THE COURT OF APPEAL

Birmingham J.
Edwards J.
Donnelly J.

Record No: 162/2019

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

GARRETT HILL

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 5th day of December, 2019 by Mr. Justice Edwards

Introduction

1. This matter comes before this court by way of an appeal against severity of sentence. On the 4th of July 2019, the appellant was before Cork Circuit Criminal Court for sentencing on foot of two criminal Bills, in the following circumstances.

2. The appellant had been returned for trial on indictment on Bill No CKDP0083/2017 (for convenience, "83/17") which contained a total of 10 counts relating to various drugs offences arising out of two incidents, both of which were said to have occurred on the same day, i.e., the 25th of August 2016. He initially pleaded not guilty to all counts upon arraignment, and his trial commenced on the 23rd of May 2019. On the following day, i.e., day two of the trial, the appellant asked to be re-arraigned. He then pleaded guilty to counts no's 5 and 6, respectively on the indictment, both of which charged him with possession of a controlled drug for the purposes of sale or supply, contrary to s. 15 of the Misuse of Drugs Act 1977. This was indicated as being acceptable to the Director of Public Prosecutions, whose counsel indicated that in due course a nolle prosequi would be entered in respect of the remaining counts. His sentencing was then adjourned, and ultimately proceeded on the 4th of July 2019.

3. The appellant was also before the court on the 4th of July 2019 for sentencing on six charges on criminal Bill No CYDP0158/2017 (for convenience "158/17") in respect of which he had signed pleas of guilty in the District Court, which he had later affirmed. The signed pleas were in respect of three charges of possession of a controlled drug for the purposes of sale or supply, contrary to s. 15 of the Misuse of Drugs Act 1977, and three charges of possession of a controlled drug, contrary to s. 3 of the Misuse of Drugs Act 1977. The charges related to the detection of separate quantities of cocaine, diamorphine and cannabis at the home of the appellant. This had resulted in a s.15 charge and s.3 charge being preferred in respect of each type of drug. The offences on Bill No. 158/17 were committed while the appellant was on bail for the offences on Bill No 83/17.

4. The appellant was sentenced ultimately to a sentence of seven years' imprisonment on Count No 5 on Bill No 83/17 with Count No 6 being taken into consideration, to date from 13/01/2017, being the date on which he went into custody. That figure of seven years was arrived at after various adjustments to a headline sentence and the application of various sentencing principles which will be discussed later in this ex tempore judgment. On Bill No 158/17 the sentencing judge treated the s.3 charges as being subsumed into the s.15 charges and as not requiring separate sentences. In effect, they were taken into consideration. He then sentenced the appellant to an ultimate of ten years' imprisonment, again after various adjustments to the headline sentence and application of sentencing principles, on Count No 4 on that Bill, being the s.15 charge relating to the quantity of diamorphine detected, and he took into consideration Counts No's 1 & 5 on the same Bill, which charged the same offence in respect of the quantities of cocaine and cannabis, respectively, also detected. In circumstances where the offences on Bill No 158/17 had been committed whilst the appellant was on bail, the 10-year sentence on Bill No 158/17 was made consecutive to the 7-year sentence on Bill No 83/17.

5. The appellant now appeals against the severity of these sentences.

Background Facts

Regarding the offences on Bill No 83/17

6. The court heard evidence that on the 25th of August, 2016, gardaí attached to Cork City Divisional Drugs Unit received confidential information that the appellant, residing at 19 The View, Gleann Na Rí in Tower, Blarney, Cork, was in possession of a large consignment of controlled drugs, and that he was using the home of a Mr Paul O'Rourke – Apartment 3, Unit 5, Blarney Shopping Centre, Blarney – to store same.

7. Based on this intelligence the gardaí immediately mounted surveillance on Paul O'Rourke's home. At approximately 2 pm, on the 25th of August 2016, both men arrived in a SEAT León rental car, driven by the appellant. The appellant was carrying a suitcase, and Paul O'Rourke was carrying a rucksack. They both entered the apartment.

