



THE COURT OF APPEAL

Record Number: 149/2021

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DEAN HOGAN

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 14th day of October 2022 by Ms. Justice Kennedy.

1. This is an appeal against severity of sentence. The appellant pleaded guilty to one count of criminal damage contrary to s. 2(1) of the Criminal Damage Act 1991, (count 1), one count of assault of a peace officer contrary to s. 19(1) of the Criminal Justice (Public Order) Act 1994, as amended by s. 185 of the Criminal Justice Act 2006 (count 2) and one count of assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997 (count 4). On the 18th March 2021, the appellant was sentenced to five years' imprisonment with the final 18 months suspended on count 1 and 3 years on count 2, count 4 was taken into consideration as was count 3 which concerned breach of a safety order contrary to s. 33(1) of the Domestic Violence Act, 2018.

Background

2. At approximately 8:45pm on the 19th July 2020, the landlady of a property in Birr, County Offaly was notified by the tenant of a neighbouring property of banging coming from inside her property. She attended at the property with her husband, knocked and rang the doorbell. The banging persisted and the landlord looked through the letterbox and saw a shirtless male who was later identified as the appellant herein. She shouted through the letterbox that she was going to call the Gardaí.
3. The property in question was home to the appellant's partner and their two daughters. The appellant had been released from prison on the 4th July 2020, and despite having a safety order against him, his partner had permitted him to reside in the property. On the afternoon of the date in question, the appellant's partner left the property with the children. During the course of the day, she received over 100 text messages and 75 missed calls from the appellant who was questioning the parentage of one of their daughters.
4. At approximately 9:30pm, Gardaí arrived at the scene and gained access to the property by climbing over a rear wall. On entering the property, they observed damage to internal doors, coffee tables, dining tables, chairs, kitchen units and appliances. In her statement to Gardaí, the landlady described the property as being "completely trashed." She estimated the total damage to the property to be approximately €1,550.
5. Gardaí originally thought the property to be vacant until they heard a noise coming from the attic. After carrying out an inspection of that space, the appellant was found unconscious and foaming from the mouth. He had to be resuscitated by Gardaí. An empty whiskey bottle was recovered. Once resuscitated, the appellant became violent and aggressive. He was arrested and brought to Birr Garda Station where he was deemed unfit for interview due to his state of intoxication.
6. The following morning, the appellant was brought to the doctor's room for the purposes of taking fingerprints. While in the doctor's room, the appellant made a phone call and became aggressive with the person he was speaking to on the phone. He made a run from the doctor's room towards Garda O'Gorman to try and hit him but was intercepted and restrained by Gardaí Treacy and O'Brien. Garda Treacy was restraining the appellant from behind and the appellant swung his head backwards, headbutting the Garda in the nose causing injury to his mouth and gums.
7. In interview, the appellant claimed he had no recollection of damaging the property or of his arrest. He further acknowledged that he was residing at the property with his partner, in breach of the safety order.

Personal circumstances of the appellant

8. At the time of sentencing the appellant was 24 years of age. He has 37 previous convictions including three previous criminal damage convictions and two previous convictions for a breach of a safety order.

9. The appellant's childhood was described by the sentencing judge as "highly traumatic" with the appellant having witnessed his father assaulting his mother throughout. His father passed away when the appellant was 15 years of age.
10. The appellant suffers from addiction issues.

The sentence imposed

11. The sentencing judge placed the offending at the upper end of the mid-range and identified a headline sentence of seven and a half years.
12. The judge considered the following factors as aggravating the offending conduct; the level of violence used, that the criminal damage was caused to a residence, that the appellant sent frightening and threatening messages to the injured party, the appellant's attempt to minimise the gravity of his offending, his prior convictions, that he is assessed at very high risk of reoffending and the impact of the offending on the victims.
13. The judge considered that it was "a hugely aggravating factor" that the appellant assaulted Gardaí acting in the course of their duties, this was the subject of count 2.
14. In terms of mitigation, the judge considered the appellant's early guilty plea, his cooperation with the Gardaí and his letters of apology to the Gardaí and to his partner. He observed that the appellant's mother paid the cost of the damage but felt that credit for this was due to her rather than the appellant. He also observed that she has endeavoured to encourage him in his rehabilitation. The judge further referenced the appellant's addiction problems, the psychological report, and his childhood difficulties.
15. In light of the mitigating factors, the headline sentence for the criminal damage count was reduced to five years' imprisonment. In order to incentivise his rehabilitation, the judge suspended the final 18 months of that sentence. A concurrent sentence of three years was imposed in respect of the offence of assault of a peace officer. The s. 2 assault offence and the offence of breach of a safety order were taken into consideration.

