



THE COURT OF APPEAL

**Mahon J.
Edwards J.
Hedigan J.**

The People at the Suit of the Director of Public Prosecutions

V

Peng Fei He

271 /16

Respondent

Appellant

JUDGMENT of the Court delivered on the 30th day of November 2017 by

Mr. Justice Hedigan

Introduction

1. This is an appeal against severity of sentence. On the 4th July, 2016, the appellant entered a guilty plea to an offence contrary to s. 15A of the Misuse of Drugs Act 1977 as amended. There were a number of other counts on the indictment which were taken into consideration. Facts were heard on the 4th October, 2016, and on the 5th October, a sentence of eight years with the final two suspended for two years was imposed. This was on condition that he enter a bond of €200 to keep the peace and be of good behaviour. The sentence was backdated to the 13th November, 2015, when the appellant was taken into custody.

The circumstances of the offence

2. The offence resulted from the controlled delivery of two packages. On the 11th November, 2015, a Dublin Airport customs officer intercepted the packages being transported by DHL. They were both from Spain but sent to different addresses, one in Dublin 15 and the other on Blackhorse Avenue. They had different phone numbers. They were found to contain cannabis.

3. Delivery on both was attempted unsuccessfully on the 13th, November, 2015. A phone message was left for the Dublin 15 package. When there was no answer at the Blackhorse Avenue address the appellant was contacted via phone and the first package was delivered by arrangement outside that address where the appellant received it and placed it in the boot of his car. The appellant was arrested shortly after having been stopped and searched. The appellant was interviewed under caution at the scene. He stated he was instructed to collect the package which contained pornography for €200. He was arrested, detained and interviewed several times.

4. The second package was not delivered as it was overtaken by events. The appellant was found in possession of both phones.

5. The appellant was interviewed six times with a solicitor and interpreter present. During the first four interviews he was untruthful but when faced with the weight of the evidence he made admissions. He accepted responsibility for both packages. He admitted selecting the locations for delivery having made sure the premises were empty. He admitted ordering the packages from Spain.

6. Somewhat inconsistently the appellant referred to having a gambling debt of €4,000 to €5,000 and alternatively to receiving €200 or €300 per kg. In evidence, it was stated that money was being sent to China from an account in the appellant's name. There was no evidence of the amount. The appellant stated it belonged to someone else. The line of inquiry was not pursued and no evidence was adduced.

7. The first package contained 3.53 kg of cannabis with a market value of €70,620 and the second package contained 3.565 kg of cannabis valued at €71,300. This was based on a valuation of €20 per gram.

8. There was an early plea entered and no disclosure was sought.

The appellant's personal circumstances

9. The appellant was born in 1983. He is married and has two children. His wife was pregnant when he was taken into custody. He has been in custody for the entirety of this child's life. He has three previous convictions in the District Court for road traffic matters. He has been living in Ireland for 12 years but with a modest income and not in a prosperous lifestyle. He has worked in several jobs and his P60s were handed in. There were positive letters handed into court from a business who had dealings with him and an employer. He has attained musical training certificates while in custody. There is also a favourable governor's report and an educational report. He has received an A1 in foundation level mathematics. He volunteered to work as a cleaner. There was one fight for which he was disciplined but otherwise he has used his time in custody well.

Sentencing

10. The sentencing judge noted that in light of the value of the drugs involved she viewed the offence as coming within the mid-range of this type of offending. If the matter had gone to trial and there was no mitigation the appropriate sentence would have been 12 years.

11. The aggravating factors were the value of the drugs being significantly over the s. 15A threshold, he was in possession of mobile phones connected with the packages, the different phones and selection of locations indicated a high degree of planning and premeditation and was significant of the appellant's involvement and there was a degree of organisation. The appellant's previous convictions were considered to be too minor to be of relevance to sentencing. It was noted that there was a lack of clarity regarding the appellant's precise role. The appellant was given the benefit of the doubt and it was accepted that he was not the main beneficiary of the proceeds but received small recompense. It was held that he acted mainly for financial motives. The financial benefit was relatively small and there was some element of fear in that he refused to name other persons involved.

