



THE COURT OF APPEAL

Record Number: 235/20

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

DANIUS GASTILAVICIUS

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 11th day of February 2022 by Ms. Justice Kennedy.

1. This is an appeal against severity of sentence. The appellant pleaded guilty to the cultivation of cannabis plants contrary to s. 17(1) Misuse of Drugs Act 1977. On the 20th November 2020 the appellant was sentenced to five years' imprisonment with one year suspended for two years on terms. Counts contrary to ss.3 and 15 of the 1977 Act were taken into consideration.

Background

2. On the 26th March 2020 Gardaí executed a search warrant at an address in Ballymote, Sligo. On entering the premises, Gardaí found the appellant and another person upstairs. Gardaí then discovered what they describe as a sophisticated cannabis growing operation in the four bedrooms of the property. Fans, thermostats and lighting had been installed into each room for the purposes of growing these plants. 19 plants in total were growing on the property and a further 60 pots were found there, filled with compost but with nothing growing in them. The total value of the plants found, at €800 per plant, was €15,200.
3. Gardaí arrested the appellant and upon searching him found €1,500 cash in his pocket and a key for the house. Two phones were also seized, a request was made for the code

to a phone, which the appellant refused to provide. He was brought to Ballymote Garda Station for interview but nothing of evidential value arose.

4. The appellant's co-accused made admissions in interview and stated that he had only been in Ireland for two weeks prior to his arrest. He was 18 years old and from Lithuania and had built up a debt of €10,000, he was brought to this jurisdiction by the person to whom he owed the debt. He was being paid €1,500 per month to be the sole occupant of the house and to tend to the cannabis plants. He had no previous convictions. His culpability was placed on a lower level to that of this appellant.

Personal circumstances of the appellant

5. The appellant was 44 years of age at the time of sentencing. He is a father of one child and divorced but has since reconciled with his wife and they are living together as a family unit for the upbringing of their child.
6. The appellant is originally from Lithuania, where upon leaving school, he joined the guilds to study and train to be a painter and decorator, with which qualification he travelled extensively through Europe engaging in constructive work.
7. The appellant has no previous convictions in this jurisdiction, but has previous convictions from the neighbouring jurisdiction. On the 26th January 2016, he was convicted of burglary at Exeter Crown Court and sentenced to seven years' imprisonment and on the 24th March 2017 he was also convicted of burglary at Ipswich Crown Court and sentenced to three years' imprisonment.
8. Prior to the incidents contained herein, the appellant had been to Ireland on two occasions, once for a period of roughly a year and on the second occasion, for roughly two to three years during which time he was employed as a baker and a kitchen porter. He had obtained an Irish PPS Number and was working legitimately and paying his taxes. It was on his third visit to Ireland that it is said the appellant's convictions from the UK caught up with him and he was approached by criminal elements on Facebook.
9. The appellant wishes to return to Lithuania to his family upon his release.

The sentence imposed

10. The judge identified a headline sentence of seven years' imprisonment, taking into account the aggravating factors.
11. The judge considered that there was very little in terms of mitigation other than the appellant's early guilty plea and his aspiration to return to Lithuania and lead a non-criminal life. Taking this into account, the judge reduced the headline sentence to one of five years' imprisonment with the final year suspended for two years from the date of the appellant's release.

Grounds of appeal

12. The sentence is appealed on six grounds, namely:

1. The judge erred in principle in ruling that the appellant's term of imprisonment be three times that of the co-accused, notwithstanding that superior mitigation merited a lesser sentence for the co-accused.
2. The judge placed too much emphasis on retribution due to the appellant not being a habitual resident of Ireland.
3. The judge placed too much emphasis on how the sentence would potentially deter other foreign nationals from committing such an offence.
4. The judge relied on certain inferences which could have led to unfairness.
5. The judge erred in outlining that organisation in relation to drug offences is more significant than the amount of drugs found in relation to drug offences.
6. The judge erred in drawing inferences from the appellant's "non-cooperation."

Submissions of the appellant

13. In terms of the first ground of appeal, the appellant submits that as both himself and his co-accused were "caught red handed" it should not have made any material difference to sentencing whether or not either man gave an account at interview. The appellant points out that his co-accused received a 16 month sentence whereas his sentence amounted to 48 months. It is submitted that a 300% disparity is excessive for the same offence.
14. In support of the second ground of appeal, that the judge placed too much emphasis on retribution due to the appellant not being a habitual resident in Ireland, the appellant submits that whether a person comes to a country and does harm to it or is present in the country for an extended period and does harm to it should not merit a significant distinction. It is contended that the judge attached too much weight to this factor.
15. Tied to the above submission, the appellant sets out the third ground of appeal, that too much weight was attached to the potential deterrence of Lithuanian or foreign nationals from committing such offences in Ireland.
16. On the fourth ground of appeal it is submitted that the judge placed too much weight on inferences made surrounding the appellant's level of involvement with the offences contained herein and that this was done without corroboration of those inferences. It is submitted that this may increase the chances of an unfair sentence. This Court is asked to consider that there was no Garda evidence put forward at sentence related to the appellant's level of involvement, there was no phone evidence such as messages and or calls which may have shown that the appellant did or did not play a "significant role", that there are no prior drug convictions and there was no evidence about the role of the appellant in the offending save for that provided by his co-accused.

