THE COURT OF APPEAL

Record No. 203/2022

Birmingham P.
Edwards J.
Kennedy J.

Between/

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

RESPONDENT

V

MARCIN KONAR

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 22nd of May 2023.

Introduction

1. Before this Court is an appeal brought by Mr. Marcin Konar (i.e. "the appellant") against the severity of the sentence imposed on him by Dublin Circuit Criminal Court on the 2nd of November 2022 in respect of a count of unlawful possession of a controlled drug for sale or supply contrary to s. 15 of the Misuse of Drugs Act 1977, as amended (i.e. "the Act of 1977"). A further count of unlawful possession contrary to s. 3 of the Act of 1977 was taken into consideration on imposing sentence. Having entered a guilty plea in respect of the s. 15 count on the 26th of May 2022, the appellant was duly sentenced by the Circuit Court judge on the 2nd of November that same year to a term of imprisonment of 2 years and 6 months, such sentence to run from the date of sentence. No element of this custodial disposal was suspended.

2. The appellant seeks a review of this sentence in essence on the basis that he was afforded insufficient credit for the mitigation present in his case, and that the sentencing judge's approach to sentencing failed to specify the discount made from the headline for mitigation, and that this in turn rendered any discerning of what mitigation was worth to the appellant a difficultexercise.

Factual Background

3. At the sentencing hearing of the 2nd of November 2022, a Garda Thomas O'Brien gave evidence in relation to the factual background of the appellant's offending.

4. On the 27th of August 2020 at approximately 10:00pm, Garda O'Brien and other members of An Garda Síochána attended at an address on Essex Street West, Dublin 2 on

foot of a search warrant obtained by gardaí in respect of that property. Upon gardaí's arrival at the premises, it was observed that there were seven people present there, including the appellant. Gardaí noted a very strong smell of cannabis pervading the property, and that this odour was detectable from the living room. It was further observed that an extractor fan in the kitchen was working and that a door to a balcony was open, as if in an effort to "*mask the smell*".

5. Having searched the property, gardaí happened upon several effects of note. They discovered drug paraphernalia including grinders, rolling papers and weighing scales. More significantly, gardaí found one kilogramme of plant material, which they suspected to be cannabis, inside a kitchen press, which was seized and subsequently sent off for analysis. The forensic science laboratory's analysis indicated the presence of 847.4 grammes of plant material which was confirmed by that laboratory to be cannabis. Gardaí ultimately valued the seized illicit material at €16,948. Gardaí also discovered "*tick lists*" inside kitchen presses and in other locations throughout the property, as well as sums of money. In total, gardaí seized €14,115 in cash.

Garda Interview

6. The appellant was arrested at the time of the search and was subsequently interviewed. In the course of this interview, the appellant made full admissions to gardaí. He told interviewing gardaí that he was staying at the property which was his friend's apartment. He conceded that he was in possession of the drugs for the purposes of sale and supply but stressed that he did not own the cannabis. He stated that he was selling the illicit material to acquaintances on behalf of another person, and that he was not drawing down a profit on this activity, instead placing the proceeds of the sales into envelopes to be furnished to the person actually in control of the drug itself.

Personal Circumstances

7. The appellant's date of birth is the 19th of June 1978, he was aged 44 years at the time of sentencing. He is a single man, divorced since 2018, and is father to two children, then aged 8 and 10 years respectively at the time of sentencing. It was described to the sentencing court that he maintained a good relationship with his ex-wife, that he continued to retain access to his children and that he paid maintenance in respect of them.

8. The appellant, a Polish national, arrived in the jurisdiction in 2004 for the purposes of sourcing employment, which he did, primarily in the construction sector. It was described to the sentencing court both in cross-examination and in the Probation Report that this employment dried up on account of the vicissitudes of that industry circa 2008, immediately after which the appellant worked for a period in the retail sector. At the time of sentencing, it would appear that the appellant was back working in the construction sector on a full-time basis.

