



## THE COURT OF APPEAL

Ryan P.  
Birmingham J.  
Irvine J.

186/12

**The People at the Suit of the Director of Public Prosecutions**  
**V**  
**Anthony Elders**

Appellant

**Judgment of the Court (ex tempore) delivered on the 10th day of November 2014, by Mr. Justice Birmingham**

1. The matter before the court sees an appeal against severity of sentence brought by Mr. Elders. The sentence that he is appealing is one of five years imprisonment for assault causing harm contrary to s. 3 of the Non Fatal Offences against the Person Act and the same sentence for criminal damage that was imposed on him in the Central Criminal Court in Dublin on the 22nd May, 2012.
2. The circumstances of the offence are that the offence occurred in the early hours of the 1st January, 2007, that is to say the early hours of New Years day and the incident started when some friends were sitting in a car close to the home of the injured party. Then the appellant opened the door of the car and asked for a lift. When refused, the appellant became aggressive, a scuffle ensued and there was a threat made to damage the car and also the nearby home of the injured party. What is particularly disturbing is that at this stage there was a reference to "eff off" though not abbreviated in that fashion, "eff off Packi bastards".
3. Now it appears and this is the really disturbing part of this case that the appellant then left the scene and returned along with a number of others and they made their way to the home of the injured party. A cavity block was thrown through the front window of the injured party's home and at that stage there were quite a number of people involved in throwing objects at the house and damaging the cars, there were a number of them, that were in the driveway and of causing damage to the extent of some €6,000. The side panels of glass at the front of the house were broken, the appellant picked up some fragments of glass and threw it, that appears to be the general tone of the evidence, at the injured party slicing his face from the top to the bottom of his cheek.
4. The sentencing as I said, took place on the 22nd May, 2012 and I should explain that the appellant had contested the matter at trial, but he had been convicted by a jury and the trial judge at the end of the trial had remanded him on continuing bail and had directed that a probation report should be prepared. But when the matter was listed for sentence, the trial judge who had presided at the trial had by then retired and the matter came on before another judge sitting in the Circuit Court in Dublin. The facts were presented once more and on this occasion a Victim Impact Report was presented to the court. It indicated that the victim had suffered very significant facial injuries involving a 10 to 15cm laceration, which was extremely deep, it involved facial nerve damage and it was the case that the victim was still suffering from a twitching of the cheek and this was so notwithstanding that the victim had undergone a general anaesthetic. It was also the case that the victim had been affected in a number of ways by this extremely serious incident. Previously he had worked as a model and as a film extra, but this came to an end. The report referred to the victim experiencing sudden mood changes, having flashbacks and being unable to sleep at night. It is the case that the victim's marriage ran into difficulties in a situation where he was experiencing mood changes.
5. The plea in mitigation that was presented to the Circuit Court judge, focused on the fact that the applicant was only seventeen at the time of the offence and that he had no previous convictions when the events occurred and he had only two road traffic matters, minor road traffic matters it would appear, up to the time of the sentence hearing in May 2012.
6. A number of references or testimonials from past employers were produced indicating that he had a good work record and the probation report which had been directed by the original trial judge referred to as being at low to moderate risk of re-offending. There was also an indication that a sum of €4,000 was available by way of compensation which had been assembled by the appellant and his family members, though this sum was not actually in court.
7. The view of the sentencing judge was that he assessed this offence as being, as he put, as the very end, the top end of seriousness and he felt that the racist element was an aggravating factor. So far as the criminal damage aspect was concerned, he saw this as mid range offence and he referred to the catastrophic consequences that this incidence had had for the injured party.
8. The grounds of appeal focus on the fact that the sentence is said to be excessive and diapproionate and also that if failed to give due regard to the previous character of the applicant and the delay in the matter coming to trial.
9. Submissions supporting these grounds of appeal have referred to the fact the maximum sentence should be reserved for exceptional and rare cases. The sentence of five years imposed on the s. 3 Non Fatal of the Person charge, was the maximum sentence permitted. Moreover it said that even if the judge felt that this was an offence that required the imposition of a maximum sentence, that even then a portion of the sentence should still have been suspended.
10. The submissions on behalf of the DPP were these, opposing the appeal, counsel on behalf of the DPP in both written and oral submissions has said that the case was approached with care by the sentencing judge, who considered all factors in relation to the nature of the offence and the personal circumstances of the applicant.
11. In the court's view, this was a very serious offence indeed. Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact.
12. There is the fact that the appellant left the scene of the original incident only to return with others in order to commence fresh hostile acts. Then there is the fact that there was an attack on the dwelling, the very significant life changing injuries that were sustained by the victim occurred as he wedged himself against the front door of his home as the locks were giving and there is the fact that the injuries were caused by glass, glass being used as a weapon.
13. On the other side of the coin there were mitigating factors present. There is first of all the fact that the offence was committed by someone who at the time was only seventeen years of age. Secondly, there is the fact that at the time of the offence, there were no previous convictions. There is the fact that there were no relevant recorded convictions between the offence date and the

sentence date. There has been some discussion in court as to where blame, if that is the right word, attaches for the significant delay, almost six years in this case coming on for sentencing, but in the court's view, the issue is not really who caused or contributed to that delay, as much as what the delay tells us about the appellant and potentially could have told the sentencing judge and the fact that somebody between 17 and 23 had effectively stayed out of trouble is a matter of some considerable significance. There is also the fact that the appellant was able to refer to his good work record and that it was clear that he had significant family support.

14. In balancing those aggravating and mitigating factors, one factor that was not present which might in other circumstances have availed the appellant was a plea of guilty because this was a case that was contested and the fact that this case was contested must have added to the distress of the injured party.

15. It is the court's view that this was a very serious offence, it is the court's view that even though the offence was committed by a young first offender, that a significant custodial sentence was clearly called for. However, it is the court's view that in a situation where the offence was committed by somebody who was only seventeen without previous convictions and who had stayed out of trouble during the significant period that expired before the case came on for sentence, that failing to take those factors adequately into account, represented an error in principle. It is the court's view that to impose the maximum sentence without either coming down off the maximum sentence or imposing some element, perhaps only a limited element as a suspended sentence amounted to an error of principle.

16. Accordingly, the court will hear such up to date information as is available as to what has happened in the meantime.

Having heard the updated information the court continued:

17. As was indicated earlier, the court's view was that this was a very serious offence and it think it is fair to say an exceptionally serious offence, but the court felt that given the factors that were identified as being ease of the appellant, that some account had to be and should have been taken of that fact, it seems to us that given the very serious nature of the offence, that the way to do that is by suspending a portion of the sentence.

18. Accordingly, the court will suspend the final twelve months of the sentence and that is on the basis, that within a period of say two months of today, the €4,000 that was referred to would be paid to the injured party.

19. Subject to that €4,000 being paid to the injured party, the final twelve months of the sentence will be suspended on the usual terms.