THE COURT OF APPEAL

President
Birmingham J.
Sheehan J.

231/12
230/12

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Michael O'Loughlin and Edward O'Loughlin

Appellants

Judgment of the Court (ex tempore) delivered on the 2nd day of December, 2014, by Birmingham J.

1. Both applicants have appealed against the severity of sentences that were imposed upon them by the Dublin Circuit Court on the 12th June, 2012. The sentence under appeal in each case was one of nine years imprisonment imposed in respect of the offence of participating in the activities of a criminal gang contrary to s. 72 of the Criminal Justice Act 2006. The maximum penalty provided in respect of the offence is one of fifteen years.

2. The background to the appeal in respect of the offences on which they were subsequently sentenced, is that the two appellants had gone on trial in February 2012, for offences of directing a criminal organisation. It is not absolutely clear to the court whether there was also on the indictment at the stage an offence of participation in the activities of a criminal and it would appear from these papers and on the basis what we heard this morning, perhaps not, but in any event the major charge in the case was one of directing the activities of a criminal organisation.

3. The trial had been expected to be a particularly lengthy one, estimated to range from three months to six months. During the course of the trial, a perceived difficulty in relation to the return for trial emerged and in these circumstances the accused men, as they were at the time, were recharged and they offered a plea to the less serious offence of participating in the activities of a criminal organisation, which were accepted.

4. Insofar as the background to the offence is concerned, the position is that the Garda Síochána launched an operation code named "Operation Foolscap" charting the activities of a Galway based criminal gang. The gang in question had apparently some thirteen to fifteen participants. There were really two elements to the garda operation. It involved first of all what might be described as a traditional police operation. But secondly, and significantly, an important part of the investigation was that the vehicles that were used by the appellants, were subjected to audio surveillance. Authority for this, having been obtained from a judge in the District Court, was pursuant to the Criminal Justice Surveillance Act 2009.

5. It appears that in all, some 110 days of recordings were monitored and on almost every day when recordings were in place, there were some discussions about criminal activities. More specifically the recordings showed the appellants preparing for having an involvement with some seven offences referred to as the predicated offences. These were drugs offences and four were burglaries.

6. The drugs offences involved cannabis herb valued at €800, cocaine valued at €8,614 and cannabis pollen 2½ kilos in quantity with a value of €15,000. So far as the burglaries were concerned, two of them were of domestic premises and two of commercial premises. The actual value of the property involved in the burglary is very small, but that is actually of no particular significance because of the fact that the gardaí were in effect aware in advance that the premises were going to be burgled and took steps to ensure that there would be nothing there of value to would be burglars.

7. Turning to the background and personal circumstances of the appellants, so far as Mr. Edward McLoughlin is concerned, he was born in October 1983, he is unemployed and he had, at the time of sentence in the Circuit Court, 48 previous convictions recorded. All of those had been dealt with in the District Court and for the most part they fell into the category of larcenies, road traffic matters and public order matters.

8. So far as Michael McLoughlin is concerned, he was born in January 1980, there was evidence that he was in a long term relationship, with two children, again there was evidence of a stable relationship. In the case of Michael McLoughlin he had approximately 50 previous convictions, all but one of which had been dealt with in the District Court. The offences there included offences of criminal damage, assaults and handling stolen property.

9. It is of some significance for reasons that we will come to shortly that in respect of both offenders, there was a long gap, a significant gap, in the pattern of offending so that when the Circuit Court judge was sentencing them, it was the situation that for a significant period, no offences had been recorded against them.

10. So far as both appellants are concerned, there was evidence before the court that their family background was a difficult one, that the family situation was dysfunctional and in both instances, there was evidence of leaving school at a very early stage.

11. In mitigation in the Circuit Court, counsel on behalf of the now appellants emphasised the plea and the circumstances in which it was entered in a situation where a difficulty in relation to the return for trial had emerged. Also emphasised was the relative ease with which their activities were disrupted and the point was made that the level at which the gang in question operated was not of the same level as some gangs operating in different parts of the country.