12. The mitigating factors were the appellant's acceptance of responsibility for the second package, his admissions in relation to this were of material assistance as he had not physically handled the package, his admissions regarding the first package were of limited

mitigation, his admission that he knew what was in the package was of some assistance but not material assistance and his guilty plea indicated at an early stage was also to be considered. It was held that these factors significantly mitigated the offence. Further, he had no previous drug convictions and there was a lack of clarity on any real or substantial benefit to the accused. Weight was given to the Garda's acceptance that the appellant was living in squalid conditions. He was entitled to mitigation regarding his lack of material gain. There was limited mitigation for fear as he did not give evidence of specific threats or identify persons allegedly threatening him. As a foreign national imprisonment may be more difficult for the appellant, however, this did not seem to be case based on the report from Cloverhill. Some weight was nonetheless given to this aspect as visits from extended family and friends would be more difficult. The Court considered his personal circumstances and the effect on his wife and young children who depend on him. The Court considered the testimonials which showed him to be a worker and relatively well educated. His behaviour in prison was commendable and he was amenable to rehabilitation. He expressed remorse through counsel.

13. The Court found that there were exceptional and specific circumstances which made the mandatory minimum sentence of 10 years unjust. The sentencing judge found that the appellant was entitled to a reduction of four years in his sentence in view of his early admissions and his acceptance of responsibility for the package and in view of his guilty plea and his lack of previous convictions for drugs offences. Then considering all the other mitigating factors and matters outlined the sentencing judge imposed a sentence of eight years with the final two suspended for two years. It was noted that this was intended as a deterrent to further offending. The sentence was backdated to the 13th November, 2015.

Appellant's submissions

14. It is submitted that the appellant provided material assistance. He admitted possession at the scene. The package was in the boot and not in his immediate possession. He made "very useful" admissions in relation to the second package. The appellant refers the Court to the mitigating factors. His guilty plea was indicated at an early stage when no trial date had been fixed. There were only minor previous convictions and otherwise he had a good character. He did not have a lifestyle which demonstrated profit from drug dealing. His relative lack of material gain. His being a foreign national, incarceration would be more difficult. His educational and governor's reports were considered. It was noted that he had not seen his second child. He had a corroborated work history. He was at a low level of the organisation. He was not the main beneficiary and received small recompense. It was accepted that he was in fear of those employing him and he expressed remorse.

15. The Court is referred to s. 27 of the Misuse of Drugs Act 1977 as amended. Fennelly J. summarised the approach of the Court of Criminal Appeal on s. 15A sentencing in *The People (DPP) v. Galligan* (Unreported, Court of Criminal Appeal, 23rd July, 2003) where he stated that the maximum sentence should also be considered. The section commences by providing for a sentence of life or some shorter period as determined by a court subject to subsections 3B and 3C. The Court, in that case, also noted the correct approach was set out by Murphy J. in *The People (DPP) v. Renald* (Unreported, Court of Criminal Appeal, 23rd November, 2001) where it was held that the gravity of the offence as determined by the Oireachtas is possibly the most important factor in deciding the appropriate sentence. The maximum sentence can indicate the seriousness of the offence. Even when it is not applicable the existence of a lengthy mandatory minimum is an important guide for determining gravity and the appropriate sentence. The minimum sentence is not necessarily the starting point. This would ignore the maximum sentence that can be imposed. It is wrong to assume only the mandatory minimum will be imposed. The court must, in accordance with ss. 3C [ss. 3D] consider the circumstances relating to the offence and the offender that are claimed to be exceptional and specific. To do this a view must be taken on what the appropriate sentence would be when appropriate matters, including those specified in ss. 3C, are considered. If there are factors which make the mandatory minimum unjust then the court does not have to impose it but their existence does not reduce the inherent seriousness of the offence. The court still has to impose an appropriate sentence having considered all the relevant circumstances and gravity of the offence as determined by the Oireachtas and demonstrated in the mandatory sentences. The minimum is not expressly a benchmark but is important in recognising the gravity of the offence and determining the appropriate sentence.

16. In *Galligan* a seven year sentence was replaced with one that was effectively five years. The appellant, in that case, was apprehended at the scene. He made admissions but claimed fear and refused to name his supplier. He pleaded guilty. He didn't inform the Gardaí of a further cache of drugs. His assistance was described as minimal. He had a previous conviction for road traffic matters. It was held that the sentencing judge placed insufficient weight on the remorse and previous good character of the appellant.

