



THE COURT OF APPEAL

Record No. 218/2016

Birmingham P.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SEAN CARRAHER (NO. 2)

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 11th day of June 2018 by Mr. Justice Mahon

1. The appellant was convicted in the Circuit Criminal Court on the 14th June 2016 following a six day trial on one count of harassing Sergeant Conor Gilmartin contrary to s. 10 of the Non Fatal Offences Against The Person Act 1997. On the 27th July 2016 the appellant was sentenced to five years imprisonment. He has now appealed against his sentence, his appeal against conviction having been dismissed by this Court in its judgment delivered on the 10th May 2018.

2. The appellant was alleged to have harassed the complainant between March 2009 and May 2011 with internet postings and telephone calls. At the time, the appellant was being investigated for offences under the Domestic Violence Act 1996 in relation to his former wife. In the course of these investigations the appellant alleged child abuse against his estranged wife. He was successfully prosecuted in the District Court, and on appeal to the Circuit Court, in relation to the offence of harassing his former wife on the 1st February 2011, and received a six month suspended sentence. The appellant became dissatisfied with the manner of the investigation of the allegations made in the course of that prosecution conducted for the most part by Sergeant Gilmartin.

3. It is alleged that the appellant made between ten and twelve telephone calls of an abusive nature to the complainant, mainly in March 2009. He also instigated fifty eight internet postings to three websites, namely "Victims of the legal profession", "Word press" and "Rate your Solicitor". These postings made various allegations about the complainant including that he was a corrupt member of An Garda Síochána and included references to his family life and an allegation of infidelity on the complainant's part.

4. The appellant was arrested in 2011. He admitted making the internet postings but claimed they were done in the exercise of his right to freedom of expression. He denied making the phone calls complained of. He complied at that time with a request to desist from this activity and was not again the subject of garda attention between then and 2016 when he was taken into custody in relation to the case now under appeal.

5. The grounds of appeal relating to sentence are:-

(i) the sentence imposed was excessive and oppressive in all the circumstances;

(ii) the learned sentencing judge erred in law and in fact in placing excessive weight on the aggravating factors as outlined during the course of the appellant's sentencing hearing;

(iii) the learned sentencing judge erred in failing to attach insufficient weight to the appellant previous character and the fact that the appellant had attempted to rectify matters in an attempt to remove such information from the internet;

(iv) the learned sentencing judge attached insufficient weight to the fact that it was the appellant's first time before the Circuit Criminal Court;

(v) the learned sentencing judge failed to attach sufficient weight to the appellant's personal circumstances, the fact that the appellant had not come to the adverse attention of the garda from the date of his arrest and interview, and

(vi) the learned sentencing judge failed to attach sufficient weight to the appellant's co-operation, and he further erred in failing to suspend any portion of the sentence which would encourage the appellant to reform and reintegrate into society upon his release.

6. The following extract from the sentencing remarks of the learned sentencing judge indicate the serious nature of the offences committed by the appellant:-

"Finding firstly that the telephone wasn't effective enough because he was being met with people who could answer him, he reverted to the anonymity of the one-way traffic of the internet, and there he sat down, he is an educated man, not troubled with the use of language, or its concept and meanings and contrived to put together internets that suggested the most grievous wrong possible to a member of An Garda Síochána, namely (that he was) corrupt; to a husband and father, namely that he was unfaithful, all based on absolutely no evidence whatsoever. I've listened at length to Mr Carraher's explanations about where he queried evidence that was assembled for him, and in particular, this great cause he has of the length of telephone records on the one hand and telephone content on the other, and how he had his great ground to build his cause, to build his case, to build his campaign, to smear a good name. Not a whit of substance to it whatsoever, but of course Mr Carraher is entirely indifferent to any of that. He has a mission, his mission to do as much damage as possible in the furtherance of the cause of his own self-interest."

7. The impact on the victim and his family was, and remains, significant. The seriousness of publicising on the internet defamatory remarks and statements cannot be overstated given the widespread and largely uncontrollable manner of its use and the almost

impossible degree to which it can be controlled or removed.

8. The focus of the appeal is on the submission that having regard to all the circumstances the sentence imposed was both excessive and oppressive. It is with equal force that the learned sentencing judge is criticised for the manner in which the sentence was not "structured"; in effect, the failure to include a suspended element in the sentence is said to be an error.

9. The appellant contested the case fully as was his entitlement. However, the consequences of so doing usually result in a lengthier period in custody than would otherwise have been the case because of the loss of mitigation, and undoubtedly this was fully explained to the appellant by his legal team in advance of the trial.

10. There can be no doubt that this offence required a significant custodial term. The extent of the stress and impact on the complainant and his family was very considerable, and the fact that it continued over two years very greatly added thereto. When the previous conviction for a similar offence is included in the mix the offending takes on an added significance although it should be stated that there was an association between the previous harassing offence and the current offence.

11. The maximum sentence for this offence is seven years imprisonment.

12. The learned sentencing judge decided that the offence came "*well on the higher end of the scale*". While in no way suggesting that the offence was not serious as indeed it was, the court is satisfied that its more appropriate placement on the gravity scale was in the mid range. On that basis the sentence imposed ought to have reflected such a placement. In the court's view, a custodial sentence of five years was not warranted in the circumstances.

13. Having so found the court must re-sentence the appellant as of today. Efforts have been made by the appellant to remove any trace of the complained of material from the internet and that has succeeded to a significant degree. The court is satisfied that the appellant has made serious efforts to have the offending material removed. In all probability a 100% success rate in that task is impossible to achieve and indeed, that fact itself strikingly serves to emphasise the extremely serious reckless nature of this type of activity, and its long lasting effects.

14. The court is satisfied that an appropriate sentence in the case is one of three years imprisonment. Allowing the appellant all due credit for the efforts taken by him to remove the offending material from the internet, and the other mitigating factors identified in the Circuit Court, and also the impressive prison report on the appellant's involvement in a number of educational courses, the court will suspend the final eighteen months of the three year term for a period of eighteen months post release subject to the appellant entering into a bond in the sum of €100 to keep the peace and to be of good behaviour and also that he does not post or share on the internet any reference whatsoever to Garda Gilmartin or any member of his family. Said sentence to commence with effect from the 14th July 2016.