**THE COURT OF APPEAL**

**[68/20]**

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

**BETWEEN**

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

**RESPONDENT**

**AND**

**MARTIN MCDONAGH**

**APPELLANT**

**JUDGMENT (*ex tempore*) of the Court delivered on the 14th day of June 2021 by Mr. Justice McCarthy**

1. This is an appeal against severity of sentence. The appellant pleaded guilty to both counts on this indictment on the 15th of October 2019 at Waterford Circuit Court. Count 1 concerned a charge of burglary contrary to section 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and Count 2 concerned a charge of section 3 assault contrary to section 3 of the Non- Fatal Offences Against the Person Act, 1997 and on the 12th of March 2020 was sentenced to a term of seven years in respect of the burglary and two and a half years in respect of the assault to be served concurrently commencing on the expiry of the appellant's sentence for separate offences which was due to expire on 12th December 2020. His pleas of guilty were at an early opportunity.

2. On Tuesday the 14th of August 2018, at approximately 10.25 am, Mr Frank Dineen was returning to his home at 26 Stephen Street, Waterford. As he placed his key in the front door, he was pushed to the ground from behind by a male. He identified himself to Mr Dineen as 'Stephen'. As a consequence of falling he suffered two broken ribs. Mr Dineen sought to keep the appellant out by seeking to shut the door, but the appellant effectively forced his way in and stole an iPhone phone from a table that was just inside the front door. When Mr Dineen got to his feet, he left the house as he was in fear for his own safety. Mr Dineen was visually impaired and had the use of a white cane of the type used by those with such an impairment. He was heavily reliant on his mobile phone. Mr Dineen's neighbour, Mr Fitzgerald, was leaving his property when he noticed Mr Dineen standing on the footpath in a distressed state and he rendered him assistance and called the Gardaí.

3. Based on his description, Mr McDonagh was found later that day with the assistance of CCTV. On arrest he was conveyed to Waterford Garda Station and a search was conducted - Mr Dineen's phone was found. He was detained but was unfit for questioning due to intoxication – this is consistent with the fact that he was intoxicated at the time of the offences. At the interview which ultimately took place Mr McDonagh said he had no recollection of the incident.

4. Apart from his physical injuries there were significant adverse effects on the victim. Mr Dineen stated that:-

> *"Following the incident, I was afraid to leave my home. I was registered blind at the time. I have since had surgery which restored most of my sight, thank God. Right up to the present day, I am still very nervous and anxious in my own home. I have difficulty sleeping."*

He went on to say:-

> *"Since the attack, I have been too nervous to take my small dog for his walks, which was one of the big pleasures in my life."*

5. The appellant was 36 years old at the time of sentencing. He has a number of previous convictions, to the most serious of which we refer: on the 23rd of July 2019, he received a nine-month custodial sentence for a section 4 theft charge (he committed the offence on the 12th April 2019); on the 30th of July 2014 an 18-month suspended sentence in relation to criminal damage; on the 25th of February 2014 an 18-month sentence for robbery; on the 11th of February 2014 a suspended sentence for a burglary with, on the same date, a suspended sentence for theft; other suspended sentences for assault causing harm, robbery, theft and burglaries had been imposed on previous occasions. On the 5th of June 2003, he received a five-month prison sentence for burglary. There are a number of road traffic and criminal damage matters. He was also convicted in Dungarvan Circuit Court on the 1st of May 2002 of arson and received a one-year prison sentence. It was accepted that a large part of the appellant's offending is related to drug and alcohol misuse; he has what is described as an entrenched poly-substance misuse and alcohol misuse addiction type issue. Apart from expressing his remorse to the victim in evidence he is an enhanced prisoner and works as a cleaner in prison. He is in receipt of a methadone prescription.

