



THE COURT OF APPEAL

**Birmingham J.
Edwards J.
Hedigan J.**

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Christopher Sexton

Appellant

JUDGMENT of the Court (*ex tempore*) delivered on the 16th day of January, 2018 by

Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence under appeal is one of eight years imprisonment with the final 12 months suspended that was imposed in the Cork Circuit Criminal Court on 25th October, 2016 in respect of an offence contrary to s. 15A of the Misuse of Drugs Act 1977.

2. The background to the case is to be found in a Garda surveillance operation that was mounted at the home of the applicant in Gurranabraher, Cork, on 12th February, 2016. On that occasion a co-accused was seen arriving at the appellant's home and then he and the appellant left the house and the area in separate vehicles. Both cars were seen to travel in convoy and went to a supermarket car park in Finglas in Dublin. There, the appellant was seen to get out of the car in which he was travelling and was seen standing beside the car driven by the co-accused. A third car driver was seen removing two bags from his car and then placing them in the boot of the car driven by the co-accused. The two vehicles that had travelled to Dublin then left the car park in Finglas and travelled back in convoy towards Cork. In Fermoy, County Cork, they were stopped and the car driven by the co-accused was searched and found to contain 20.3 kg of cannabis resin. The applicant was arrested and a follow-up search of his home was conducted which saw 97 g of cannabis recovered, which had a value of €580. This was the subject of a s. 15 charge in respect of which a concurrent sentence of two years imprisonment was imposed. The value of the drugs that were seized from the car was €122,000. When arrested and detained, the appellant initially denied any involvement or knowledge but subsequently accepted his involvement and in particular accepted that he had organised for the co-accused to travel to Dublin in order to collect 10 kilos of cannabis. He indicated that he was to receive a sum of €3,500 for his part in the enterprise.

3. In terms of his background and circumstances, the appellant has a number of convictions over a long number of years in relation to s. 3 of the Misuse of Drugs Acts, the most recent being in 2012, but no convictions under s. 15 or 15A and no Circuit Court convictions.

4. He is a married man, his date of birth is 9th November, 1974, and he is the father of two young children. The Court was told that there was a concern at one stage about an issue in relation to skin cancer.

The judge's approach to sentencing

5. The judge began his sentencing remarks by saying that this was a very serious case in which drugs with a street value of in excess of €120,000 came to be moved about and that there was no doubt that one of the main organisers was the defendant, Christopher Sexton. He said that a clear differentiation had to be made between the two defendants arising from their criminal involvement in that the appellant was very much at the higher end of what was a well-organised, developed scheme involving the transfer of drugs between Dublin and Cork. He indicated that he did not accept that Mr Sexton was a drug addict and that his previous s. 3 convictions were more consistent with recreational use than addiction. He felt that there was a sufficient level of co-operation, in terms of admissions that were forthcoming and the early plea of guilty to allow for a departure from the ten year presumptive minimum. He then imposed the sentence which is the subject of the appeal. When he came to deal with the co-accused he commented that he was in a different category altogether, having become involved because the opportunity presented itself, an opportunity presenting itself at a time when he was vulnerable. In his case, a sentence of five years imprisonment with the final three years suspended was imposed.

6. Three issues were raised in the course of the written submissions:

- (a) That the judge failed to give sufficient credit for the plea of guilty.
- (b) That the judge erred in the way in which he structured the sentence, in particular that he erred in failing to suspend a greater portion of the sentence in order to provide an opportunity for rehabilitation.
- (c) That the co-accused received a much more lenient sentence.

This last point has not really been pressed in the course of today's appeal and really it was never a point of any great substance as the situation of the appellant and the co-accused, Mr Mannix, were radically different indeed.

7. One issue that was referred to in the course of written submissions and which have featured in the appeal hearing was the matter of an enquiry under s. 4 which had been touched on during the course of the sentence hearing, the issue having arisen while evidence was being given by Detective Sergeant Lar O'Brien, the investigating member.

8. The issue arose in these circumstances, prosecution counsel asked,

"Q. Now, one last matter I am going to take up with you is this, the question of any s. 4 enquiry into profit or otherwise from this kind of behaviour where either accused is concerned?

A. Yes, I do believe a s. 4 enquiry is necessary in the case of Christopher Sexton, not in the case of Paul Mannix.

Q. Are you in a position to deal with such a thing today or do you require the opportunity to make further enquiries or the like?

