THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

Record No: 332/2016

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

CONOR JUDGE

Appellant

JUDGMENT of the Court delivered on the 16th July 2018 by Mr. Justice Edwards.

Introduction
1. On the 21st of March 2013, the appellant pleaded guilty to two counts of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and one count of criminal damage contrary to s. 2 of the Criminal Damage Act 1991. He subsequently brought an unsuccessful motion seeking to set aside his pleas of guilty. In those circumstances, he appeals in the first instance against the judgment and order of the trial judge refusing to set aside his guilty pleas.

2. The appellant was sentenced on the 16th of December 2016 to three years' imprisonment on count no 3 (the criminal damage count) to date from 27/07/2016. The other two matters, being the two counts of theft, were taken into consideration. In the event that the appellant is unsuccessful on appeal in setting aside his pleas of guilty, he wishes to further appeal against the severity of the sentence that was imposed upon him.

Background to the appeals
3. The thefts related to an excavating bucket, a quick hitch and a hydraulic ram stolen from a tracked excavator that was parked at the site of works then being undertaken in connection with the construction of a windfarm. The criminal damage related to damage done to the excavator in question in the unsuccessful attempt to remove further parts from it.

4. The appellant was found at the scene by Gardaí. He initially gave a false name, but upon realising that he had been recognised by one of the Gardaí, he elected to co-operate and sat into a Garda car where made a cautioned statement of admission. He was later arrested and charged with the offences with which this Court is now concerned and was sent forward for trial to the Circuit Criminal Court, where he pleaded guilty upon arraignment. At the time of entering his said pleas the appellant was represented by both solicitor and counsel.

5. Following his pleas of guilty, it was indicated to the prosecution on the appellant's behalf that, while the appellant accepted that he had stolen parts and had done criminal damage to the said excavator, he was disputing the extent of the loss and damage alleged to have been incurred, and that in the circumstances it was intended to seek a Newton hearing on that issue. A witness statement from the owner of the excavator on the Book of Evidence had apparently indicated that he had suffered loss and damage in the order of approximately Stg£18,000 (well in excess of €20,000) as a result of the appellant's crimes.

6. The appellant's application for a Newton hearing was acceded to and it proceeded before his Honour Judge Hunt, who was then still a judge of the Circuit Court, on the 23rd of July 2013. The court determined that substantial damage had indeed been caused to the excavator. While the ruling did not place a precise value on the damage, the judge concerned indicated that he was satisfied that it was certainly in the five figure range, i.e. in excess of €10,000. It had been contended on behalf of the appellant that it had been significantly less than that. The matter was then adjourned for sentencing to the 5th of December 2015 and a Probation Report was ordered.

7. His Honour Judge Hunt was appointed to the High Court before the matter was resumed, and in those circumstances it was taken up by another Circuit Court judge. Upon the resumed date the matter was further adjourned to the 19th of March 2014, on which date the appellant's legal team applied to come off record. In the meantime, the appellant had been assessed by a Probation Officer on the 24th of February 2014 and he had informed the Probation Officer of his wish to change his pleas and to contest the case before a jury. The application for the original legal team to come off record was permitted and the matter was further adjourned to the 27th of May 2014 when the appellant was assigned a new solicitor. The case was then further adjourned to the 5th of June 2014. On that date the new legal team informed the court that the appellant wished to change his pleas and to contest a trial. Various reasons were given, including alleged misapprehension as to consequences, the availability of additional evidence, a belief by the new legal team that certain other evidence was contestable, and a concern on the part of the new solicitor concerning the appellant's mental health and in particular whether he was now fit to plead, and by corollary whether he had been fit to plead on the 21st of March 2013. The matter was put back for a psychiatric report concerning the appellant's fitness to plead, initially to the 29th of July 2014, and again on that date to the 9th of December 2014.

8. The appellant was seen by a Consultant Psychiatrist on the 19th of September 2014 and her report was available for the hearing on the 9th of December 2014 and was presented to the court on that date.

9. The Consultant Psychiatrist reported that the appellant, despite displaying complex psychopathology indicative of Narcissitic Personality Disorder and Paranoid Personality Disorder, was fully fit to plead. Moreover, there was no reason to believe that he did not fulfil the criteria for fitness to plead in March 2013. There was no objective evidence of intellectual impairment at that time.

10. The matter was then further adjourned to the 15th of January 2015 with the appellant being directed to set out detailed grounds in writing as to why the court should permit him to resile from his guilty plea. It was indicated to the court that the appellant would be maintaining, *inter alia*, that he had been coerced into pleading guilty by his previous legal team and the court further directed that the former legal team should be put on notice of the appellant's claims in that regard.

11. Ultimately the matter came on for substantive hearing on the 17th of November 2015 when the court heard both affidavit and oral

evidence from the appellant, and oral evidence from Garda Catriona McGrath, oral evidence from the appellant's former solicitor and oral evidence from the appellant's former counsel.

