



THE COURT OF APPEAL

Appeal No. 286CJA/2016
Mahon J.
Edwards J.
Hedigan J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

MARCUS GANTLEY

RESPONDENT

JUDGMENT (ex tempore) of the Court delivered on the 4th day of July 2017 by Mr. Justice Mahon

1. This is an application by the appellant pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of sentences imposed on the respondent at Dublin Circuit Criminal Court on the 3rd October 2016 on the grounds that they were unduly lenient pursuant to the provisions of s. 2 of the Criminal Justice Act 1993.

2. On that date the respondent was sentenced in respect of four offences to prison terms ranging from three months to two years, and with the two year sentence directed to be served consecutively to a twelve month sentence. The details of each of the offences are as follows:

(i) Resisting or wilfully obstructing or impeding a peace officer acting in the execution of the peace officer's duty contrary to s. 19(3)(c) and (4) of the Criminal Justice (Public Order) Act 1994, as amended by s. 185 of the Criminal Justice Act 2006 (Bill Number 937/2014). The respondent pleaded guilty to this offence and was sentenced to a term of three months imprisonment to date from the 3rd October 2016.

(ii) Possession of a controlled drug with intent to unlawfully supply to another contrary to s. 15(1) and s. 27 of the Misuse of Drugs Act 1977 (as amended by s. 6 of the Misuse of Drugs Act 1984) (Bill Number 22/2015). The respondent pleaded guilty to this offence and was sentenced to twelve months imprisonment, to date from the 3rd October 2016.

(iii) Assault contrary to s. 2 of the Non Fatal Offences against the Person Act 1977 (Bill Number 22/2015). The respondent pleaded guilty to this offence and was sentenced to three months imprisonment to date from the 3rd October 2016.

(iv) Possession of a controlled drug with intent to unlawfully supply to another contrary to s. 15 and s. 27 of the Misuse of Drugs Act 1977 (as amended by s. 6 of the Misuse of Drugs Act 1984) (Bill Number 283/2016). The respondent pleaded guilty to this offence and was sentenced to a term of imprisonment of two years. It was further directed that the final eighteen months of the said two year sentence be suspended for a period of eighteen months post release on certain conditions. It was directed that that sentence commence on the legal expiration of the twelve months sentence imposed in respect of Bill Number 22/2015, (2) above.

3. The total net custodial term imposed was therefore eighteen months and the period of suspension also eighteen months, and the operative period of that suspended sentence again eighteen months.

4. In relation to the first offence, Bill number 937/14, it occurred on the 8th May, 2014. On that date Garda Cahill was on duty with a colleague and while driving at Brown Street, Dublin 8 he observed three males, including the respondent, in conversation, and he also noticed the respondent handing over something to one of the others in the group. The gardaí approached the three men and advised them that they intended to search them pursuant to s. 23 of the Misuse of Drugs Act 1977 (as amended). The respondent walked towards Garda Burke with his hands up and in an aggressive manner. He pushed Garda Burke against the patrol car, and then emptied his pockets out. He again aggressively walked towards Garda Burke on four occasions, each time being ordered to move back. He told Garda Burke to stop pushing him and using foul language in so doing. He attempted to hit Garda Burke in the face and again with his elbow, before he ran away. He was caught, restrained, handcuffed and taken to the garda station. He resisted being handcuffed and kicked out at Garda Burke while he was on the ground.

5. The second offence (Bill number 22/15) occurred on the 8th June 2016. Gardaí noticed the respondent in the company of another man at South Circular Road in Dublin engaged in a suspected drugs transaction. They were then observed entering a Spar shop in Dolphin's Barn. The men were followed into the Spar shop by two gardaí, informed that they were to be searched pursuant to s. 23 of the Misuse of Drugs Act 1977, and that it was intended to take them to the garda station for that purpose. The respondent refused to comply and he was then arrested. He became violent, pushing one garda and attempting to flee. He struggled violently with Garda Godfrey, who was dragged around part of the shop knocking over a number of display units and damaging a number of shop products. He was finally restrained. The respondent also attempted to bite and punch Garda Godfrey. Garda Godfrey eventually had to use his pepper spray to subdue the respondent. He continued to act aggressively after being placed in the Garda patrol car, and again when he was taken into Kevin Street Garda Station. Three bags of diamorphine were found in the course of a search of the respondent, weighing 5.489 grams, and with a street value of approximately €780.

6. In relation to Bill number 283/16, the respondent was stopped by a customs officer at the departure terminal in Dublin Airport. The respondent's baggage was searched and underneath the top layer of clothing a bag containing white powder was found and the gardaí were contacted. This white powder transpired to be cocaine with a street value of €17, 248. At the time of committing this offence the respondent was on bail for the previous two offences, namely those relating to Bill number 937/14 and 22/15.

