



THE COURT OF APPEAL

Record Number: 19/20

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DANIEL HOGAN

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 1st day of July 2020 by Ms. Justice Kennedy

1. This is an appeal against sentence. The appellant pleaded guilty to four counts including two counts of criminal damage contrary to section 2 of the Criminal Damage Act, 1991, a count of burglary contrary to section 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and a count of production of an article capable of inflicting serious injury contrary to section 11 of the Firearms and Offensive Weapons Act, 1990.
2. On the 5th February 2020, the appellant received a sentence of five years' imprisonment with the final eighteen months suspended on terms.

Background

3. On the 2nd September 2018, Gardaí received a call at 1:30 am of an incident occurring at Liffey Park, Mayfield of a male smashing the windows of vehicles and slashing tyres. On arrival at the scene, a grey Peugeot 206 was observed as having been damaged extensively. There was broken glass all over the road. Gardaí then became aware of two women standing outside 11 Liffey Park who identified themselves as Elizabeth O'Leary and Shanice O'Leary, mother and daughter. Shanice O'Leary had previously been in a long-term relationship with the appellant. They identified Daniel Hogan as having been the male responsible for the damage to the car. They also reported Daniel Hogan had gained entry to 11 Liffey Park and stood in the hallway while brandishing a metal bar which he later discarded on the green in front of the house. As a result of this report, an investigation was launched, forensics and other samples were taken, and later on that

same day the appellant was arrested and interviewed in relation to these offences. The appellant made no admissions and he later pleaded guilty on the day of the trial.

4. We have been informed this morning that notification of that plea was given to the Director of Public Prosecutions some days in advance of the trial. There were some limited amendments to the indictment.

Personal circumstances of the appellant

5. At the time of sentencing the appellant was 22 years of age. He has five previous convictions, the most recent being for an offence contrary to section 6 of the Public Order Act, 1994. He has one previous conviction for an offence contrary to section 3 of the Misuse of Drugs Act, 1977 and two other public order offences.

The sentence

6. In imposing sentence, the sentencing judge stated that in terms of mitigation he would take into account the plea of guilty.
7. In terms of aggravating factors, the trial judge stated as follows:-

“I think Shanice O'Leary who would know him well is correct when she says that whatever he thinks about having a problem with drink, he certainly has a problem with his attitude and that he is a very domineering, violent type of person which was shown to full extent on the night in question when he blaggarded this unfortunate girl and her mother in their own home in Mayfield. His behaviour was intolerable. He in effect put the windows in around them and it was only when they called the guards that he began to back off. He damaged not alone their house, but their car, and everything was done deliberately and he armed with an iron bar. I think this is a very grievous offence at the higher end of the scale so I think a sentence of five years is merited on the criminal damage, the burglary”

8. The sentencing judge proceeded to impose a concurrent sentence of two years in respect of the count of production of an article capable of inflicting serious injury. The sentencing judge suspended the final eighteen months of the five-year sentence on terms, leaving an effective sentence of three and a half years' imprisonment.

Submissions of the appellant

9. The appellant submits that the failure of the sentencing judge to set a headline sentence was compounded by the apparent difficulty to ascertain the sentencing judge's reasoning with regard to the final sentence imposed.
10. The appellant further submits that the sentence imposed was too severe taking into account all of the factors.
11. The appellant submits that the sentencing judge took the unwarranted view that the appellant was in a general sense as opposed to specifically on the night in question a domineering and violent person notwithstanding the fact that he had no previous convictions relating to assault or any other offences against the person.

12. The appellant submits that the trial judge seems to not have considered the appellant's previous record, his age at the time of offending, his display of remorse and his alcohol problem.
13. The appellant further submits that the suspension of eighteen months should not be discounted from a consideration of the sentence. For a person such as the appellant, with a problem with drink, having a partially suspended sentence hanging over him would have a more penal effect that perhaps in respect of other persons.