Grounds of appeal

16. While six grounds of appeal are filed, the appeal may be considered under the following three headings: 1) The Headline Nominated on Count 1, 2) Undue Emphasis on Aggravating Factors and 3) Inadequate Discount for Mitigation. Although, in truth, the gravamen of this appeal rests with the contention that the nominated headline sentence for the criminal damage offence was simply too high.

The Headline Nominated on Count 1

17. The appellant submits that the Psychological Assessment Report inaccurately refers to the appellant's failure to accept responsibility for the index offences and includes a reference to "physical abuse" inflicted by the appellant on his partner. It is suggested that these inaccuracies may have unconsciously coloured the sentencing judge's understanding of the facts of the offences and led to him mis-assessing the gravity of the offence in respect of count 1 at the upper mid-range of such offences.

18. Further, it is noted that criminal damage contrary to s. 2(1) attracts a maximum penalty of 10 years' imprisonment (120 months.) The appellant submits that the mid-range may be taken to encompass a period of 40 months to 80 months and therefore, the imposition of a headline sentence of seven and a half years or 90 months, falls beyond the apex for offences deemed to be within the mid-range and amounts to an error in law and in fact.
19. It is submitted that as a consequence of the headline sentence being set outside the upper mid-range, the final sentence of five years' imprisonment with the final 18 months suspended also amounts to an error.
20. In response to the appellant's suggestion that a reference to "physical abuse" in the psychological report may have been treated as an aggravating factor by the sentencing judge, the respondent submits that there is no basis for such a speculation as that issue was clarified with the judge before he gave his judgment. The abuse referred to was the trashing of the appellant's partner's home.
21. The respondent submits that in light of the aggravating factors in the case including that the appellant was in breach of a safety order at the time of the commission of the offending herein, the judge's assessment of the gravity of the offending was entirely reasonable and within the margin of a judge's discretion.
22. The respondent acknowledges that a headline sentence of seven and a half years' imprisonment falls outside what might be calculated as the upper mid-range on the application of strict mathematics but submits that sentencing is not an exercise of mathematics and notes that the judge in the present case was required to take into consideration an offence of breaching a safety order and a s. 2 assault offence perpetrated against a member of An Garda Síochána.

Undue Emphasis on Aggravating Factors

23. It is said that the sentencing judge erred in determining that the appellant's assault of a Garda acting in the course of their duties was a "hugely aggravating factor" in circumstances where it was accepted by prosecution that same was "definitely reckless." The appellant contends that the imposition of a three-year sentence in respect of this offence amounts an error in principle in that it fails to take into account the circumstances in which the assault took place.
24. It is the respondent's position that the sentencing judge was correct to acknowledge the seriousness of inflicting assaults on those who are tasked with the task of law enforcement. Prof. O'Malley on Sentencing Law and Practice (3rd ed) is cited as follows:

"Assaults committed against members of the police, prison staff, firefighters, medical staff in accident and emergency units and others providing essential public services are usually treated very seriously. As well as inflicting personal injury, assaults of this nature may render victims incapable of performing their duties and coming to the aid of people who urgently need their services. They may also have

the effect of dissuading others from embarking on careers as front-line service providers."

25. Further reliance is placed on the case of *The People (DPP) v Daniel Connors* [2018] IECA 144, which is quoted from as follows:

"It is important that the Courts should be seen to support the important role played by first responders who daily in their public service are called upon to face danger, such as in this instance that faced by the pursuing Gardaí who were shown callous disregard and were needlessly endangered by the appellant's conduct."

Inadequate Discount for Mitigation

26. It is submitted that the appellant was given insufficient credit for how he met the offences. In this regard, the appellant further suggests that the sentencing judge was led into error by the Psychological Assessment Report which took the view that the appellant failed to take full responsibility for the offending, which in turn led to him failing to afford the appellant an adequate discount for mitigation. It is submitted that the appellant did take full responsibility for the offences as outlined in the Probation Service Report.
27. It is contended that the judge afforded the appellant limited mitigation for his letters of apology on the basis that his remorse would not prevent him from reoffending and further, that the judge gave credit to the appellant's mother, who paid for the damage caused to the property, despite this being done on the appellant's behalf and at his behest. Moreover, it is submitted that the appellant's efforts to address his addiction while in custody were overlooked by the judge in imposing sentence.
28. Emphasis is placed on the appellant's early guilty plea. The appellant cites the case of *The People (DPP) v Melissa Whelan* [2018] IECA 142 as authority for the proposition that there should be a reduction of 25-30% for such pleas. It is, however, noted that the reduction applied in the present case was one of circa 33%.
29. The respondent points out that in line with the *Whelan* case, the appellant received a reduction for mitigation in excess of what is generally deemed appropriate.

