



## THE COURT OF APPEAL

Birmingham J.  
Sheehan J.  
Edwards J.

267/13

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Niall Hutton**

**Appellant**

**JUDGMENT of the Court delivered on the 16th day of December 2016 by**

**Mr. Justice Sheehan**

1. This is an appeal against sentence.
2. On the 2nd December, 2013, a sentence of ten years imprisonment was imposed on the appellant following a plea of guilty to the sale and supply and importation of drugs in September 2012. These drugs had an overall value of €894,110.
3. On the same date eight years of a ten year suspended sentence was reactivated. This suspended sentence had been imposed on the appellant on the 15th June, 2009, following a plea of guilty to possession of cocaine valued at €8,380 and cannabis valued at €61,329 for the purpose of sale or supply contrary to s. 15A of the Misuse of Drugs Act 1977, as amended.
4. The learned sentencing judge directed, as he was obliged to do, that the sentence of ten years imprisonment commence at the expiration of the eight year sentence.
5. The appellant therefore is serving a sentence of eighteen years imprisonment and the ground of appeal advanced on his behalf is that the sentencing judge did not have sufficient regard to the principle of totality when imposing the two sentences.
6. The principle of totality was most recently approved and restated by the Supreme Court (in the context of consecutive sentencing for offences committed in prison) in *Gilligan v. Ireland and Others* [2013] 2 I.R. 745. MacMenamin J. for the Court stated:

“The totality concept is a form of check to ensure that, where proportionate sentences are chosen for each offence, the court may, when appropriate, adjust that overall sentence, or the last sentence imposed, in order to achieve proportionality and overall fairness. An authority from the Court of Criminal Appeal demonstrates how this balancing test applies in practice. In *The People (D.P.P.) v. Healy* [1990] 1 I.R. 388, the court observed that, in a proper case, a sentencing court might, even in the case of a grave offence, adjust the sentence downwards where not to do so would impose a manifestly unjust punishment on the accused.”
7. That principle was also applied by this Court in its judgment in *DPP v. Martin McBride* [2016] IECA 223, delivered on the 25th July, 2016, by Mahon J. In that case the Court held *inter alia*, that an overall sentence of seventeen years imprisonment offended the totality principle and the Court reduced the overall sentence to one of fourteen years imprisonment. In *McBride* the appellant had pleaded guilty to two s. 15A offences involving the possession of cannabis for the purpose of sale or supply. The second offence was committed while the appellant was on bail for the first offence. The appellant was subject to a mandatory ten year prison sentence in respect of the second offence and that sentence was required by statute to be deemed to be consecutive to the first offence for which the appellant had received a sentence of eight years imprisonment. The Court could not interfere with the second sentence, but held that even though the first sentence of eight years imprisonment had been deemed to be correct in principle, this Court could interfere with that sentence in order to ensure the proper application of the totality principle.
8. In considering the arguments advanced by both parties in this appeal, it is necessary to have regard to the background to each offence and the personal circumstances of the offender. On the 24th June, 2008, a house in Carlow was searched and cannabis valued at €61,329 and cocaine valued at €8,380 was found in the appellant's bedroom. When confronted about these matters at the time of his arrest the appellant made full admissions to the gardaí. At the time he was a 29 year old single man, the father of an eleven year old girl and unemployed. The prosecuting garda agreed at the time of the offence the appellant's cocaine habit had become a daily problem for him and had led to him accumulating debts of €30,000. The prosecuting garda also told the Court that the appellant had showed no signs of any wealth.
9. The Court was told that he had a previous conviction contrary to s. 15 of the Misuse of Drugs Act 1977, as amended, for which he had received a suspended sentence of nine months imprisonment. This related to a seizure of 13ozs of cannabis. He had two other convictions for possession of drugs under s. 3 of the Misuse of Drugs Act 1977, as amended and two convictions for drunken driving.
10. At the time of sentence he had completed a residential drug treatment programme and was engaged in counselling. The Court was told he had the full support of his family and was now making such progress in overcoming his addiction that he was planning to start a degree course in civil engineering.
11. The Court identified the seriousness of the offending as being towards the “lower end of the middle range” and proceeded to identify ten years as the appropriate sentence. The Court went on to then suspend that sentence in full in view of the mitigating factors, but on condition that the accused abstain from alcohol and drugs for a period of ten years.

12. On the 2nd July, 2013, the appellant pleaded guilty to the sale, supply and importation of drugs valued at €894,110 and on the 2nd December, 2013, was sentenced to ten years imprisonment in respect of the s. 15A offence it being a second offence and the sentencing judge having no option but to impose a ten year sentence. The background to this offence is helpfully set out in the respondent's submissions.

13. Some time in the middle of 2012, the appellant ordered 1 kg of an illegal synthetic drug over the internet. He did so from a website which appeared to be based in China. Arising from this he was approached through that website to become a distributor of these drugs. An arrangement developed whereby he would take delivery of parcels of various illegal drugs from abroad. All of these were synthetic drugs of a type that had a similar effect to that of cocaine. When he received each parcel the appellant would break up, weigh and repackage the drugs as directed by email from the supplier in China and then he would arrange to send these drugs to different locations abroad. Among the countries to which he distributed the drugs were: New Zealand, Romania, France, Germany, Scotland and England.