7. The appellant maintains that the learned sentencing judge erred in principle in relation to the following:

- (i) Failing to have any or any adequate regard to the gravity of the offences and in particular to the fact that all offences were committed while on bail.
- (ii) Concluding that possession of a quarter kilo of cocaine for sale and supply contrary to s. 15 of the Misuse of Drugs Act 1977 as amended and valued at €17,248 was at the lower end of the sentencing range.
- (iii) Failing to give due and adequate weight to the report of the probation officer who assessed the respondent as being at a high risk of reoffending over the following twelve months.
- (iv) Placing excessive weight on the content of the probation report whereby the respondent said he was under a threat, despite this not being advanced in mitigation at the sentence hearing.
- (v) Sentencing the respondent in the absence of a governor's report and a urinalysis report which the sentencing court previously ordered for the sentence hearing.
- (vi) Placing excessive weight upon the personal circumstances and mitigating factors raised on behalf of the respondent and inadequate weight to the aggravating factors.
- (vii) Imposing sentences of imprisonment on the respondent which reflected the seriousness of the offences, and the circumstances in which the offences were committed.
- (viii) Imposing sentences of imprisonment on three separate bill numbers which were all committed on bail to each other to a total of three years imprisonment, while suspending the final eighteen months imprisonment and backdating the said sentences to the 28th July 2016, and the imposition of the said sentences is a clear divergence from the norm of sentences which could properly have been imposed upon the respondent having regard to the details of the offences and the maximum penalties available, and the personal circumstances of the respondent and his previous convictions thereby justifies the intervention of this Honourable Court.

8. The court was advised in the course of oral submissions that the focus of the application to review the sentences is on the final or overall sentence imposed, that is the eighteen month custodial sentence followed by a suspended term of eighteen months. The court was not being requested to review the individual sentences.

9. Section 2 of the Criminal Justice Act 1993 provides as follows:-

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the sentencing court) on conviction of a person on indictment was unduly lenient, he may apply to the (Court of Appeal) to review the sentence.

(2) An application under this section shall be made on notice given to the convicted person within 28 days from the day on which the sentence was imposed.

(3) On such an application, the Court may either:

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

10. Section 11(1) of the Criminal Justice Act 1984 provides, in part, as follows:-

"Any sentence of imprisonment passed on a person for an offence committed after the commencement of this section while he was on bail shall be consecutive on any sentence passed on him for a previous offence or, if he is sentenced in respect of two or more previous offences, on the sentence last due to expire..."

11. Section 11 of the Criminal Justice Act 1984 as amended by s. 10 of the Bail Act 1997 provides as follows:-

"Where a court:-

(a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail,
and

(b) is required by subsection (1) to impose two or more consecutive sentences,

then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor."

12. The learned sentencing judge explained her decision to structure the sentencing of the respondent as she did, in the following terms:-

"...I've taken into account at all times the principles of proportionality and totality and I don't think the combination of the six, six month, twelve month and two years is in any way disproportionate and I am going to suspend the last eighteen months of it. So, I don't see how that could be considered to be disproportionate. I've been conscious of the years that have totalled up when considering the three bills. So, I don't think I'd finished what I was going to say on that, on the spectrum of gravity for s. 15 offences at the lower end of the range. No evidence of luxury or financial gain in his life or that he was or is a member of the drug trade. He was under pressure and perhaps there was a threat in relation to his partner and himself which he acted upon because he was in fear and in his favour he has entered a guilty plea. I have taken into account his personal circumstances and the letter handed in. So, that's two years and I am suspending the last eighteen months of the final Bill, on strict conditions of his own bail of €100 to keep the peace and be of good behaviour, that he remain under the supervision of the Probation Services for eighteen months and that he comply with all of their advice and recommendations in relation to employment, education and drug treatment to include urinalysis and that he keep them up to date in relation to his up to date contact details."

13. The respondent's personal circumstances include a history of drug addiction. His lifestyle is described in the probation report as being *chaotic*. His mother was a heroin addict. He has eight previous convictions, including three relating to illicit drugs and two for violent disorder. He has been assessed by the probation service as being at a high risk of re-offending.

14. A disturbing aspect of this case is the extent of the offending by the respondent over a relatively short period of time and his propensity to ignore bail conditions and offend while on bail, indicating a complete disregard for the law generally, and, more particularly, for the opportunities afforded to him to reform his behaviour. The offences committed by the respondent and which are the subject of this appeal rank individually from being relatively minor to moderately serious, the latter including the assault on a member of An Garda Síochána and an offence involving over €17,000 of illicit drugs.

15. The learned sentencing judge was, in effect, required to sentence the appellant with a somewhat global perspective. She was required to have due regard to the principles of totality and proportionality for that reason and because there had to be an element of consecutive sentencing included. In the court's view the so called final sentence, being one of two years imprisonment to be served consecutively to a twelve month sentence (a total of three years) and with the final eighteen months suspended, was very lenient indeed.

16. It is however well established that the court should interfere with a sentence only in circumstances where it was found to be unduly lenient and not merely lenient, and also not on the basis that the court or any of its members might believe that a different sentence was appropriate. It is also well established that a significant degree of deference to the decision of the sentencing judge is appropriate. A judge sentencing at first instance enjoys a wide discretion in formulating and structuring a sentence having heard all the relevant evidence at first hand. These issues are discussed in some considerable detail in the judgment of this court delivered by Edwards J. in *DPP v. Flanagan* [2015] IECA 94.

17. In all the circumstances, the sentences imposed on the respondent fall short of being unduly lenient and the court will therefore not interfere with them. The court recognises the learned sentencing judge's efforts to construct a final sentence that did not offend against the principle of totality and proportionality, albeit going to the limit in so doing. Her reasoning was clearly heavily influenced by a desire to afford the respondent every opportunity - possibly a final opportunity - to rehabilitate, hence the imposition of onerous conditions relating to the suspended element of the sentence.

18. The court will dismiss the application. It also confirms that the sentences in the court below are to date from the 28th July 2016.