Comparator Cases

30. A number of cases are cited by the appellant in support of their submission that the headline sentence of seven and half years was unwarranted in all the circumstances. Reliance is placed *inter alia* on *The People (DPP) v Stephen Barry* [2009] IECCA 66 in which the Court of Appeal suspended the final 12 months of the three-year sentence imposed for criminal damage on an appellant with 19 previous convictions and *The People (DPP) v Rosemary Jones* [2019] IECA 51 in which this Court substituted a sentence of two years' imprisonment with the final 6 months suspended in place of a sentence of three years' imprisonment for criminal damage estimated at €10,000.
31. The respondent relies on *The People (DPP) v Enda Gavigan* [2022] IECA 94 which involved similar offending to the offending herein. The respondent notes that the finalised

net sentence imposed by the Court of Appeal in *Gavigan* exceeds the appellant's sentence by 18 months.

Discussion

32. The real issue in this appeal rests with the nominated headline sentence on the criminal damage count. It is said that in all the circumstances of this case, the headline nominated is simply too high and that this in itself amounts to an error in principle. The range of penalty extends from that of a non-custodial option to that of 10 years' imprisonment; the judge identified a notional headline sentence at the lower end of the upper scale being that of 7 ½ years whereas the appellant indicates that the judge had originally nominated the notional sentence as falling at the upper end of the mid-range and fell into error in ultimately nominating the sentence he did. The Director says the aggravating factors present merited such a headline sentence.
33. It is the position that there are many aggravating factors present which, of course, include the appellant's previous convictions for criminal damage. The damage to this premises was to a value of €1,550 and occurred in a dwelling house. Fortunately, the injured party was not present at the time of the incident.
34. The Director urges on this Court to take account that the pleas were entered on a full facts basis and took into consideration counts 3 and 4 being the offences of s.2 assault and breach of a safety order. However, the order of the court below indicates the imposition of a standalone penalty for the offence of criminal damage, and it seems that the above counts were taken into consideration with the penalty imposed on count 2, being the assault of a peace officer. Arguably therefore, when nominating the pre-mitigation sentence on count 1, the judge did not take into consideration counts 3 and 4.
35. When we look at the aggravating factors of which the judge took account, it is clear he had reference to phone and WhatsApp messages to the injured party which he said were aggressive and threatened damage to the house. However, there is no evidence on the transcript regarding the content of such messages, and therefore the judge could not take that into account absent evidence. Whilst there may well have been such messages, evidence is required before a court may take matters into consideration as aggravating offending conduct.
36. In the circumstances of the present case, while there are many aggravating factors present to include 3 convictions for criminal damage, and the impact on the victim, we are persuaded that the headline sentence nominated was too high and that this amounts to an error in principle, however, before we take any further steps, we will address the other aspects of this appeal.
37. Insofar as it is said on behalf of the appellant that the judge erred in identifying as an aggravating factor that an assault was perpetrated against a member of An Garda Síochána, we are satisfied that this was an error in principle in that a court may not take as an aggravating factor an element of the offence which is intrinsic to the offence in question. However, we are satisfied that whilst this was an error, it is not of such

substance so as to justify intervention by this Court. The ultimate sentence imposed for this offence was well within the margin of appreciation afforded to a judge.

38. No real issue is taken with the reduction afforded for mitigation resulting in the ultimate sentence on the criminal damage count of 5 years' imprisonment with the final 18 months suspended to encourage the appellant's rehabilitation, such suspension being for a period of 10 years. Issue is taken with the operational period of the suspension, being that of 10 years.

Decision

39. In conclusion, we are satisfied that the judge erred in nominating the headline sentence of 7 ½ years on the criminal damage count, however, when we consider the ultimate sentence imposed by the judge, that being 5 years with 18 months suspended to encourage rehabilitation, we are of the view that if this Court were to quash the sentence, we would find ourselves in the position when re-sentencing of imposing a sentence in the same terms as the court below. The only aspect where we would differ from the sentencing judge is in terms of the period for which the final 18 months of the sentence was suspended. We consider that the suspension for a period of 10 years is not proportionate when one considers that portion of the sentence which may fall for consideration as to re-activation should that arise is one of 18 months. Moreover, the length of the operational period of a suspended sentence must be proportionate in the distributive sense and there should be a reasonable prospect of compliance on the part of the offender. In the circumstances, 10 years is too long.
40. We will intervene but only to a very limited degree. In order to re-structure, we quash the sentence imposed on the criminal damage count but reimpose the same sentence as in the court below. However, while we order that the final 18 months of the sentence is suspended on the same conditions, the operational period will be for a period of 3 years.