12. The appellant's allegations as deposed to in his affidavit included a claim that:

> *"The only reason I pleaded guilty was because counsel told me to. He told me that he was friends with the Judge, that they had spoken about the case and that if I pleaded guilty to something that I did not do that I would get away with a fine."*

13. The appellant had further alleged that he did not have an opportunity to read the indictment in advance of being arraigned. Asked why he did not plead not guilty when the charges were read out in the Circuit Court and when asked by the Registrar whether he wanted to plead guilty or not guilty, the appellant stated that he was *"half afraid".* The appellant stated that he felt *"like cattle being run up a crush"*, and that he did not know what to do as he was never in that position before. According to the appellant, he firmly believed that he had no choice but to plead guilty. He was told that there was only one way out and that if he opened his mouth he would be gone away in the back of a van. According to the appellant, prior to the arraignment he was brought into a room and he could not get a word in edgeways. In the aftermath of the arraignment, the appellant proceeded into the foyer of Roscommon Circuit Criminal Court and he was advised that he was after doing the right thing. The appellant says that he was advised by his solicitor and counsel to go about putting together €10,000 in compensation, but that he was very unhappy with what had occurred and he walked out the door of the courthouse. He contends that in the following days he attempted to contact his solicitor to obtain an appointment, however he was unable to organise an appointment.

14. The appellant maintains that the Newton hearing then took place on the 25th of July 2013, during which the excavator owner, Mr Roper, had given evidence. The appellant contends that Mr Roper lied in the course of his evidence and that he, the appellant tried to communicate this to counsel but counsel would not listen. He stated that he was sitting behind his counsel and tried on numerous occasions to suggest different questions that he should ask, but that he was dismissed on every occasion. The appellant stated that after this he went outside and he was fuming. He says that he then met his solicitor who knew he was in bad form. His solicitor was pushing him out the door. He says that he does not recollect whether counsel came outside with him at this time. The appellant stated that he then went away and cooled off after a few days. Then he started ringing his solicitor's office and telling him that he wanted to change his plea, but he was just *"fobbed off".*

15. Other allegations made by the appellant were to the effect that his previous legal team had not consulted with him sufficiently, that they had not gone through the Book of Evidence properly with him, and that they were in *"cohoots"* with the Gardaí.

16. Both the appellant's previous solicitor and counsel vehemently denied the appellant's allegations in their testimony before the court, and contended that the appellant had been dealt with professionally and was fully and appropriately advised throughout. They disputed that he was coerced in any way.

17. It is noteworthy that the appellant's affidavit also contained certain allegations against the principal investigating Garda in the case, Garda Catriona McGrath. He had alleged on oath that Garda McGrath had made inappropriate sexual advances towards him as an inducement to him to plead guilty, before later withdrawing those allegations in court through his counsel, and admitting in response to questions asked of him by the Circuit Court judge that he had lied on oath in that regard.

18. It was argued on behalf of the appellant that he was a vulnerable individual suffering from a mental disability by reason of being narcissistic and paranoid but that his previous legal team had failed to recognise his vulnerability and had allowed (and, on the appellant's own version, had placed pressure on him) to plead guilty in circumstances where, had they been aware of his mental health difficulties, *"perhaps more caution would have been exercised".* The court was urged to vacate the plea in the interests of justice.

19. The application was vehemently opposed by counsel for the respondent, who contended that the appellant did not have good and substantial reasons for changing his plea; that his mental-health issues had nothing to do with his decision to plead guilty; and that in making the allegations that he had made he was *"somebody who clearly presents himself as cunning and somebody who is able to tell lies and to tell half-truths in order to assist him in the specific situation that he is in and then have explanations for them at the end."*

20. In support of the respondent's position the Circuit Court judge was referred to *Byrne v McDonnell* [1997] 1 I.R. 392 and *Dunne v McMahon* [2006] IEHC 72.

21. The Circuit Court judge decided to reserve his judgment overnight. This then prompted an application for overnight bail on behalf of the appellant until the following morning.

The application for overnight bail

22. The application for bail was objected to by the prosecution on the basis, *inter alia*, that the appellant had failed to answer his bail on a previous occasion, specifically on the 10th of November 2015.

23. On that occasion the motion to set aside the pleas of guilty had been due to proceed but the appellant did not turn up to court. Rather the appellant's solicitor had appeared in his stead and the solicitor had informed the court that his instructions were that the appellant's partner had had a baby a day or two previously and that his client was bringing both of them home that day. On that basis the court adjourned the matter for a further week to the 17th of November 2015.

24. In the course of the bail hearing it was suggested that the appellant had knowingly caused his unwitting solicitor to give false information to the court, and that while the appellant's partner had indeed given birth to a baby in relatively recent times the baby had been born on the 1st of November 2015, much earlier than had been indicated. The appellant was pressed in evidence as to when his baby had been born, and he persisted in saying that it was two days before he had instructed his solicitor that he could not attend court because he had to bring his partnerand baby home. It was put to him that this could not be so because he had announced the birth on his own Facebook page on the 1st of November 2015. The appellant was vague in response.

25. Garda McGrath later gave evidence in respect of the Facebook posting and it was put to her by counsel for the appellant that in fact what had been announced was that the baby was due on the 1st of November, but that the baby had not in fact been born until the 7th of November. Garda McGrath replied that she had printed off a screenshot of the Facebook page, which contained a picture of a baby and announced a baby "Zara" on the 1st of November.