9. It was outlined both in the course of the sentencing hearing and in the Probation Report that the appellant's life was afflicted by certain addictions, most particularly gambling but also cannabis misuse. The depths of his struggle with his gambling addiction reached

what was characterised as a "*pivotal*" low in 2018 and precipitated the breakdown of his marriage. Following this, he took significant steps to address this behaviour, which steps comprised regular attendance at a gamblers anonymous group and engagement with supportive counselling provided by a Dublin-based centre for counselling and therapy called "CKU" which caters for Polish expatriates. The Probation Service was furnished with a letter from CKU, dated the 26th of April 2021, which correspondence was noted in the Probation Report, attesting to the appellant's successful completion of a programme of recovery and attendance at gambler anonymous meetings, and recommending further engagement with group and individual therapy.

10. The appellant's previous convictions were also outlined to the sentencing court. He had appeared before Dublin District Court in January 2021 in relation to two road traffic-related matters which were disposed of summarily by way of the imposition of a fine. More significantly, he had a history of appearance before the Dublin Circuit Criminal Court, having previously pleaded guilty before that court on the 15th of October 2021 in relation to a count of theft from his then employer contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, as amended, that occurred at some point in time between the 1st of September 2017 and the 11th of May 2018. On that occasion before the Circuit Criminal Court, he was not subject to an immediate custodial disposal, the sentencing court instead preferring the imposition of a suspended sentence. The conditions of this suspended sentence were not described, nor was its period of duration specified.

11. The Probation Report averred that on the occasion the appellant was referred to the Probation Service in relation to the theft offence, he was then assessed as posing a low risk of re-offending, and that protective factors then identified included his engagement with support services, his addiction-free lifestyle, and his full-time employment. The Probation Report before the sentencing court in the present case did not differ in its finding, notwithstanding the appellant's commission of a subsequent offence. It cited the same protective factors and also further identified the appellant's lack of extensive criminal history; his high-level of victim awareness; positive peer support (it noted the appellant's dissociation from cannabis misusing peers); stable accommodation, and; positive pro-social family influences.

Plea in Mitigation

12. Counsel for the defence drew the sentencing court's attention to the personal circumstances of the appellant, in particular his familial circumstances and his "*long history of work*". He submitted that the appellant had been given a suspended sentence on the last occasion he was before the Circuit Criminal Court, and he asked the sentencing court to afford the appellant a "*second chance*" on account of the steps that the appellant had taken to overcome the personal difficulties he had previously faced arising from his gambling addiction. He noted that these difficulties had given rise to the divorce, and that the appellant in that context had turned to drugs. Counsel emphasised that the appellant had made full admissions to gardaí, that he accepted responsibility for his actions, and did not seek to deflect blame onto anyone else. In the course of his

admissions, the appellant had demonstrated "*insight*", it was said, into his role in the drug supply and the devastation that illicit substance misuse has wrought and continue to wreak upon communities. In this vein, it was further submitted that the appellant was conscious of the impact his actions had had upon his family. Counsel sought to draw the sentencing court's attention to the content of the Probation Report, in particular to the assessment of the appellant as posing a low risk of reoffending, and it was also stressed that the appellant had not come to adverse attention since the index offence of the 27th of August 2020.

Sentencing Judge's Ruling

13. In his ruling made at the sentencing hearing of the 2nd of November 2022, exhibited in the below quotation, the sentencing judge set out his reasoning for handing down a custodial sentence of 2 years and 6 months:

> *"JUDGE: Thank you. Stand up please. On the particular date the guards had certain information, to search this particular house, it was occupied by a number of men, I think, it seems there was six or seven there, they found a large amount of cannabis on the premises, I think about more than .8 of a kilogram of cannabis, the value attributed to by the experts is in the region of €16,000. They also found a lot of cash, I think in the region of €14,000 and a tick list, so the indications from their finds was that there was a good deal of dealing being done from this particular premises. Now, it seems to his credit, this defendant made admissions in relation to his own involvement, it seems his explanation is that he was dealing on behalf of a third party, it seems, I must infer he was profiting to some degree from these dealings, if I accept that explanation. Now, so he was dealing in a considerable way, in relation to cannabis, there was a considerable amount of cannabis present, there was a tick list, and a considerable amount of cash involved in this case, now Mr Konar has some record of conviction, he got involved in some theft back in the past, he appeared it seems before my colleague [...] who gave him a suspended type sentence and obviously the Court must take that into account, these are other non, none too relevant convictions. Now, the mitigation is very clear, pleas of guilty, cooperation, plea of guilty I should, cooperation, admissions, strong work history, I think he's a responsible father, I have evidence that he's paying maintenance, it seems, it's a pretty good probation officers report. In the short term at least the probation officer indicates there's a low risk of reoffending and I think I can accept that but the underlying misbehaviour is very serious, he was involved in quite serious drug dealing and taking everything into account including the mitigating factors, I cannot see how this man can avoid a custodial term by reason of his misbehaviour. In relation to the count, he's pleaded guilty to two, that's the 15 count, I'm going to impose upon him a two-and-a-half-year term of imprisonment and it's from today's date. [...]"*

Notice of Appeal

14. In Notice of Appeal, bearing a Court of Appeal stamp dated the 9th of November 2022, Mr. Konar now appeals against the severity of the sentence imposed on him by Dublin

Circuit Criminal Court on the 2nd of November 2022. Therein, he advances a number of grounds, namely:

> *"1. The Learned Trial Judge erred in fact and in law in failing to provide sufficient weight to the mitigating circumstances in this case, namely the Appellant's guilty plea, his admissions, his strong work history, his family circumstances, and the positive probation report indicating that he was at low risk of reoffending and his insight into his offending.*
>
> *2. Without prejudice to the generality of the foregoing, the Learned Trial Judge did not set a headline sentence and did not specify the extent to which credit was being given for the above mentioned mitigating circumstances.*
>
> *3. The sentencing imposed by the Learned Trial Judge was, in all the circumstances, unduly severe and disproportionate to other sentences imposed for similar offences by the Circuit Court."*

Parties' Submissions on Appeal

Submissions on behalf of the appellant

15. In the first place, it is submitted that the sentencing judge's approach to sentencing the appellant marked a departure from established practice, detailed in this Court's judgment in *DPP v. Davin Flynn* [2015] IECA 290, of first setting a headline sentence by reference to the gravity of an individual accused's offending prior to any discounting in consideration of mitigation. While it is not submitted that this approach to sentencing is mandatory upon a judge engaging in the exercise of sentencing, counsel submits that it nevertheless represents "*best practice*". The sentencing judge on the 2nd of November 2022 did not approach sentencing the appellant in this manner, opting instead for an instinctive synthesis-style approach.

16. As a consequence of not expressly nominating a headline sentence, the specific discount afforded for mitigation in the appellant's case was obfuscated. The appellant further submits that whatever credit was afforded for mitigation, however undiscernible it may be, was insufficient having regard to the significant mitigating factors at play in the present case, in particular the appellant's personal circumstances and the positive Probation Report indicating that he posed a low risk of reoffending.

17. Further, the appellant takes issue with the absence of consideration of any element of non-custodial disposal. While it is conceded that it would be unusual for an accused to be afforded a second chance, in circumstances where he had previously not been subject to an immediate custodial disposal on the last occasion he was before a sentencing court, it is submitted that it should be borne in mind that the appellant's offending in the present case arose in the context of considerable difficulties he was experiencing in his life. It is thus put to this Court that this is a case in which the sentencing judge could have reasonably considered a partially suspended sentence so as to balance the objectives of punishment and rehabilitation.

Submissions on behalf of the Director

18. Counsel on behalf of the Director reply to the appellant's submissions by noting that for an applicant in an appeal against severity of sentence to be successful, he must first establish that there was an error in principle. With this in mind, the Director submits that while the sentencing judge did not follow best practice in sentencing the appellant, he was not obliged as a matter of law to observe adherence to the approach of first setting a headline sentence and then considering mitigation in turn. Counsel refers this Court to a number of authorities, namely, *DPP v Martin Reilly* [2016] IECA 43, *DPP v. Viorel Salageanu* [2016] IECA 232, and *DPP v. A.D.* [2018] IECA 308 as supportive of the proposition that the focus is on the final sentence imposed and whether it fell within the sentencing judge's margin of appreciation or conversely whether it represents a deviation from what might reasonably be expected in a given case.