17. It is submitted that s. 15A sentencing involves a complex weighing of multiple factors. Comparing cases can be of limited value but the below cases demonstrate that the sentence in this case departed from the sentencing norms. In *The People (DPP) v. Whitehead* [2008] IECCA 123 the appellant was caught red handed and entered an early guilty plea. She was of material assistance. She was used a mule to import €90,000 worth of cannabis. She received €2,000. She was impecunious and had a young family to support in South Africa. Her sentence of seven years with one suspended was reduced to three years with six months suspended.

18. In *The People (DPP) v. Devlin* [2016] IECA 125 this Court while reducing the sentence upheld the starting point of 12 years. The case involved cannabis valued at €1,300,000. The instant case is far less significant and the starting point of 12 years was erroneous. In *The People (DPP) v. Martyn & Mannion* [2016] IECA 162 there was an appeal against undue leniency. Both respondents had been given entirely suspended sentences. They were in a car into which €200,000 worth of cannabis was transferred. They pleaded guilty and made admissions. One had significant previous convictions. This Court upheld one sentence and replaced other with a sentence of two years.

19. In *The People (DPP) v. Ryan* [2016] IECA 258 this Court upheld a sentence identical to the one imposed in the instant case. The cannabis was valued at €96,000. The appellant had a lavish lifestyle and had been investigated by CAB. He admitted being involved in supply for eight months. The offence appeared to be committed for financial gain. It is submitted that the instant case is of an entirely different character and warrants a significantly different sentence.

20. In *The People (DPP) v. Clohessy* [2016] IECA 356 the appellant had cannabis valued at €632,000 which he was holding for others. He made admissions and pleaded guilty. He had no previous convictions. This Court refused the undue leniency appeal against the sentence of five years with three suspended. In *The People (DPP) v. Wallace* [2016] IECA 57 the appellant was in a car transporting cannabis. He received €500. The cannabis was valued at €180,000. He had previous convictions. He had significant health problems and limited mobility. He pleaded guilty and made admissions. This Court upheld an entirely suspended five year sentence. In *The People (DPP) v. Ryan & Rooney* [2015] IECA 2 one appellant handed over heroin and cocaine valued at €1,200,000 to the other in a parked car. Neither had previous convictions and were unlikely to reoffend. Both entered guilty pleas. The offending was for financial gain. The entirely suspended sentences were unduly lenient. This Court imposed sentences of three years.

21. The appellant submits that the 12 years headline before mitigation was incorrect. The mitigating factors warranted a greater discount.

Respondent's submissions

22. It is submitted that the sentencing judge correctly identified the headline sentence, which reflected the gravity of the offence, then specified the mitigation and weight to be attached to those factors. The Court took the view that the appellant was not a drugs mule in the traditional sense. He ordered the packages and picked the addresses. This indicated a high level of planning and premeditation. It also constituted significant involvement on the appellant's part. The sentencing judge did not err in so placing the offence.

23. In *The People (DPP) v. Flynn* [2015] IECA 290 without ruling as to whether the starting figure was too high, it was held that the sentence arrived at after mitigation was "not per se indicative of there having been an error in that regard". The within headline figure was appropriate and within sentencing parameters. The bottom line sentence was correct and proportionate in the all the circumstances including the gravity of the offence and the appellant's personal circumstances. It was not indicative of any error of principle.

24. In *The People (DPP) v. Keane* [2007] IECCA 119 it was held that when determining the gravity of the offence the court must consider the circumstances of commission, the nature of the offence and its impact on the victim and society. In the present case, the offending was serious in nature and the appellant's culpability was very significant.

25. It is submitted that the gravity of the offence should be remembered. The maximum penalty is life imprisonment. The court can and should take account of the harm caused to society by drug trafficking. The mandatory minimum is noted in s. 33 of the Criminal Justice Act 2007 to be in view of the harm caused to society by drug trafficking. The sentencing judge was entitled to have regard to appropriate matters. By law she was obliged to not only consider the appellant's circumstances but also balance the public interest and have due regard to the principle of deterrence. Deterrence covers individual deterrence and general deterrence given the effect of this type of offending on the community. It is submitted that the sentence imposed must mark society's denunciation and abhorrence of such offending.

26. The respondent refers to the statement of law by Denham J. in *The People (DPP) v. M.S.* [2000] 2 I.R. 592. She held that sentencing involved aspects of retribution, deterrence, protection of society, reparation and rehabilitation. Regarding the principle of deterrence, it is submitted that both personal and general deterrence constitute an element of sentencing policy in cases of this nature. In O'Malley, "Sentencing Law and Practice", 2nd Ed., (Dublin, 2006) the author notes that both general and specific deterrence "are grounded on an assumption of rationality".