26. After Garda McGrath left the witness box she made certain enquiries and later returned to the witness box and gave further evidence that she had checked with the hospital concerned and that the hospital had confirmed that the appellant's baby had been born on the 1st of November 2015. The witness was then stood down and the appellant was recalled and he was confronted with the latest evidence of Garda McGrath. He then sought to suggest that he had been unsure about the date, that he had thought it was the 7th of November but now accepted that it must have been the 1st of November. However, he persisted in claiming that his excuse for not turning up in court on the 10th of November had been true and valid. He contended that his partner had spent a lengthy time in hospital because the baby had been born by Caesarian section, that she was breastfeeding and had not been working out, and that she still had stitches in, with the result that mother and baby were still in hospital at the time he had given instructions to his solicitor.

27. The Circuit Court judge, who by this stage was understandably sceptical, instructed Garda McGrath to revert to the hospital a second time to see if this could be confirmed. It transpired that the account given by the appellant was entirely untrue, that the baby had been born on the 1st of November 2015 by normal delivery, not by Caesarian section, and that both mother and baby had been discharged on the 3rd of November 2015.

28. Unsurprisingly, the application for overnight bail was refused in circumstances where the appellant had manifestly lied to the court, and had failed to explain in any satisfactory way his failure to answer his bail on the 10th of November 2015.

The Circuit Court judge's judgment on the motion to set aside the pleas
29. The Circuit Court judge delivered what we consider to have been a meticulous judgment on the motion to set aside the pleas of guilty on the 18th of November 2015. After rehearsing the background to the proceedings, and the procedural history of the case, he then referred to the various lies that the appellant had told when giving evidence before the court on the previous day. He continued:

> *"This in and of itself leaves the accused with a major credibility issue. The application herein is founded on the statement of grounds and supporting affidavit which were sworn on the 23rd day of June 2015. The accused sought to set aside the plea on a number of grounds which can be summarised as follows: (1) the only reason he pleaded guilty was because his then counsel, Mr A, told him to and also told him he was personal friends with the judge and that they had spoken about the case and that if he pleaded guilty to something he didn't do he'd get away with a fine. Mr A has denied this application in the most trenchant terms. He has said that the accused only proffered his guilty plea after he had an extensive consultation with him on the 8th of March at the offices of [a named firm, his former solicitors] and also after full disclosure was made.*
>
> *Mr A says that the decision to plead guilty was only taken by the accused after two appearances in the Circuit Court, on the 27th of November 2012 and the 12th of March 2013. Mr A says the decision to plead was only taken on the 21st of March 2013, which was the date of the arraignment. Both he and [the instructing solicitor] Mr B are adamant that no pressure was put on the accused to plead to the charges and that it was his own decision to do so. They have denied in the strongest possible terms the accused's assertion that they didn't want him to plead not guilty. Mr A has also denied talking to Judge Hunt about the case as alleged by the accused and I'm satisfied that this is in fact the case. I am further satisfied that no judge would, as alleged by the accused, stand over a situation where he knowingly allows an accused to plead guilty to something he didn't do. In this particular case, the latitude extended by Judge Hunt in facilitating the accused and having his change of plea litigated is indicative of someone who values fairness and justice.*
>
> *The second ground is that his previous legal team did not go through the statements in the book of evidence in detail. Mr A was clear that he perused the book of evidence and issued a letter for further disclosure. I am happy to accept Mr A's evidence in this respect.*
>
> *The third ground is that the accused states that he didn't know that there were three charges on the indictment. I don't think this is a very relevant matter, however, I do not accept the accused's evidence in this respect as there were three separate charge sheets given to him following his arrest in March 2012 and furthermore he was served with a book of evidence which contained a statement of three separate charges on page 2 thereof. The accused alleges he was unaware of the dates the offences were alleged to have occurred. Again, I don't accept this as the dates were abundantly clear from a reading of the charge sheets and the book of evidence, both of which were served personally on the accused.*
>
> *The fourth ground is the accused has alleged that his former legal team threatened to withdraw from representing him unless he pleaded guilty. Both Mr A and Mr B have denied this allegation, with Mr B making the point that if he were to operate on such an approach he wouldn't have too many clients.*
>
> *The fifth ground is that the accused has alleged that his former legal team were in cahoots with the guards. He hasn't produced a scintilla of evidence to support this most outrageous allegation. Mr B and Mr A have both denied this allegation with Mr A stating that he barely knows Garda McGrath who was in charge of the garda investigation.*
>
> *The next ground is that the accused says that he never read the indictment before being arraigned and he was half afraid when he pleaded guilty at the arraignment on the 21st of March. I do not accept that the accused never read the indictment, nor do I accept that he didn't know what he was doing or what he was pleading guilty to when he was arraigned on the 21st of March 2013.*
>
> *The criminal justice system in this country has set up an elaborate statutory protocol which must be followed before an accused is arraigned. The accused must be notified of the charges and the evidence. He must have legal advice to determine what his approach is to the charges. The charges must be put to him in open court and his plea must on the record in open court. These procedures are in place to ensure that an accused is afforded due process and fairness. All of these processes were afforded to the accused. Accordingly, he was able to make an informed decision before proffering his guilty plea.*
>
> *Another ground the accused alleges that after pleading guilty he expressed his disquiet to his legal team about the plea and indicated he wanted to change it one week before the July sittings in 2013 at which the Newton hearing was heard. Both Mr B and Mr A are adamant that the accused changed his mind after the Newton hearing as he was disappointed it hadn't gone his way. The evidence from the court file indicates that the first note is given of the accused's intention to change his plea was at the March sittings in 2014, which was approximately one year after the arraignment. Up until then the accused continued to be represented by Mr A and Mr B. There is a clear conflict in the statement of grounds in respect of this application between paragraphs 10 and paragraph 12. In paragraph 10 the accused alleges telling his legal*

