

## THE HIGH COURT

[2014 No. 579 SS]

## IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTARY PROVISIONS) ACT 1961

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA JAMES KEARNEY)

PROSECUTOR

AND

DAVID COOPER

DEFENDANT

**JUDGMENT of Mr. Justice Noonan delivered the 16th day of April, 2015****Background**

1. This matter comes before the Court by way of consultative case stated by the District Court.

2. On the 29th of July, 2013, the defendant appeared before the District Court in Cork on foot of a charge sheet which alleged the following offence:

"On a date between the 28th of March, 2013 and the 29th of March, 2013 at St. Finbarr's Cemetery, Glasheen Road, Glasheen, Cork in the district court area of Cork city district number 19 did without lawful excuse damage property, to wit, deface headstones with graffiti in the cemetery belonging to another intending to damage property or being reckless as to whether such property would be damaged. Contrary to s. 2(1) of the Criminal Damage Act 1991."

3. The prosecuting Garda gave evidence before the District Court that he received a complaint that headstones in the cemetery in a place known locally as the republican plot had been defaced by graffiti. He arrested the defendant on the 4th of April, 2013 on suspicion of causing the damage. The defendant was detained in Togher Garda Station where he was interviewed and made certain admissions in relation to the offence. The contents of the memorandum of the interview were put in evidence before the court.

4. Under cross-examination on behalf of the defendant, the prosecuting Garda agreed that there was no estimate of the value of the damage caused and when asked who the owner of the cemetery was, he said it was the people of Ireland. There was no complaint by any person purporting to be the owner of the cemetery. This concluded the prosecution evidence.

5. The defendant's solicitor therefore applied for a direction that there was no case to answer and made various legal submissions to the court. Arising out of those submissions, the District Court referred the following questions to this court for determination:

- (i) In a prosecution for an offence of damaging property contrary to s. 2(1) of the Criminal Damage Act 1991, is it necessary that there be a complaint made by an injured party who owns or claims to own the property in question before a valid prosecution can be taken?
- (ii) In a prosecution for an offence of damaging property contrary to s. 2(1) of the Criminal Damage Act 1991, is it necessary that the prosecution tender some evidence that the property in question was owned by another?
- (iii) In a prosecution for an offence of damaging property contrary to s. 2(1) of the Criminal Damage Act 1991, is it necessary for the prosecution to tender evidence of the costs or value of the damage alleged to have been caused?
- (iv) Arising from the foregoing, should I accede to the application of the defence for a direction of no case to answer?

**The Criminal Damage Act 1991 ("The Act")**

6. Insofar as relevant to the issues that arise in this case stated, the provisions of the Act are as follows:

"1 – (1) In this Act –

'property' means –

(a) property of a tangible nature, whether real or personal, including money and animals that are capable of being stolen, and

(b) data.

(2) Property shall be treated for the purposes of this Act as belonging to any person—

(a) having lawful custody or control of it,

(b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest), or

(c) having a charge over it.

2.—(1) A person who without lawful excuse damages any property belonging to another intending to damage any such

property or being reckless as to whether any such property would be damaged shall be guilty of an offence...

7.— (2) (a) Where a person is charged with an offence under section 2, 3 or 4 in relation to property belonging to another—

(i) it shall not be necessary to name the person to whom the property belongs, and

(ii) it shall be presumed, until the contrary is shown, that the property belongs to another.

(c) Where a person is charged with an offence under section 2 in relation to such property as aforesaid, it shall also be presumed, until the contrary is shown, that the person entitled to consent to or authorise the damage concerned had not consented to or authorised it, unless the property concerned is data and the person charged is an employee or agent of the person keeping the data."

### Submissions

7. Counsel for the prosecutor, Mr. Dwyer BL, submitted that it was unnecessary that there be a complaint by an injured party to sustain a conviction. In that regard, he relied on the dicta of Charleton J. in *DPP (Quigley) v. Monaghan* [2007] IEHC 92.

8. He contended that there was no requirement for the prosecution to lead any evidence of ownership of the property damaged having regard to the presumption contained in s. 7(2)(a) of the Act and he further relied on the judgment of Hedigan J. in *Cullen v. District Judge McHugh* [2013] IEHC 444. He relied on the same judgment as authority for the proposition that there was no requirement to prove the amount of damage caused.