8. Around 40 minutes later, both men returned to the car, and then drove to the car park of Cork Builders Providers in Togher. Here they rendezvoused with a blue Volkswagen Transporter driven by a Mr Nicholas Crowley. The appellant was observed exiting the SEAT car, carrying a package, suspected to contain controlled drugs, over to the passenger side of the Volkswagen Transporter, and then getting in to that vehicle. At this point gardaí then intercepted the suspected drugs transaction and arrested all three men. They recovered 55 grams of diamorphine valued at €7,713 from the glovebox of the Volkswagen Transporter. Mr Crowley was believed by gardai to have been in the process of purchasing these drugs from the other two men at the time of this interception.

9. A further 689 grams of diamorphine valued at €96,586 were later recovered from Paul O'Rourke's home in Blarney during a follow up search, bringing the total value of drugs seized to €104,299.

10. The appellant, having been arrested and detained at Togher Garda Station, was interviewed on six occasions but made no admissions. Despite this, forensic examination of the items seized at both locations succeeded in establishing a link between them. Three "sandwich" type plastic bags, described as partial bags, were found in the apartment. Part of these had been torn away. The quantity of diamorphine found in the glove box of the Volkswagon Transport was packed using this type of plastic, and it appeared on examination to have been detached by tearing from a larger item. When the tear line on the plastic in which the diamorphine recovered from the Volkswagon Transporter was packaged was compared with the tear line on the partial bags found in the apartment they were found to match up. In addition, the appellant's DNA was recovered from the partial bags found in the apartment. Furthermore, analysis of the phones seized from the three men at the time of their arrest showed that the appellant had had several conversations with Nicholas Crowley that day, while Paul O'Rourke had not, suggesting that it was the appellant who was in charge of this drug trafficking operation.

11. The appellant was subsequently charged on the 27th of August, 2016, on Bill No 83/17, with various offences including the two charges under s.15 of the Misuse of Drugs Act 1977 to which he ultimately pleaded guilty. One of these related to the diamorphine recovered at Cork Builders Providers car park in Togher, and the other related to the seizure of diamorphine at Apartment 3, Unit 5 in Blarney Shopping Centre.

12. During the appellant's sentencing in respect of these offences, the court heard that the appellant was the main organiser and was believed to have been operating as a drugs wholesaler, whilst Paul O'Rourke was his 'store man', and Nicholas Crowley was a customer.

Regarding the Offences on Bill No 158/2017

13. On the 12th of January 2017, at approximately 10.30 pm, gardaí from the Cork City Divisional Drugs Unit, on foot of a search warrant issued pursuant to section 26 of the Misuse of Drugs Act, approached the appellant's home in Togher, Blarney. Two gardaí entered the back garden to secure the rear of the house. Given both the time of year and the time of day, it was dark. However, there were lights on in the rear conservatory of the house, and the gardaí who entered the garden could clearly see the appellant in the conservatory. He was observed to be engaged in repeatedly transferring cannabis from a bag to a plastic cup atop a weighing scales. He was oblivious to the presence of the two gardaí outside. Other gardaí knocked on the front door. The appellant was seemingly unperturbed and went to answer the door, calmly removing his gloves as exited the room and leaving the cannabis exposed in the conservatory and visible to anybody who might enter it. He had been expecting gardaí to call, as they routinely did, to check up on him as he was subject to a curfew as one of his bail conditions. However, he was clearly not expecting an imminent search of his house on foot of a search warrant.

14. In the search that followed, 476 grams of cannabis was recovered, valued at €9,538. Also found were 18 grams of diamorphine hidden in the cooker extractor fan, valued at €2,537; and 12 grams of cocaine concealed in a shoe rack in the conservatory, valued at

€883. In total, the drugs valued at €12,958 were seized. €4,375 in cash was also seized by gardaí, and was later forfeited to the State as representing the proceeds of drug dealing.

15. It was accepted by the prosecution that the appellant's guilty pleas, particularly in respect Bill No 158/17 where the pleas were entered at the earliest opportunity, but also in respect of Bill No 83/17, albeit that they were late pleas in that instance, were of considerable benefit to the State, as they had obviated any necessity for undercover gardaí who had performed surveillance to give evidence in open court. This was important at a time when they were still operationally involved in Cork.