The appellant quotes from the transcript of the sentencing judge as follows, "It appears that he (the Applicant) had a prior familiarity with Ireland and may have had knowledge

in that regard, which should be useful in organising this criminal activity” and contends that this may have been an inference too far in the circumstances.

17. In terms of the fifth ground of appeal, the appellant contends that, in sentencing, the amount of plants has been the most significant factor, as evidenced by the fact that legislators introduced minimum mandatory sentencing for offences where the amount of drugs exceeded €13,000. While organisation is a relevant factor especially where there is Garda evidence in support of this, it is contended that the judge appears to have placed too much emphasis on the drugs which were not in existence but which could have been.
18. On the sixth ground of appeal, it is noted that a negative inference was drawn by the judge due to the appellant maintaining his right to silence. That this was described as “non-cooperation.” It is submitted that drawing such a negative inference from remaining silent is unsafe. It is also pointed out that the appellant provided his name and date of birth to Gardaí during the search when same was requested.

Submissions of the respondent

19. In addressing the appellant’s first ground of appeal, the respondent points out that the maximum sentence available for cultivation is 14 years and that the possession for sale or supply count which was taken into consideration carries a maximum sentence of life imprisonment. It is submitted that there was a justifiable and clear distinction drawn between the two accused persons which is explained in detail in the judgment and was borne out by the evidence. Firstly, it is submitted that a significant distinction was drawn between the two accused persons when setting the headline sentences. Secondly, both were given reductions to take account of the mitigating factors. In the appellant’s case there was minimal mitigation available other than the guilty plea whereas, in stark contrast, there were significant mitigating factors to be found in respect of the co-accused.
20. It is noted that while both men were motivated by commercial gain and that they were cultivating cannabis in order to supply it to drug dealers, the appellant’s role was “at the very least was that of an organiser on the ground” and that he did not live at the property but visited it which could serve to insulate him from the criminal activity. He had the keys to the property and €1,500 on his person. The appellant was found to have played a “significant role in the management of this crime.” Based on these factors, a headline sentence of seven years, exactly half the maximum sentence available, was fixed on the appellant. While a significantly lower headline sentence of four years and three months was fixed in respect of the appellant’s co-accused, the respondent notes that he was found to have been a person with “no involvement in the overall planning and execution of the organisation of the crime” and a “low-level menial worker.” He had just turned 18 and was described by the Gardaí as “naïve.”
21. In terms of mitigation, the respondent submits that there was very little put forward on behalf of the appellant in terms of personal mitigation. He is a man with no previous convictions in this jurisdiction, with a good work record who is father to a fifteen year old boy residing in Lithuania. It was also submitted that he would find life in an Irish prison

difficult as a foreign national and that he had no debts or addiction issues.

Notwithstanding this absence of significant mitigation, other than the plea of guilty, the sentence was reduced from a headline indication of seven years to a sentence of five years.

In stark contrast to this, the respondent submits that there was significantly more mitigation available in respect of the appellant's co-accused who was an 18 year old with no previous convictions. The co-accused cooperated with Gardaí and pleaded guilty. The court found that his circumstances were indicative of a "clearer route to rehabilitation." The headline sentence of four years and three months was reduced to a sentence of three years with the final 20 months suspended.

22. The respondent cites *DPP v. Norton* [2015] IECA 276, in which this Court affirmed the proposition that all things being equal, co-offenders should in general, receive comparable sentences but that significant distinctions can legitimately be made between two people who plead guilty to the same offence. In that case, a sentence 250% greater than the sentence imposed on his co-offender was handed down to the appellant due to the distinctions between them and the prevailing evidence.
23. In response to grounds two and three, the respondent contends that it is difficult to discern from the transcript of the sentencing judge that any particular emphasis was placed on the call for retribution in passing sentence for the offence. It is contended that the judge was actually more concerned with achieving the sentencing goal of deterrence. It is submitted that the remarks acknowledge the difficulties with deterring people who would not be expected to have any knowledge of the functioning of the Irish Courts but also points to the realistic practical implications of a lax sentencing regime for offences of this nature.
24. In terms of grounds four and six, the respondent submits that the appellant points to certain unspecified inferences regarding the extent of his involvement in the offence which he says should not be relied upon without corroboration. The respondent also disputes the claim that there was no Garda evidence regarding the appellant's level of involvement, quoting from the evidence-in-chief of Garda Patrick Naughton, as follows:

"Q. And I think you arrested Mr Gastilavicius?

A That's correct Judge.

Q. And you searched him and found one and a €1,500 cash in his jacket pocket?

A. That's correct Judge.

Q. I think you also found a key in his jacket and you confirmed that it was the key to the front door of the property?

A. That's correct Judge.

Q. And I think you seized two phones from him and you asked him for the code to the iPhone but he refused to give it to you?