9. Mr. McCullough BL on behalf of the defendant submitted that despite the presumption in s. 7(2)(a), the prosecution still had to establish that the property in question was owned by someone as opposed to not being owned by anyone. He contended that the word "property" in its plain and ordinary meaning imports the concept of a thing that is owned. Therefore, the prosecution must establish that the thing in question is owned by someone before it can be regarded as "property" to which the presumption applies that it belongs to someone other than the accused. By way of illustration, he instanced a wrecked motor car abandoned on waste ground, evidently discarded there. Despite the fact that it does not belong to anyone, if the prosecutor's submission is correct that the presumption applies to it, then one could be convicted of an offence under the Act.

10. The defendant submits that on its proper construction, the subsection requires the prosecution to adduce evidence of ownership by some party before the presumption arises. As a penal statute, the Act must be strictly construed.

11. As an alternative to that submission, the defendant argues that the construction proposed by the prosecutor casts an onus upon the defence to prove that the item in question is not owned, an impossible burden to discharge which would infringe the presumption of innocence and render the section unconstitutional. Therefore, the alternative construction argued for by the defendant ought to be preferred as it renders the section constitutional.

12. As a further alternative to the latter submission, the defendant argues that the evidence before the court has, as a matter of law, rebutted the presumption that the property belongs to anyone as a reasonable doubt has been raised on the issue and accordingly the District Court should grant a direction that the defendant has no case to answer. Finally, it is contended that there can be no conviction in the absence of a complaint by the owner or any valuation of the alleged damage.

### Discussion

13. The word "property" is capable of bearing a number of different meanings. Although it is defined in s. 1, the definition itself includes the word "property". It seems to me that the word is used in the context of the Act as meaning something that is capable of being damaged in the manner defined in s. 1(1). Thus viewed, I do not think it can be said that a thing only becomes "property" when it is proved to have an owner.

14. Reverse onus provisions in criminal legislation are not uncommon. Where they shift the evidential as distinct from legal burden onto the accused, they will generally be regarded as constitutionally valid provided that they are proportionate – see *O'Leary v. Attorney General* [1993] 1 I.R. 102, [1995] 1 I.R. 254 and the recent judgment of the Supreme Court in *McNulty v. Ireland and the Attorney General* [2015] IESC 2.

15. Of course, there is no challenge to the constitutionality of s. 7(2)(a) in these proceedings. Rather, it is said that in order for the section to be read constitutionally, the interpretation advanced by the defendant is open and should be preferred. The basis for that contention is the suggestion that otherwise, an onus would be cast upon the defendant which would be impossible to discharge, i.e. that the property in question was not owned by anyone. I think in reality that is a rather fanciful notion. The section was clearly enacted to avoid the difficulty that may arise from time to time in the prosecution being able to identify the relevant legal owner of an item of property that has been damaged. Cases where a genuine doubt arises as to whether the property is owned by anyone must be very rare. In the case of real property, as here, no issue can arise as the concept of realty without ownership is unknown to the law.

16. Where personal property is concerned, the surrounding circumstances will normally enable the court to readily infer whether the item in question has an owner or not. Thus, if the item were located in a refuse dump where it had obviously been discarded and abandoned by its original owner, little difficulty would arise in rebutting the presumption that the item was in fact owned by a party other than the accused. I cannot see how the section casts any impossible burden on the accused or could be seen as a disproportionate response to the issue it seeks to address.

17. The section makes clear that there is no requirement on the prosecution to show who the true owner is. As stated by Hedigan J. in *Cullen* (at para. 4):

"This presumption is a mandatory one. It shall be presumed. That presumption on a literal reading of the Act may only be set aside by showing the contrary. That has not been shown and thus the presumption must stand. The fact the charge sheet specifies a named person and that person's ownership is not proved in Court cannot change the presumption. Insofar as it is evidence of anything, it is that the property belonged to another."

18. The findings of the court in the same case are also authority for the proposition that it is not necessary for the prosecution to prove the quantum or value of the damage caused:

"Did the Gardaí need to prove the quantum of damage?

The Act provides that any damage to the property of another is criminalised. Whether the damage is great or small the offence is constituted where there is property, it belongs to another and it is damaged. The fact the charge sheet measures the damage at particular level where such particularisation is not necessary cannot and does not amend the Act."

19. In the light of the foregoing, I propose to answer the questions posed by the District Court as follows:

(i) No

(ii) No

(iii) No

(iv) No.