THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

94/16

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Ibrahim Lawel

Appellant

JUDGMENT of the Court delivered on the 9th day of October 2017 by

Mr. Justice Hedigan

Introduction
1. This is an appeal against severity of sentence. The appellant entered a guilty plea at Naas Circuit Criminal Court, on the 6th October, 2015, to a s. 15A offence pursuant to the Misuse of Drugs Act 1977 as amended ("the 1977 Act") arising from the controlled delivery of a parcel containing cocaine. The appellant was sentenced on the 14th March, 2016, when the Court imposed a sentence of 10 years imprisonment. The final three years were suspended on condition that the appellant enter a bond of €200 to keep the peace and be of good behaviour for a period of three years. He was given credit for the period he spent in custody.

2. The offence occurred in 2011 and on the 19th July, 2012, the Circuit Court discharged the appellant from the indictment. An application under s. 4E of the Criminal Procedure Act 1967 was successfully brought claiming that the package containing the controlled drugs was not inspected, seized or detained in accordance with law. The Court of Criminal Appeal reversed this decision (*The People (DPP) v. Lawel* [2014] IECCA 33). It held that as the package was not addressed to the appellant no constitutional right arose. Therefore, it was an error to find that there was a breach of a constitutional right. Further that s. 4E was not the appropriate method of challenge. It upheld the illegality of the provisions relied upon in the interception. The charges were reinstated. The appellant was at liberty during the time between these two judgments.

The circumstances of the offence
3. The offence occurred on the 25th May, 2011, when the appellant took receipt of a parcel at his home in Co. Kildare which contained €1.4m. worth of cocaine. The delivery was by way of controlled delivery. The parcel was addressed to a fictional person, namely, "Tony Tutu, Honorary Consul of the Republic of South Africa". It contained a green bag labelled "Diplomatic Mail". It purported to have been sent by the South African embassy in Venezuela.

4. The parcel arrived at the FedEx depot in Dublin Airport on the 20th May, 2011. It was examined, suspected of containing cocaine and detained. A field test determined that it contained cocaine. Detective Garda John Dunning initiated a controlled delivery. It was delivered on the second attempt. On the 24th May, 2011, there had been no one home and a card with a fictitious telephone number was left. This number was used by someone other than the appellant to arrange delivery for the next day. The appellant accepted the parcel and signed for it using the name Tony Tutu on the 25th May, 2011. The parcel was left inside a front door but not an interior door. It was not secreted in any fashion.

5. Shortly after delivery the appellant was observed leaving the premises in his car. He picked up Mr. Ashola who had been waiting in the estate on foot and handed over the keys to the exterior door. Mr. Ashola came to the premises and immediately left with the parcel. The appellant continued on to his job street leafletting in Swords. Mr. Ashola travelled with the parcel and met a third co-accused. The Gardaiì seized the parcel later that day in Co. Meath. The appellant was placed under surveillance and was arrested later that day.

6. The appellant upon arrest stated that he signed for the parcel for a friend as a favour. During interview at Finglas Garda station he stated he took delivery for a named friend. He stated that he didn't know there was cocaine in the parcel but that he did know that Mr. Ashola was involved in a class of criminality but not that he was a drug dealer. He also accepted that he didn't ask what was in the parcel because he didn't want to know. Further he had expected a smaller parcel than was delivered. He accepted that in doing so he was being reckless. It was on the basis of this recklessness that he entered a guilty plea. Mr. Ashola and another co-accused entered guilty pleas and were sentenced, in a different court, to 10 years with nothing suspended.

The appellant's personal circumstances
7. The appellant was born in 1980. He was originally from Nigeria. He came to Ireland in 2007 and applied for refugee status which was granted in 2015. He has no previous convictions and had never come to Garda attention before. At the time of sentencing he was living in Galway. He got married in 2014. He has a number of FETAC qualifications dating back to 2009. A city of Dublin Vocational Educational Committees certificates, in relation to the European Computer Driving Licence, together with a future FETAC Certificate, for word processing and such matters, were handed into the Court. These were completed prior to July, 2012 while he was in Cloverhill. At the time of sentencing he was undergoing a course of studies in the national university of Ireland in Galway, which was a DFS1 science and engineering foundation course. This was a preliminary course with the intention of proceeding to fuller studies in information technology in Galway. There were references from his Pastor and a friend as to his character and community ties. At sentencing he had served almost nine months in custody.

