



THE COURT OF APPEAL

Record Number: 268/19

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PATRICK RING

APPELLANT

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

1. This is an appeal against a sentence of three years' imprisonment, the last eighteen months of which was suspended, imposed at Cork Circuit Criminal Court on November 27th 2019 for an offence of possession of heroin for sale or supply contrary to s.15 of the Misuse of Drugs Act, 1977, as amended, and committed on December 20th 2017 at Grand Parade, Cork. The appellant had been found in possession of small foil packages of heroin to a market value of €575.00 for the purpose of dealing. When searched, he was found to have €65.00 cash. He pleaded guilty at the first available opportunity.
2. The matter first came up for sentence before the Circuit Court on May 29th 2019. On that occasion, the judge had the benefit of a Probation Report and having regard to its contents and the submissions of counsel, he adjourned the matter for further consideration and to obtain a further report. On November 27th 2019, a further sentencing hearing took place whereby such report was available and sentence was imposed.
3. The appellant is 48 years of age and has 91 previous convictions of which seven are for theft, 24 for assault, 37 in respect of Public Order issues, 3 are for possession of offensive weapons, one for burglary and six under the Misuse of Drugs Acts. In particular, five of those six convictions are convictions under s.15 of the 1977 Act, as amended. At the time of sentencing for the present offence he was serving a sentence of five years' imprisonment, the last two years thereof had been suspended in respect of a similar offence. That had been imposed on May 17th 2018 and it was understood that he would be released on normal remission on August 15th 2020. A sentence for a similar offence of six months had been imposed on July 11th 2018 to be served concurrently with the former.
4. The personal circumstances of the appellant are unfortunate. He has a long history of addiction to both alcohol and controlled drugs and in particular, it appears, heroin. He has been in custody since May 16th 2018 and it appears that he has engaged in a

methadone detoxification programme with success. At the time of the offence herein he was living in a Simon Community shelter for homeless persons and had known many periods of homelessness over the years. It does not appear to be in doubt but that his engagement in the sale of heroin on this occasion was to feed his own habit.

5. The appellant has four children, now all adults, and four grandchildren. He does not have any qualifications of a formal kind but worked over the years as a painter and decorator. Such limited education of a formal nature as he has, has been gained whilst in prison. Since the breakdown of his relationship with his partner in Youghal, County Cork in 2004, the appellant has been using or accessing services for the homeless and has spent many years in prison on and off. He has before now been placed under the supervision of the Probation and Welfare Service who have had many dealings with him since 2005 but due to ongoing addiction issues and what are described by them as a related chaotic lifestyle, his level of engagement is described as being "less than satisfactory" and it is stated in the report of 10 May 2019, the first of two, that:-

"Further offending behaviour soon followed and custodial sentences were imposed before behavioural change was possible."

6. When the matter was first before the Circuit Court for sentencing on the adjourned date, the probation officer took the view that the supervision provided for on his release in August 2020 pursuant to the suspension of the sentence of five years:-

"gives him the best possible opportunity to address his addiction while in custody and prepare for his release back into the community. If he can gain control over his addiction, then probation supervision could have a positive impact on reducing further criminal behaviour."

At that time, he was described by the Probation Officer as presenting with:-

"a strong desire to fully address his addiction while in Cork Prison."

The appellant was engaging with an addiction counsellor. The report is available to the Court in respect of such engagement during 2019 and he apparently presented with a good insight and commitment to addressing his addiction. However, the Probation Officer also said that:-

"The risk of re-offending when back in the community for Mr. Ring will however remain high. As things stand, he will be homeless on release and the only option available to him would be a bed in one of the two homeless hostels in the city. He correctly identifies the risk of this environment in maintaining a drug and alcohol free status."

7. On the sentencing date, the Probation Officer, in his second report, reported that the appellant continued his engagement with the Drug Treatment Services in the prison and had a willingness to undergo a residential treatment programme on release, something which it was considered might be appropriate. It also appears to be the case that the

prison service would facilitate a short period temporary release to assist him in taking up such treatment should it arise. It refers furthermore to the fact that sanctions were imposed upon him in prison for being "under the influence" (it is not clear under the influence of what) and "retrieving contraband". It is significant that the Probation Officer went on to state that these events "call into question his commitment to remain drug free."

8. In the course of debate with counsel on 29 May, the trial judge stated that:-

"Can I say to you Mr. Devlin what I have in mind if I was to proceed to do a full sentence this morning, I would find it very difficult to avoid a consecutive sentence to the sentence he presently serving."