How the Co-offenders were dealt with

16. Both Paul O'Rourke and Nicholas Crowley were also charged with various offences arising out of the seizures on the 25th of August 2016. They were dealt with separately from the appellant, and had already been sentenced by the time he came to be sentenced.

17. Paul O'Rourke had ultimately pleaded guilty to a count of possession of controlled drugs for sale or supply, with a value of €13,000 or more, contrary to s. 15A of the Misuse of Drugs Act 1977 relating to the diamorphine found at his apartment, while Nicholas Crowley had pleaded guilty to a count of possession of controlled drugs for sale or supply, contrary to s. 15 of the Misuse of Drugs Act 1977, in relation to the diamorphine found in the search of the Volkswagon Transporter.

18. Mr O'Rourke was sentenced to seven years' imprisonment with the final two years suspended. Mr Crowley was sentenced to eighteen months' imprisonment.

Appellant's Personal Circumstances

19. The appellant is a 38 year old male, originally from Drogheda, Co Louth, who was born on the 17th of January 1981. He is married to a Blarney based woman for more than 10 years and he has a number of children. He is unemployed.

20. The appellant has 23 previous convictions, including a conviction for a relevant offence. In that regard he was convicted in the District Court in September 2014 of an offence under s. 15 of the Misuse of Drugs Act, 1977 and was sentenced to five months' imprisonment. He also has three previous convictions for possession of controlled drugs contrary to s.3 of the Misuse of Drugs Act, 1977. In addition, he has two Circuit Court convictions, namely one for possession of stolen property in May 2011 and one for assault causing harm in May 2015. He received sentences of two years' imprisonment, and twelve months imprisonment, respectively, for those offences. The remainder of his convictions are for road traffic offences.

21. The court below heard evidence that the appellant had been engaging well with education services in the prison while on remand. He had a good disciplinary record, with just one lapse, and was an enhanced prisoner. A Governor's Report in respect of him was positive. The court also heard that he retains the support of his wife, and a letter from her was handed in.

The Sentencing Judge's Remarks

22. The judge's sentencing remarks in this case were lengthy and it is unnecessary to quote them in full. However, it will be helpful to quote selected passages in respect of which complaint is made or bearing on complaints that are made in the grounds of appeal.

23. The sentencing judge commenced by outlining the evidence he would be taking into account, the range of available sentences, and several well recognised sentencing principles. Having done so he observed:

> *"As Detective Cahalane has made clear, this man is indeed a cog in a particular wheel and in many of these cases that's the question that's asked: Is the offender a cog in the wheel or is the offender a victim of that wheel? In this case, it is clear that this Mr Hill is indeed a cog in the wheel and when we say that, what wheel are we talking about? And it's important that this Court must recognise what that wheel is. It's a wheel of death, it's a wheel of destruction. It destroys lives, it destroys families and communities and it is quite clear that Mr Hill is no fool, as is evidenced by the governor's report, and he knows very well the consequences of his actions and it is clear to this Court by virtue of his conduct between 2016 and 2017 that he showed a total disregard for those consequences."*

24. The sentencing judge went on to note the positive Governor's report that had been received, and the submission by counsel for the defence that this was evidence of engagement in self -improvement and a desire to rehabilitate. He expressly rejected the latter saying:

> *"…it is this Court's view that it is not its obligation or indeed its role to structure a sentence in such a way as to make allowance for a prisoner who might change his attitude to crime sometime in the future, to for example suspend, partially or otherwise, or to reduce the sentence today which it might otherwise impose just in case Mr Hill might so turn his back on crime into the future. The Court must again remind itself that if a prisoner, if an offender decides in the future that he or she will indeed so turn away from crime, that is the role of the parole board, not of this Court. The question today, this very day, for this Court is whether this offender is bettering himself while in custody to be a better criminal when he comes out or to be a better citizen. It is this Court's strong view that this offender has shown no signs whatsoever of remorse, no appreciation of the effect of his drug dealing, his criminality, though he's clearly fully aware and may be presumed to be so fully aware by this Court of the impact of his criminality on other drug users, their families, their neighbours and communities. And we must always remember the victims of drug-fuelled crimes. Indeed as we can see the impact that his actions and the actions of his colleagues in drug dealing on the very stability in some parts, the very stability of this State in many parts of this country."*

25. The sentencing judge stated that he had had the opportunity to observe the accused during the opening of his trial in respect of the 2016 offences and that he had observed *"not a scintilla of evidence …of any remorse, regret, apology for his actions, not to mind*

any intent of turning his back on the crimes that he's committed", and that there was *"nothing at all before this Court today that in this Court's view can allow it to embark on any effort to incentivise rehabilitation, which is regrettable"*.

