



THE COURT OF APPEAL

[46/2018]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

ZENARUS SLIPKUS

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 27th day of November 2018 by Birmingham P.

1. This is an appeal against severity of sentence.

2. The sentence under appeal is one that was imposed on 5th February 2018 at Cork Circuit Criminal Court. On that occasion, a sentence of three years imprisonment was imposed in respect of a s. 15 Misuse of Drugs Act offence, being an offence of possession for the purpose of sale or supply. It is to be noted that the case came before the Circuit Court on foot of signed pleas of guilty.

3. The background facts are that on 21st September 2015, Gardaí mounted a surveillance operation relating to a house in the Blackrock area of Cork. The accused was seen to go from that house to a wooded area off Marine Walk. When he completed what business he had there, Gardaí examined the area and a glass container was found which contained 65 individual bags of Heroin, amounting to some 14.1 grams in weight and which was valued by Gardaí at €1,974. The area was kept under surveillance and the accused returned there on the following day. At that stage, the Gardaí moved in after he was seen removing a jar from the undergrowth. He was arrested and detained, and while he initially denied involvement in criminal activity, he then proceeded to enter an early plea of guilty.

4. In terms of his background and personal circumstances, he is 47 years of age. The Court heard that he was living in very basic conditions also heard that he had a partner and a son in Lithuania. The sentence hearing heard that he had been in custody since 22nd September 2018, the day on which he was charged with this offence. In terms of previous convictions, he had one recorded previous conviction for an offence of obstruction under the Misuse of Drugs Act where a sentence of nine months imprisonment was imposed in the District Court in Tralee in November 2016. The sentence was suspended. A condition of the suspension was that he undertook to leave the State and to remain outside the State for a period of ten years. The Court heard that he had what was described as "dated" previous convictions in Lithuania for assault and theft and that he had served time in prison for these offences. Despite the fact that the previous undertaking to leave and remain outside the State had not been honoured, counsel for the defendant at the sentence hearing referred to his client's willingness to give such an undertaking, though, realistically, adding that that could hardly be considered at that point.

5. The investigating Garda, in the course of his evidence, accepted that the appellant was not directing the operation. He commented that the appellant was one of a group of Lithuanian nationals involved in drugs activity and that he was at the lower end, involved in street dealing.

6. The Judge's approach to sentence was to identify a headline or pre-mitigation sentence of five years, and then having done that, to reduce this to three years. In the course of his sentencing remarks, the Judge said that the early plea was a significant factor in the case, but it was the situation that the accused was caught red-handed.

7. The grounds of appeal are that the sentence imposed was unjust and there is criticism of the fact that no element of the sentence was suspended. In the course of the oral presentation of the appeal, the Judge was criticised for focusing on the fact that the accused had returned to the State, and having done so, then committed an offence at a time when he had given an undertaking to have remained outside the State.

8. The offence that was dealt with in the District Court in Tralee was obviously a relevant offence, an offence under the Misuse of Drugs Act. The fact that the accused was treated leniently on that occasion, was given a chance, but soon after having been given the chance had failed to take it, was a relevant consideration. The Court does not see any basis for criticism of the sentencing Judge for how he approached this issue.

9. There was one slightly unusual development in the course of the appeal hearing today. Counsel for the appellant sought to adduce

additional evidence which was not before the Circuit Court. That application was made notwithstanding the fact that no motion for leave to adduce additional evidence had been brought. The Court agreed to receive the evidence on a de bene esse basis. It then became clear that the new material related to the fact that the appellant, since the sentence hearing and while in custody, was diagnosed with certain medical conditions.

10. In exchanges with counsel, members of the Court made the point that the information was of the kind that would usually arise for consideration at the second stage of the appeal process when a Court was considering resentencing, having identified an error in principle at first instance. The Court believes that that is the correct approach. The medical information now available, even if it had been available in the Circuit Court, would not necessarily have resulted in a significantly different outcome.

11. Overall, in the view of the Court, this was a serious offence and the Circuit Court was correct to so regard it. The Heroin that the appellant was in possession of and to which he went on consecutive days was in 65 individual bags, thus lending support for the view of Gardaí that the appellant was involved in street trading. The offence was committed by someone with a recent, relevant previous conviction. It was committed against a background of a suspended sentence and the conditions of the suspended sentence were not honoured.

12. In those circumstances, the Court is not persuaded that the Judge in the Circuit Court erred, either, when identifying a pre-mitigation headline sentence or in deciding to impose the sentence that he ultimately did. The sentence eventually decided upon, one of three years, fell firmly within the available range and the Court must therefore dismiss the appeal.