8. He felt vulnerable to Mr. Ashola in 2011 due to the uncertainty regarding his immigration status and felt that if difficulties arose Mr. Ashola, who had been in the jurisdiction longer, might be able to assist him. It is accepted by the prosecuting Garda that there was an imbalance of power in that relationship.

9. The appellant had no involvement in setting up the operation or in the distribution thereafter. He had no ownership and was not to receive any profits from the distribution. He received €20 for diesel to get back to his leafletting job. It was accepted by D/Garda Dunning that the appellant was at the lowest rung of the ladder and his admissions reflected his involvement. Further it was accepted that he is unlikely to come to Garda attention again.

10. The appellant cooperated with and assisted the investigation with the knowledge he had which was limited. His account was borne out by the investigation of the electronic devices.

Sentence
11. Before imposing the sentence the judge noted that whilst his involvement was at a low level the appellant was a very important link in a sophisticated and elaborate plot. It was accepted by the prosecuting Garda that the appellant was not aware of the package's contents albeit he was aware that he was receiving an illegal package. It was further accepted that he had no part in setting up the operation in question and had no role in the distribution of these drugs. The Garda accepted that it was very unlikely he will ever come before the courts again. The judge had regard to s. 27(3) of the Act 1977. In relation to the maximum sentence of life imprisonment the judge was satisfied that the offence was in the higher range. He had regard to the appellant's personal circumstances.

12. The mitigating factors were that he plead guilty, fully cooperated with the investigation, made admissions and told the Gardaiì everything he knew and in the circumstances, this amounted to materially assisting in respect of the investigation of the offences. He has expressed remorse, he did not receive any financial gain or profit from the drugs and he was not one of the organisers or controllers, in the sense of where the drugs originated. He completed educational courses and was doing an Information Technology course in the university of Galway. He had no previous convictions and had not come to the attention of the Gardaiì since the date of this offence and D/Garda Dunning expressed a view that he's unlikely to come before the Courts again.

13. The judge noted there were substantial aggravating factors. These were that this is a serious offence. The manner of his involvement in the offence; this was a sophisticated and elaborate operation. He was an essential player in respect of the drugs. He was to receive and accept delivery of the parcel of drugs. The address being used was given as the South African embassy. He was to use a false name in respect of signing for the parcel. It was a controlled delivery. The parcel was delivered to the address; it was signed for by the appellant as Mr. Tony Tutu. The drugs were left inside the door for collection by Mr. Ashola. He collected the drugs approximately 15 minutes later. The South African address and name which were fictitious were used to give cover in respect of the delivery of the parcel containing the drugs. He was acting at all times as the receiver of the drugs and for a short period as the storer by reason of where they were left for collection. He played an important link or part. The drugs had to have a delivery address. There had to be a person available as a receiver for the drugs. On both of these issues he played an important part in respect of the drugs. He played an important link or conduit in respect of the drugs and in respect of the sale or supply of drugs. The substantial amount of drugs, substantial street value and the effect of drugs on society.

14. The judge was satisfied having regard to the appellant's personal circumstances, the totality of matters and the mitigating factors, a sentence of 10 years would be unjust in all of the circumstances, but it remained an extremely serious case. A sentence of 10 years with the final three suspended was imposed.

Appellant's submissions
15. In his written and oral submissions the appellant appeals on seven grounds. First, the sentence imposed was excessive and disproportionate in all the circumstances and placed undue emphasis on aggravating factors. It is submitted that the trial judge used the maximum penalty of life imprisonment at the starting base rather than arriving at a "notional sentence" while bearing the maximum sentence in mind and then going back to make deductions. He then considered the offence within the higher range and simply balanced personal mitigation with the aggravating factors. Emphasis was placed on the "sophisticated and elaborate operation" as an aggravating factor and the appellant's lack of involvement in setting up the operation was disregarded. It is submitted that cases involving similar drug values with greater aggravating factors in relation to the offender's involvement have received lesser sentences. The appellant only received €20 and was merely reckless in his role of signing for them and allowing them to be left in his porch for 15 minutes. In *The People (DPP) v. Bogdan* [2016] IECA 70, an appeal against severity, this Court refused to interfere with a sentence of six years where the offender knowingly imported €1.5m. worth of cannabis herb for €5,000. The DPP submitted that the judge appropriately considered all the mitigating and aggravating factors and arrived at a properly constructed sentence.

