**THE COURT OF APPEAL**

**Record No. 114/2016**

**Birmingham J.**
**Mahon J.**
**Hedigan J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND–**

**HUGH MYERS**

**APPELLANT**

**JUDGMENT of the Court delivered on the 5th May 2017 by Mr. Justice Mahon**

1. The appellant pleaded guilty and was convicted on the 27th April 2016 at the Circuit Criminal Court sitting in Dundalk, Co. Louth of one count of criminal damage contrary to s. 2 of the Criminal Damage Act 1991. He was sentenced on the 29th April 2016 to a term of imprisonment of two years, to date from the 9th February 2016. This is the appellant's appeal against that sentence.

2. The offence in question arose from a incident at Rathmullen Park, Drogheda in Co. Louth on the night of the 27th September 2011. A mob of people, numbering between twenty five and thirty, many armed with weapons, attacked 239, Rathmullen Park. The weapons in question included wooden handles, slash hooks and hatchets. The appellant described how he and his family threw stones at the approaching crowd to keep them away from no. 239, and that they were fearful of being killed had the crowd succeeded in reaching the house. An indication of the extent of the aggressive mood of the mob was Gda. Paul Norton's description of how he witnessed the crowd at the rear of 239, Rathmullen Park, and that as he attempted to exit the patrol car he received a blow to his face which knocked him back into the car. The appellant was accused of throwing stones at, and damaging, an adjoining property at 242, Rathmullen Park, a house owned by a person associated with persons involved in the attack on the appellant's house. He claimed that he acted in defence of himself and other occupants of no. 239.

3. The appellant is a forty eight year old man with three young children, and has a troubled social background. At an early stage he acknowledged his involvement and accepted that he had broken a window at 242, Rathmullen Park. He expressed remorse and his willingness to pay compensation in respect of the damage done to the window.

4. The appellant's grounds of appeal are that the learned sentencing judge:-

> (i) Failed to construct a sentence that was proportionate to the offence;
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> (ii) fell into error, such error being one of principle, in incorrectly placing on the scale of severity the particular offence, the subject matter of the prosecution (this was stated in the course of oral submissions to be the main focus of the appeal),
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> and
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> (iii) reaching a decision based on evidence other than the evidence adduced in the course of the sentence hearing.

5. It is contended on behalf of the appellant that the assessment by the learned trial judge that the case, in terms of its severity was in the middle range was inappropriate. It is suggested that the offence of breaking a single window fell in the lower range in terms of its seriousness and in terms of the sentence warranted. The learned sentencing judge is also criticised for apparently, at the commencement of his sentencing judgment, suggesting incorrectly, that the appellant had been one of a gang attacking 242, Rathmullen Park whereas in fact he was not part of any mob.

6. In the course of his sentencing judgment, the learned sentencing judge, having noted that the maximum sentence for the offence was one of ten years, and placing the offence in the middle range, stated, *inter alia*:-

> *"It would appear that, as I said, it was deliberate, intentionally and indeed it may have been motivated by some degree of animosity, having regard to what was happening at the scene and having regard to the house been Mrs. Brenda Murphy's house, there was some degree of animosity or certainly over reaction or disproportionate reaction but picking up a stone and damaging a window amounts to serious damage and serious criminal damage."*

7. The learned sentencing judge identified as aggravating factors in the case, the fact that it was a serious offence, the manner of the appellant's involvement in the offence, and the manner and the amount of criminal damage caused to Mrs. Murphy's house. It was, he said, a serious interference with Mrs. Murphy's entitlement and right to her property. He went on to state:-

> *"The criminal damage was most certainly deliberate, intentional and indeed may well have been motivated by some degree of animosity towards Mrs. Brenda Murphy having regard to what was occurring, what happened next door, the people who were living next door and Mrs. Murphy's connections with those persons."*

8. The learned sentencing judge noted the mitigating factors as including the plea of guilty, the appellant's cooperation with the investigation and his admissions, and his expression of remorse.

9. The appellant has a substantial number of previous convictions, numbering seventy four. Of these, twenty one relate to public order offences, four are for varying assaults from s. 2 to s. 5, five are for criminal damage, one is for possession of a weapon, one is for theft and twenty nine are for road traffic offences. He has three offences for breaching barring orders. The convictions date between May 1985 and January 2016. His record includes a number of three to six month prison sentences and a number of

suspended prison sentences. In all, custodial or suspended sentences were imposed on fifteen to twenty occasions.

10. The placing by the learned sentencing judge of the offence in the middle range in terms of its gravity was, in the court's view, erroneous. A possible explanation for this error is that the background facts detailed to the learned sentencing judge painted a picture of what could only be reasonably described as utter mayhem of the most serious nature, particularly having regard to the carrying of extremely dangerous weapons by a mob as it approached a dwelling house. However, in truth, the appellant's involvement in the entire affair was at least partly motivated by his efforts to defend his family house from a marauding mob of heavily armed men. Against this background the offence, being the breaking of a neighbour's window, could not reasonably be considered to fall within the mid range of an offence which carried a maximum sentence of ten years imprisonment. A more appropriate placement of the offence on the gravity scale would have been in the lower range.

11. It is, nevertheless important to emphasise that an offence which involves a breaking of a window in a person's home may, in some instances, depending on the circumstances, properly be categorised in the mid range of the offence.

12. Ultimately, in an appeal such as this, it is the sentence as actually imposed which will determine the outcome of the appeal. A sentencing judge enjoys a wide discretion in the imposition of a sentence in any particular case, and this court will ordinarily not interfere with that discretion, and certainly will not do so simply because this court, or any of its members, might have chosen a different sentence if sitting at first instance.

13. In this case, the court is satisfied that the sentence of two years was unduly harsh, notwithstanding the appellant's substantial number of previous convictions.

14. Had the appellant no previous convictions, or even very few minor previous convictions, the appropriate sentence may well have been an entirely suspended one, or indeed, a community service order. However, the fact that the appellant has so many previous convictions, including five for criminal damage, renders the imposition of a custodial sentence inevitable.

15. The court will quash the sentence imposed in the Circuit Court and will sentence the appellant afresh as of today. It is noted that the appellant has already spent approximately fourteen months in prison. This court will impose a sentence of fifteen months imprisonment, also to date from the 9th February 2016.