

30. It is also suggested that the appellant received insufficient discount for his plea. The appellant entered a plea at the earliest opportunity in accordance with s. 29(1)(a) of the Criminal Justice Act 1999, thus preventing any waste of State resources and of Garda time. The appellant gave no indication that he would ever be seeking a trial date, thus ensuring that his case would be dealt with as expeditiously as possible. The early guilty plea saved the injured party the anxiety, stress and experience of the criminal process in giving evidence, of having to come to court to face the appellant and of being subjected to cross examination. The injured party would have been aware from an early stage that the appellant had taken responsibility for his actions and had expressed remorse for his actions through his plea of guilty. The prosecuting Garda under cross examination confirmed the appellant's plea of admission of guilt on the day of the incident. The appellant accepts the plea was offered in circumstances where he had in effect been caught red-handed and there was a strong case against him but says that those factors should not have operated to negative the other considerations that have been mentioned.
31. The discounting for mitigation in the case, including incentivisation of continued rehabilitation was reflected by the suspension of the final eighteen months of the sentence. In practical terms this represented a 30% discount on the time which the appellant would have to serve, providing he adhered to the conditions on which his sentence was being partially suspended. We do not accept that there was insufficient recognition of the plea and his co-operation and find no error in that respect. In so far as rehabilitation is concerned, the extent to which a trial judge may see fit to reward progress to date and incentivise future rehabilitation is entirely within his discretion. However, we have said on several occasions that there must be a sound evidential basis for prioritising rehabilitation over the other recognised objectives of sentencing. In this case while there was some hopeful signs that the appellant may have finally resolved to address his behaviour, and to do so by seeking treatment for his underlying alcoholism, his track record in terms of actual progress to date was slight and the Probation Report was not very favourable in that he was not recommended for Community Service for the reasons stated therein, and it was indicated that he remains a person assessed as being at high risk of re-offending by reason of not yet having addressed his alcohol abuse. We do not accept that the trial judge took into account matters that were not before the Court. Rather, he considered in the round the full picture with respect to the appellant's alcoholism, his efforts to rehabilitate to date which on any view were limited and his stated desire to go into residential treatment. The evidence was that he has been referred to the Addiction Services within the prison system, and that he hopes to undertake a residential alcoholism treatment course on his release. The sentencing judge acknowledged this but felt he needed structure in his heretofore chaotic life, and we completely agree. Far from ignoring the recommendation of the Probation Service that he undergo residential treatment, and the appellant's express desire to do so, the sentencing judge, in suspending the final eighteen months of the sentence, made it a specific condition of the suspension that he should undergo residential treatment. We find no



error of principle in the sentencing judge's approach and consider that it was the appropriate one having regard to the state of the evidence.

32. In conclusion, we are satisfied that this appeal should be dismissed.