



THE COURT OF APPEAL

Appeal No. 191/14

**Sheehan J.
Mahon J.
Edwards J.**

BETWEEN

The People At The Suit Of The Director Of Public Prosecutions

Respondent

And

David Gill

Appellant

Judgment (ex tempore) of the Court delivered by Mr. Justice Mahon on the 9th day of November 2015

1. The appellant was, on 4th April 2014, convicted of unlawful possession of a controlled drug for the purpose of supply contrary to s. 15A (as inserted by s. 4 of the Criminal Justice Act 1999) and s. 27 (as amended by s. 5 of the Criminal Justice Act 1999) of the Misuse of Drugs Act 1977, contrary to the Misuse of Drugs Regulations 1988/1993, as made under s. 5 of the Misuse of Drugs Act 1977, following his plea of guilty at the Dublin Circuit Criminal Court. The appellant was sentenced on 29th July 2014 to a term of imprisonment of seven years, as and from that date. He has appealed that sentence.

The Background Facts

2. On 22nd August 2013, in the course of a garda surveillance operation, the appellant was stopped in a white van on the Kylemore Road in Dublin by gardaí. Following a search of the vehicle, approximately 8.5 kilos of cannabis herb was discovered, with a street value of €171,500. A search warrant was duly obtained for a lockup facility on Dale Road, Dublin in the course of which approximately 19.5 kilos of cannabis resin was discovered. This had a street value of €389,500, putting the street value of the entire drugs haul at approximately €580,000. A search was also undertaken of the appellant's home and a sum of €30,500 in cash was found hidden inside a pool table.

3. The Grounds Of Appeal

- (a) The learned sentencing judge erred in law and in fact in that he failed to place adequate significance on the mitigating factors in the case;
- (b) the learned sentencing judge erred in law in failing to adequately or at all properly consider the previous good character of the appellant and the evidence of Garda Russell that in his ten years of serving in the National Drugs Unit based in Dundrum, he had no knowledge of the appellant;
- (c) the learned sentencing judge erred in law in failing to give sufficient weight to the evidence of Garda Russell that he accepted that the drugs were not owned by the appellant and that the appellant was justified in being in fear of the owner of the drugs;
- (d) the learned sentencing judge erred in law in failing to give sufficient weight to the evidence of Garda Russell in relation to the control being exercised by the owner of the drugs over the appellant;
- (e) the learned sentencing judge erred in law in failing to give sufficient weight to his own finding that the appellant was unlikely to re-offend;
- (f) the learned sentencing judge gave undue weight to the aggravating factors in relation to the offence;
- (g) the learned sentencing judge erred in law in failing to adequately set out the basis upon which he viewed seven years' imprisonment in the circumstances of the case before him, and
- (h) the learned sentencing judge erred in law and in fact in imposing a sentence which in normal circumstances was excessive and disproportionate.

The Appellant's Personal Circumstances And Background

4. The appellant was born on 3rd May 1975 and is now 40 years old. He is a married man with three young children. Although unemployed at the time of the commission of this crime, he generally has a good employment history. He had no previous convictions. He has a lengthy involvement in sport and in particular soccer. That involvement included playing soccer and coaching young players. A number of testimonials have been submitted and considered by the Court, including an impressive letter from his wife emphasising her husband's involvement in family life and his importance to his children.

The Appellant's Co-Operation

5. The appellant was immediately co-operative with the gardaí. He accepted that the cash found in his home was the proceeds of the sale of drugs. For their part, the gardaí accepted that the drugs in question were not the property of the appellant and that they, and the cash, belonged to a third party, and that the appellant was afraid of this individual. The reason for the appellant's involvement was financial.

The Learned Sentencing Judge's Decision

6. In the course of his judgment, the learned sentencing judge referred to the appellant's positive background; the fact that the drugs were not his property; the plea of guilty; the appellant's cooperation; his lack of previous convictions and his positive contribution to his community and family. He referred to the ten year mandatory minimum sentence provided for in respect of a s. 15A offence, and to circumstances which permitted the Court to deviate from that mandatory minimum, namely where there existed exceptional circumstances as provided for in the legislation.

7. The learned sentencing judge decided that there were exceptional and specific circumstances present in this case which allowed him to deviate from the imposition of the mandatory minimum sentence of ten years. He referred specifically to the appellant's co-operation and his lack of previous convictions. He did not refer specifically in this context to his plea of guilty, but he clearly bore that in mind. He proceeded to impose a sentence of seven years' imprisonment.

