



THE COURT OF APPEAL

Record Number: 6/20

Edwards J.
McCarthy J.
Kennedy J.

APPROVED

Neutral Citation Number: [2020] IECA 156

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

EHIOMA MONYE

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 29th day of May 2020 by Ms. Justice Kennedy

1. This is an appeal against sentence. The appellant pleaded guilty to importation of a controlled drug contrary to section 15B of the Misuse of Drugs Act, 1977 (as amended). On the 17th December 2019, the appellant received a sentence of three years' imprisonment in Dublin Circuit Criminal Court.

Background

2. On the 24th July 2019, the appellant flew from Barcelona to Dublin. At Dublin Airport he was stopped by customs officers following a call from an authorised officer in relation to an indication from a sniffer dog concerning a bag from Barcelona. The appellant's bag was put through an x-ray scanner and an anomaly was noticed. He was informed that his luggage

would be searched and on being asked if he packed the bag himself, he said: "Yes, but my friends packed some of it as well". The bag was then searched and ultimately, 2.6 kgs of cannabis herb with an estimated value of €52,438 was recovered. The appellant stated that he had lived in Barcelona since October 2018, working as an engineer. On being asked whether he had instructions to meet anybody regarding the controlled substance, he said "No, I think they were trying to contact me when I arrived."

3. The appellant was subsequently arrested and questioned by gardaí. During the course of interview he stated that he had no knowledge of the drugs in his bag and they were placed there without his knowledge. The appellant subsequently pleaded guilty and he was sentenced on the 17th December 2019.

Personal circumstances of the appellant

4. The appellant, originally from Nigeria, is a UK citizen. He was 27 years old at the time of sentencing. The Court heard that he had studied engineering in university, had a master's degree in aerospace engineering and had moved to Spain for work. He has no previous convictions in this jurisdiction but has four convictions in the UK, the most recent in 2016 for driving under the influence, failing to report a collision and giving his name and address in 2014, simple possession contrary to the Misuse of Drugs legislation in 2013, and possession of a knife in 2011.

5. In his plea in mitigation, a letter from the appellant's father was handed into the Court expressing the hope that he completes a specialist training programme to enable him to refocus into the future. Testimonials and a letter from the appellant expressing remorse were also furnished.

The sentence

6. A sentence of three years' imprisonment was imposed. In arriving at this sentence, the sentencing judge stated as follows:-

“I think I can accept that he was transporting these drugs for some type of reward and it seems he doesn't have the background that he would own these drugs. Now the mitigation is clear in the case: (1) he has pleaded guilty; (2) he did co-operate, he didn't make admissions in the garda station, but the important issue he pleaded. He has a record of conviction but it's not too relevant. He has a work history, which is to his credit, he seems to be an intelligent man with good educational background and qualifications. Now undoubtedly he has committed a serious crime and must be punished for that crime.

I think the appropriate sentence, taking all the factors into account, including the matters raised by Mr Clarke on his behalf, is a term of imprisonment of three years backdated to the 24th of July of this year. Thank you. I note also that he's an English national, thank you.”

Submissions of the appellant

7. The appellant submits that the sentencing judge did not set out the offence on the spectrum of severity and indicate his starting point or how much credit he was giving the appellant for the mitigating circumstances.
8. It is said that the sentencing judge failed to take into account the admissions made by the appellant to the customs officials and the appellant submits that there was a wealth of mitigation present which was not adequately reflected in the sentence.
9. The appellant further submits that the sentencing judge erred in imposing an immediate custodial sentence with no suspension of the final part of his sentence. It is submitted that the sentencing judge failed to have sufficient regard to the significant steps towards rehabilitation which the appellant had taken and failed to give due weight to the public interest in the rehabilitation of the appellant. The appellant submits that the sentencing judge ought to have considered the incentivisation of the appellant by partly suspending his

sentence, as per the principles set out in the judgment of Walsh J. in *People (Attorney General) v. O'Driscoll* (1972) 1 Frewen 351 where he stated:-

“The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case - not only in regard to the particular crime but in regard to the particular criminal.”