team he wanted to change his plea one week before the July sittings at which the Newton hearing was dealt with, whereas at paragraph 12 he says that after the Newton hearing he started ringing his solicitor's offices letting them know he wanted to change his plea.

It is common case that accused was unhappy with the outcome of the Newton hearing and I'm satisfied that it was sometime after the Newton hearing that he decided he wanted to change his plea from guilty to not guilty. It is clear that the accused felt the valuation of the damage to the digger was exaggerated and he knew both from the advice he received from [his former solicitors] and from the comments made by Judge Hunt that restitution would be an important factor in determining sentence. I believe the accused decided he would not pay what he perceived to be an exaggerated claim and for this reason determined to change his plea from guilty to not guilty. This is reflected in the concerns re valuation of the damages to the digger expressed in paragraph 16 of the statement of grounds and in the paragraph headed, "Allegations against Mr Roper" which makes comments on Mr Roper's statement in the book of evidence.

The probation report of Nuala Macken dated the 10th of March 2014 indicates that on the 24th of February 2014 the accused informed her that he was withdrawing his plea of guilty. I am satisfied that the accused decided to change his plea sometime between December 5th, 2013 and the 19th of March 2014 and I am relying on the probation report and the court record in making this determination.

Another ground is that the accused says that the statements of Garda Gannon and Garda McGrath that he gave the false name of Frank O'Rourke when first being interviewed by them is incorrect. He says he gave his middle name of Francis and the Irish equivalent of surname Bhreitheamhnaigh. Garda McGrath was adamant that the name given was Frank O'Rourke and she says that this was the name of a gentleman who was married to the accused's aunt. There is no doubt but that on being apprehended by both Garda Gorman and Garda McGrath the accused endeavoured to conceal his identity. This was hardly the actions [sic] of someone who had nothing to hide. I do not accept the accused's evidence in this matter and I'm satisfied beyond reasonable doubt that the evidence of Garda McGrath on this matter is true and accurate.

Another ground is the accused alleges he was not cautioned before he gave a statement to Garda McGrath. He also says that in the statement of grounds that Garda McGrath had a small notebook and a pen but only wrote a few words on it. Prosecution exhibit 1 is the statement taken by Garda McGrath from the accused. The accused acknowledged in evidence before this Court that it was his signature on the bottom of the statement and that it had been witnessed by both Garda McGrath and Garda Gannon. The statement was taken in the patrol car and Garda McGrath said it took 15 minutes to write it down. She also says that the accused was cautioned before making a statement and indeed the caution is contained in the written statement which has been signed by the accused. The statement is on an A4 sheet and is very extensive. It is clearly not as alleged by the accused on a small notepad with only a few words on it. Again, I am satisfied that the accused's evidence in relation to this matter is unsatisfactory and unreliable. The accused acknowledged that he was owed money by Mr Willis and in a statement taken by Garda McGrath says he believed the digger, which was damaged, belonged to the same Mr Willis. I think this evidence gives credence to the contents of the statement made by the accused and to the admissions contained therein.

Another ground in the statement of grounds and affidavit is that the accused alleged that Garda McGrath had a vendetta against him because he had spurned advances made by Garda McGrath to him. At the opening of this hearing [his present counsel] Mr C for the first time on behalf of the accused stated that the accused was no longer relying on these allegations as grounds supporting the current application to change the accused's plea. When rightly pressed by Mr D, counsel for the State, as to what this meant it was conceded that the allegations were untrue. When giving sworn testimony to this Court, the accused when pressed on the issue acknowledged that the allegations were untrue. The accused accepted that he had sworn in his affidavit as to the veracity of these allegations and then tried to minimise matters by trying to maintain that he had not read the affidavit in full before swearing it. This was a most serious admission by the accused. He acknowledged having perjured himself and of having cast the most serious and damaging slurs on the personal and professional integrity of Garda McGrath. I am absolutely satisfied that the accused embarked upon this path for no other reason than to cast suspicion over Garda McGrath and, by extension, hope to evoke a sympathetic response from the Court to the current application. The accused by these actions has been exposed as someone who thinks little or nothing of the oath he has taken to tell the truth and who, furthermore, will lie to further his own ends. This action by the accused casts irreparable damage on his credibility.

Another ground is the accused produced a photograph purportedly of the damaged digger. No provenance was provided for the photograph and as far as I am concerned it is of no evidential value. Accordingly, I am not going to concern myself any further with it.