16. Second, the sentence imposed was excessive and disproportionate in the all the circumstances and failed to adequately take into consideration the relevant mitigating factors. The appellant submits that insufficient weight was given to the mitigating factors, namely; he had no previous convictions; was substantially a person of good character; was a refugee, vulnerable to the approach made; made full and frank admissions and cooperated; that investigations corroborated his admissions as to his extremely limited role; pleaded guilty; provided as much material assistance as was possible; was unlikely to come to further Garda attention; since his release from remand he had moved on with his life, marrying his wife, achieving refugee status, and continuing with his education. In *The People (DPP) v. Mannion & Martyn* [2016] IECA 162 an entirely suspended sentence was not unduly lenient for Mr. Martyn despite his not spending any time in custody given his lack of previous convictions, that it was a once off offence and his limited role. There was strong mitigation and a period of liberty prior to finalisation. The Court emphasised the sentence Mr. Mannion had already served.

17. Third, the learned trial judge failed to exercise, properly or at all, his discretion to depart from the presumptive minimum sentence. It is submitted that a failure to depart from the headline 10 year sentence was an error in principle. This is especially so as the two co-accused received 10 year sentences and their roles were starkly different.

18. Fourth, he failed to weigh correctly in the balance the evidence in respect of the role of the appellant in the offence, and in particular, erred in law and in fact in determining the sentence with regard to the 'sophisticated and elaborate' nature of the importation of drugs, as opposed to the appellant's role in that operation. It is submitted that the appellant's role was as close to minimal as it could be. He did not know the parcel contained drugs but was reckless in this regard. He had been expecting a small box. The parcel was left in his porch for 15 minutes. His role was also subject to his vulnerability to an individual with power over him. He had no role in setting up or interest in the enterprise. His sentence should reflect his culpability and his contrasting culpability with his co-accused who received the same sentence without the three year suspension. It was submitted that the trial judge's analysis failed to consider that a "receiver" could be someone otherwise uninvolved in the enterprise and the appellant's role did not necessarily result in him being other than on the "lowest rung".

19. Fifth, the trial judge erred in law and in fact in failing adequately to give the appellant due credit for his guilty plea and the stage at which it was entered. It is submitted that this is so in circumstances where the decision overturning the s. 4E judgment affirmed that the interception was in breach of s. 84 of the Postal and Telecommunications Act 1983. The Court fully upheld the challenge to the legality of the power used to examine the package, pursuant to s. 77, as well as upholding the challenge to the legality of the power of detention of that package pursuant to s. 7, as well as upholding the challenge to the power of seizure of that package, under s. 202 of the Customs Consolidation Act 1876. The Court ruled that it was an illegality rather than a breach of a constitutional right and it was for the Circuit Court judge to determine whether to admit the fruits of that illegality. The appellant, however, instructed to plead guilty. The Court of Criminal appeal judgment was made available to the trial judge. D/Garda Dunning agreed that there remained a degree of complexity to the case and that the plea was of some assistance to the Gardaiì. Inadequate credit was given to the

significance of the plea and there was no reference to the context in which it arose.

20. Sixth, the trial judge erred in having undue regard to the sentence imposed on the co-accused and failed to adequately distinguish between their roles and involvement in the offences, and that of the appellant. It is submitted that the three year suspension does not reflect the contrast in full involvement, organisation and remuneration of the co-accused and the appellant's limited role consisting of limited involvement, no organisation and almost no remuneration. This Court makes significant distinctions in the sentences of co-accused where there are varying degrees of involvement and culpability. In *The People (DPP) v. Kilkenny* [2016] IECA 348 there were cannabis plants with a potential value of €2.8m. The sentence on foot of an undue leniency appeal was increased from 10 years with 6 suspended to 12 with 4 years suspended. The offender had a central role leasing premises and sourcing machinery. Those tending the plants were given 7 years with 6 suspended on condition that they leave the jurisdiction. It was again held to be proper and necessary that different roles attract different sentences in *The People (DPP) v. Mannion* [2016] IECA 314.

21. Seventh, the trial judge failed to have regard sufficiently or at all to the efforts made by the appellant in respect of his rehabilitation and further failed to have regard to the objective of rehabilitation insofar as same is a component part of any sentence.