12. When it came to sentence, the judge said that he was driven to the conclusion that the O'Loughlins were involved at leadership level, that they were directing other parties to commit crime and that they were probably the intelligence behind the organisation. He felt that while offences of burglary and drug dealing of themselves were serious offences, that to be involved in an organisation that was involved in such activities was more serious again.

13. One of the criticisms that was made by the appellants of the approach of the learned trial judge is the conclusion reached by him that the O'Loughlins were at a leadership level and it is said that that conclusion conflicted with the evidence of Detective Inspector Roche which was to the effect that the appellants were mid range and that is interpreted by the appellants and their lawyers as meaning that Detective Inspector Roche was indicating that they were mid range within the organisation.

14. However, that criticism is misplaced because in fact a careful reading of the transcript makes clear that Detective Inspector Roche was speaking about the level of criminality that the gang was involved in which was described as mid range, while the judge was speaking of something different, the judge was speaking about the position of both the accused within the organisation. A court dealing with sentencing in the case of participating in the activities of a gang is going to have to ask itself a number of questions. The judge is going to ask questions about the nature and the activities of the gang in question, the level at which the gang operate and the court is also going to ask itself questions about the level at which the individuals operate within that organisation.

15. It does though seem to the court that the reference to "directing" is a matter of concern and is perhaps indicative of some degree of blurring of the distinction between the two offences, the s. 71 offence and the s.72 offence. There is a further criticism that is made, and that is to really more criticism of the garda witness rather than of the court. This relates to the fact that the evidence from Detective Inspector Roche was that the organisation was on what might be described as upward trajectory and that if it had not been for the gardaí intervention that the likelihood is that the organisation in question would become more successful and a greater threat to society. Again that criticism does not really address the fact that membership of a criminal organisation is in the nature of a continuous offence. While it would rarely be permissible to say in respect of somebody facing a single charge of burglary, that if they were not caught then, that they were likely to go and commit further burglaries, it is the nature of criminal organisations that if not stopped, they can be expected to continue and perhaps go on to a greater level.

16. However, one area where in the court's view there is greater substance of the criticisms, relates to how the fact that there was a long period when no offences were recorded was dealt with by the sentencing judge.

17. He dealt with it in these terms:

> "What is notable is that there is a gap between their last convictions and the matters that they now face. It seems to me that they learnt from that, that it happened to them. It seems to me that I am driven to the conclusion that the O'Loughlins were intelligent enough to know that the best way to avoiding arrest and being dealt with the by law is to be involved in an organisation and probably asked to have other parties to commit a crime, but that is as may be, so I have to sentence them."

18. It seems to the court that in a situation where the evidence, devised from traditional policing activity and from surveillance was limited to a period of some months and where there was a gap of some years in terms of recorded offences, that that did involve a degree of impermissible speculation on the part of the trial judge.

19. The combination therefore of the fact that the court takes the view that there was a blurring of the distinction between the s. 72 offence and the s. 71 offence and the manner in which the gap in convictions was dealt with leads the court to the view that there was an error in principle.

20. In this situation the court has considered the grounds put before it. The court has been provided with an amount of further material to date and from that it emerges that both appellants are pursuing a degree with the Open University and the court takes some cognisance of that.

21. This was a case where the learned trial judge found himself in a difficult situation. The case was the first or if not the first, certainly one of the very first cases involving a prosecution under the sections to come before the court. He was therefore the first judge called on to pass sentence. Clearly there were no formal guidelines available, structured guidelines as it were, in terms of how to approach the question of sentence, moreover he did not have available to him any informal information as to what the "going rate was" because of course there was no "going rate".

22. The sentence imposed, was in the view of the court, unduly severe in a situation where the organisation in question was operating at mid level of criminality and in a situation where there had been a plea entered in the circumstances in which it was. The court does not lose sight of the fact that at the time the plea was entered, that there had been a ruling on questions of admissibility which was adverse to the appellants. It was nonetheless a valuable plea at an early stage of what was going to be a very lengthy trial.

23. Having concluded as the court does, that there was an error of principle, the court has to identify as of today what is the appropriate sentence and having considered the matter, the court has decided to substitute for the sentence imposed which was one of nine years imprisonment a sentence of six and half years imprisonment, which will date from the same day as the sentence was backdated to in the Circuit Court.