



THE COURT OF APPEAL

[2020] IECA 379

Court of Appeal Record No. 47/2019

**Birmingham P
McGovern J
McCarthy J**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

ROBERT O'DONOGHUE

APPELLANT

JUDGMENT of the Court delivered on the 3rd day of February 2020 by Mr. Justice McCarthy

1. This is an appeal against a sentence imposed at Cork Circuit Criminal Court on the 7th of March 2019 for an offence of criminal damage contrary to section 21 of the Criminal Damage Act 1991. The appellant was sentenced to a term of imprisonment of five years, the last three years of which were suspended on his entry into bond to keep the peace and be of good behaviour for a period of five years from his release date, that he would place himself under the provision of the Probation Service for five years from such date, that he would write a letter of apology to the victim within three weeks, that he remain sober in public at all times and that he approach no closer than ten metres from the curtilage of O'Donovan's Hotel. The latter condition applied for a period of five years.
2. The appellant had pleaded not guilty to the charge in question and also to what might shortly be termed related charges of a threat to damage property and of a threat to kill or cause serious harm. The victim of the latter offences was one Dina O'Donovan. The appellant was acquitted on them.

3. The appellant had visited the hotel in question on the 27th of December 2017 and was informed as was the fact that he was barred from the premises. He met Ms O'Donovan and following an exchange between them he was removed from the premises. He then rushed to an external door in order to gain access and he began kicking the door forcefully causing a bolt to give way and gaining access. The cost of repairs was modest. Ms O'Donovan was understandably upset about the event. She described the incident as having shaken her to the core and she has expressed worry about the fact that the appellant also lives in Clonakilty.
4. She describes herself as having had vulnerable feelings "*inflicted upon her*". The appellant has a bad record of criminality. Evidence was given that there were 24 convictions in this jurisdiction and six abroad. He appears to have numerous convictions for public order offences but the most significant were summarised in his evidence by Detective Sergeant Long. He said: -

"At Cork City Circuit Court on the 17th June 2015 damaging property belonging to another contrary to s. 2 of the Criminal Damage Act he received a sentence of five years imprisonment with a period of twelve months suspended. There were two charges of damaging property on that date judge, on the 17th June 2015 and also there was a charge of carrying a firearm with criminal intent for which he received the same sentence judge. A sentence of imprisonment for five years with twelve months of it suspended judge. An aggravated burglary contrary to s. 13 of the Criminal Justice Theft and Fraud Offences Act at the same sitting of Cork Circuit Court for which he received the same sentence.

On the 14th of March, 2014 in Amsterdam in the Netherlands he was convicted of extortion committed by two or more persons and attempted extortion committed by two or more persons for which he received 407 days imprisonment.

On the 13th May, 2013 at Amsterdam he was imprisoned for what a local law judge with probation for two years."

5. Reference is made in the transcript to the fact that at the time of sentencing the appellant had not been employed since the 6th of June, 2017. The offences of which he was convicted in 2015 appear to have been committed in 2008 and he was extradited to this jurisdiction. On the face of it accordingly, one might have supposed that he was serving a suspended period of that sentence but it was expressly submitted on this appeal that this was not so when the offence was committed and this was not controverted by counsel for the respondent.
6. In the nature of the offence we think that the judge fell into error in setting the headline sentence as one five years. We think that that error was a consequence of the fact that he took the view that this offence was in the mid-range in respect of sentencing for offences of the present kind. The maximum sentence is one of ten years.

7. We think that an appropriate headline sentence would have been between two and three years. There are few, if any, mitigating factors and he has a bad record. We would have thought that any judge at first instance would be well justified in imposing a sentence of three years being an appropriate headline sentence. Equally however, it is in the public interest that on the appellant's release from custody he should be encouraged to rehabilitate or the converse, that is to say discouraged, from the commission of further offences. We will accordingly allow the appeal and quash the sentence. We will therefore proceed to resentence.
8. We see no reality in the present case in suspending the sentence for as long as five years given his record in respect of public order offences, apparently relating to alcohol. Were we to do that there could in substance be a sentence of five years to serve. It is accordingly one of those cases where there is substance to the proposition that a suspended sentence is a real penalty and we must have regard to this fact. We will accordingly resentence the appellant to a term of imprisonment of two and a half years, the final six months whereof we will suspend for a period of one year. In doing so we note that he has what appears to be a firm offer of employment. It is fundamental that the appellant does not have any engagement with the O'Donovan family, or seek to enter their hotel. In practical terms this may not arise even though his current address is in Clonakilty, Co. Cork.
9. However we think it right that it be a term of that suspension that he enter into a bond to keep the peace and be of good behaviour for the period of twelve months from the date of his release from custody that he not approach the said hotel premises nearer than ten metres and further that he not approach the members of the O'Donovan family or resort to any place where they might reasonably be found or the vicinity thereof.