Finally, the accused alleged Mr A was motivated to say that he was fully advised of the charges in the book of evidence because Mr A failed to progress debt collection matters for the accused despite having been paid for these matters. The accused says he has cheques to support this assertion, yet he has failed to produce or exhibit such cheques. Mr A has no recollection of ever acting in a debt collection matter for the accused and has no record of such payment. I am satisfied that this assertion by the accused against Mr A has not been proved and I am further satisfied that there is no truth in this assertion as is evidenced by the accused's failure to produce the alleged cheques and Mr A's evidence that he has no recollection of receiving such cheques or of having acted for the accused in debt collection matters.

Accordingly for these reasons, and for the reasons outlined above, I'm satisfied that there is no basis in either the evidence or in fact which supports the grounds set out in the statement of grounds which the accused has lodged in this matter.

Mr C has argued that he accused is a vulnerable person with mental health issues and that accordingly he should, for these reasons, be allowed to change his plea. A report was obtained from Dr Maguire which dealt with the accused's ability to understand legal matters and his ability to plead both at the time of the arraignment and at the time of the report. This report found that the accused was capable of instructing his legal team and had the mental capacity to plead. Mr C seeks to rely on the case of Jonathan Byrne v. Judge James Paul McDonnell and Joseph Murphy, which is a decision of Keane J given in the High Court on the 19th of December 1995. In particular Mr Thompson relies on the passage of Keane J on page 402 where he says:

> *"It seems clear that in any trial whether summary or on indictment, the trial judge can permit a person who has pleaded guilty to change that plead at any time before the case is finally disposed of by sentence or otherwise."*
>
> *I don't think anyone argues with that proposition and it is accepted by all parties that I have a discretion to allow the accused to change his plea. In the Byrne case the High Court held that the District Judge had erred in the exercise of that discretion when he refused to allow Byrne, who had no legal representation when he entered the guilty plea, to change his plea to not guilty once he had the benefit of legal representation. The same situation does not pertain in the present case as the accused had legal representation and advice from the very beginning and long before he entered the guilty plea.*
>
> *Accordingly, I'm satisfied that the Byrne case can be distinguished from the present case for that very reason.*
>
> *In the exercise of my discretion on whether to allow the accused to change his plea I must, as set out in the case Dunne v. McMahon delivered by Laffoy J in the High Court on the 27th of February 2006 have as my paramount consideration the constitutional right of the accused to a fair trial and ensure that such right is protected. In this case the accused had the benefit of legal representation from the start. He was given ample time to consider all matters. He got all relevant disclosures and on his third appearance in the Circuit Court tended a guilty plea on the 21st of March 2013. This was followed at the request of his legal team by a Newton hearing in July 2013 in which he fully participated. No indication of an intention to change the plea was communicated to any official party until the 24th of February 2014 when he told the probation officer of his intention to change his plea. On that sequence of events I'm satisfied that the accused's constitutional right to appear at trial was both vindicated and protected.*
>
> *Finally turning to Mr C's argument that the accused's mental state entitles him to change his plea, the expert evidence I have from Dr Maguire indicates the accused is fit to plead and was fit to plead when he proffered his guilty plea. It also indicates that he has the capacity to give instructions to his legal team. While Dr Maguire's report makes reference to the accused displaying complex psychopathology which is indicative of narcissistic personality disorder and paranoid personality disorder, there is no evidence to show that these provide good and substantial reason as to why his guilty plea should be set aside. Indeed the evidence of Dr Maguire, as I have previously outlined indicates that the accused is fit to plead and give instructions.*
>
> *Some of the matters outlined in Dr Maguire's report and in the accused's medical history may, subject to substantiation, be matters for mitigation in terms of sentencing but they do not provide good and substantial reason to compel the Court to exercise its discretion and allow the accused to change his plea from guilty to not guilty.*
>
> *In summary, the accused's application is refused and this Court finds that there is no basis whatsoever to the unfounded allegations made by the accused against Garda McGrath, his previous legal team consisting of Mr A and [named firm], Solicitors, and against His Honour Judge Anthony Hunt. It further finds that there is no basis in respect of the allegations made against Mr Roper.*
>
> *This Court is satisfied that the accused is an unreliable witness who has been found to tell untruths both on oath to this Court and in the verifying affidavit and statement of grounds that were the basis of this application."*

30. The appellant now appeals against the Circuit Court judge's refusal to set aside his pleas of guilty.

Grounds of Appeal in respect of the refusal of the motion

31. It was submitted that in refusing the appellant's request to change his plea, the trial judge did not have adequate regard to the vulnerability of the appellant arising from his mental health issues. Although it was accepted that the appellant was deemed to be a person who was fit to plead, he nonetheless had significant mental health difficulties in respect of which the court ought to have had greater regard.

32. It was conceded on behalf of the appellant that this case was distinguishable from the two cases cited earlier, and upon which the respondent places strong reliance, namely *Byrne v McDonnell* and *Dunne v McMahon*, insofar as they both involved circumstances where an accused wished to resile from a guilty plea which had been tendered when he was not legally represented, a circumstance that does not exist here. Nevetheless it was submitted on behalf of the appellant that the trial judge had erred in not exercising his discretion in favour of the appellant given the uncontroverted evidence of his mental health difficulties.