Respondent's submissions
22. It is submitted that there was no error in principle, the sentence was proportionate, properly constructed, within the range of sentences for similar offences and appropriate consideration was given to all the mitigating and aggravating factors. The respondent, in relation to the first ground of appeal, submits that there is no basis for this proposition. While the trial judge referred to life imprisonment as the "starting base" it was clear that he did not use this as the headline sentence and deduct the mitigating factors from it. He had regard to the sentencing provisions in s. 27(3) of the Act 1977 and assessed where the offence came in the range. The trial judge correctly assessed the offence as being in the higher range. The market value was €1.4m. and the offence was "sophisticated and elaborate". The trial judge expressly considered that the appellant did not gain financially from the drugs and was uninvolved in the organisation and control of the drugs. The appellant was considered an important link who signed for the drugs using a false name. his lesser involvement is reflected in the suspended element of his sentence which his co-accused did not receive.

23. In relation to *Bogdan* it is submitted that the DPP made its submissions in response to the arguments raised by the appellant therein.

24. The respondent submits that while the quantity and type of drugs is not determinative it is highly relevant when sentencing especially when assessing the headline sentence. *In The People (DPP) v. O'Mahony & Brennan* [2014] IECA 57 an unsuccessful appeal was brought against a sentence of 13 years with the final three suspended where a plea had been entered on the first occasion in relation to cocaine and heroin valued at €3.5m. Both accused had no previous convictions and had chronic addiction issues which they took very positive steps in dealing with. The Court of Appeal held there was no error in principle in not departing from the mandatory minimum sentence due to the value and quantity of drugs. In *The People (DPP) v. Devlin & Delvin* [2016] IECA 125, which involved €1.3m. worth of cannabis, the Court found that that it could not conclude that the sentencing judge fell into error in imposing sentences of 12 years with the final two and four years suspended respectively. The starting point was not excessive. The four year suspension addressed the significant mitigating factors. In *The People (DPP) v. Byrne* [2015] IECA 289, where the accused pleaded to possessing cannabis valued at €1.5m., this Court did not disturb the sentence of 12 years but increased the suspended portion from three years to four and a half.

25. In relation to the second ground of appeal the respondent submits that there is no basis for it. The trial judge expressly identified the appellant's personal circumstances and the mitigating factors. The weight attached to the latter is evidenced in the ultimate sentence imposed, the suspended period and the street value involved. It is submitted that given the language used in the legislation and the stage the plea was entered or intention to do so indicated that it could not be considered an early plea. The appellant is not entitled to the same credit he would have received if the plea had been entered at a much earlier stage. In *Mannion & Martyn* this Court found the sentence imposed on Mr. Mannion to be unduly lenient. This was a highly unusual case and is limited to its own facts. While it was held that a fully suspended sentence was not inappropriate for Mr. Martyn that case involved cannabis valued at €200,000. The appellant herein found himself at liberty in radically different circumstances.

26. In relation to the third ground of appeal it is submitted that the trial judge specifically considered whether there were exceptional and specific circumstances relating to the offence which would render the maximum/minimum sentence of 10 years or a higher sentence unjust. He exercised his discretion in departing from the presumptive minimum. He noted it remained an extremely serious case. The trial judge considered the provision, considered it unjust to impose and then rightly placed the offence on the scale of penalties, had regard to the aggravating factors and discounted for the mitigating factors.

27. In relation to the fourth ground of appeal it is submitted that the trial judge identified and correctly addressed the appellant's role and discounted for it. The trial judge identified the important role the appellant played in the offence. His lesser role was reflected in the suspended element of the sentence. The appellant's analysis of the trial judge's comments is not correct. He was the receiver in that he signed for the parcel in a false name at a false address and as such was an important link.28. In relation to the fifth ground it is submitted that the appellant successfully had his charges dismissed and was released and argued in the appeal that the judge had been correct in so doing. The appellant contended that he instructed that the matter not be appealed further or used at trial but to enter a guilty plea. It is submitted that the appellant is trying to have his cake and eat it. The appellant should get credit for his plea and should not receive a greater penalty for his s. 4E application. However, his argument ignored that he contested the proceedings before pleading. The legislation refers to the point at which an intention to plead was indicated. The appellant received the appropriate credit.

