THE COURT OF APPEAL

Record No: 204 2016

Birmingham P
Edwards J.
Kennedy J

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

BRIAN COLLOPY

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 10th December 2018 by Mr. Justice Edwards .

1. On the 5th April 2016, the appellant signed pleas of guilty to a number of drugs offences, including an offence contrary to s. 15A of the Misuse of Drugs Act 1977 as amended ("the Act of 1977"); an offence contrary to s. 15 of the Act of 1977; and an offence contrary to s. 3 of the Act of 1977. These pleas were later affirmed by the appellant at Limerick Circuit Criminal Court on the 15th April 2016.

2. The sentencing hearing took place at Limerick Circuit Criminal Court on the 18th July 2016, following which judgment was reserved. On the 20th of July 2016 the appellant received a sentence of 8 years' imprisonment on the s.15 offence, backdated to the 15th of December 2015. In circumstances where all three offences to which the appellant signed pleas of guilty arose out of the same seizure of diamorphine, the sentencing judge opted to make no order with respect to the s.15 and s.3 charges, respectively.

3. The appellant now appeals against the severity of the sentence.

Background Facts
4. Detective Sergeant Alan Cullen of the Limerick Drugs Squad gave evidence that on that on the 15th of December 2015, the Gardaí searched the conjoined properties of 34 and 36 St. Ita's Street, which were connected through the kitchen area at ground floor level and also through a door on the first floor. The Gardaí, having arrived at approximately 7 pm, gained forced entry though the front door of number 34 whilst other Gardaí covered the entrance to number 36. The Gardaí then upon entering found the appellant's brother, Kieran Collopy, exiting a bathroom in number 36, and the appellant, Brian Collopy, in a bedroom also in No 36.

5. In a further search of the common kitchen area, 10 single ounce packets containing Diamorphine – commonly known as Heroin – were found wrapped in black plastic on a countertop. There was also visible evidence of dust and powder in the area, later confirmed to be Diamorphine, as well as paraphernalia for weighing and handling the substance. A mobile phone found adjacent to the Diamorphine packages, had traces of the appellant's DNA on it. The total amount of Diamorphine found by the Gardaí came to 264.44 grams, which was said to have an estimated market value of €37,000.

6. Further evidence was recovered on the staircase and in the upstairs bathroom from which Mr Kieran Collopy had exited, including the presence of a weighing scales, and a saucepan, both of which bore traces of Diamorphine. In addition, a small amount of wet Diamorphine powder was found in the bathtub. At the scene, both men denied knowledge of the presence of Diamorphine at the property. In the course of further searching of the property quantities of cash were found in two locations, i.e., €800 in a kitchen cupboard and €340 in an upstairs bedroom.

7. In giving evidence at the sentencing hearing, Sergeant Cullen stated that the ounce bags of Diamorphine would in all likelihood be sold to wholesalers, who would then further divide the substance and sell it to street level dealers. In Sergeant Cullen's opinion, the Collopy brothers sat atop the pyramid of Diamorphine distribution in Limerick.

8. The Gardaí, and counsel for the prosecution, have conceded that the guilty pleas were offered at the earliest possible opportunity and that the appellant should be regarded as having been of material assistance.

Appellant's Personal Circumstances
9. The appellant was born on the 11th of August 1972. He is married with four children, and is currently unemployed and in receipt of social welfare. He is one of a large family of seven brothers. He has a number of health issues and is currently on medication for a heart complaint. He has several previous convictions, largely relating to road traffic matters but also involving criminal damage and theft. In addition, he has one relevant conviction from 2002 related to s.3 possession of drugs, for which he was fined €250, and one significant conviction dating from 2011, in respect of threatening to kill a witness in criminal proceedings against his brothers. Arising from the latter, the appellant served six years in prison and was released 11 months prior to the offence that now concerns the court.

Sentencing Judge's Remarks
10. In passing sentence upon the appellant, the sentencing judge, having rehearsed the relevant evidence, made the following sentencing remarks *(inter alia)*:

> *"Insofar as section 15A and the statutory scheme of things is concerned, it is important to note that there is a different sentencing regime for the ordinary charge of possession for sale or supply, or the ordinary section 15 as it's more commonly referred to, and a charge under section 15A or section 15B where the value of the drugs exceeds €13,000. Conviction under section 15A and/or section 15B automatically attract a basic presumptive sentence of 10 years or more. This applies regardless of the mitigating factors that may exist, meriting a lower sentence. A sentencing Court*

may, however, impose a lower sentence where there are mitigating factors that amount to exceptional and specific circumstances which would render the imposition of a 10-year sentence or more unjust in all the circumstances. It is important to note that the case law suggests that the 10-year presumptive sentence is not to be regarded as the starting baseline. In considering a sentence for offences contrary to section 15A or B, regard must be had for the provisions of section 27(3), the penalties section, and in particular, subsections 3(c) and 3(d). A Court may consider departing from the presumptive sentence if it is satisfied that particular circumstances prevail, and matters that can be considered include; the stage at which the plea was indicated, the circumstances in which the indication was given, whether the person was of material assistance, whether there are any previous convictions for drug trafficking offences, and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence. I should say also that in their pleas of mitigation, counsel for the defendants referred to several cases for guidance from the Court of Criminal Appeal and Court of Appeal.

