THE COURT OF APPEAL

[264/2019]

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN
THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

JASON HAYES

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 14th day of September 2020 by Mr Justice McCarthy

1. This is an appeal against a sentence of three years imprisonment imposed at Cork Circuit Criminal Court on November 27th 2019 for the offence of possession of a controlled drug (24.5 g of cocaine valued at €1750) contrary to s.15 of the Misuse of Drugs Act, 1977. The appellant came before the Circuit Court on a signed plea of guilty. The offence had been committed at a car park near Midleton, County Cork on February 26th 2019; the appellant was a front seat passenger in a car which was stopped and sought to be searched by the Gardaí. When the Gardaí approached the vehicle, a Garda O'Neill informed the driver that he was going to search it. The appellant locked the doors and refused to open them. He sought to conceal an item (which transpired to be the cocaine) in his trousers. When the Gardaí managed to open the passenger door the appellant attempted to escape; in the course of his arrest he struck the Garda on a number of occasions but his resistance was overcome. When interviewed he said nothing.

2. The appellant was born on May 7th 1984. He has a number of previous convictions, those being one for obstruction of a police officer, another for violent disorder, one for assault contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997 and another for an offence contrary to s.2 of the 1997 Act. Most significantly in the present case, he was convicted on a plea of guilty of offences contrary to Sections 15 and 15A of the 1977 Act on April 29th 2005 in respect of which sentences of three and five years imprisonment respectively were imposed, but suspended for periods of three and five years respectively. He has one conviction dating from 2010, in respect of simple possession of a controlled drug contrary to s.3 of the 1977 Act; he was sentenced to a term of imprisonment of five months in respect of the latter offence. There are also what are described in the Probation Report as numerous road traffic offences, but these are not of significance in the present context.

3. A complication arose at the sentencing hearing in that the appellant was then before Circuit Court in respect of other charges the most serious of which was a charge of aggravated burglary but in the event he was permitted to change his plea in respect of the latter and was acquitted after a trial. We mention this because the Probation Report which the judge had ordered and which was before the court makes reference to the latter. For the present purpose, however, the report was of assistance to the trial judge in as much as it deals with his history of contact with the courts and the Probation Service and the issue of drug addiction. The appellant has had contact with the Probation Service since 2010 and he had successfully engaged with it; something which extended to the successful completion of a Community Service Order.

4. According to the report, the appellant has stated that he misused alcohol from the age of 15 and had become a regular cocaine user by the time he was 18. However, when referred to the institution known as Arbour House, (which deals with addiction issues) in 2010 in respect of misuse of alcohol, cocaine was not an issue. It further appears from the report that the appellant attended the well-known Cuan Mhuire residential treatment centre for drug addiction but that he self-discharged prior to the completion of his course. Subsequently, however, he availed of a place offered to him at the Fellowship House secondary treatment centre and participated in its programme. The Circuit Court had the benefit of a letter from Arbour House dated the 21st of November furnished at the request of the appellant to the effect that he had been attending it; it is there stated that the appellant "*has provided your own samples and all are clear to date. Jason is also due to attend Arbour house today programme on completion of an assessment…*" There is no indication in it of over what period of time samples were provided but the report states that from contact which the probation officer had with Arbour House on November 6th 2019 the appellant was attending on a "semi-regular" basis, but that the staff there had concerns that the appellant was not motivated to attend to avail of the support they offer; this information was obtained on the 6th and an earlier contact of the 9th of October 2019 had already established that the appellant had produced two "dirty" urinalysis samples in the same week and another that had been diluted. The Probation Officer describes herself as having had "*concerns in relation to his recovery as he is not participating fully in the process offered by Arbour House*". It appears that she was also informed that the appellant had missed appointments which no doubt was also taken into account by her. Nonetheless, the fact remains that at the time of sentencing it appears that there was a place available for him, albeit for non-residential treatment. The appellant attended for treatment at Fellowship House admitted on May 5th 2019 with a discharge date of July 26th 2019. The course in question extended to participation in a community employment scheme and he did so.

5. The appellant obtained employment with "All Fresh Wholesale" on September 22nd 2019 and a favourable reference was given in evidence by his employer. Similarly, such a reference had been before the court in respect of his participation in the community employment scheme. The Probation Report is to the effect that since he left school the appellant has had "various employments", he lives just outside Cork city with his partner and her child whom he supports and his extended family live in the same area. The

Probation Officer comments that the appellant's employment is a "new positive factor" in his life.