19. The Director submits that however the sentencing judge approached sentencing in the present case, it cannot be gainsaid that he approached the matter before him in "*a careful methodical manner*", and it is further argued that the Circuit Court judge placed the appellant's offending behaviour within the appropriate range of sentencing in all the circumstances of the case. With respect to this latter submission, the Director identifies as factors aggravating the appellant's offending, the quantity and value of the drugs found, the paraphernalia discovered, and the quantity of cash seized, as well as the circumstances of drug-dealing in which all those materials were found by gardaí. Moreover, it is noted by the Director that the appellant had previous convictions, including a Circuit Court conviction for theft in respect of which the appellant had received a suspended sentence. Counsel concedes that there was strong mitigation at play in the present case, however it is stressed that this mitigation was specifically addressed in the sentencing judge's remarks.

20. Counsel submits that the sentencing judge was engaged in a balancing exercise with respect to the gravity of the appellant's offending and the strong mitigation under consideration. It is argued that the sentence imposed on the 2nd of November 2022 was "*just and proportional*" and was within the Circuit Court Judge's margin of appreciation, and that the various factors acting for and against the appellant were taken into account. The Director refers to a number of authorities in respect of this submission, most significantly *The People (DPP) v. Sarsfield* [2019] IECA 260, but also *The People (DPP) v. Long* [2009] 3 I.R. 486 and *The People (DPP) v. Farrell* [2020] IECA 163. The latter case, Farrell, is treated as a comparator by the Director, inasmuch as this Court, in resentencing the appellant in that case, had nominated a headline of 4 years, had deducted 18 months for mitigation and had suspended a further 6 months, all in circumstances where the value of the drugs approximated €2,000. It is observed that in both *Farrell* and the present case, the appellants had entered guilty pleas, had no previous drug-related convictions, had made admissions, and had co-operated with gardaí following arrest. The principal distinction arises with respect to Mr. Farrell's chronic heroin misuse, his acting under coercion as a result of his addiction, and the value of the drugs at issue (which was approximately one eighth the value of the drugs at issue in the

present case). *The People (DPP) v. Thornton* [2020] IECA 245 is further cited by the Director, again involving mostly similar circumstances and resulting in an almost analogous sentence, save for the suspension of 6 months.

21. Having regard to these authorities and her foregoing submissions, the Director submits that the appellant has failed to identify any manifest error in principle such as to warrant intervention by this Court.

Court's Analysis and Decision

22. While it is true to say that this court recommends, as a matter of best practice, that sentencing judges at first instance should adopt a structured reasoning approach in sentencing, they are not obliged to do so. Sentencing by instinctive synthesis has always been, and remains, a legitimate approach to sentencing. That having been said, the reason this Court regards the structured reasoning approach to be preferable is that it is more transparent and therefore more readily amenable to appellate review. As we said in the *Davin Flynn*, case to which the appellant has referred:

> *"18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.*
>
> *19. However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld."*

23. We are faced with a difficulty in this case, namely, that because the sentencing judge did not nominate a headline sentence, we cannot know precisely what level of discount he afforded for mitigation. The fact that he did not nominate a headline sentence does not imply an error of principle, but it does make it more difficult for this court to review his sentencing decision. It does not make it impossible to do so, however. We can ask ourselves what would have been the appropriate range within which to set a headline sentence in the circumstances of this case. In a situation where we know what the post mitigation sentence was, and where we know what factors were available to be taken into account as mitigation, we can then, by a process of comparison and reverse engineering, form a view as to the appropriateness of that ultimate sentence.