A. Yes I would indeed, yes with regard to deal with further"

At which point the judge intervened and said "No. I'll adjourn Mr Sexton." And the judge continued, "But you say initially the Guards are looking for a s. 4 enquiry as to his profits," at which point defence counsel for Mr Sexton said "Well, it's entirely a matter for the State and the Court, Judge." The judge responded, "I know, I am just saying, well, what I will do is I will Guards liberty to bring a s. 4 enquiry, to take a s. 4 enquiry and liberty to apply thereafter on notice to you." Counsel replied "OK."

9. Counsel for the appellant has drawn attention to the fact that this was an issue that was referred to by the sentencing judge in the course of his remarks. He concluded the portion of his sentencing remarks that dealt with Mr Sexton as follows:

"I would measure a sentence of eight years as being the appropriate one and given that some level of supervision will be needed on this man when he is released, I will suspend the final 12 months of that sentence on condition that on his release he will, for the period of 12 months be under the care of the Probation Service and obey all their directions. I do not see any present need to require him to take any rehabilitation course because, as I have said, I am not convinced that he is a drug addict and as I have already indicated, a s. 4 enquiry is to be permitted and carried out by the Gardai."

10. The Court does not feel that those remarks can fairly be interpreted as indicating that the judge felt that the fact that there was to be a s. 4 enquiry closed down the question of rehabilitation. Rather, the Court feels that the judge at that point in his remarks was doing no more than confirming his earlier procedural ruling.

11. In the course of the oral presentation, though not in the written submissions, attention has been drawn to the fact that this was not a case where a headline sentence was nominated. This Court has on a number of occasions expressed the view that a two-stage process identifying a headline figure and then applying mitigation represents best practice but has also made clear that failure to follow that best practice will not necessarily see the sentence set aside. The real question though, in the context of the present appeal, has to be whether the sentence was overly severe to the extent that the sentence imposed constituted an error in principle. The Court takes as its starting point that it agrees with the trial judge that this was a very serious case in which drugs with a street value in excess of €120,000 came to be moved between Dublin and Cork and the Court agrees with his assessment that there was no doubt that one of the organisers of that enterprise was the appellant. However, it is the case that despite his view about the seriousness of the offence, the judge said that he felt that there was a sufficient level of co-operation, reflected in the admissions made by the appellant and the plea of guilty to permit him to depart from the presumptive minimum provided by statute.

12. In the case of *DPP v. Ryan* [2016] IECA 258, a decision of this Court of 18th July, 2016, which has been referred to by the prosecution as a comparator which is of assistance, the court, towards the end of its judgment, had commented:

"This was a case where a presumptive minimum sentence was applicable. The judge felt that there were factors present which permitted him to depart from the presumptive mandatory minimum. No issue has been taken with correctness of that conclusion. However, had the judge felt that the such factors as were in favour of Mr. Ryan could not be seen as exceptional so as to justify departure from the presumptive statutory minimum, it cannot be regarded as a foregone conclusion that the appellant would have succeeded in identifying an error in principle in that regard."

Slightly earlier in that judgment the Court had commented:

"The background and the circumstances of those coming before the courts on s. 15A charges vary very significantly. In some cases those involved are mules, in some case couriers, in some cases individuals who have been pressurised to store or move drugs because they have accumulated drug debts. In some cases it is accepted that there is no financial gain, the only benefit being some forbearance in relation to debts that have been accumulated. In other cases the indication is of payment in kind with the individual being provided with a supply to feed that individual's own addiction. Mr Ryan does not fall into any of these categories."

Those remarks have some relevance in the context of the present case.

13. It is, though, the case that the Court acknowledges that the suspended portion of the sentence in *DPP v. Ryan* [2016] IECA 258 was greater than in this case: two years, there, of the eight, rather than one here. But nevertheless the Court takes the view that a sentence eight years with one suspended, therefore a net sentence of seven years, represents a significant departure from the presumptive statutory minimum, a departure that might indeed be seen as generous. As in the Ryan case, it certainly could not be said that the sentence was so severe as to fall outside the range of penalties. It was undoubtedly a significant sentence but those who take the decision to become involved in serious drug offending must expect to be dealt with severely. In the circumstances no error in principle has been identified and the Court must dismiss the appeal.