



**THE COURT OF APPEAL**

**Appeal No.: 261/2015**

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

**The Director of Public Prosecutions**

**Respondent**

**- And -**

**Anthony Foody**

**Appellant**

**Judgment (ex tempore) of the Court delivered on 9th day of June 2016 by Mr. Justice Mahon**

1. The appellant pleaded guilty and was convicted on 13th October 2015 at Castlebar Circuit Criminal Court to one count of criminal damage contrary to s. 2(1) of the Criminal Damage Act 1991. On 29th October 2015, the appellant was sentenced to a term of three years imprisonment, with the final eighteen months suspended for a period of five years post release, on condition that he enter a bond in the sum of €100 to keep the peace for five years. The appellant has appealed against his sentence.

**Background facts**

2. The offence occurred on 19th May 2015 at a private house in Ballina, Co. Mayo and which was occupied at the time. The appellant broke through a door into the porch of the residence, but was unable to gain access into the main house because of a locked internal door. His efforts were thwarted by the prompt arrival of the gardaí. The damage caused was to the lock mechanism of the door and was estimated at €200.

3. The appellant had a significant drink problem, and he was found to have been severely intoxicated and incoherent at the scene of the crime.

4. The appellant has ninety six previous convictions, the last of which pre-dated this conviction by just five months. In 2010, the appellant was convicted of criminal damage and burglary in 2009 and received a two year sentence. Prior to 2009, the appellant had a crime free period of five to six years. A number of his convictions are for burglary, theft, misuse of drugs and assault. Most are for public order type offences.

**Grounds of appeal**

5. The appellant's grounds of appeal are:-

(i) The appellant was given an excessive sentence in the circumstances.

(ii) The learned trial judge failed to take properly into account the mitigating circumstances including the appellant's expression of remorse to the victim of his offence.

(iii) The learned trial judge failed to take into account, or properly take into account, the appellant's background and alcohol addiction.

(iv) The learned trial judge failed to take into account, or properly take into account, the plea of guilty entered by the appellant at the first opportunity, the relatively low value of the criminal damage, the absence of violence / threatening behaviour and his full co-operation with the gardaí at the scene of the offence.

(v) The learned trial judge gave undue weight to the appellant's previous convictions and failed to take account of his immediate recent history of good behaviour.

(vi) The learned trial judge failed to take properly into account the circumstances of, and the background to, the offence, and the appellant's immediate acceptance of guilt for the offence.

(vii) The learned trial judge imposed an excessive sentence notwithstanding that the offence involved damage of less than €200 in circumstances where such a sum was made available to the victim of the offence by the appellant at the sentencing hearing.

(viii) The learned trial judge concluded that the mitigating circumstances merely balanced the aggravating factors rather than concluding that the former outweighed the latter.

(ix) The learned trial judge identified the place on the sentencing scale to which the offending behaviour ought properly to be associated with reference to the appellant's criminal conviction history rather than the ingredients, nature and effects of the offence itself.

**The sentencing judgment**

6. In imposing the sentence of three years imprisonment with the final eighteen months suspended, the learned sentencing judge expressed pessimism at the prospect for rehabilitation having regard to the appellant's long history of previous offending. He remarked that the appellant, at the age of thirty six, was a person to whom *criminality is a habit*, and that he did not appear capable or willing to tackle this habit. He identified as the only mitigating factors the fact that the appellant had pleaded guilty, his apology and his offer to pay €200 in compensation to the owner of the house. He identified as an aggravating factor the fact that the offence was committed late at night at an occupied dwelling house. He described the incident as 'most disturbing' for the occupants of the house.

The learned sentencing judge stated:-

*"So, taking into account the plea of guilty, his previous history of wrongdoing; the plea of guilty clearly merits credit by way of mitigation. I can identify no other significant mitigating circumstances. I note the apology that he has made and I note the offer of €200 in compensation which he is prepared to pay to the person whose house he tried to get into that night, to repair the locks and that will be accepted and paid over."*

7. A significant feature in this case is the appellant's history of excessive alcohol consumption. Undoubtedly he has a very serious alcohol addiction problem. While this problem, and in particular, the fact that he was found by the gardaí to be severely intoxicated at the scene of the crime, goes some way to explain the commission of the offence, self induced intoxication is not generally the basis for a more lenient sentence than might otherwise have been the case. In a judgment of the Court of Criminal Appeal in the case of *DPP v. Reilly* [2004] IECCA, McCracken J. stated:-

*"If a person by consuming alcohol induces in himself a situation in which his likelihood to commit acts of violence is increased, particularly to the stage where he commits an act which he would not have committed had he not consumed the alcohol, then surely the courts would be failing in their obligations to the public if they allowed the cause of his violence, namely the alcohol, to excuse his actions."*

8. The extent of the appellant's self induced alcoholism is, in the circumstances of this case, a cause for apprehension that any meaningful rehabilitation will be the result of the learned sentencing judge's decision to suspend fifty per cent of the sentence imposed.

9. The offence, while involving relatively minor damage, did, as was clearly identified by the learned sentencing judge, involve an occupied private residence and the intentional damaging of a device designed to make that house secure from intruders. To this extent the offence was certainly not a minor one. A court is entitled to take into account and treat as an aggravating factor in relation to a criminal damage offence the fact that the property in question was an occupied private residence, as indeed was the view taken by the learned sentencing judge.

10. The sentence imposed being one of three years with the final eighteen months suspended for a period of five years was certainly not in anyway a lenient sentence. It was at the upper end of what might have been considered the appropriate range for this particular offence. It was a sentence which the learned sentencing judge was entitled to impose and it was within his discretion to so do, having regard to the appellant's very poor prior record of offending and the extent to which the prospect of rehabilitation did not appear very positive. The lengthy period in respect of which the suspended sentence will hang over the appellant is clearly designed to act as a strong incentive to him to stay out of trouble for a prolonged period after his release from custody.

11. The court is unable to identify any error of principle on the part of the learned sentencing judge, and so must therefore dismiss the appeal.