29. In relation to the sixth ground of appeal it is submitted that he did receive a lesser sentence than the co-accused who entered guilty pleas and do not appear to have brought s. 4E applications. There were no grounds advanced to support the proposition that the three year suspension does not reflect the marked contrast in full involvement, organisation and remuneration.

30. In relation to the seventh ground of appeal it is submitted that no grounds were advanced to support this proposition.

Decision
31. There is no doubt but that the offence involved herein was of the most serious nature. The appellant pleaded guilty in the Circuit Criminal Court to a charge under s. 15A and s. 27 of the Misuse of Drugs Act 1977 (as amended). This arose from circumstances where he received by arrangement, a postal delivery using a false name, of a consignment of cocaine valued at €1.4 m. This was, as the learned trial judge pointed out, a sophisticated and elaborate operation. The appellant was an essential player in that operation.

32. The learned trial judge heard detailed evidence from the prosecuting Detective Garda John Dunning of the circumstances of the

case. The consignment was intercepted at Dublin Airport and identified as containing cocaine. A Garda controlled delivery was made to an address fictitiously described as a part of the South African embassy. The package was delivered and seen to be signed for and received by the appellant. It was placed inside an external door but outside an internal door. It was left there by the appellant while he went by car and picked up one of the two co-accused who was a main player in this drug dealing operation. This man was brought back to the house and departed with the consignment. The appellant was paid €20 as a contribution to the cost of diesel to get him back to Swords to continue his job of leafleting.

33. Detective Garda Dunning gave evidence of the appellant's role in this drug operation. He accepted that he did not know the package controlled drugs albeit he was aware of its suspicious nature. The Detective Garda agreed that the plea made was on the basis that the appellant was reckless as to the contents of the package. He also agreed that the appellant was under the influence of the man who asked him to take delivery. There was, the Detective Garda agreed, an imbalance of power in the relationship. The appellant was a vulnerable person, he agreed. The Detective Garda also agreed that the appellant had no role in setting up the operation nor any role in subsequent distribution. He agreed that the appellant had no ownership of the drugs nor was he to share in any of the profits of the sale thereof. He agreed the appellant was at the lowest rung of the ladder. He had never come to the attention of the Gardaí before and Garda Dunning considered it unlikely he would ever again. He further stated that the appellant gave substantial cooperation to the Gardaí and thus materially assisted in the investigation of the offence.

34. The learned trial judge accepted all of the above evidence and clearly based his decision to disapply the mandatory minimum sentence of ten years on the exceptional and specific circumstances as found in this case. It is indeed, in the Court's view, quite exceptional that the prosecuting Garda accepted the appellant did not know that he was handling drugs when he received the special delivery. He also clearly took account of all these mitigating factors when he suspended the last three years of the sentence. Was he correct however when he took as his starting point a ten year sentence? This was the same sentence as that imposed on the two co-accused who, it was accepted, were the masterminds of this drug operation and who would be the full profiteers therefrom. Even allowing that they received no suspensory element to their sentences, is there a disproportion present here between their sentences and the appellants? The Court must consider each offender and each offence in their own light. Here by all accounts the appellant was in effect a "patsy" for two shrewd criminals. This offence was a first offence for him. He in effect received no money for his role only a minor contribution to the cost of driving between Swords and Athy. The three year suspension amounted to a 30% reduction but the Court notes that a rough figure of 25% reduction would have been justified by the guilty plea alone in most similar cases. That only allows a 5% allowance in respect of all the other mitigating factors found present herein. That does not appear to be a sufficient allowance. Thus while the Court acknowledges the meticulous care with which the learned trial judge approached the sentencing herein, we consider such a 5% discount to be inadequate in all the circumstances and thus we identify an error in principle. We will therefore quash the sentence imposed by the court below and will proceed to resentence the appellant.

35. The appellant has furnished reports demonstrating that he has made very substantial efforts at rehabilitation. It is to be hoped he will continue to do so. It seems to the Court that taking into account all the mitigating factors outlined above, there are indeed present the exceptional grounds to justify disapplication of the mandatory sentence. We consider that the appropriate sentence is one of six years with the final 18 months suspended on the same conditions on the same conditions as were imposed in the Circuit Criminal Court. This should include as credit the almost nine months that the appellant spent in custody on remand from 26th October, 2011 to 19th July, 2012.