Submissions of the respondent

14. The respondent submits that the failure to state a headline sentence is not relevant in this case when the factors taken into account in sentencing are clearly expressed by the sentencing judge.
15. The respondent submits that the sentencing judge was justified in his characterisation of the offending as "a very grievous offence at the higher end of the scale" given the details of the offending on the night in question, the high level of damage done and the impact on the injured party.
16. The respondent submits that the sentencing judge was also justified in concluding that there was not much in the way of mitigation beyond the plea of guilty. Nonetheless, it is submitted that the structuring of the sentence, by suspending the last eighteen months of the sentence, was an adequate reflection of the matters of mitigation.
17. The respondent submits that the sentencing judge's view that the appellant had a problem with his attitude and that he was a domineering, violent type of person was consistent with the facts of the offences and reflected the view expressed by Shanice O'Leary after her long relationship with the appellant.

Discussion

18. The essence of this appeal is the contention that the judge failed to nominate a headline sentence and imposed a sentence which was too severe in the circumstances which necessarily incorporates the suggestion that the judge failed to take proper account of the mitigating factors and incorrectly assessed the gravity of the offences.
19. Firstly, insofar as the suggestion is made that the judge failed to nominate a headline or pre – mitigation sentence, as the appellant properly comments in his submissions, the absence of such a nomination is not necessarily fatal to an any sentence imposed. Whilst we have stressed the optimum approach to sentencing, as in *The People (DPP) v. Kelly* [2005] 2 IR 321, we have also stressed that this Court will look to the global sentence imposed.
20. It is true that in sentencing the appellant, the judge acknowledged that he had pleaded guilty, albeit that this was a late plea given that it was entered on the date of trial. The judge observed, in taking the plea of guilty into account as a mitigating factor that there was very little that could be said in favour of the appellant. We cannot disagree with this observation. It is the position that there was little to be said on behalf of the appellant;

indeed his own counsel recognised in the opening stages of his plea in mitigation on behalf of the appellant that "all I can say is he has pleaded guilty." It indicated on behalf of the appellant that he was remorseful and that in effect, he regretted his actions. In the circumstances we do not see any error in the judge's approach in recognising the pleas of guilty as being the primary mitigating factor.

21. It is said that the judge had scant regard for the appellant's expression of remorse, which it is contended was genuinely proffered to the sentencing court. However it is trite to say that the fact that the plea was entered at such a late stage tempers the genuine nature of an expression of remorse.
22. It is also said that the judge failed to take into account the appellant's age. It is correct to say that he is a young man, however we are absolutely satisfied, that while the judge did not specifically refer to the appellant's age, given the ultimate sentence imposed, that the judge, in imposing the sentence which he did, incorporated the appellant's youth.
23. The real complaint, it appears contended for by the appellant, is that the judge, while accepting that the appellant may have a difficulty with alcohol, went on to indicate that he had an attitude problem which, the judge in effect said was evidenced by his conduct on the night in question. Again it is very difficult to disagree with the judge's assessment of the appellant's conduct on the night in question. He entered a private dwelling, clearly deliberately and prior to doing so, he abused one of the injured parties, both physically and verbally. It was manifestly open to the sentencing judge to arrive at a conclusion concerning the appellant's conduct on the relevant date.
24. In the circumstances of the offending conduct, and the personal circumstances of the appellant, we are not persuaded that in suspending eighteen months of a five-year sentence the sentencing judge imposed a disproportionate sentence and thereby erred in principle.
25. Certainly it could be said that the sentence is a reasonably substantial one, but it is a sentence within the margin of appreciation afforded to the sentencing judge.
26. Finally, it is said that a partially suspended sentence is particularly penal for the appellant as he is a person with an alcohol problem. This we find to be a somewhat unusual submission. The fact that the sentence is partially suspended should act as an encouragement to the appellant to keep the peace to be of good behaviour during the currency of the sentence and assist in his future attempts to rehabilitate himself.
27. Accordingly we find no error in principle, the appeal is dismissed.