6. At sentencing, the judge has this to say -

> *"I've no doubt that this offence was committed intentionally, not recklessly and not negligently, and this goes towards his culpability. And there are, in relation to the section 3 assault, aggravating features. The injuries sustained by an elderly gentleman, two fractured ribs and a vulnerable victim, a blind man who was using a cane at the time. The assault occurred when, presumably, with his visual impairment, the attention of the victim was given to concentrating on getting his key into the lock. So, as I say, he was assaulted from behind without warning and with no chance for the victim to defend or protect himself. The burglary is at the upper*

*end of the mid-range of gravity. And the appropriate headline sentence is nine years' imprisonment. In relation to the section 3 assault, this is at the upper end of the mid-range of gravity and the appropriate headline sentence is three and a half years' imprisonment.*

*In mitigation, Mr Roberts points to the early guilty plea and the addiction difficulties of the long drug and alcohol difficulties that Mr McDonagh has had in his life from teenage years. And he points to the fact that he has now achieved the status of an enhanced prisoner. He points to his remorse which he describes as genuine and the personal sworn apology given by Mr McDonagh. I note, however, that Mr McDonagh said in his apology that he was not trying to play down what happened, that he had no right to go knocking on that man's door. He clearly doesn't seem to have heard or doesn't wish to recall the fact that it wasn't a question of knocking on that man's door, it was a question of knocking that man down. So, that seems like a cynical attempt, to me, to do exactly what he says he's not doing: playing down the nasty assault of a man."*

7. The judge went on to say:-

*"For the mitigation on the burglary charge, I'm prepared to reduce the sentence by two years to seven years. And on the assault charge, I am prepared to reduce the sentence by one year, both sentences to run concurrently because I'm satisfied that the incident took place in the same time and place.*

*Now, in relation to Mr Robert's request that he be given an incentive to rehabilitate himself. Before a sentence can be suspended, it is quite clear that a prisoner must demonstrate efforts to deal with his substance abuse which would be the reason for rehabilitation in this case. And the suspension of part of a custodial sentence must be justified on evidence-based actions of which, in this case, I'm not satisfied that there are any to warrant suspension. In the probation report, the experienced probation officer states: "While Mr McDonagh appears to understand the link between his offending behaviour and his addiction, at this time, he has not progressed his plans to reduce his methadone or actively source residential treatment while in custody." I am not satisfied that he has reached the point in his life where, on release, he will change his ways."*

**Grounds of Appeal**

8. The appellant advances the following grounds of appeal:-

(i) The Trial Judge erred in setting a headline sentence on 9 years in respect of Count 1;

(ii) The Trial Judge erred in placing the offences in Count 1 at the upper end of the mid-range on the scale of gravity;

(iii) The Trial Judge erred in imposing a 7 year sentence in respect of Count 1 which was unduly harsh and disproportionate in all the circumstances of the case;

(iv) The Trial Judge erred in setting a headline sentence of 3.5 years in respect of Count 2;

(v) The Trial Judge erred in imposing a 2.5 year sentence in respect of Count 2 which was unduly harsh and disproportionate in all the circumstances of the case;

(vi) The Trial judge erred when setting sentence by double counting some factors as aggravating in respect of each separate count in this matter;

(vii) The Trial Judge erred in setting a sentence that was unduly harsh and disproportionate in all the circumstances;

(viii) The Trial Judge erred in failing to properly assess and weigh the aggravating and mitigating factors when setting proportionate headline sentences in respect of both counts;

(ix) The Trial judge erred in not suspending any portion of the sentence despite evidence of rehabilitation on the part of the Appellant.

9. There is a considerable overlap amongst the grounds of appeal and we will deal with them together. An appeal is not now being pursued in respect of the assault sentence; in truth the assault is effectively part of the *actus reus* of the burglary. The leading authority on sentencing is *DPP v Casey & Casey* [2018] 2 IR 337. The appellant submits that upon analysis of the authorities the Trial Judge incorrectly placed the burglary offence at the upper end of the mid-range of gravity, and subsequently set an excessive headline sentence: this is the primary point since if the headline sentence was wrong the post mitigation sentence is potentially in error as a consequence. While it is accepted that sentencing is not a process of mathematical certainty, it is submitted that the headline sentence set by the Trial Judge cannot be considered proportionate in light of the authorities to which we have been referred and submissions made on foot of them.

10. On the authority of *Casey*, mid-range burglary offences ought to merit pre-mitigation sentences in the range of four to nine years, and cases in the highest range to merit pre mitigation sentences in the range of nine to fourteen years. It has also been emphasised by this Court on a number of occasions that of course there may well be an overlap between the ranges and that one is not dealing with simplistic mathematical differentiations when identifying the ranges or where on a given range a particular offence falls, especially at the margins. A sentencing judge has a considerable margin of appreciation.