6. The judge assessed the headline sentence at five years but took the view that having regard to the signed plea of guilty and "other mitigating factors" a sentence of three years was appropriate. In addressing mitigation, the judge had regard to what he describes as the "*good work ethic*" of the appellant but that there was "*very little further… in mitigation*". He took the view that there was no tangible evidence of an intention to rehabilitate and, indeed, said that there was there was no basis "*..[to] incentivise ….. rehabilitation because there is no effort been made by Mr Hayes…*"

Submissions

7. The grounds of appeal are effectively that the trial judge erred in fixing a headline sentence of five years and, in any event thereafter, failing to give sufficient weight to the mitigating factors. Mr. Devlin for the appellant submitted that a signed plea of guilty attracts a special weight involving a greater discount from a headline sentence than that which might be otherwise afforded- that it is on any view a plea at the earliest possible opportunity and, from the start, means that the prosecution does not have to take any further steps in preparation for a trial. He further submitted that the trial judge was wrong in what is said to be his conclusion that no efforts towards rehabilitation had been made when, on the facts, that was not so. In this regard he pointed particularly to the reports from the organisations engaged in drug treatment. Further, he submitted that the reports and indicative of the fact that notwithstanding the Garda evidence to the effect that at the time of his apprehension he was not influenced under the influence of drugs, he was in fact addicted. He referred also to the fact that there was no charge before the court of resisting arrest and he submitted that the reference to the Probation Report and in the judgment to the absence of victim empathy referred to the aggravated burglary charge. He submits that the court could, and indeed should, have adjourned the matter so that he might avail of treatment - the accused to be granted bail, and if rehabilitated, to suspend the sentence. He contends that these elements gave rise to an error or errors in principle.

8. Counsel for the prosecution contends, however, that there was no error of principle, the appellant had been apprehended in *flagrante delicto* diminishing the significance of the plea whether signed or not, that he had previous relevant convictions under the Misuse of Drugs Act, that the manner in which he had been dealt with previously, by the suspension of sentences, had no deterrent effect, and that the judge was entitled to take the sceptical view he did as to the reality of the appellant's submission that he was making real efforts at rehabilitation, this latter based largely on the Probation Report. Mr McCarthy for the prosecutor submits that there "had to be a sentence with an element of punishment in it and with an element of deterrence".

Discussion

9. We do not doubt that, as a mitigating factor, a signed plea is one which attracts special weight. However, as with all pleas it must be considered in the evidential context and due to the fact that the appellant was caught in *flagrante delicto* he had little choice but to

plead guilty. The aggravating circumstances include of course the fact that the appellant violently resisted arrest and sought to escape; it is of no relevance in this context that no charge was laid in respect of such conduct. Many events could be the subject of a multiplicity of charges, and the fact that the prosecutor has sensibly refrained from laying all which might theoretically be open, when the entire circumstances forming part of the *res gestae* must be taken into account on sentence, does not mean that there is an irregularity or that some element of the *res gestae* must be ignored

10. We think that it is highly relevant that the appellant was guilty of previous offences under the Misuse of Drugs Act and also did not take the opportunities for rehabilitation afforded by the way in which the court dealt with two of those offences, and in particular, that the sentences of five and three years respectively were wholly suspended. It need hardly be said that the fact that he committed such prior offences under the Act was an aggravating factor also. We think that any offence involving the possession of controlled drugs for the purpose of supply must be regarded as serious, even where, for example, the quantity in question might be regarded as at the lower end of the scale, so to speak. It is plain from the transcript that Mr McCarthy was merely accepting that on the evidence the quantity was not of "a significant amount" and that such an acknowledgement of fact was not a concession, still less a factor which meant that the headline sentence should have been lower. We think that Mr McCarthy is right in his submission that sentences in respect of offences of this class must have a deterrent element both personal and general and that a punitive element must also exist. We think that the judge was entitled to have regard to the views expressed by the Probation Officer on the issue of rehabilitation and he took into account the good work record of the appellant. He was right in his choice of the headline sentence as being five years, and further, he gave a more than ample reduction for mitigation. Accordingly, we consider that there was no error in principle calling for the intervention of this Court.

11. We accordingly dismiss this appeal.