The Appellant's Submissions

8. The appellant contends that the learned sentencing judge failed to take account of a number of factors or to place adequate significance or relevance to them, including his plea of guilty, his co-operation, his lack of previous convictions, his previous good character, his family responsibilities, and his employment history as well as other matters.

9. The appellant further contends that the learned sentencing judge failed to give sufficient weight to the evidence of Garda Russell to the effect that the drugs in question were not the property of the appellant, and that he (Garda Russell) was satisfied that the appellant was genuinely in fear of the owner of the drugs, and was under the control of that person.

10. The appellant also contended that the learned sentencing judge failed to give sufficient weight to his own finding that the appellant was unlikely to re-offend.

11. The appellant also complained that the learned sentencing judge gave undue weight to aggravating factors in the offence, aggravating factors relating to the offence, including, and, in particular, his involvement in *"the transportation and distribution of drugs on a pretty industrial scale for reward"*.

12. The learned sentencing judge was also criticised for failing to follow a two-stage process, stage one being the specifying of the sentence that the offence warranted in terms of its gravity and seriousness and aggravating factors, and then, stage two, the discounting of that sentence having regard to the relevant mitigation matters and personal circumstances of the appellant.

13. It was also contended that in general terms the sentence of seven years was, in all the circumstances, excessive and disproportionate.

Decision

14. At the outset this court is satisfied that the learned sentencing judge appropriately determined that there were exceptional and specific circumstances such as warranted the imposition of a sentence less than the mandatory minimum term of ten years, as provided for by Statute.

15. In this regard, and as particularly emphasised by counsel for the appellant, the appellant's real and genuine co-operation from the outset and his anxiety to plead guilty at the earliest stage were significant factors in the appellant's favour. These, it was contended were all strong pointers to the extent of the appellant's genuine remorse. Additionally, the court was reminded that the appellant had a real fear of a third party, described as a major gangland figure, in relation to the seized drug consignment and cash. Other compelling factors, it was pointed out, included his lack of previous convictions and his strong family involvement.

16. All that being said, the issue in this case has to be, did the learned sentencing judge err in principle in his decision to impose a seven year sentence having regard to the very substantial value of the drugs involved and the fact that the appellant was himself actively involved with illicit drugs for financial reward, and was so involved at a relatively important level, albeit he was not the owner of the drugs or the cash in question.

17. The learned sentencing judge mentioned, in addition to all of these factors, the likelihood that the appellant would not involve himself in criminal activity in the future. He went on to stress the very serious nature of the offence which the appellant, whom he described as intelligent and mature, knowingly became involved in.

18. It was submitted that the learned sentencing judge erred in failing to indicate prior to sentencing, the appropriate location on the sentence range open to him before considering the various mitigating factors by way of discount from that sentence. While ideally, that should be done in all cases, where it is not done, this court will necessarily undertake that assessment before adjudicating on the appropriateness of the sentence being reviewed. The fact that such an exercise is not expressly undertaken by a sentencing judge does not of itself undermine the sentence imposed.

19. In the courts view, and having due regard to the minimum mandatory sentence of ten years identified and stipulated by the Oireachtas, the appropriate sentence in this case, excluding all mitigating factors, was in the region of ten to eleven years. That being the case the sentence of seven years actually imposed is in reality three to four years less than the appropriate headline sentence, and as such adequately represents a reasonable and fair discount for the strong mitigating factors present.

20. This is not to say that the mandatory minimum of ten years will always be the appropriate starting point for a s. 15A sentence, and from which discounts are then to be calculated in appropriate cases. This was made clear by the Court of Criminal Appeal in the case of *DPP v. Rossi and Another* (Unreported 18th November 2002). A s15A offence can attract a sentence of up to life imprisonment.

21. It is apparent in this case that the learned sentencing judge had, in arriving at the conclusion that there were exceptional and specific circumstances such as warranted a lesser sentence than the mandatory minimum of ten years, took account of the more significant mitigating factors before arriving at the seven year term.

22. While seven years is possibly at the upper end of what was the appropriate sentence range for this offence, and for this offender, having taken all factors into account, it cannot be said that such a sentence was excessive, or amounted to an error of principle.

23. The appeal is therefore dismissed.

