THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Appeal Nos. 227/14 & 228/14

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Xiao Fei Weng and Shi Dong He

Appellants

Judgment of the Court delivered on the 17th day of November 2015 by Mr. Justice Edwards

Introduction
1. In this case the appellants both pleaded guilty to a count of possession of a controlled drug for the purposes of sale or supply, contrary to s. 15 of the Misuse of Drugs Act 1977 (as amended by the Misuse of Drugs Act 1984) and a count of cultivation of a controlled drug, namely plants of the genus Cannabis, contrary to s. 17 of the Misuse of Drugs Act 1977 (as amended by the Misuse of Drugs Act 1984) before Castlebar Circuit Criminal Court.

2. They were sentenced on the 16th of May 2013 and received identical sentences of 6 years imprisonment in respect of the s.15 offences and 6 years imprisonment in respect of the cultivation offences, to run concurrently. The appellants now appeal against the severity of their sentences.

The facts of the case
3. On the 24th of October 2012, Gardaí who were in possession of a search warrant, raided a premises known as Unit 16, Swinford Business Park, New Park, Swinford, Co Mayo. This was a large warehouse type premises that had been leased by a third party in July of that year. Inside the building they found a very sophisticated cannabis growing operation. A smaller grow house had been constructed within the main building in which 1,498 cannabis plants were found to be growing. This grow house was equipped with lights, an air filtration system, insulation and other features designed to conserve energy and focus the heat on the growing operation.

4. A quantity of cannabis herb was also found in the course of the search.

5. The two appellants were present on the premises at the time of the raid and were immediately arrested. It was accepted by the Gardaí that it was not their enterprise, that they were low level operatives and that their involvement could properly be characterised as that of "gardeners".

6. Both appellants were co-operative, although the second named appellant was somewhat more so than the first named appellant. The second named appellant admitted that he knew he was growing cannabis and that it was illegal. The first named appellant, however, claimed to have believed that it was flowers that they were growing. The first named appellant claimed to have been told that he would receive €800 for tending and watering the plants. The second named appellant told Gardai that it had been represented to him that he would receive 15% of what the cannabis was sold for.

7. The sentencing court heard evidence that the value of the 1,498 cannabis plants found was estimated to be €1,198,400 while the value of the cannabis herb found, which weighed 417 grammes, was €8,342.

8. The appellants are both Chinese nationals.

9. The first named appellant arrived in this country as an undocumented person on the 25th of March 2009 on a flight from Geneva. In circumstances where he did not having the required passport and visa he attempted to enter this country undetected, but was arrested and charged with an offence contrary to s.12 of the Immigration Act, 2004 and was initially remanded in custody to Cloverhill Prison. After a number of further remands spanning some five months approximately he was admitted to bail. However, he absconded while on bail and from then until he was arrested in connection with the offences the subject matter of his appeal he has remained in this country, living under the radar as an illegal alien and fugitive from justice.

10. The sentencing court heard that the first named appellant has no ties to this country, no family here, no partner and no children here. His English is virtually non-existent. He claims to have a wife and to have two children in their early teens, all of whom are China. The court further heard evidence that the first named appellant came to Ireland because of financial poverty and in an effort to improve the circumstances of his family. He claims to have paid a sum of 300,000 Yuan, which represents approximately €30,000, to be smuggled from China to Europe. He borrowed the necessary money from relatives, and got involved in the crimes with which this Court is presently concerned in order to earn enough money to repay that debt. He had only been working at the grow house for eleven days before his arrest. Prior to that he had been working in various restaurants but had been unable to earn sufficient money to repay his outstanding debt.

11. The second named appellant came to Ireland on the 21st of October 2000 on foot of a study visa in order to study English. He did study English at a college in Dublin and co-operated with the immigration authorities here while he was doing so. He subsequently entered a relationship and he and his partner had an Irish born child. When his Visa ran out he sought leave to remain, principally on the basis of having an Irish born child. However, having failed to comply with demands made by the immigration authorities, his application was refused. Thereafter he remained in Ireland as an illegal alien, and worked in various low paid employments, including in a branch of the Eddie Rockets chain of restaurants. He has reasonably good English.

12. The second named appellant claimed to have become involved in the offences with which this Court is concerned to earn enough money to pay for medical treatment for his parents in China both of whom are said to be unwell. He had become involved by answering an advertisement on the internet. He had also been there for only a short time before the Garda raid.

