

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 6/2017

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA**

LAMBERT ENNIS v R

Miss Jacqueline Cummings for the appellant

Miss Patrice Hickson and Miss Kameisha Johnson for the Crown

6 December 2017 and 15 January 2018

MORRISON P

[1] At some time after 10:00 pm on 28 June 2015, the appellant went to the home of his estranged wife, the complainant. While there, he damaged some windows of the house, a door and an assortment of furniture and household items.

[2] The appellant was charged with malicious destruction of property, pursuant to section 42 of the Malicious Injuries to Property Act ('the Act'), which provides as follows:

"42. Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal

property whatsoever, either of a public or private nature for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding ten dollars, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for a term not exceeding two years, with or without hard labour; and, in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable to be imprisoned for a term not exceeding five years, with or without hard labour."

[3] On the appellant's first appearance before the Corporate Area Criminal Court in Gordon Town on 9 July 2015, the matter was referred to mediation, where an agreement was in due course reached between the parties. This agreement called for, among other things, payment of \$400,000.00 by the appellant to the complainant by way of restitution for the damage done to her property.

[4] However, the appellant did not honour the agreement as regards payment of \$400,000.00. On 14 March 2016, an order for indictment for malicious destruction of property was made by the Chief Parish Court Judge, Her Honour Miss Judith Pusey ('the judge'). Upon the appellant's plea of guilty, the judge sentenced him to one year's imprisonment, suspended for three years; and ordered him to pay \$400,000.00 to the complainant by way of restitution, or, in default of payment, serve six months' imprisonment. The order for payment stipulated that the appellant should pay \$100,000.00 immediately and the balance by monthly instalments of \$50,000.00 each on the first day of each succeeding month.

[5] This is the appellant's appeal against the judge's order for payment of restitution. On 6 December 2017, after hearing submissions from Miss Cummings for the appellant and Miss Johnson for the Crown, we allowed the appeal and set aside the judge's order for payment of restitution. The sentence imposed on the appellant was confirmed in all other respects and the court ordered that it should be reckoned as having commenced on 14 March 2016.

[6] In arriving at this decision, we were greatly assisted by the fact that both Miss Cummings and Miss Johnson were agreed that the judge's order could not stand in the face of this court's decision in **Andre Richards, Kayton Gayle, Kadian Biggs and Corey Green v R** [2012] JMCA Crim 26. The appellants in that case, who were also charged for malicious destruction of property under section 42 of the Act, were ordered by a Resident Magistrate to pay restitution. It was held that the Resident Magistrate erred in making the order for restitution, Dukharan JA observing (at paragraph [30]) that "[t]here is no provision in that section for an order of restitution".

[7] In our view, this consequence flows inevitably from the clear wording of section 42, which prescribes a maximum sentence of five years' imprisonment in circumstances such as those which existed in this case. Unlike in the case of summary conviction of a first offender under section 54, which gives the court power to discharge a first offender "upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the Court", the court has no similar or analogous power in relation to a charge on indictment under section 42.

[8] It is for these reasons that the court agreed with counsel and made the order referred to at paragraph [5] above. Unfortunately, therefore, the complainant must be left to pursue such other options as may be available to her to recover compensation for the damage caused to her property by the appellant.