33. In reply, counsel for the respondent contends that the trial judge's discretion was correctly exercised in the circumstances of the case, there being no good and substantial reason to allow a change of plea.

Decision on the appeal against the refusal of the motion

34. Walsh on Criminal Procedure (2nd edn.) at page 1225, para 19-142 correctly summarises the position in the following terms:

> *"The trial judge has a broad discretion to permit the accused to change his plea from guilty to not guilty at any stage in the trial right up until sentence is passed. So long as the discretion is exercised judicially and with due regard to the protection of the accused's constitutional right to a fair trial, it is unlikely that a refusal to permit a change from a plea of guilty to not guilty could be upset on appeal. There is English authority to suggest that the discretion will be used very sparingly to permit a change of plea where the accused has understood the nature of the charges against him and entered a clear and informed plea of guilty."*

35. We agree with the respondent that this case falls well short of the type of situation where the accused ought to be allowed to change his plea, and even further short of a situation where the trial judge's discretion should be interfered with on appeal. The accused in this case was at all times legally represented and advised by an experienced solicitor and counsel. He has failed to show good and substantial reason why his pleas should be set aside.

36. It is clear that the trial judge was best placed to adjudicate on the credibility and reliability of the witnesses who were called on the issues in controversy. However, even based on the transcript account, it is manifest that he was correct to treat the testimony of the appellant with the highest degree of scepticism and incredulity in circumstances where he had admitted to lying on oath in several respects, both on the substantive application and during the related bail hearing, and there was cogent and entirely credible conflicting evidence from the legal professionals who had represented him at the time that he had entered his pleas of guilty.

37. We dismiss without hesitation any suggestion that the appellant's narcissism and tendency towards paranoia had anything to do

with his decision to plead guilty. The evidence is clear. He was not suffering from any kind of mental illness, or mental disorder within the meaning of the Criminal Law (Insanity) Act 2006. He was fit to plead, fit to instruct counsel, and able to receive and comprehend advice from his legal representatives. It is telling that when he first intimated a desire to change his pleas he made no complaint about the service he had received from his legal representatives. It was only at a later stage, presumably when he had been advised that he had to show good and substantial grounds, that he made a plethora of allegations against his lawyers, all of which the trial judge, correctly in our view, was satisfied to dismiss as being without foundation. We find no error of principle in the approach of the trial judge and are satisfied that his decision represented the proper and lawful exercise of a legitimate discretion.

38. In the circumstances we dismiss the appeal against the refusal to set aside the appellant's pleas of guilty.

Evidence heard for the purposes of sentencing
39. Following, the Circuit Court Judge's refusal to set aside the appellant's pleas of guilty, counsel for the appellant asked that the court should not proceed immediately to sentencing so as to enable him to consider the implications of the court's ruling. This application was acceded to and sentencing was adjourned to the 8th of March 2016. Following a renewed bail application, the appellant was admitted to bail upon onerous conditions. Unfortunately, the appellant failed to adhere to his bail and did not turn up for court on the 8th of March 2016. A bench warrant for his arrest was issued on that date and was subsequently executed on the 29th of July 2016. He was then remanded in custody until his sentencing hearing ultimately proceeded on the 13th of December 2016.

40. At the sentencing hearing the court heard evidence once again from Garda McGrath concerning the general circumstances of the offence, and the contents of the cautioned statement taken from the appellant at the scene in which he had made admissions. The court heard that the value of the digger bucket that was stolen was approximately €1,000; the value of the hydraulic ram was approximately €4,000 and the value of the quick release hitch was approximately €2,500. It is understood that these were recovered. In addition, damage, estimated in the Newton hearing to have been at least €10,000, had been caused to the hydraulic pump and the two track motors when they were starved of hydraulic oil due to the loosening of hydraulic hoses during the removal of the hydraulic ram.

41. The court was told that the appellant had twelve previous convictions, the majority of which were for various road traffic offences, including one offence of dangerous driving, and two of which were for public order type offences, specifically engaging in threatening, abusive and insulting behaviour in a public place. All matters were dealt with in the District Court and were dealt with by means of fines or other non-custodial penalties.

42. In terms of the appellant's personal circumstances the sentencing court heard that he was born on the 6th of November 1986, that he had been the eldest of five children and had had a difficult childhood. He had left school after the Junior Cert and commenced a carpentry apprentice which he did not complete. Instead he started a plant hire business which was apparently successful for a time. However, he had been unemployed in recent years and in receipt of job-seekers allowance.

43. The court also learned that the appellant had been in a relationship with a former partner from whom he was now estranged, and with whom he has three children. These were aged ten, six and four respectively at the date of sentencing and the appellant does not enjoy access to them. He is now in a new relationship, and has had an additional child with his new partner, a daughter, who was born on the 1st of November 2015. He was said to be living alone in a buy to let house in Maynooth up until he went into custody.

44. The court was told that the appellant was the victim of an assault in 2007 in the course of which he had suffered a head injury. He subsequently had developed depression and suicidal ideation and in 2009 was receiving treatment from Kildare Mental Health Services. He appears to have been diagnosed at that time as suffering from Post-Traumatic-Stress -Disorder and Adjustment Disorder was queried. He was prescribed antidepressants for a time and was recommended to undergo Cognitive Behavioural Therapy, but failed to do so. He had no other relevant medical history save for the findings of the previously mentioned psychiatrist who assessed him in 2014 concerning his fitness to plead.

