



THE COURT OF APPEAL

Record Number: 221/2018

**Whelan J.
McCarthy J.
Kennedy J.**

BETWEEN/

**THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENT

- AND -

WESLEY PURSE

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of July 2019 by Ms. Justice Máire Whelan

Introduction

1. This is an appeal against severity of sentence. On the 5th February 2018, the appellant pleaded guilty at Clonmel Circuit Criminal Court to three counts:

- (1) possession of a controlled drug for unlawful sale or supply in contravention of the Misuse of Drugs Regulations 1988 and 1993 made under s.5 of the Misuse of Drugs Act, 1977 contrary to s.15 and s.27 (as amended) of the Misuse of Drugs Act, 1977.
- (2) unlawful possession of a controlled drug contrary to s.3 and s.27 (as amended) of the Misuse of Drugs Act, 1977; and
- (3) cultivation of cannabis contrary to s.17 and s.27 (as amended) of the Misuse of Drugs Act, 1977.

2. The appellant was sentenced in respect of the said offences on the 29th June, 2018, by His Honour Judge Teehan. In respect of count one he was sentenced to a term of five years' imprisonment and in respect of count 3 to a term of four years' imprisonment both to run concurrently from 3rd of May 2017. Count two was taken into consideration.

Background

3. The appellant was born in February, 1978 and is a Welsh national. He is now aged forty-one years. It was submitted on his behalf at the sentencing hearing on the 29th June, 2018, that he had resided in this jurisdiction for four or five years prior to his arrest in connection with the offences in question on the 3rd of May, 2017. He had rented a dwelling house and property at Rossadrehid, Ballydavid, County Tipperary. On the 3rd May, 2017 Gardaí obtained a search warrant in respect of the said premises which was believed to be used by the appellant for the cultivation and harvesting of cannabis plants on a large scale and in connection with the supply of cannabis. Enquiries indicated that there had been tampering with the ESB meters and that exorbitant consumption of electricity was occurring at the house. A search of the property indicated that the attic was equipped with UV lights, a ring, a water system and the area was insulated with all natural light blocked off. There, forty-six mature cannabis plants were found. In the garage the remains of a previous cannabis plant harvest were found on the floor in black plastic bags. In the kitchen area a box was located containing €250 worth of cannabis herb. An upstairs bedroom was noted to be locked and secured. On gaining entry, Gardaí found it to have been adapted with a sophisticated system in operation for the cultivation of cannabis including UV lighting, a full running water system, fans and heaters. There were approximately sixty-six cannabis plants being grown in that room at the time.

4. On the 8th May, 2017, Detective Garda John English encountered the appellant who initially gave a false name. He was subsequently arrested for possession of a controlled drug for unlawful sale or supply (s.15 of the Misuse of Drugs Act). He gave three separate interviews to the Gardaí. He declined the services of a solicitor. During the said interviews, he made admissions as to his involvement, though initially claiming that he had been coerced by a gang or a group in Cork. The credibility of this claim was substantially undermined when he provided names of one or two people whom he claimed to have been his employer or boss. It was subsequently established in respect of one such that same was merely an alias which the appellant had been using for himself outside of the jurisdiction.

5. Regarding the valuation of the cannabis, a notice of additional evidence was served on behalf of the respondent suggesting that

the valuation of the plants and the yield on the date of detection indicated a valuation of between €350 and €400 each. There were one hundred and twelve plants located in the search. A valuation of €350 was ascribed to fifty-six of them and €400 to a further fifty-six, resulting in a total valuation of €42,000. That valuation was not disputed.

Previous convictions

6. The appellant had ninety-two previous convictions, all of which had been committed outside of the jurisdiction and had been dealt with before the courts of either England or Wales. He had thirty-seven previous convictions for theft, five for failing to surrender to bail, twenty-four road traffic convictions, two for public order offences, three breach of conditional discharge convictions, one for violent disorder, three convictions for breach of community service orders, one each for harassment, breach of restraining order, for perverting the course of justice and affray. Relevantly, he had thirteen previous convictions in respect of drugs.