11. The following factors may place a given offence of burglary in the middle range if not in the upper end thereof:-

(i) A significant degree of planning premeditation;

(ii) Two or more participants acting together;

(iii) Targeting residential properties, particularly in rural areas;

(iv) Targeting a residential property because the applicant is known to be vulnerable on account of a disability or some other factor,

and

(vi) Taking a damaging property which had a high monetary value or high sentimental value.

12. Factors which might tend to place a burglary in the highest range of gravity may include:-

(i) Ransacking a dwelling;

(ii) Entering during the night a dwelling which was known to be occupied especially if the occupant was alone;

(iii) Violence used or threatened against any person by the occupier or anyone else in the course of the burglary;

(iv) Significant injury whether physical or psychological or serious trauma caused to a victim of the burglary.

13. The Court also there pointed out that previous convictions for burglary or kindred offences would also be an aggravating factor apart altogether from the loss of mitigation which might be involved by virtue of previous convictions.

14. It seems to us in this case a number of aggravating factors exist which justify the conclusion that this case was legitimately considered by the trial judge to fall within the upper end of the mid-range; in particular, there was a degree of premeditation, the appellant must have known of the victim's disability since he was carrying a white cane, he was targeted at, and entry was effected by force to, his home, he was significantly physically injured, he fled from his home due to understandable fear and has had not merely physical *sequelae* but psychological factors – his lifestyle has been adversely affected, for example, he no longer derives pleasure from taking his dog out for a walk. It is true that a judge could take a somewhat different view- in particular, the view that the headline sentence ought to have been lower but as we have said the judge has a margin of appreciation and we think there was no error of principle in the arrival at the headline sentence.

15. The appellant submits that the Trial Judge failed to have adequate regard to the mitigating factors present in the case although this was not his primary point; he further submitted that the judge ought to have suspended a portion of the sentence and that there was significant mitigation in the form of the entry of the early guilty plea, the accused's difficulties with substance abuse, his attempts at rehabilitation and his expression of remorse, with the outlined authorities evidencing that the presence of such mitigating factors may warrant a reduction in sentence. It is submitted that where all are present, this should be reflected in a significant reduction in sentence, certainly more significant than the reduction that ultimately occurred. It is also submitted that the Trial Judge did

not offer any assessment of the mitigating factors present in the case, merely stating he had taken them into consideration.

16. The respondent submits that the sentencing Judge was entitled to have regard to the demeanour of the witness in the witness box and the manner in which he gave his apology; it was said that the judge was in the best position to assess the credibility of the assertion of remorse and was not impressed thereby- he was not obliged to accept at face value the sincerity of the remorse in circumstances where the appellant claimed that he had no recall of the incident; the appellant said he had not seen the white cane. With this we agree. The Judge considered the question of rehabilitation in light of the Probation Report which highlighted the fact that the appellant, had failed to show a willingness to engage with the Prison Services in respect of rehabilitation. The Court was entitled to critically assess the submission that the appellant was at a crossroads in his life or the applicability of '*The Jennings Principle*' as submitted. The appellant was an offender who, on the basis of the Probation Report, was at a very high risk of re-offending.

17. It was also submitted that the Judge also erred in failing to incentivise rehabilitation by suspending some portion of the sentence. It is said that significant efforts had been made at rehabilitation by the appellant and it appeared that his offending could in some part be attributed to his prolonged drug use.

18. As to the latter point the respondent rightly submits that there must be an evidential basis for the suspension of part of the sentence, as sought by the appellant. In *DPP v. Jamie Coughlan* (Court of Appeal, *ex tempore*, 24th June 2019), Edwards J. noted:-

> *"Further, we note that the sentencing Judge sought to justify the suspension of the final two years of the post-mitigation sentence in part on the basis that it would serve to incentivise his rehabilitation. We have stated in the past that rehabilitation is an important objective in the sentencing process in which the Court must have regard. However, it is important to emphasise that before an intervention, involving going the extra mile, would be justified on the grounds of rewarding progress in one's rehabilitation to date and/or to incentivise future rehabilitation, there has be a sound evidential basis for so intervening. There has to be evidence of a real prospect of rehabilitation".*

This is also the position here.

19. We accordingly dismiss this appeal.