**THE COURT OF APPEAL**

**[53/2018]**

The President

Edwards J.

Kennedy J.

**BETWEEN**

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

**RESPONDENT**

**AND**

**KRZYSZTOF WOJTALSKI**

**APPELLANT**

**JUDGMENT (Ex tempore) of the Court delivered on 12th day of November 2018 by Birmingham P.**

1. This is an appeal against severity of sentence.

2. The sentence under appeal was one of four years imprisonment that was imposed on 9th February 2018 in respect of offences of possession of drugs for the purpose of supply contrary to s. 15(1) of the Misuse of Drugs Act 1977 (as amended) and the offence of cultivation of Cannabis contrary to s. 17 of the same Act.

3. The sentence hearing took place following a conviction after a contested trial which had taken place in December 2016. The initial sentence hearing did not proceed to a conclusion after a Garda had given certain evidence, which had come as something of a surprise to the parties, and so the matter was adjourned.

4. In the aftermath of the proceedings in the Circuit Court, it was indicated the appellant wished to appeal his conviction and sentence, but ultimately, the matter has proceeded as an appeal against severity of sentence only.

5. The background to the case is to be found in the fact that on 16th April 2015, Gardaí, who were in possession of a search warrant, searched the premises at Hollyview, Newtown, Carlow which was the home of the appellant. During the search of a pig shed, Gardaí came across a steel door in the floor of the shed which opened into what was described as a very elaborate bunker. There, Cannabis plants were being cultivated and there was a lighting and heating system in place. There were some 32 mature plants and some 115 immature plants. Gardaí placed a value of €32,000 on the crop. The question of how valuation would be approached was the subject of some controversy at trial, though, it will be noted that establishing any particular value was not a necessary ingredient having regard to the charges that had been proffered. When the appellant came to be questioned in relation to the matter, he initially said that what had been found was not Cannabis, but hemp, which would not have been illegal. He also said that the product was for his personal use and at another stage, he indicated that he was acting under duress from a criminal gang.

6. In terms of the appellant's background and personal circumstances, the Court heard that he was 37 years of age, that he was a Polish national and that he was the father of a 17-year old son. He had a number of previous convictions, some of direct relevance to the matters before the Court. On 6th November 2013, at Carlow District Court, he received a sentence of six months imprisonment, but which was suspended, in respect of the offence of cultivation of drugs. In Carlow Circuit Court, on 17th February 2013, in respect of an offence under s. 15 of the Misuse of Drugs Act, that is to say possession for the purpose of sale or supply, and an offence of cultivation, he received a sentence of six months, and again, this was suspended. The Court also heard that he had a drug conviction in Poland in 2005, but that full details of this conviction were not available, though it appeared to have been dealt with by way of a sentence of 12 months imprisonment which was suspended for a period of six years. There were also a number of convictions recorded under the Road Traffic Act. The Court heard that the appellant had an "attachment" to Cannabis and that this was combined with an interest in horticulture. In the course of sentencing remarks, the Judge indicated that the appropriate sentence was, in her view, one of five years imprisonment, but because she had been told that the appellant suffered from a skin condition, would reduce the sentence to one of four years imprisonment.

7. Three grounds of appeal were identified in the written submissions:

> (i) That the Judge erred in failing to give proper weight to the manner in which the appellant met the case, and in particular, the fact that a number of admissions were made pursuant to s. 22 of the Criminal Justice Act;
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> (ii) that the Judge erred in failing to give adequate weight to the mitigating factors that were present with the exception of the appellant's health issue and
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> (iii) that in all the circumstances, the sentence imposed was excessive and oppressive.

8. Today, the grounds have netted down to a complaint that the factors that were present in favour of the appellant, other than the medical situation, that is to say, the skin condition, were not afforded sufficient weight and that the sentence was excessive. It will

be noted that the focus of appeal is firmly on the mitigation side and that no issue is taken with the assessment of gravity. There has been no challenge to the headline or pre-mitigation sentence.

9. The factors that are pointed to as having not received sufficient attention included that the appellant had not come to the attention of Gardaí during the period between the offence which gave rise to the proceedings and the delayed sentence hearing, the fact that the Court heard that there was no indication of trappings of wealth or affluence, but the point on which most emphasis is placed is the manner in which the case was run at trial by the defence and the fact that admissions were made pursuant to s. 22 of the Criminal Justice Act 1984. In particular, Counsel on behalf the appellant points to the fact that there was no challenge to the validity of the search warrant. Counsel for the DPP says in response that no error has been established, that proper regard was had to such factors as were present by way of mitigation, that the sentence imposed was an appropriate one and that the Court should not interfere with it.

10. This Court has made the point on a number of occasions that merely because a sentence might have been structured differently or a somewhat different sentence might have been imposed does not provide a basis for intervention. Indeed, the Court has made the point that merely because the Court, had it been called on to sentence at first instance, might have imposed a different sentence would not, of itself, provide a basis for intervention.

11. In this case, the sentencing Court took a starting sentence of five years and then reduced it to four years. In doing so, the Court specifically referred to the skin condition that the appellant suffers.

12. In the Court's view, the reduction from the starting sentence of five years to the ultimate sentence of four years was sufficient to reflect the factors that were present in favour of the appellant. That the appellant did not come to Garda notice or reoffend during the period between detection and the sentence hearing is a matter that requires only limited recognition. It is the obligation of every citizen and every resident not to offend. That general position is reinforced by the fact that for much of the period, the appellant was on bail and had he offended during that period, then by statute, that would have been an aggravating factor. As to the manner in which the case was met, the Court would observe that in cases where a plea of guilty is entered, it would not be unusual for a defendant's representative to point to factors which, arguably, could have been raised and which would have provided a basis for contesting the case in order to enhance the value of the plea by making the point that this was not the case of a plea being entered only because the accused had absolutely no alternative open to him.

13. However, generally speaking, when a plea of not guilty is entered and a case is contested, it is to be expected that the case would be run in order to advance the defence tactical and strategic objectives. The Court recognises that there may be exceptional cases such as where a defence is specifically confined to raising a particular legal issue and where care is taken to avoid adding to the stress or strain on an injured party, but normally, tactics and strategies are for the defence and will be of very limited relevance if the stage is ever reached of a sentence hearing.

14. In this Court's view, this was a serious case. The manner in which the offence was committed, the use of a concealed bunker under a pig shed is indicative of planning and premeditation. The comments made by the sentencing Judge that the accused knew exactly what he was doing, that he knew it was illegal because he had been convicted previously of the same offences and that it was therefore an act of disregard for the law of the land were very much in point.

15. It is a striking feature of this case that the appellant had been before the Irish courts on two previous occasions in relation to cultivation of drugs offences and on each occasion had been dealt with by way of a suspended sentence, but that he had not been dissuaded from further offending. Indeed, it is the case that he had also offended in relation to drugs in Poland and that he had been dealt with there too by way of a suspended sentence.

16. In this Court's view, the reduction from the headline or starting sentence was an appropriate one and cannot be said to have been inadequate to take account of the factors that were present in favour of the appellant.

17. Accordingly, in a situation where there has been no criticism of the headline or pre-mitigation sentence, the ultimate sentence imposed cannot be said to have been inappropriate.

18. In the circumstances, the Court has not been persuaded that any error of principle has been established and the Court is of the view that the sentence imposed fell within the range that was available to the Judge in the Circuit Court.

19. Accordingly, the Court will therefore dismiss the appeal.