26. The sentencing judge observed that the roles of Mr O'Rourke and Mr Crowley were not comparable with that of the appellant, whom he regarded as being *"the organiser in chief"*.

27. The sentencing judge went on to list what he regarded as aggravating factors in the case as being "*the nature of the offence, the role played by this man, the nature of the drug involved, the type of drug, the value of the drug though in this Court's view the value is not necessarily an extremely guiding factor"*. He also referenced the appellant's lack of remorse and failure to co-operate as factors, which although not aggravating as such, *"which assist the Court, along with many other factors, that* [it] *is not his intention"* to give up a life of crime. The sentencing judge further referenced the appellant's previous convictions for drugs offences, and said that they must be treated as aggravating factors.

28. The sentencing judge then considered mitigation, and counsel for the appellant's contention that he should have regard to the fact that a lengthy prison sentence would impose hardship on the appellant's family. He expressed sympathy with their position but commented that *"the Court must show equal sympathy to all the other young people the victims of drugs in this country and they must be afforded the same recognition as your own family."*

29. He acknowledged that the pleas (on Bill 83/17) had the value conceded by the prosecution and indicated that they must be treated as a mitigating factor. He then commented:

> *"Beyond those factors, the Court finds very, very little by way of any further mitigation that it can rely upon when it comes to imposing penalty in respect of these two offences.*

30. He considered possibly making the sentences for the offences on Bill 83/17 consecutive inter se, but decided that it was not appropriate and that instead he would impose a sentence on one offence, which would have to be custodial, and reflect *"not only a substantial element of penalty but of deterrence"*, while taking the other into consideration.

31. The sentencing judge characterised the gravity of the offences on Bill No 83/17 as being *"exceptionally high"* and commented that *"The offence could not be more grave."* He then nominated a headline sentence of 10 years and discounted by two years from that for the mitigating factors.

32. The sentencing judge then moved to deal with Bill No 158/17. He stated that *"The general comments already made by this Court apply equally to these offences. The same aggravating factors apply but they're added to."* He identified as the additional

aggravating factors that there were three types of drugs involved, the fact that he was brazenly preparing drugs for sale in his own home, with his children sleeping upstairs, and notwithstanding that he was on bail and subject to a curfew.

33. On the mitigating side there was the different consideration, from that which had existed in the case of the offences on Bill No 83/17, that he had signed pleas at the earliest opportunity in the District Court, and he acknowledged the existence of jurisprudence suggesting that this should be reflected with a serious level of discount for mitigation, perhaps up to one third of the headline sentence.

34. The sentencing judge nominated a headline sentence of 15 years for the s.15 offences on Bill No 158/17, but said that he would discount from that by four years to take account of the mitigating factors, particularly the signed plea, leaving a net 11 years. He considered imposing consecutive sentences for the s.15 offences but decided against that and instead determined that he would simply impose one sentence for the s.15 offence involving the diamorphine and would take the s.15 offences in respect of the cannabis and the cocaine into consideration.

35. Having regard to s.11 of the Criminal Justice Act 1984 the sentencing judge recognised that he was obliged to make the sentence on Bill No 158/17 consecutive to the sentence on Bill No 83/17. That meant aggregating the 11 year net sentence on Bill No 158/17 with the 8 year net sentence on Bill No 83/17, giving a cumulative sentence of 19 years. The sentencing judge then reduced that by two years in application of the totality principle.

36. Grounds of Appeal

37. The appellant appeals on the following grounds:

In respect of 83/17

I. The sentencing judge erred in law and in fact in assessing the gravity of the offence.

II. The sentencing judge erred in failing to give a sufficient discount from the headline sentence having regard to the mitigating factors.