14. On the 12th September, 2012, customs officers at Cork Airport became suspicious of three parcels received by a courier company through the airport that day. These parcels were each addressed to a John Nolan of 311 O'Connell Court, Waterford. The packages were sent for forensic examination and it was established that they contained illegal drugs. It was also established that there was no such address in Waterford. Whereas O'Connell Court did exist, there was no residence there numbered 311.

15. On the 13th September, 2012, another parcel again addressed to John Nolan at the same address and again containing illegal drugs was also seized at Cork Airport. On the 17th September, 2012, the gardaí arranged for a controlled delivery of all four parcels to be made in Waterford. On that day the undercover Detective, playing the part of the courier, contacted the phone number for delivery given on the parcels and he spoke with the appellant who arranged to take the delivery outside his address at the complex which was 411 O'Connell Court. The appellant took delivery of the parcels and shortly thereafter he was arrested nearby in possession of the drugs contained in the parcels.

16. Subsequently the gardaí obtained a search warrant to search the appellant's residence at 411 O'Connell Court and there they found another large quantity of drugs and related drugs paraphernalia. As result of these finds the appellant pleaded guilty at Waterford Circuit Criminal Court to various offences in relation to the sale, supply and importation of these drugs during the previous September, including an offence under s. 15A and s. 15B of the Misuse of Drugs Act.

17. In the course of sentencing for these offences the learned judge located the case "at the lower end of the scale" but did not accept that any weight should be given to the fact that sometime previous to the offending the drugs, the subject matter of these charges, were lawfully for sale in Ireland in what were sometimes referred to as "Head Shops". The trial judge noted that the appellant had been addicted to drugs for a great part of his life, had cooperated with the gardaí, had a good work history in better economic times, and further that since going to prison following his arrest for the Waterford offences he was getting on very well there.

18. The sentencing judge was initially disposed to imposing an eight year sentence for these offences until he realised that he had no option but to impose a ten year sentence.

19. At the outset it should be noted that this Court has no power to interfere with the ten year sentence imposed in Waterford Circuit Court. That sentence was mandatory by virtue of the provisions of s. 27(3)(f) of the Misuse of Drugs Act 1977, as amended, and because the Waterford offence was a second or subsequent offence under s. 15A or B of the Act. The sentencing judge was also obliged to make that sentence consecutive to the reactivated sentence as the Waterford crimes had been committed while the appellant was subject to a ten year suspended sentence.

20. If we hold that the overall sentence in this case offends the totality principle the only way the sentence can be reduced is by reducing the first sentence whereby the appellant was directed to serve eight years of the original ten year sentence. It is clear from the transcript that when considering what was the appropriate sentence in the Carlow case, the learned judge was aware that he was entitled to depart from the presumptive minimum ten year sentence.

21. We have considered the submissions of Mr. Gageby S.C. for the appellant and the submissions of Mr. Whelan BL for the respondent. It is correct to say that the trial judge when imposing sentence in this case was conscious of the totality principle as well as conscious of the intention of the legislature when dealing with these offences contrary to s. 15A of the Misuse of Drugs Act 1977, as amended. Nevertheless Mr. Whelan fairly concedes that the sentence imposed was indeed a lengthy and harsh one and while he maintains that it was not manifestly unjust, in light of the personal circumstances of the appellant, the manner in which he met the charges in each case, his willingness to respond as truthfully as he could to the gardaí when first confronted we take the view that the justice of the case can be met by a sentence that is significantly lower.

22. We are supported in this view by the manner in which the sentencing judge described the seriousness of the offences in each case. He identified the Carlow case as being "in the lower end of the middle range" and the Waterford case at the "lower end of the scale". While these are imprecise terms, they nevertheless are an indication of the sentencing judge's appraisal of the seriousness of the offending behaviour, no doubt by reference to other s. 15A offence cases that he has dealt with. We are satisfied therefore that the sentencing judge in endeavouring to apply the principle of totality failed to give sufficient credit to the appellant for the mitigation that was undoubtedly in the case and to this limited extent we find an error of principle, but one nevertheless which allows us to proceed to a fresh sentence hearing.

23. Given the circumstances that led to the appellant's offending in Carlow and bearing in mind his personal circumstances as well as the progress that he has made in prison, we are of the view that while he cannot expect to avoid a substantial sentence, an overall sentence of fourteen years imprisonment would in all the circumstances of this case be a proportionate sentence. Therefore we set aside the reactivated eight year sentence and substitute in its place a sentence of four years imprisonment leaving an overall sentence of fourteen years imprisonment in this case.

24. Accordingly we direct that four years of the ten year prison sentence be activated and be deemed to commence on the 2nd day of December, 2013. We direct the ten year sentence be consecutive to that sentence. Given that the sentencing judge found that the appellant in this case was addicted to drugs at the time that he committed each of the offences then in accordance with the relevant provisions of the legislation, we direct that Mr. Hutton be brought before Waterford Circuit Court for a review of his ten year sentence when he has served half of that sentence which he will commence when he has served the four year sentence for the Carlow offences which we have today substituted in respect of the eight year sentence.