7. The evidence was that his first conviction for drug offences was before Cardiff Magistrates' Court in July, 1996 when he was about eighteen years of age.

8. The Circuit judge considered the more significant offences relating to drugs including the following: -

(a) His most recent conviction was on the 1st July, 2016, at Stafford Crown Court where he was convicted of supply and control of drugs, class A, cocaine. The offence was committed on the 20th June, 2014. He was sentenced to twelve years' imprisonment. It is not clear whether he was convicted *in absentia* or how he came to be at liberty in this jurisdiction in the years subsequent to the said conviction up to and including the date of his arrest. There was no suggestion of a warrant being outstanding for his extradition.

(b) He was convicted on the 22nd March, 2013, at Cardiff Crown Court of possession of cannabis with intent to supply and sentenced to eight months' imprisonment. On the same date he was convicted of possession of a controlled drug, amphetamines, with intent to supply and sentenced to nine months' imprisonment.

(c) He had been convicted at Cardiff Crown Court on the 27th March, 2001, of possession of controlled drugs and sentenced to four years' imprisonment.

Grounds of appeal

9. The appellant advanced the following grounds of appeal: -

(1) That the trial judge erred in principle in identifying a headline sentence of eight years and imposing a five-year custodial sentence in respect of count 1 and same was unduly harsh and not proportionate in the circumstances.

(2) The trial judge erred in principle in imposing a four-year custodial sentence in respect of count three and same was unduly harsh and not proportionate in the circumstances.

(3) The trial judge erred in determining that the offence in count three was within the upper end of mid-range of the scale of gravity in respect of drug offences.

(4) The trial judge erred in determining that the offence specified in count one was within the middle range on the scale of gravity in respect of drug offences.

(5) The trial judge erred in principle in failing to properly assess the mitigating factors in coming to a proportionate sentence, including;

(a) the early plea of guilty;

(b) cooperation with the investigation;

(c) the expression of remorse;

(d) the peculiar circumstances applying at the time of the commission of these offences between the accused and his family.

(6) The trial judge erred in failing to have adequate regard to the accused's circumstances and the fact that he has to serve a twelve-year sentence in the UK upon the expiration of the within sentences.

10. It was contended that the sentencing judge failed to credit the appellant for the many instances of mitigation, including his cooperation with the authorities, his early plea of guilty, his financial dependency, his status as a foreign national and his apology to the Court. Further, there had been positive testimonials from the prison authorities since his committal in May, 2017 and he had achieved enhanced prisoner status. It was contended that "The [appellant] did not appear to profit greatly from the enterprise" and that it had been accepted by the Gardaí that he had not been living a lavish lifestyle. It was argued that the sentencing judge ought to have had greater regard to the fact that the appellant is a foreign national in an Irish prison with no family ties in this jurisdiction, his partner and three children apparently living in the UK. Reliance was placed on the decision in *DPP v. Wharrie* [2016] I.E.C.C.A. 1. It was contended that the circuit judge did not have regard to the principle of proportionality in structuring the sentence as he did and that the judge ought to have struck a balance when taking into account the quantity, value and type of drugs seized when determining the appropriate sentence.

11. On behalf of the appellant, a number of sentencing decisions were advanced as comparators and it was contended that, by analogy with same the sentence imposed was unduly severe.

12. It was contended that the sentencing judge expressed views during the sentencing hearing concerning cannabis herb and its impact that were inappropriate and gave rise to "a perception of bias or prejudice". However, this ground was not pursued at the hearing.

13. The Director opposes the appeal on all grounds.

Sentencing hearing

14. In his approach to sentencing the Circuit Court judge firstly identified the aggravating factors as the amount involved, accepting the valuation of €40,000 as representing the true valuation of the drug seized: -

"This is... a substantial quantity of drugs and I am obliged to have regard to that factor as an aggravating factor."

Secondly, he noted that the appellant had accumulated an enormous number of previous convictions in another jurisdiction, many of them for quite serious offences; a substantial number of them for drug violations. The sentencing judge was satisfied that the fact that a sentence of twelve years had been handed down for possession of cocaine for sale or supply in the neighbouring jurisdiction was "an indicator that Mr. Purse has been involved for some time in the very nefarious drugs trade". Thirdly, the Court noted that when approached by Gardaí initially he had given a false name, "in a small way, an aggravating factor".