He went on to say:-

"That's number one, and number two then after applying the usual totality I might have to bring that back a little bit and have them both together but, however, I hope Mr. Ring understands that that's where the Court has to seriously look at imposing a consecutive sentence for this offence to the sentence he is serving at the moment."

9. The judge also accepted the contents of the Probation Report then before him and he took it to mean that to the Probation Officer, Mr. Ring had presented as "motivated and committed to his path at present while in Cork prison". The judge referred thereafter to "the high risk of reoffending", especially in the context of homelessness, and then added:-

"So there are certain plans that your client must put in place I would have thought -to avoid, for example, to reduce that high risk and to have places to go."

The judge then indicated the course he proposed to adopt on that first occasion:-

"With that in mind the Court would have in mind putting this matter back to the end of the second term, next term, towards the end of that term for an up to date report from the probation officer. In this, if Mr. Ring continues to be actively pursuing his programmes and continues to present to the Probation Service in the manner that he is at the moment, then obviously there may be a substantial element of suspension of any additional sentence for this offence."

10. Furthermore, and we think that this is important due to the case made on appeal, the judge added:-

"That's not making any promises. Mr. Ring is serving de facto a three-year sentence imposed last year and he has a bond that is entered into for a further two years so the Court must take all that into mind when imposing it."

And:-

"The Probation Officer seems to be with him in many respects and if he can stay with Mr. Coughlan and proceed accordingly, then the court might be free to take a more lenient approach to this offence than it would if it proceeded this morning."

11. There are a number of elements of repetition there, but one thing is clear is that the judge had not tied his hands in any way. It will accordingly be seen that there is no basis for the suggestion that the judge gave anything in the nature of a promise or said that anything which might legitimately have given rise to an expectation that the appellant would receive a concurrent and not consecutive sentence. If anything, the tenure of the judge's remarks are that a more lenient approach would be taken by him in certain circumstances than might otherwise be the case. Without any further limitation on his sentencing discretion, there is no basis for the suggestion that something in the nature of an inducement was given to the appellant to cooperate with the Probation Service and in particular to address addiction issues.
12. In sentencing the appellant, the judge correctly fixed the headline sentence at four years. By virtue however of the plea of guilty and the mitigating factors, the judge took the view that such sentence ought to be reduced to three years, but he suspended the final eighteen months thereof with special reference to the fact that the appellant had committed himself seriously to becoming free of addiction to drugs and otherwise rehabilitate himself.

The Appeal

13. The grounds of appeal as set out in the Notice of Appeal are as follows:-

- i) That the learned trial judge imposed a sentence which was disproportionate and unduly severe and harsh in all of the circumstances;
- ii) That the sentence imposed was disproportionate and in error having regard to the fact that the appellant had entered an early plea of guilty, and, having come before the learned trial judge on the 29th May 2019, had adjourned to 27th November 2019 and the judge had directed an up to date Probation and Welfare Services report on account of the positive progress which the appellant was making while in prison, and that on that account he would not finalise the sentencing on that said date (29th May 2019) and would not impose a consecutive sentence on that date. The appellant therefore had a legitimate expectation that on the adjourned sentencing date the learned trial judge would not impose a sentence which was unduly severe and/or disproportionate in view of the positive progress which the appellant had made and which he had continued in his efforts to rehabilitate himself while in prison;
- iii) That the appellant had fully engaged with and had abided by all of the directions of the Probation and Welfare Service in Cork Prison and had fully availed of all the services in the prison so as to attempt to rehabilitate himself;

- iv) That the learned trial judge was in error as a matter of fact that the appellant had not cooperated in the investigation of the offence as a ground for imposing the sentence which he did.

At the appeal hearing, Mr. Devlin dealt with these grounds together.

The primary basis of the appeal however was the proposition that in some sense the judge had limited his discretion when the matter first came before him, and in particular that he had indicated that a consecutive rather than a concurrent sentence would be imposed in respect of the offence should the hopeful signs for the appellant's future indicated in the probation report prove well founded. We have already dealt with the judge's observation in this regard and we cannot but repeat that there is no basis for this proposition on any view.

The appellant did not, nor could he question the headline sentence which was fixed but confined himself in effect to state that the sentence was disproportionate. We cannot accept that this is so having regard to all of the circumstances of the case with special reference to the numerous convictions of the appellant under the Misuse of Drugs Act.

- 14. We therefore can find no error by the sentencing judge and we consider that the sentence imposed was within his discretion.
- 15. We accordingly dismiss this appeal.