Insofar as the aggravating factors are concerned in this particular case, the nature of the drugs involved, Diamorphine, otherwise known as heroin, is a dangerous, highly addictive, insidious and pervasive drug and is an absolute scourge in our society. It can cause havoc, it destroys both people as human beings, as persons, it has a devastating effect on the people in its grip, and also in many cases, a devastating effect for their families, their loved ones that have to cope with people with a heroin addiction, as well as society as a whole. The amount, €37,000, some may take the view is not an enormous amount in the great scheme of things, but the Court is of the view that it is a very significant amount, given the nature of the drug involved. Another aspect of the aggravation, in the Court's view, is that in this case, the Court is not dealing with accused that were mules or couriers or were under any duress or pressure or threat; it appears from the evidence tendered by the State that these two accused were active participants at a high level. There's no mention of any personal drug issues, that this was strictly a commercial enterprise. The modus operandi, the one-ounce deals. The State has been giving evidence that they consider, as I've said, both accused to be at the top of the pyramid. The Court acknowledges the fact that the accused do not have any serious drugs convictions, per se; however, it does take into account that there are a number of serious convictions there. And it is to be noted that … Mr Brian Collopy was only finished a long sentence some 11 months before this trouble.

Insofar as the mitigating circumstances are concerned, most of these are common to both matters, the Court is very cognisant of the fact that both accused gave a very early indication of pleas in this matter, and that this, the State, as I've already mentioned, acknowledge it was of major material assistance. It is again appropriate to state that they pleaded guilty effectively in the District Court, that they signed their pleas of guilty in the District Court, that they were transferred to this Court and affirmed their pleas again. Neither of the accused waited for the preparation of the book of evidence in this particular matter, they came forward at all stages on a signed plea. There is the considerable saving of garda time and the saving of forensic witnesses et cetera that their evidence has now effectively all been obviated by the early plea in the matter. There's also the fact that had matters gone to trial, that in fact there could have been applications for separate trials, which effectively would have meant that two trials on the same set of facts would have had to be run, but that, as I said, has all be obviated by the very early plea of guilty. Despite the State's view that the have a very coercive case in this particular matter, I think it is fair comment to suggest that there's no such thing as an absolute, and the State concede that this was spread over two houses, of which there were a number of occupants. There is the acceptance by both accused of their responsibility and culpability in the matter. There's the fact that both accused are extremely anxious to put these matters behind them and to get on with their life; it's been described as both accused are at a crossroads at this particular juncture.

Having assessed all the evidence in this particular matter and also having had time to refer to a number of the cases, of which there is a myriad of cases available to the Court, this Court must treat this case as a very serious matter. This was a covert, calculated, commercial operation carried out for the financial benefit of the two accused. They were effectively involved in the peddling of drugs which are both dangerous and devastating to society, and people who get involved in this type of enterprise and are caught, as both these accused were, must bear the responsibilities of their own actions. I do take into account, however, having considered all matters, that there are exceptional and specific circumstances which allow the Court to depart from the minimum presumptive, and in having considered this particular case, I would believe that the appropriate tariff in the mid-range of matters is between six and 10 years. And having considered all the aggravating factors and the mitigating factors in this matter, I'm going to impose a sentence of eight years on each of the accused on count number 1, and I'm going to backdate that to the 15th of December 2015 which is the date that both accused went into custody."

Grounds of Appeal

11. In contending that the sentence imposed was too severe, the appellant submits that the sentencing judge erred insofar as he did not give due weight to the mitigating factors present in the case, namely:

i. The fact that the appellant came forward on foot of a signed plea;

ii. That the plea of guilty was indicated by respected solicitor at the earliest possible opportunity;

iii. That there was significant saving of garda time;

iv. That there was significant saving of time for expert witnesses from the Forensic Science Laboratory;

v. That there was significant saving of court time;

vi. That the plea of guilty was significant in the context of the location of the offence i.e. two houses run into one with multiple occupants, etc. and

vii. The acknowledgement by the prosecution that the appellant was of material assistance.

Appellant's Submissions

12. The appellant's written submissions relate predominantly to the sentencing judge's alleged failure to give an appropriate discount for mitigation after initially outlining the headline sentence for the offence.

13. To this end, the appellant claims that the sentencing judge did not follow the recommended best practice of the Court of Appeal as elucidated in cases such as *People (DPP) v Flynn* [2015] IE CA 290, and *The People (DPP) v Raymond Molloy* [2018] IECA 37.