45. There was no up to date Probation Report. A previously requested report that had been furnished in February 2016 suggested that the appellant was at that point re-engaging with Kildare Mental Health Services but stated that:

> *"It is difficult to envisage the Probation Service getting involved in this case until a point is reached where Mr Judge is prepared to accept responsibility for his offending behaviour. It will be important therefore to ascertain whether there are any extenuating circumstances regarding his mental health which are affecting him in this regard"*

46. The appellant's legal team have not sought to put any further medical or psychiatric information before us.

The sentencing judge's remarks.
47. The appellant was sentenced on the 16th of December 2016. In the course of his sentencing remarks the sentencing judge stated (inter alia):

> *"In determining sentence in this case, the Court has to look at all factors including the gravity of the offence and culpability of the accused. The Court must also look at all aggravating factors, mitigating factors and the psychiatric report. The Court is also obliged to take into account the four pillars of sentencing, namely deterrence, punishment, restitution and rehabilitation. The aggravating factors in relation to this matter are 1), the brazenness of the offence. People like Mr Roper are entitled to expect that machinery which is left by them unattended in the open countryside will not be interfered with. Crimes of this type are all too prevalent in rural Ireland and they are an attack on the fabric of rural society which has traditionally been built on respect for others and their property.*
>
> *2), the level of damage caused to the digger in the course of removing the parts from it is a further aggravating factor. It is clear that this damage is valued at in excess of €10,000. This is a considerable loss for Mr Roper to have sustained.*
>
> *3), the failure of the accused to make any form of recompense to the victim is a further aggravating factor. It shows that the accused does not appreciate the seriousness of the offence and it would appear that he has no interest in making amends to Mr Roper.*
>
> *4), the furnishing of a false name to Garda Gannon when he was initially stopped is again a further aggravating factor that shows an initial unwillingness by the accused to cooperate in the investigation of this matter.*
>
> *5), the failure of the accused to abide by the bail terms that were granted to him in respect of this matter, and the fact that two bench warrants had to be issued for his arrest, are again extremely aggravating factors that the Court must*

take into account.

And 6), the accused previous record in the case, he has numerous offences for road traffic matters. He also has two offences for public order. I am satisfied that as none of the previous offences are similar in terms to the current offence, they should not constitute a major aggravating factor for sentencing purposes. The mitigating factors that I have to take into account are 1), the making of a statement by the accused in the initial stages of the investigation can be treated as a mitigating factor in that it assisted the State in the successful prosecution of his case.

2), the accused's plea of guilt saved the State the time, cost and resources that a criminal trial would have involved, although the benefit of this plea has been somewhat diluted by the subsequent attempt by the accused to change his plea, particularly when such subsequent attempt was based on falsehood and lies.

3), it is noted that the accused has a new partner and a child and obviously any custodial sentence will negatively impact on his relationship with them and that in and of itself is a significant punishment.

4), it is accepted that at the time the offences were committed, the accused was in very poor financial circumstances and it would appear that those circumstances have deteriorated even further. It appears that the accused has lost his business and had no means of earning a livelihood. I am advised that the accused is also suffering the repossession of his house, although no documentary evidence has been furnished to support this. Nevertheless, I am satisfied that the accused is a person who has fallen on hard times.

5), the report by Dr Maguire for the hearing in respect of his desire to change his plea of guilt indicates that the accused has a complex psychopathology which is indicative of mixed features of a narcissistic personality disorder and paranoid personality disorder. It seems clear to me that Mr Judge has some psychological issues and Mr Thompson has indicated that these may stem from a head injury that he received in 2007. It is noted that the accused suffered from depression and post-traumatic stress disorder in 2009.

It seems clear to me that the way in which the accused attempted to change his plea of guilty in this matter and the willingness on his part to tell blatant lies, indicates that he is not capable on occasions of acting in his own best interests. I am also taking into account the fact that the accused has apparently a good work history and a good work ethic. I note that he is the father of three other children and that his ex-partner left him in 2011 and that he no longer has any contact with the three children he has with his ex-partner.

In determining sentence in this case, the Court has to weigh the needs of society against the needs of the accused and the needs of the victim. Unfortunately, restitution does not appear to be practical in this case. Accordingly, the sanction imposed by the Court must contain an element of deterrence. The Court does not have the benefit of any probation report because the accused did not engage positively with the Probation Services. The three offences in this matter carry maximum sentences of up to 30 years if sentences were imposed consecutively. The Court, in imposing sentence, has to impose a sentence that is proportionate. I am satisfied that the offending in this case warrants a five year sentence before mitigation is taken into account. Accordingly, taking into account the mitigation that I've outlined above, I am going to reduce the sentence to three years' imprisonment. The accused has not indicated at any stage his willingness to make reparation to the accused, nor has he expressed remorse for his wrongdoing, nor has he apologised for the scurrilous allegations he made against Garda McGrath. In the light of this, I do not believe that it is appropriate to suspend any portion of the sentence.