24. In considering what would have been an appropriate headline sentence for the present offence in the circumstances in which it was committed in this case we must, as always in drugs cases involving sale or supply, consider the issues of gravity and the potential harm done. The Court's approach in that regard must be informed by the range of penalties available to the sentencing court (in this instance from non-custodial options up to an unlimited fine and/or life imprisonment or both), the sentencing policy to be applied in drugs cases as stated expressly by the Oireachtas, and the jurisprudence of the superior courts (including this Court's guideline judgment in *The People (DPP) v. Sarsfield*, case cited at para. 20, above.

25. In this particular case, there was evidence before the sentencing court from which it could infer dealing at a reasonably substantial level. The quantity of drugs found was just under a kilo (847.4 g). It comprised cannabis plant material and was valued at €16,948. However, cash sums were also found on the premises amounting to €14,115 and these were accepted by the appellant as having been the proceeds of sales of cannabis. In addition, the paraphernalia frequently associated with drug dealing were found on the premises including grinders, rolling papers, weighing scales and tick lists. In circumstances where the statutory sentencing policy mandated by the Oireachtas is that offending involving drug dealing is to be regarded as inherently serious and punished accordingly, and taking into account the range of penalties, the *Sarsfield* guidance and the circumstances of the case, we are satisfied that a sentencing judge would have been obliged, if engaged in structured reasoning, to nominate a headline sentence of between 4 and 5 years in this case.

26. It is clear that there was substantial mitigation available to this appellant. He had pleaded guilty and had done so at an early stage. As against that, however, he was caught red-handed. He was cooperative and made admissions with respect to his own involvement but, insofar as he claimed that he was not the owner of the drugs and was selling on behalf of somebody else, he did not identify the individual in question or render assistance at that level. Accordingly, it is correct to say that he was somewhat cooperative but that it was not unqualified cooperation on his part. The sentencing judge acknowledged that he had been cooperative to the extent identified. He also took into account that the appellant had a strong work history, was a responsible father and had been assessed by the Probation Service as being at low risk of offending. We think that that such mitigation would have afforded the offender an entitlement to discount of between 40% and 50% of an appropriate headline sentence.

27. We agree with the sentencing judge that the custodial threshold was unquestionably met in the circumstances of this case. We also agree with the sentencing judge that on the evidence the appellant must have been profiting to some degree.

28. Approaching the matter on the basis that the appropriate headline sentence would have been between 4 and 5 years (and acknowledging that a sentencing judge must have a margin of appreciation) and that the appropriate discount from that would have been between 40% and 50% (again allowing for a margin of appreciation), we can see no error

on the part of the sentencing judge in this case. If he had had a headline sentence of 5 years in mind and afforded a 50% discount to the accused, he would have ended up at 2 years and 6 months' imprisonment, which is exactly what the post mitigation sentence, in fact, was. If he had had the slightly lower headline sentence of 4 years in mind and again afforded a 50% discount he might have ended up at 2 years' imprisonment, but a difference of only 6 months would have been within his margin of appreciation and would not have been an error. This Court would not be justified in interfering unless it is satisfied that there exists a clearly demonstrated error of principle.

29. Complaint is made that the sentencing judge did not opt to suspend any portion of the post mitigation sentence. The sentencing judge is not obliged to suspend any portion of a sentence. It is an issue for judicial discretion. Relevant in the context of the present case is the fact that this accused was previously given a chance by the Circuit Court, and yet he had re-offended and in a significant way (albeit by the commission of a different type of offence). While his previous convictions were not an aggravating factor, it is relevant that he had been given a chance previously and had not taken it. Moreover, there had been progressive loss of the mitigation that he would otherwise be entitled to for being of good character by virtue of the fact that he had three previous convictions recorded against him, one of which had involved a suspended custodial sentence imposed by the Circuit Court. We therefore do not criticise the sentencing judge for not suspending a portion of the sentence in the circumstances of this case. Rather, we find no error of principle in the fact that he did not do so. It was an option open to him but he was not obliged to suspend a portion. He exercised his discretion not to do so, and we are satisfied that his discretion was lawfully exercised.

30. In circumstances where the appellant has failed to demonstrate any error of principle on the part of the sentencing judge, we are satisfied that we would not be justified in interfering. Accordingly, the appeal is dismissed.