14. The appellant submits that the trial judge identified the headline sentence as falling to be located in the mid-range, that is between six and ten years. Following this, the trial judge purports to arrive at his final sentence of 8 years after *"having considered all the aggravating factors and the mitigating factors in this matter"*. It was submitted by the appellant that this exhibits a lack of clarity about the discounting process, and indeed about whether there was any discounting at all. It was submitted that there were numerous mitigating factors present in this case of which account should have been taken.as outlined above.

15. After stating that the headline sentence was in the range of six and ten years, the appellant submits that the trial judge gave no indication as to the rationale for why he settled on eight, an omission which it is argued constitutes an error in principle and resulted in an unduly severe sentence.

Respondent's Submissions
16. The respondent points to the gravity of s. 15A offences. The 10 -year presumptive mandatory minimum sentence to be imposed under the legislation, even if not strictly adhered to, remains a strong indication of legislative policy concerning how the gravity of the offence is to be viewed, and the severity with which it must be treated.

17. Reliance is placed by the respondent on the Court of Appeal decision in *The People (Director of Public Prosecutions) v. Ryan* [2015] IECA 10, where the former President stated:

> *"S.15A requires both exceptional and specific circumstances about the offence or the perpetrator that make it unjust to impose the 10 year minimum sentence before the court is able to depart from that regime: DPP v Botha [2004] 2 IR 375. Even if it would be unjust to impose the 10- year minimum sentence, an offence under s.15A is a very serious one and the court must have regard to the minimum and maximum punishment –the latter is life imprisonment—when determining the appropriate sentence. The fact that there is a severe minimum albeit subject to some exceptions is an important guide to gravity: Renald CCA 23/11/2001. The quantity and value of the drugs are critically important in assessing gravity: DPP v Long [2009] 3 IR 486. This also follows from the specification of €13,000 in the section. People who enter into the trade for reward must expect severe treatment from the courts, in enforcing the statutory policy clearly laid down by the Oireachtas. DPP v Duffy, CCA 21/12/2001; DPP v Lernihan 2007 IECCA 21. Couriers play an essential role in the illegal drugs trade and if they willingly go into it for financial reward cannot expect less than severe treatment from the courts in accordance with the clear and unambiguous policy of the legislation: DPP v Hogarty – 21/12/2001 per Keane CJ."*

18. Regarding the appellant's submission that the trial judge erred in principle by not adhering to the methodology proffered by the Court of Appeal in *Flynn and Molloy*, the respondent submits that precedent does not require strict adherence to it, and regard should be had to the substance of the ruling rather than requiring a mechanical process.

Discussion and Decision
19. The critical paragraph of the sentencing judge's judgment is perhaps unfortunately phrased, in as much as he indicates that he had determined that the "appropriate tariff" should be in the range from six to ten years, but did not make clear whether he was referring to the range applicable to the headline sentence or the ultimate sentence. His words have been interpreted by counsel for the appellant as referring to the range applicable to the headline sentence. However, it is clear to us from what followed subsequently, and indeed from an overall reading of the sentencing judgment, that the sentencing judge, despite the wording that he used, had in fact intended to indicate the range within which he saw the ultimate sentence, i.e., the post mitigation sentence, falling.

20. To be fair to the sentencing judge, he did not use the expression "headline sentence". The expression "headline sentence", as used in the jurisprudence of this court, connotes a pre-mitigation sentence. It is clear, however, that the sentencing judge in referring to the "appropriate tariff" was referring to the post mitigation sentencing range because in the very next sentence he then proceeds to indicate where on the range he had identified the case as falling *"having considered all the aggravating factors and the mitigating factors in this matter"*.

21. Moreover, the sentence actually imposed, although a lenient one in our view, makes sense on this interpretation. The interpretation urged by counsel for the defence does not make sense, and would have meant that the gravity of the offending conduct was under assessed, resulting in a headline, i.e., pre-mitigation, sentence, that was too low and one likely to result in an unduly lenient overall sentence.

22. An appropriate headline sentence for this offence would have been twelve years' imprisonment, with some margin of appreciation on either side of that figure. However, we are of the view that very substantial discount required to be afforded for the signed plea of guilty. Signed pleas are very much to be encouraged and are a rarity in s.15A drug cases. Clearly this appellant received good advice, and acted on it. The ultimate sentence of eight years that he received would have required a discounting from the headline sentence that we have suggested as being appropriate by one third. A discount at that level would be appropriate in the circumstances of the case, if the presumptive mandatory minimum sentence was not to apply and could be avoided.

23. We consider that but for the fact that the appellant signed a plea, it would have been difficult for him to have avoided the imposition of a ten-year sentence. However, the assistance provided by the signed plea was sufficiently material and exceptional to justify a departure from the presumptive minimum in the circumstances of the case. Accordingly, the eight-year sentence that was actually imposed was properly within the range of the sentencing judge's discretion in our view, and we find no error of principle.

24. We therefore dismiss the appeal.

25.