A. That's correct Judge."

The respondent also submits that the reference to "non-cooperation" is unlikely to be a reference to the appellant having exercised his constitutional right to silence but is more likely to be a reference to the appellant having refused to allow Gardaí to inspect his phone for evidence of drug related activity.

25. In response to ground five, that the judge erred in outlining that organisation is more significant than the amount of drugs found in relation to drug offences, the respondent submits that, far from being in error, the judge was applying the same reasoning as that set out in This Court's judgment in *DPP v. Sarsfield* [2019] IECA 260. The respondent cites a passage from the judgment dealing with the increased culpability of the organisers or directors of drug related activity together with the case specific relevance of the quantity of drugs involved.
26. To conclude, the respondent submits that the appellant has failed to identify any error in principle in the sentence imposed and that it could not be said that the sentence that was imposed was so severe as to fall outside the available range of penalties.

Discussion

27. The first ground of appeal concerns the issue of parity of sentence. Mr. Jackson BL (who now appears for the appellant) properly concedes that there are distinctions to be drawn regarding the culpability of each offender, but contends that a sentence 3 times greater than that of his co-accused is simply disproportionate and does not properly reflect those differences.
- Mr. Mulrooney BL for the respondent contends that the differences between the offenders in terms of culpability and mitigation were of such an order so as to justify the sentences imposed.
28. It is clear from the evidence that each offender's motivation for involvement in the offences before the Court was that of commercial gain. However, from thereon in there is a clear divergence in culpability. The co-offender owed a significant debt to the party who brought him to this country, thus indicating an element of pressure on him, secondly, not only was he a very young man of 18 years, but he was also described by the prosecuting Garda as naïve. It was accepted that he had no involvement in the overall planning and organisation of the offending and was at a lower level of the operation than the appellant. Moreover, he was left only with money for food and no funds were found in his possession.
29. In contradistinction, the appellant was found with €1,500 in his possession, the precise amount which his co-offender was to receive by way of payment, the key to the premises was found on his person, along with two phones in respect of which he did not co-operate. This was a course of action he was entitled to take, but equally, the judge was

entitled to take the absence of co-operation into account together with the other evidence in order to come to a conclusion regarding his culpability. The appellant is much older than his co-offender. In the circumstances, not only was the judge entitled to differentiate between the two men, finding that the appellant's role was that of "an organiser on the ground", he was, in our view, entitled to take the view that the appellant's culpability was of a significantly higher order than that of his co-offender and did not err in his assessment of the pre-mitigation sentence at the mid-range, being seven years' imprisonment.

30. There was also a considerable divergence in the mitigating factors on behalf of each man. While each pleaded guilty to the offending and were entitled to a reduction in that regard, the appellant is a man with two previous convictions which lead to a progressive loss in mitigation, whereas the co-accused was a young man with no previous convictions. He, (the co accused) co-operated with the Gardaí and set out his role in the offending. Both men are non-nationals.
31. In light of the appellant's mitigating factors, the most significant being that of his plea of guilty entered at an early stage in the proceedings, the judge reduced the sentence by in excess of a quarter to that of five years and, in order to foster rehabilitation in light of the appellant's desire to desist from crime and return to his family, he suspended the final year of that sentence.
32. Regarding the co-accused, the headline sentence of four years and 3 months was reduced to one of one year and 4 months in light of his mitigation.
33. In our view, we are not at all persuaded that the judge erred in distinguishing between the two accused as he did. He properly nominated the headline sentence in each case, carefully assessing the culpability of each offender and applying a considerable reduction for mitigation in each instance. In fact, having decided that the culpability of each was properly determined by the judge, that, in our view, is substantially determinative of this issue, given that he then applied the mitigating factors and reduced appropriately in each case. It could be said that such allowance was on the generous side, but none the less, it was within the margin of appreciation afforded to a trial judge.
34. Insofar as it is said that the judge was entitled to draw inferences from the facts in order to assess the appellant's role, no issue is taken by Mr. Jackson in this respect, but he does say that the judge was not correct to place the appellant's role as that of being significant in the management of the criminal activity. However, absent the appellant giving evidence of his role, having pleaded guilty, the judge was fully entitled to rely on the evidence and draw the inferences which he did as to the appellant's culpability. This he did with care and attention to the detail of the evidence adduced. It is clear from what we have said that we do not find the judge drew an inference which was unfair to the appellant.
35. We will deal very briefly with the contention that the judge placed too much weight on the need for general deterrence in crime of this nature by persons not ordinarily resident in

this jurisdiction. The judge acknowledged that not all persons would be aware of the sentencing regime in this jurisdiction. He also set out the requirement for a proportionate sentence, taking into account rehabilitation and an individual's personal circumstances. We find no error in this respect.

Conclusion

36. In the circumstances and for the reasons stated above, we are not persuaded that the judge erred in the sentence imposed and accordingly, the appeal is dismissed.