10. The appellant refers to *The People (DPP) v. McGinty* [2007] 1 IR 633 and *The People (DPP) v. Alexiou* [2003] 3 IR 513 where the Courts upheld the imposition of wholly suspended sentences in respect of s15A offences. In *Alexiou*, Murray J. held that :-

“...where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interest of justice.”

Submissions of the respondent

11. The respondent accepts that there were a number of mitigating factors for which the appellant was entitled to credit. However, the respondent submits that the mitigation must be balanced with the seriousness of the offence and the manner in which the legislature views such offending behavior. The respondent refers, *inter alia*, to the dicta of Hardiman J. in *The People (DPP) v. Botha* [2004] 2 IR 375:-

“...it is clear that the effect of the statutory provision is significantly to encroach on the otherwise untrammelled discretion of the sentencing court. If there are no specific and exceptional circumstances rendering it unjust to impose the minimum

sentence then that sentence must be imposed, if indeed a greater one is not considered appropriate. Even if there are such circumstances, both the maximum and the minimum sentence continue to exist as clear and definite guidance to the Court. The Oireachtas, as it is entitled to do, has indicated that this offence is to be considered a very grave one capable of attracting a sentence which might be regarded as harsh in certain circumstances and on certain individuals. It is important that sentencing courts should bear this in mind.”

12. The respondent submits that the cases referred to by the appellant: *The People (DPP) v. McGinty* [2007] 1 IR 633 and *The People (DPP) v. Alexiou* [2003] 3 IR 513, support a wholly suspended sentence only where there are wholly exceptional circumstances. It is submitted that no such circumstances are to be found in the present case.

13. The respondent submits that once the sentencing judge had concluded that he was entitled in principle to depart from the mandatory minimum, he considered the mitigating factors and the personal circumstances in detail, but while retaining the perspective that is required by the legislature in relation to the serious nature of the offence concerned

14. The respondent refers to *The People (DPP) v. Sarsfield* [2019] IECA 260 where the Court emphasised that the culpability of an offender under the 1977 Act varies depending on their role in a drug trafficking operation but even those lesser roles of storing or transporting drugs may still be very important in facilitating the trafficking of drugs.

15. The respondent further refers to *The People (DPP) v. Morrow* [2019] IECA 268 where the Court reiterated the importance of proportionality and stated:-

“Gravity is measured by the assessment of culpability and the harm done or in the instance of a drugs offence the potential harm which is caused to society by the scourge of drugs.”

The Grounds of Appeal

16. Two grounds of appeal are advanced as follows;

that the judge:-

- (1) Failed to balance adequately the mitigating factors with the aggravating factors and thus imposed a sentence which was disproportionate in all the circumstances and
- (2) Failed to encourage further rehabilitation by suspending the custodial sentence contemplated.”

Discussion

17. This Court recently delivered a judgment in *The People (DPP) v. Sarsfield* [2019] IECA 260 where Birmingham P. observed:-

“The culpability of those coming before the courts varies considerably. Sometimes, though perhaps not as often as one would wish to see, the Courts are dealing with those in a supervisory role: those managing or directing the operations in question. Probably more frequently, however, those brought before the Courts play a lesser role and could be described as lower -ranking operatives in a wider criminal enterprise. These lesser roles, whether they involve storing or transporting drugs, may still be very important and without which major drug dealing and trafficking could hardly occur.

In assessing the gravity of a particular offence, the value and quantity of drugs seized have long been regarded as critical factors to be taken into account in evaluating where on the scale of seriousness the offence falls. See, in that regard, the judgment of the Court of Criminal Appeal in the case of *DPP v. Derek Long* [2008] IECCA 133. However, as that judgment itself makes clear, that is not of course to say that the value of a drugs haul is, in and of itself, determinative of the sentence to be imposed”.