15. In his approach the judge indicated that in respect of count two, unlawful possession of a controlled drug contrary to s.3 and s.27 (as amended) of the Misuse of Drugs Act, 1977 he would take that offence into consideration. He noted that the other offences fell at the very top of the middle range in terms of gravity.

16. The offence of possession of a controlled drug for unlawful sale or supply contrary to s.15 of the Misuse of Drugs Act, 1977, as amended, carries a maximum sentence of life imprisonment. In respect of that offence, the sentencing judge identified eight years as the headline sentence being at the top of the middle range. In respect of count number three, cultivation of cannabis contrary to s.17 and s.27 (as amended) of the Misuse of Drugs Act, 1977, the sentencing judge was of the view that a sentence of six years was warranted, being at the top of the middle range in respect of the said offence which carries a maximum sentence of fourteen years' imprisonment.

17. The mitigating factors considered by the sentencing judge included the plea of guilty which he characterised as "a powerful mitigating factor". Additional mitigating factors included that the appellant answered every question so there was co-operation to an extent. Further, he made admissions which the sentencing judge considered to be "significant". Whilst he cooperated with the Gardaí, the Court accepted that he put forward propositions initially which when investigated were not substantiated. He had from an early stage indicated that a plea of guilty would be entered.

18. He had furnished a letter by way of explanation to the Court indicating that he was not employed and living away from his native country, Wales, and that he had sought to get "quick money". Further, the Court took into account that he is a man with a partner and children and recently his partner had suffered a miscarriage and these events had caused trauma within his household. Additionally, the Court noted that he had apologised for his actions finding "It is very much to his credit that he has apologised in written form today". The Court also noted that he was highly regarded by the prison authorities and had used his time in custody well. The nature of the drug was treated by the sentencing judge as a mitigating factor. "Certainly, the matter would be viewed more seriously if one of the harder drugs were involved". In conclusion the judge noted: -

"I must have regard to the principle of totality because Mr. Purse is facing a lengthy spell of incarceration in Wales, and that being so, it seems to me that an appropriate sentence... ought to be, in view of the fact that he is a foreign national, spending time in an Irish prison... prison in Ireland is undoubtedly more difficult for somebody who is not a native to Ireland than it would be for somebody in a comparable situation, who is a native of this country. So, in all the circumstances, what I am going to do is impose a sentence of five years on count one and four years on count three to run concurrently. I am taking count two into consideration, and the sentences will date from the... the 3rd of May, 2017".

Discussion

19. As was stated in *The People (DPP) v. McCormack* [2000] 4 I.R. 356 where at p. 357 it provides: -

"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused."

20. O'Malley in the text "*Sentencing Law and Practice*" 3rd edn. at p.111 notes the obligation of the court as being "... to impose a sentence that fairly reflects the totality of the offending conduct, while making due allowance for personal mitigation and other relevant factors." As was observed in that text "It is equally important to consider carefully the sentence merited by each offence on conviction".

21. We are satisfied having considered the transcript that the sentencing judge carried out a comprehensive balancing exercise. It is a reasonable inference that the sentencing judge considered the matter as having exceptional and specific circumstances which warranted a lesser penalty.

22. We note that the Court did have regard to every mitigating factor raised. Whilst the Court noted that the appellant did not have the trappings of wealth, nonetheless, he had drug assets with an agreed valuation of €40,000; the fruits of his endeavour at cultivation of cannabis and possession of such a significant quantity of a controlled drug for unlawful sale or supply. The sentencing judge in arriving at an ultimate sentence of five years in respect of count number one, correctly identified the headline sentence as eight years, and an ultimate sentence of four years in respect of count number three where he had also correctly identified six years as representing the headline sentence. He was also correct in determining that the said sentences should run concurrently and further in imposing no separate sentence in respect of count number two but rather taking it into account. The sentence was approached in a manner which properly assessed the mitigating factors specifically raised including the early plea, the level of co-operation afforded with the investigation, the expression of remorse and the particular circumstances obtaining at the time of the commission of the offences in question between the accused man and his family.

