



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.
265/15**

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Christopher McCarthy

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 22nd day of July 2016 by Mr. Justice Sheehan

1. This is an appeal against sentence.
2. The appellant pleaded guilty at the Circuit Criminal Court in Nenagh on the 20th October, 2015, to malicious damage and to obstructing the gardaí. The maximum sentence for the malicious damage offence is ten years imprisonment and the maximum sentence for the obstruction offence is six months imprisonment.
3. The judge imposed a sentence on the appellant of eight years imprisonment for the malicious damage with the final three years of that sentence suspended on the following terms:-
 1. That the appellant keep the peace and be of good behaviour for a period of five years following his release from prison.
 2. That the appellant abstain entirely from drinking alcohol during that five year period.
 3. That before his release from prison the appellant place himself on the homeless list.
 4. That the appellant whilst in prison and on his release for the entire period which the sentence is suspended engage with the addiction services.
 5. That the appellant will engage with the Probation Service while in prison and for a period of three years from his release and engage practically with them.
 6. That he be bound over in his own bond of €100.
4. A sentence of three months imprisonment to run concurrently with that sentence was imposed in respect of the obstruction charge.
5. The background facts are that the appellant entered the house of a person he knew by breaking the back window. This is what constituted the malicious damage. When he got into the house he sat down in the bedroom and started to drink from a bottle of vodka which he had brought with him.
6. The owner of the property had noticed him calling to his home from some distance away. He had known the appellant for a considerable amount of time and he saw him break his back window. The owner then went to the gardaí. The gardaí arrived and the appellant became difficult and abusive towards the gardaí and obstructed them in the course of their attempts to arrest him.
7. The appellant was arrested, charged and remanded in custody on that date.
8. The appellant is a 27 year old, homeless traveller who was one of eighteen children. His family home is no longer available to him. He has a long standing alcohol problem and has 133 previous convictions. The court was told that all of these convictions occurred in the District Court and included the following: 27 previous convictions for burglary, 15 previous convictions for criminal damage, 6 previous convictions for theft, 3 previous convictions for assault, 1 for threatening to kill. He also had a number of Road Traffic Act offences, including the unauthorised taking of a vehicle and had convictions for possession of articles or knives in connection with theft.
9. The appellant had broken into the injured party's home on two previous occasions namely, the 28th May, 2013 and before that on the 1st May, 2013.
10. The appellant gave evidence at the Circuit Court. He apologised for his behaviour and promised that he would cease offending. Sergeant Kelly, the officer in charge of the prosecution, gave evidence to the effect that the appellant had had a very difficult background and wrongly believed that he was still welcome at his family home. However there was no room for him there. Sergeant Kelly said that one reason why the appellant had nowhere to go was because he had refused to put himself on the homeless list while in prison.
11. Counsel for the appellant now challenges the sentence imposed contending that it is disproportionate and he submits that the trial judge erred in law in placing the criminal damage offence close to the top range in respect of penalties available for this offence. When sentencing, the trial judge had stated "it was not at the top range but very close to it".
12. Sergeant Kelly also told the sentencing judge that the gardaí did not see prison as being a long term solution for Mr. McCarthy. They wanted to see him back in society, but he had issues to address. In the course of his sentencing remarks, the trial judge noted that the plea of guilty was a matter which brought very real benefit to the injured party. The trial judge also said that he had enormous sympathy for the appellant who had unfortunately had a very chaotic home life and one in which violence was

unfortunately a part and it was also unfortunate the trial judge said that the appellant did not now have a place to call home. He noted that the appellant would like to think that the family home where he grew up was available to him, but through nobody's fault this was no longer the case.

13. The trial judge also noted that it was the first time that Mr. McCarthy was in the Circuit Court for sentence and stated that he was not a very clever criminal. He also noted that while custody on remand the appellant had been on lock up for 23 hours a day. He noted that Mr. McCarthy had been depressed and also accepted that he was genuine in his contrition, and genuine in having some kind of insight into the suffering he had caused to the injured party Mr. Cole. He was mindful of what the Sergeant had said namely, that the appellant was somebody who caused the gardaí no trouble except when he was drinking.

14. In this regard it had been noted that when Mr. McCarthy got out of prison normally his first port of call was to the local garda station where he attended to tell the gardaí that he was not going to cause any more trouble.

15. Counsel for the respondent while recognising the difficulties faced by the sentencing judge does not strenuously press us to uphold the sentence that was imposed and we find ourselves in the position that there was a significant and substantial departure from what is the appropriate sentence for this offence.

16. Before proceeding to resentence the appellant we asked the parties for further submissions and we received submissions from both parties including a submission from counsel for the respondent requesting that a term be imposed in the event of any suspended sentence that the appellant stay away from certain areas in Nenagh.

17. We also have had the benefit of correspondence between the appellant's solicitor Michael Breen and the Prison Governor, the Probation Service and Tipperary County Council. Mr. Breen has put all the authorities on notice of his client's requirements and we hope that this will result in the appellant being placed immediately on a pre-release programme when we impose the sentence that we are about to announce.

18. The Circuit Court judge was rightly concerned to protect the injured party in this case. Mr. McCarthy had unlawfully entered his home on two previous occasions. The Circuit Court judge was also rightly concerned about the appellant's record. We acknowledge that he has a terrible record and has a serious alcohol problem. The appellant has to be encouraged in this regard, but he must know that it is up to himself at the end of the day.

19. Accordingly we set aside the original sentence in this case and we substitute a sentence of three years imprisonment in lieu thereof. We suspend the final twelve months of the three year sentence on condition that Mr. McCarthy stay away from the injured party permanently and also on condition that he stay away from Green Street, Grove Street and The Crescent in Nenagh areas frequented by the injured party.