



## THE COURT OF APPEAL

**Sheehan J.  
Mahon J.  
Edwards J.**

**192/14**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Timothy Fogarty**

**Appellant**

**Judgment of the Court (ex tempore) delivered on the 9th day of November 2015 by**

**Mr. Justice Sheehan**

1. On the 16th October, 2013, following a jury trial the appellant was convicted at Tipperary Circuit Court of having in a public place an electric powered air rifle intending to unlawfully intimidate another person to wit Fiona Ryan contrary to s. 9(5) of the Firearms and Offensive Weapons Act 1990. The offence was committed on the 20th June, 2011 and the appellant was sentenced to four years imprisonment with the final twelve months suspended for a period of five years from the date of release.
2. He now appeals against the severity of the said sentence. The facts are that at 9.10 am on the 20th June, 2011, at Birdhill, Co. Tipperary, the injured party was walking on the roadway about 200 yards from her home. The appellant who was driving his jeep lowered his window and shouted at her. She did not hear what the appellant said and continued walking. The appellant then drove his vehicle across the road and pulled up nearby. As Fiona Ryan was walking in his direction the appellant got out of his jeep and pointed the air rifle at her. He did not say anything. She screamed and ran towards her home. The appellant drove off in his jeep. He was interviewed by the gardaí some time later and agreed that he had met Fiona Ryan on the morning in question, but denied pointing the air rifle at her.
3. The background to the offence was said to be that there had been some tension between the appellant and the injured party and her brother who were both the proprietors of a local public house which the appellant attended from time to time.
4. The prosecuting garda told the court that the appellant was a 54 year old married man who was separated from his wife and who was the father of a fourteen year old boy. He had 36 previous convictions in respect of offences committed between 1981 and 2013 and his convictions included two for drunk driving, five in respect of public order offences. He had been convicted of common assault over 20 years ago. The remaining offences were road traffic matters and the most recent of these had related to an offence of driving while disqualified, as a result of which he was imprisoned for a short period of time and disqualified from driving for 30 years.
5. The injured party was very frightened by the incident and told the court that her legs would not hold her up such was the fright that she had got.
6. The appellant is the owner of a small farm and at the time of sentence had been living there. His mother who had lived with him had died a short period of time before he was sentenced. He had attempted to set up an equestrian centre on the small farm, but this had not worked out and at the time of the offence was proposing to set up paint balling activities on the farm. It was in connection with this business venture that he had purchased an air rifle which the garda witness had described as looking like a full length firearm.
7. The appellant has filed written submissions under several different headings, but these were helpfully narrowed down by his counsel at the oral hearing essentially to two grounds namely that the learned trial judge wrongly identified this case as being located at the higher end of the range of available penalties and further that the learned trial judge failed to give sufficient weight to the mitigating factors that had been identified in the psychologist's report. This was a detailed report, prepared and signed by three psychologists which had been presented to the sentencing judge in support of the plea in mitigation.
8. The report stated that the overall level of intellectual functioning of the appellant lay at the borderline range of intellectual disability, his overall thinking and reasoning abilities being exceeded by 99% of adults of his own age.
9. The court agrees with the learned trial judge's assessment of the impact this incident has had on the injured party, notwithstanding the fact that there was no victim impact report. He was ideally placed to assess the impact having presided over two trials in which she had given evidence and he was entitled to say that the impact on her constituted an aggravating factor.
10. However, given the momentary nature of the production of the air rifle and the circumstances in which it took place namely, that the context was such that no other form of criminality was involved, this Court is of the view that the offending behaviour in this case before taking account of the mitigating factors is that the offence lay in the mid range and we identify the starting point in this case as three years imprisonment. Thus, the error of principle that we identify lies in the decision of the learned trial judge to locate the offending at the most serious end of the available range.
11. The court must now proceed to sentence the appellant afresh, taking into account his personal circumstances as they are today. Apart from the psychological report which demonstrates that the appellant's level of culpability is reduced as a result of the level of his cognitive functioning, this as well as the unusual difficulties that the appellant will face in prison are factors this Court can consider as mitigatory. In this regard the court notes that the trial judge regarded these difficulties that the appellant would face in

prison as allowing him to give him some mitigation for this matter.

12. While of course hold that that defendant is responsible for his actions, we are nevertheless obliged to factor some mitigation as a result of the reduced culpability demonstrated by the psychologists in their report. A person described as having the defendant's level of cognitive functioning will generally have that matter factored favourably into any sentence that he or she faces.

13. Apart from these matters, this Court has been furnished with five certificates of courses completed by the appellant. The court is most impressed with the answers given by the appellant in which he explains how these courses will help him to reintegrate into the community and also how they have enabled him in his view, to be less likely to offend in the future. The court therefore substitutes a sentence of three years imprisonment for the sentence originally imposed in this case and will suspend the final twelve months of that sentence for a period of two years following the appellant's release on the same terms and conditions as the original bond namely that he keep the peace and is of good behaviour for a period of two years post release.