23. Whilst emphasis has been placed on the fact that the appellant is a foreign national in an Irish prison, a factor expressly noted by the judge, this has to be looked at in the context of the submissions advanced on his behalf at the hearing where it was confirmed to the Court that he was resident in this jurisdiction since in or about 2012 or 2013. He had established a nexus with this jurisdiction and occupied a rental property here. It represented the base from which he carried on his activities of cultivation of cannabis for unlawful sale and/or supply.

Comparators

24. The decision in *DPP v. Wharrie* which was sought to be relied on is distinguishable in several material respects. In that case, the appellant was on board a vessel which foundered close to the Irish shore. He had no nexus whatsoever with this jurisdiction. By contrast, the appellant was resident in this jurisdiction for several years prior to May 2017. As to the issue of proportionality, the quantity, value and type of drugs seized are relevant and were correctly considered so by the trial judge. The appellant at hearing was aged approximately forty years. In the context of drug offending, his first conviction was in July, 1996 when he was eighteen years old. It was material that over the ensuing years the appellant has continued to re-offend and been convicted on numerous occasions in relation to drug offences. The evidence at trial was that he had ninety-two previous convictions as outlined above. Thirteen were in respect of drugs, including sentences of twelve years imposed on the 1st July, 2016 in England (Stafford Crown Court) in respect of supply of a controlled class A drug, cocaine, which offence was committed on the 20th June, 2014, a date when he was ostensibly resident in this jurisdiction. No explanation was forthcoming as to the circumstances whereby he was at large between the 1st July, 2016, being the date of the said conviction, and the date of his arrest on the 8th May, 2017, in Clonmel.

25. As was stated by Edwards J. in *The People (DPP) v. Byrne* [2017] I.E.C.A. 97 at paras. 26 and 27 the process which should be undertaken by a court when sentencing includes the following: -

"[26]. ... 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.

[27]. 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."

26. In the instant case and given the gravity and extent of the previous offending, particularly the thirteen previous convictions in respect of drug offences, including a twelve-year sentence of imprisonment, such conduct was relevant as is clear from the jurisprudence of this Court including the decision in *DPP v. McMenemy* [2014] I.E.C.A. 47 (unreported) Court of Appeal, 18th December, 2014. The fact that an appellant has previous convictions for a similar offence constitutes a serious aggravating feature to which a sentencing judge ought to have regard to at a sentencing hearing. In the decision of *DPP v. Dwyer* [2007] I.E.C.A. 3, Denham J. delivered judgment where the Court of Criminal Appeal determined that the trial judge had erred in principle in failing to give adequate weight to an appellant's previous convictions. The Court thereafter increased the sentence upon the sole ground that the sentencing judge had failed to take the previous convictions into account and have due regard to their nature, stating at p.10 of the judgment that:

"First, in referring to the previous convictions the trial judge stated that 'they are not of great moment'. This was an error. As may be seen from the list they are of some significance."

27. The appellant contends that the decision in *The DPP v. Phuc Nguyen Lee and Anor.* [2015] I.E.C.A. 157 is of relevance. However, we consider that decision to be wholly distinguishable. The appellants had been convicted pursuant to s.17 only and were neither charged nor convicted with any offence pursuant to either s.15 and s.27 as amended, of the Misuse of Drugs Act, 1977. They were foreign nationals trafficked into this jurisdiction, neither of whom spoke any English. The Court noted that they were merely workers, that they were vulnerable and had been exploited and they had no freedom to walk away from their involvement. It is clear from the decision that they were subjected to coercive control and had no involvement in setting up, planning, financing or generating any benefit from the operation in question beyond a modest income and very basic living conditions. Whilst one of the accused persons had one previous conviction of relevance, the other had none. By contrast, the appellant in the instant case had dominion and control and was the tenant of the premises in question, notwithstanding his initial contentions that he was working for a third party. By contrast, English is the appellant's native language and he has resided here for several years. It transpired that a third party identified by him was his alter-ego and a mere alias under which he was known in another jurisdiction. In the instant case, the appellant has ninety-two previous convictions, thirteen of them for drugs including of the most serious kind.