18. In the present case, the appellant imported a controlled drug of significant market value into this jurisdiction. It seems that he was the transporter of the substance and was involved for financial gain. Whilst his role appears to have been confined to that of transporting the drugs and may then be said to be a lesser role, nonetheless, it is an important role. This was a serious offence and as has been stated previously, the victim of these types of offences is society as a whole; drugs cause untold damage to our communities and consequently, deterrence is an important factor in the imposition of sentence.

19. The optimum approach in imposing a proportionate sentence is a two-stage process; the assessment of a headline or pre mitigation sentence having regard to the gravity of the offence, with regard to the range or spectrum of available penalties. As will be seen hereunder, the legislative framework for offences of importation of controlled drugs where the market value is 13,000 or more specifies a presumptive minimum sentence of 10 years which may be departed from if a court is satisfied that there are exceptional and specific circumstances relating to the offender or the offence which would make such a sentence unjust.

20. Having nominated a headline sentence, there may then be a downward adjustment to take account of relevant mitigating circumstances.

21. The relevant portion of section 27 of the Misuse of Drugs Act 1977 Act as amended provides:-

“33.— Section 27 of the Misuse of Drugs Act 1977 is amended by the substitution of the following subsections for subsections (3A) to (3K):

“(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment—

(a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and

(b) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.

(3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3D) (a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.

(b) Subsection (3C) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that

purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including—

(i) whether that person pleaded guilty to the offence and, if so—

(I) the stage at which he or she indicated the intention to plead guilty, and

(II) the circumstances in which the indication was given...”

22. While the judge did not expressly indicate that circumstances existed to permit a departure from the presumptive minimum sentence, he did so depart and we can see that circumstances exist enabling him to do so. However, it nonetheless remains that an offence contrary to s15B of the 1977 Act, is a serious one.

23. As stated in *The People (DPP) v. Renald* (Unreported, Court of Criminal Appeal, 23rd November, 2001):-

“Even where exceptional circumstances existed which would render the statutory minimum term of imprisonment unjust, there was no question of the minimum sentence being ignored. Perhaps the most important single factor in determining an appropriate sentence is the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the seriousness of the offence may be obtained from the maximum penalty imposed for its commission. This is particularly true in the case of modern legislation. What is even more instructive is legislation which, as in the present case, fixes a mandatory minimum sentence. Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provision, that is to say, the maximum sentence. It would be wrong to assume that the offence of

importing controlled drugs in excess of the prescribed amount or value will attract only the mandatory minimum sentence, long though it may be.”

Decision

24. While the judge did not nominate a headline sentence, we have, on many occasions, said that while the approach of nominating a headline sentence is the optimum approach, the failure to do so, will not of itself amount to an error in principle. This most experienced sentencing judge adopted a global approach resulting in a sentence of three years imprisonment. We find no error on the part of the judge in this respect.

25. This was a serious offence, where the appellant transported a controlled substance to this jurisdiction for financial gain. While the judge determined not to impose the presumptive minimum sentence, the legislation fixes such a minimum to reflect the serious nature of drug crime.

26. We look to the global sentence imposed and we are not persuaded that the judge erred in the imposition of a sentence of three years. Nor do we accept that he failed to take sufficient account of the mitigating factors, (of which there were many), in imposing an ultimate sentence of 3 years' imprisonment.

27. There were as we say, significant mitigating factors giving rise to a reduction in sentence, however, those factors do not to our mind give rise to exceptional circumstances, justifying a wholly suspended sentence.

28. We accept the respondent's submission that this is not a man with a drug addiction and thus operating under a form of coercion to commit the offence. This is a man who is highly educated, with gainful employment who committed the offence for the purpose of financial gain.

29. Moreover, there was no error on the part of the judge in not suspending any part of the sentence.

30. In the circumstances, we are satisfied the sentence was within the margin of appreciation afforded to a sentencing judge and was indeed wholly appropriate.

31. Accordingly, the appeal is dismissed.

Isabel Kennedy
28th June 2020