Accordingly, I am imposing a sentence of three years backdated to the date the accused went into custody, which is the 27th of July 2016. I am imposing that sentence on count 3, the criminal damage charge and I'm marking counts 1 and 2 proven and taken into consideration."

The appeal against severity of sentence.

48. The appellant now appeals against the severity of his sentence on the grounds that it was excessive. In terms of alleged errors of principle it complained for the most part that insufficient allowance was made for mitigation.

49. In that regard it was submitted that the trial judge should have had greater recourse to a consideration of the appellant's mental health issues in the context of mitigation. It was further complained that, having identified the relevance of the mental health issues of the appellant, the trial judge did not sufficiently advert to them in considering the manner in which he had met the case. Specifically, it was submitted, the lack of remorse and lack of apology, although matters the court was entitled to deprecate, were nonetheless issues that ought to have been viewed through the prism of the mental health difficulties of the appellant. In the circumstances, the court's finding that it could not suspend any portion of the sentence failed to take account of a relevant factor. It is submitted that the court could have part suspended the sentence imposed and have made the part suspension contingent upon the successful completion of any treatment directed by relevant mental health personnel. Though it was accepted that the appellant's previous lack of engagement with the Probation Service was of some relevance, it was submitted that the particular facts of the case required a specific consideration of what non-custodial orders might be appropriate, particularly in view of the court's own observation that the appellant was *"not capable on occasions of acting in his own best interests".*

50. It is also complained, although sensibly in our view it was not very strongly pressed, that the sentencing judge placed too much emphasis on the appellant's previous convictions and that he was wrong to conclude that the breaches of bail conditions were *"extremely aggravating factors."*

51. In response counsel for the respondent has submitted that the sentencing judge did not commit any error of principle, that the sentence imposed was within the permissible range and that it was proportionate.

Discussion and Decision

52. In this case in the assessment of gravity the sentencing judge correctly had regard to the ranges of available sentences (ten years on each count), the need to impose proportionate sentences, and the need to have regard to the needs of society, as well as to those of the victim and those of the accused. He considered that there was a need for a sanction that contained an element of deterrence. He considered the circumstances of the offending conduct and identified various aggravating circumstances in respect of which no issue is taken including the brazenness of the offence, the level of damage caused, the appellant's ostensible lack of remorse in failing to make any form of recompense to the victim, and the provision of a false name to the Gardaí

53. Issue is taken with the description of the failure to adhere to bail terms as being *"extremely aggravating factors".* The trial judge was entitled in our view to regard the breaches of bail as being somewhat aggravating. It is clear to us that the characterisation of them as being *"extremely aggravating"* represented no more than some judicial hyperbole most likely indulged in with a view to impressing upon the appellant that he had not helped his cause, because it is clear from the headline sentence actually nominated by the sentencing judge that he did not in fact treat the case as being an extremely aggravated one. We are satisfied that there was no error of principle on this account.

54. Issue is also taken with the sentencing judge's characterisation of the appellant's previous convictions as not constituting a major aggravating factor, thereby suggesting that he did regard them as aggravating to a degree. We consider that this was simply infelicity of language because the sentencing judge correctly adverted to the fact that the previous convictions were in no way similar to the offences for which the appellant faced sentencing, and we are satisfied that in fact he meant no more than that the appellant had lost the mitigation that he would have been entitled to if he had had no previous convictions. There was no error of principle in that regard.

55. Having considered the circumstances bearing on the offender's moral culpability and the harm done, in the context of the range of penalties available, the sentencing judge determined upon a headline sentence for the criminal damage offence that was exactly mid-range. We are completely satisfied that this was appropriate in the circumstances of this case and the trial judge did not err in that regard.

56. Moving then to the second stage of the sentencing exercise, the sentencing judge discounted from his headline figure by some 40% to reflect the mitigating circumstances in the case. These were principally the plea of guilty (albeit that the evidence against the appellant was strong), his co-operation in making admissions, and his mental health issues, his family circumstances, his previous employment record and various adversities that he had experienced in his life. In our view a discount of 40% from the headline figure was sufficient allowance for these factors and comfortably within the trial judge's margin of appreciation. We find no error in this.

57. Finally, complaint is made that no additional portion of the sentence was suspended to incentivise rehabilitation. In that regard there was no track record of engagement in work towards rehabilitation by the appellant. Moreover, no specific proposals in that regard were advanced by him or on his behalf, particularly in terms of any program of treatment aimed at addressing his psychpathology. On the contrary, the appellant had breached commitments and undertakings given to the court in the context of bail. The sentencing judge would have had no credible basis for suspending a further portion of the sentence in those circumstances.

58. We have some doubts as to whether the sentencing judge in fact had jurisdiction to take the theft offences into consideration. Arguably, there should have been discrete sentences imposed for those matters, rather than a taking of them into consideration., having regard to the terms of s.8 of the Criminal Justice Act 1951, in circumstances in which the appellant had actually been arraigned on the relevant counts and had pleaded guilty. However, as this was to the benefit of the appellant, and in circumstances where no complaint has been made in that regard by the respondent, we will not interfere with it of our own initiative.

59. In conclusion, we are satisfied that the sentence imposed on the criminal damage count was correct and proportionate, and we therefore dismiss the appeal.