28. Whilst the appellants in *The People (DPP) v. Xiao Fei Weng and Anor.* [2015] I.E.C.A. 261 had been charged pursuant to s.15 and s.17 of the Misuse of Drugs Act, 1977 (as amended by the Misuse of Drugs Act, 1984), there were, again, significant distinguishing features. It was accepted by the Gardaí that whilst the individuals were arrested at the premises, it was not their enterprise, that they were merely low-level operatives and that their involvement could properly be characterised as that of "gardeners". One was an undocumented person who had lived under the radar in this jurisdiction as an illegal alien and a fugitive from justice arising from his attempt to enter the country undetected. The Court was satisfied that the activity was engaged in to earn enough money to repay a gang debt. There was evidence before the Court that the appellants had been informed by the persons for whom they worked that they could not leave and food was supplied to them on a daily basis. They had only been engaged in the activity for a short time before the garda raid. They were both first time offenders, and the Court was satisfied that they stood at the bottom of the chain of command. The individuals were of relatively young age at the time and one was a student. One of them spoke no English at all and lacked any education, training or language skills, and the individuals lacked previous convictions and were persons of good character. By contrast, in the instant case there are no comparable errors of principle on the part of the sentencing judge as those identified in the said cases. The facts differ significantly from the circumstances in the instant case and are wholly distinguishable.

29. Regarding the decision in *The DPP v. Broszczack* [2016] I.E.C.A. 121, which was also relied on, the appellant in the instant case is considerably older than *Broszczack*, who was aged about twenty-five and had no previous convictions either in this jurisdiction or in Poland. He had suffered exceptional family tragedies, including the deaths of his parents and brother. In that case, it is of note that there was no charge pursuant to s.17 for cultivation of cannabis.

30. The case of *DPP v. Ba Nguyen and Anor.* [2014] I.E.C.A. 55 was relied on. It concerned a charge of cultivation of cannabis contrary to s.17 of the Misuse of Drugs Act, 1977, as amended. The parties were both sentenced to six years' imprisonment with the final two years suspended. They were found to be living in very rudimentary conditions in a commercial unit. They had been trafficked into this jurisdiction and were a husband and wife of Vietnamese origin. They had no previous convictions in any jurisdiction and the Court was satisfied that they were economic migrants vulnerable to exploitation, operating at the lowest level in an organisation that had trafficked them for the purposes of operating the cannabis plant. They spoke no English and were under the dominion and control of unidentified third parties. The key facts contrast very significantly with the operative facts in the instant case.

Conclusions

31. The judge carried out a careful assessment and did strike a balance which achieved a correct adjustment between the competing considerations stemming from the significant aggravating factors which required to be balanced against the many mitigating factors in the case. Ultimately, the court is satisfied that a proportionate sentence was established and imposed in respect of both offences.

32. The sentencing judge identified and took into account the salient aggravating and mitigating circumstances as is clear from the transcript and discounted three years in respect of count one and two years in respect of count two, together with a direction that the sentences be concurrent.

33. The sentencing judge was entitled to have regard to the very serious similar offences committed in the neighbouring jurisdiction. That the offences in question were committed at a time when he, on the face of it, ought to have been serving a twelve-year sentence of imprisonment in England is a very significant further aggravating factor. Further, the Court was correct in identifying the offences as being at the very top of the middle range of such offences. He was correct in considering that the value of €40,000 was significant and a further aggravating factor.

34. The final sentences do not represent any deviation from what might reasonably have been expected in a case such as this. The offences did fall into the upper end of the middle range considering their gravity. The conduct of the appellant, including his thirteen previous convictions in respect of drug offences in the context of ninety-two previous convictions (inclusive of the thirteen for drugs), demonstrates his significant disregard for the law. We are satisfied that the sentences imposed are to be regarded as proportionate and within the margin of reasonable appreciation enjoyed by a sentencing judge. We are satisfied that this Court ought not to interfere with the sentence in circumstances where it reveals no error in principle.

35. Accordingly, we would dismiss the appeal.