III. The sentence imposed on the appellant was disproportionate when having regard to the sentence imposed on the co-accused.

In respect of 158/17

IV. The sentencing judge erred in identifying 15 years as the presumptive headline sentence and in treating this offence as more serious than the offence under 83/17.

V. The sentencing judge did not afford appropriate discount for mitigating factors as in keeping with case law

In respect of both bills

VI. The sentencing judge mischaracterised the character and conduct of the appellant as aggravating rather than mitigating factors.

VII. The sentencing judge treated the appellant's lack of an emotional response during the open speech of Prosecution Counsel at his trial as evidence of a lack of remorse on his part.

VIII. The sentencing judge erred in incorrectly applying the totality principle.

Submissions

38. The court received helpful written submissions from both sides for which it is grateful. These were amplified in oral argument at the hearing of the appeal.

Discussion and Decision

The Sentence on Bill No: 83/17

39. Counsel for the appellant conceded before us that the headline sentence of 10 years nominated for these offences was within the range of the judge's discretion. While he characterised it as towards the severe end of the range he could not say it was disproportionate. Accordingly, his principal "stand alone" complaint in respect of the sentencing on Bill No 83/17 was that too little discount had been given for the pleas of guilty, albeit that they were late in the day. It had been conceded by the prosecution that they were valuable in the circumstances of the case, and in his submission they ought to have attracted a greater level of discount.

40. In exchanges with the bench counsel for the appellant conceded that notwithstanding that the pleas were considered valuable, it could not be said that they merited the highest. level of discount. Nevertheless, he still maintained that they should have attracted more discount than was in fact afforded.

41. We cannot agree. The pleas, which were the only mitigating factor put forward of any substance, were rewarded by a 20% discount. We consider that this was appropriate in the circumstances of the case.

42. We also disagree with the submission that there was an unjustified breach of the parity principle. We are satisfied that there was a clear basis for differentiating this case from the cases of Mr O'Rourke and Mr Crowley. This appellant was clearly in overall control of the operation.

The Sentence on Bill No 158/17

43. The main complaint here was with the headline sentence of 15 years. It was contended that this was disproportionate to a significant extent, and out of kilter with similar offences even taking into account the serious aggravating circumstances of this case. The Court was referred to its recent decision in *The People (DPP) v Sarsfield* in illustration of the point.

44. We have no hesitation in saying that we agree that the 15-year headline sentence was disproportionate to the gravity of the offences, and substantially so. If the principal aggravating factors of the offences being committed while on bail, the brazenness of the circumstances of their commission, their commission in the context of the appellant having relevant previous conviction were to be ignored in the first instance, the appropriate headline sentence, based on the intrinsic gravity of the un-aggravated offence, would be in region of 7 years. The effect of the aggravation would certainly be to elevate the gravity somewhat, but it would certainly not operate to more than double it. We would assess the cumulative aggravation as increasing the intrinsic gravity of the offence by 30%, but no more than that. That would have indicated a headline sentence of nine years rather than 15 years. There was a clear error of principle here, and we so find.

45. In the circumstances we must quash the sentence imposed by the Court below and proceed to re-sentence. This also has implications for the overall sentence in circumstances where there is a requirement to impose consecutive sentence.

46. In relation to Bill No 158/17 we will nominate a headline sentence of 9 years. On the mitigation side, the appellant was entitled to a discount the order of a third, which would suggest a net sentence for these offences, before any aggregation, should be one of six years.

Consecutivity

47. A straight aggregation of the net sentences of eight years on Bill No 83/17 and that of six years on Bill No 158/17 gives a cumulative sentence of fourteen years. Having stood back and considered the overall proportionality of that sentence we are prepared to reduce the figure of fourteen years to thirteen years in application of the totality principle. Accordingly, the six year net sentence on Bill No 158/17 will be reduced to five years to give effect to this.

48. We agree with the judge at first instance that there was an insufficient evidential basis in the circumstances of this case for suspending any portion of the cumulative overall sentence.

49. The appeal is allowed.