27. In light of the facts of this case, particularly the value of the drugs and that the appellant was found in possession of the mobile phones, the sentencing judge was entitled to treat the offence as warranting 12 years imprisonment. She noted the planning and premeditation. The appellant was involved for financial gain and was not labouring under a drug addiction.

28. It is submitted that the sentencing judge gave the appellant significant credit for his guilty plea and personal circumstances. She engaged in a detailed analysis of the case before imposing sentence. The matter was adjourned to the following day after the facts and mitigation were heard. It could be argued that excessive weight was given to the mitigating factors. There was effectively a 50% reduction. The judge outlined in great detail the factors she was taking into consideration. More than sufficient discount was afforded for the mitigating factors.

29. The respondent accepts the duty to pass the appropriate sentence having regard to the particular circumstances of the crime and the criminal. This is what was done in this case. All factors, including the appellant's personal circumstances, were balanced. Each case turns on its own facts and can be distinguished from other decisions. In the cases referred to by the appellant the role and culpability of the offender can be distinguished from the present case.

30. It is well established that an appellate court cannot interfere with a

31. sentence simply because it would have imposed a different sentence had it been dealing with the matter at first instance. This was so held in *The People (DPP) v. O'Halloran* (Ex Tempore, Court of Criminal Appeal, 21st October, 2002).

32. It is submitted that the complaints about how the sentencing judge dealt with sentence do not actually or factually amount to an error in principle.

Decision

33. In *The People (DPP) v. Byrne* [2017] IECA 97 at paras. 26 and 27 Edwards J. helpfully set out the process which should be undertaken by a court when sentencing:-

"...the exercise of sentencing generally involves a two stage process. The first stage involves assessing the gravity of the offence, with reference to culpability (including aggravating factors tending to increase culpability and mitigating factors tending to reduce culpability), and the harm done, and determining where on the scale of available penalties the offence should be located before account is taken of any mitigating factors not already taken into account as bearing on culpability. In this way the sentencing judge determines on a headline sentence in the first instance.

The second stage involves discounting from the headline sentence arrived at in the first stage for any mitigating factors not already taken into account, such as a plea, previous good character, age, remorse, co-operation, restitution, a good work record, adversities in the accused's person's life and life history, public service or positive contributions to society, good works, efforts at rehabilitation and any other relevant circumstances capable of going to mitigation. In this way the Court endeavours to arrive at a just and proportionate ultimate sentence."

34. The sentence in this case was a severe one. This of course reflects as it must the grave nature of drug offending and the terrible social damage wrought thereby. Examining the sentencing process of the learned sentencing judge it is clear that it involved a careful and meticulous analysis of the facts of the case and the submissions that had been made to her. She found the headline sentence to be one of 12 years and then considered all those mitigating factors that were outlined above in deciding upon the sentence in this case of 8 years. She was then careful to provide some incentivisation for his continuing rehabilitation by suspending the last 2 years. She also for all the reasons outlined above found that there did exist exceptional circumstances which would make the mandatory minimum of 10 years unjust. We agree with all her analysis and treatment of the case save only for the headline sentence that she identified.

35. We have considered carefully the submissions made to us by both counsel. We have examined the cases to which we have been referred for comparative analysis of sentencing. The case of *People (DPP) v. Devlin* [2016] IECA 125 is one of those that bears some

consideration. In that case drugs with a value of 1,300,00 Euro were involved in an illicit transaction. Heroin and cocaine were the drugs in question. A 12 year sentence was upheld by this court. Almost ten times the value of drugs in this case were involved there. Additionally, cannabis was the drug involved herein. We are of the view that the headline sentence identified herein was too severe and thus identify an error of principle. We will therefore quash the sentence and proceed to resentence. We find that the headline sentence in this case should be one of 9 years. Applying the same mitigating factors outlined above together with the very favourable reports that have been furnished to us today, we consider the appropriate sentence should be one of 6 years. We also consider that the same exceptional circumstances exist as specified by the learned sentencing judge which would make the mandatory minimum sentence of 10 years unjust. Further, as the learned sentencing judge found, we are very impressed by the manner in which the appellant has conducted himself in prison. The conduct to which she was referred has continued since sentencing and this is greatly to the credit of the appellant. We hope his positive attitude will continue and to incentivise that we will suspend the last 18 months of the sentence subject to the same conditions as before.