



THE COURT OF APPEAL

Record Number 118/2017

**Birmingham P.
McCarthy J.
Hunt J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

rESPONDENT

- AND -

STEPHEN BROPHY

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 25th day of October 2018 by Mr. Justice McCarthy

1. This is an appeal against a sentence of imprisonment imposed on the accused at Nenagh Circuit Criminal Court on the 20th April, 2017 in respect of offences of violent disorder contrary to section 15 of the Criminal Justice Public Order act 1994 and assault causing harm contrary to Section 3 of the Non-Fatal Offences Against the Person Act 1997. A sentence of four years was imposed in respect of the former and three on the latter. The learned sentencing judge suspended the last two years of that accumulative period on terms *inter alia* that the accused would enter into a bond to keep the peace and be of good behaviour during and for a period of seven years and further would not approach a member of what was described in the order as the McCarthy family, except by expressed friendly invitation and in a friendly manner. The sentence commenced 28th April though the accused was then serving a sentence of eight months' imprisonment.

2. This prosecution ultimately arises as a result of what has been described as a feud between two families' resident in Ashbury View Roscrea Co. Tipperary. At the relevant time a deep hostility between the members of what are described as the McCarthy/O'Donohoe family and the Hutchinson/Marshall family existed. An incident had occurred on the 30th January, 2015 and when the Gardaí attended at Ashbury View, they were approached by members of the Hutchinson/Marshall family who told them that they had been attacked by the McCarthy/O'Donohoe family and that the latter had retreated into their home at No 1. Ashbury View; the Hutchinson/Marshalls live at No. 4. At this point a large number of persons came out of No. 1 with weapons including slash hooks, iron bars axe handles and timber stakes. What one might describe as a riot took place for an hour or, an hour and a half thereafter; the Gardaí who originally attended the scene were placed in great danger in attempting to separate the warring factions and they required assistance from other garda stations. They succeeded in calming the situation, but many items were thrown, there was much name calling and what is described as "baiting" by each side of the other to fight.

3. A similar event occurred subsequently on the 20th June from which the charges against the appellant arise; similarly, the Gardaí on arrival at the scene observed that the McCarthy/O'Donohoe premises and their cars had been damaged and some members of that family were described as being severely injured, they were highly aggressive, they demanded that the Hutchinson/Marshall family come out and fight; the latter did so, they were armed with missiles, there were again many insults.

4. The Gardaí attempting to separate the protagonists were placed in grave danger because of the extent to which missiles were thrown. Again, the Gardaí had to seek assistance from colleagues.

5. The McCarthy/O'Donohoe family were described as being at one stage in an uncontrollable rage, they blamed the other side for what they thought was perhaps the fatality in the case of their grandmother. The events took up to two hours before the Gardaí succeeded in calming matters.

6. In the course of the incident on the 20th July, the accused, a member of the Hutchinson/Marshall faction, threw a pitchfork at the McCarthy/O Donohoe faction, this bounced on the ground and the forks struck Sharon McCarthy in the lip and chin area, she was removed to hospital and subjected to surgery. In the result she has a scar on the lip and downwards towards the chin; this is visible; and it is a source of great upset and embarrassment to her to put the matter no further.

7. It is accepted by the prosecution that the pitchfork was not aimed at anyone in particular amongst the McCarthy/O'Donohoe group but rather by chance struck her. Because of the injury and the nature of the item however it is manifest that the conduct of the accused was in an especially serious category and he was described as being stripped to the waist.

8. Between the time when the matter first came before the Circuit Court in a series of sentencing hearings and at the suggestion of the learned Circuit Court Judge an attempt was made to engage in mediation so that the once good relations which had existed between the families might be restored.

9. The accused's relationship with the families however has come to an end, he was in prison at the time of the mediation efforts and he now lives in Dublin with a different partner and child. We think we can conclude that he will have no further involvement with either side or with Roscrea of which he a native.

10. There are nineteen accused in the present case; it is not clear to us whether or not some or all, with the exception of the present accused, were present only for the incident which gives rise to the present case but certainly those sentenced on the same

day were. We are told that the matter was dealt with in what has now come to be called "modules".

11. All the accused pleaded guilty. In any event fourteen persons and the accused were sentenced on the same day. While sentences of imprisonment were imposed on these fourteen they were in each case suspended and they range from sentences of three years to six years.

12. In general observations prior to dealing with each accused individually the learned Circuit Court Judge had described the assault causing harm charge as being "in the top range", he also described the appropriate headline sentence for the violent disorder as being five years and for assault causing harm four years.

13. A number of the persons involved had a significant number of previous convictions, and whilst we do not have precise details, it appears that one Fintan Marshall was serving a three-year sentence for assault causing harm when sentenced in the present case and he was described as having a "bad criminal record".

14. The nearest approximation to offences with the degree of seriousness of those of the accused arose in his case. He had received the benefit of a number of suspended sentences in respect of prosecutions under the Misuse of Drugs Acts and a number of assault charges. It will be seen from the judgment that considerable emphasis, perhaps decisive, was placed by the learned Circuit Court Judge on the previous convictions of the accused. In the course of the hearing, the grounds of appeal were distilled into a complaint that there were errors in principle on the part of the learned Circuit Court Judge in making the sentences consecutive in light of the fact that both offences arose out of the same transaction, having regard to the disparity between the sentences imposed upon him and the co-accused and that he failed to have proper regard to the totality principle.

15. We think that these criticisms are well founded; it would be uncommon although it is lawful, for a Judge to impose consecutive sentences arising from the same transaction. We are satisfied however, that this is not a case in which this should have been done, because in truth, the assault was merely one act by the accused in the course of his extensive activity being similar activity to the co-accused on the occasion in question.

16. We think that the difference in his position by virtue of his previous criminal record is not so marked in and of itself to justify the disparity but we think that what singles him out from the co-accused is the use of so dangerous a weapon as the pitch fork. His moral culpability is obviously greater having regard to the nature of the weapon and the fact that Sharon McCarthy was significantly injured with long term adverse consequences.

17. We think that the application of the totality principle, means that not only are consecutive sentences inappropriate in the circumstances but that even if they were concurrent they were of such length as to themselves constitute a breach of the principle.

18. In the circumstances we will accordingly quash the sentences imposed. We will substitute for those sentences a sentence of four years' imprisonment in respect of the violent disorder, the latter two years to be suspended, and three years for the offence of assault causing harm, the last year to be suspended; both sentences to run concurrently. We believe that these sentences will reflect the relevant mitigating factors and are conducive to the avoidance of future criminality by the accused. The suspended sentence will be so suspended on the same terms as the suspensions in the Circuit Court but we think that a suspension for a period of two years rather than seven post-release will meet the circumstances of the case.