13. The investigating Garda confirmed that both men were essentially living on the premises. They had been told by their employers that they couldn't leave and their food was supplied to them daily.

14. The sentencing court heard that neither appellant has any previous convictions, and the prosecuting Garda also very fairly stated that the Gardaí have no reason to believe that either of them had ever been involved in such activity before.

15. The sentencing court heard that both appellants had intimated an intention to plead guilty at the earliest opportunity, and had done so.

The issue of possible deportation as raised in the pleas in mitigation
16. In the course of pleas in mitigation presented on the appellants' behalf the sentencing judge was told that deportation orders were likely to be made against both appellants and she was urged to consider imposing a sentence but, in circumstances where the appellants were prepared to give an undertaking that they would not challenge the validity of any deportation orders made against them, to suspend it on the basis that the appellants faced imminent deportation.

17. No objection to any such proposal was voiced on behalf on the respondent.

The judge's sentencing remarks.
18. In passing sentence on the appellant's the sentencing judge made the following remarks:

> *"Now, this matter is in for sentence today. I heard the evidence yesterday, I heard the evidence of prosecuting guard, Sergeant Thomas McIntyre, in relation to the backgrounds to the arrest and and how this matter came before the Court, and I also heard submissions from Mr Madden and Mr O'Connor in relation to -- or, sorry, Mr Garavan in relation to the mitigating factors and the plea on behalf of the accused. I put the matter back to today and I took the opportunity to -- I read the book of evidence overnight and the submissions that have been made to me. And it seems to me that obviously there's a very, very serious matter and very serious charge on which the accused come before the Court and which they attract -- counts two and six attract a maximum sentence of life imprisonment and counts four and eight a maximum sentence of 14 years imprisonment. And all drugs offences coming before the courts are of that nature and gravity are taken seriously. The value of the drugs haul involved is approximately 1.2 million, which is a very substantial amount of drugs that were seized in the raid, and I don't need to repeat here the seriousness and the scourge that drugs are in our society and the impact that the release of such an amount of drugs onto the market for sale would have had on the wider community.*
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> *In mitigation of the accused - and those matters are all aggravating factors in my opinion - the mitigating factors are that both accused pleaded guilty at the very earliest opportunity. They made full admissions and cooperated with the gardaí. They both have personal circumstances which were put before the Court. However, having read the book of evidence I don't accept that either of them were unaware of what they were engaged in. They are both first-time offenders and that's a matter which the Court must take regard of and all of the authorities say that, and equally they were at the bottom of the enterprise so to speak, the bottom of the chain of command.*
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> *So, bearing all that in mind, it's an offence that it certainly, given the amount of the drugs involved, it certainly would be -- there is another offence which would attract a presumptive minimum 10 years. That doesn't apply in this case because I'm dealing with a section 15 charge, but however, I think a sentence of in or around -- in the absence of any mitigating factors I would have thought that a sentence of 11 years would be appropriate in this case. However, I have to take account of all of the mitigating factors and in particular the early plea and the admissions and the cooperation that they provided to the gardaí and then the other personal matters which have been put before the Court. And I propose to impose a sentence in relation to each offence. In relation to Mr Weng on counts two and four I intend to impose a sentence of six years imprisonment, and in relation to Mr Dong He, in relation to counts four and eight I intend to impose terms of imprisonment of six years in respect of each of those charges, and both of the sentences to run concurrently.*
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> *Now, it has been suggested to me in mitigation that the Court should bear in mind the possibility of deportation of these accused. This is not a matter that this Court can have any role in. However, it is clear from the decision of the Criminal Appeal in the case of DPP v. KB, who was a non-national who came before the Circuit Court and had received a 10 years imprisonment in relation to drugs, and it was appealed to the Court of Criminal Appeal, who did reduce the sentence to five years and suspended all but one year of the sentence and gave liberty to apply in relation to deportation, and I see no reason to depart from that in this case. It's a matter entirely for the immigration authorities and the prison authorities as to whether or not an application is made to deport. I assume, given that the matter was raised by counsel for the defence, that it would not be opposed by both defendants, but that's a matter entirely for them and I would give liberty to have the matter re-entered before the Court in the event that there was to be a voluntary deportation matter put in effect by the relevant authorities, but it's not a matter for this Court. So, it's basically six years each imprisonment."*

19. The sentencing judge then volunteering the following additional remarks by way of addendum:

> *"I suppose I should say for the avoidance of any doubt that in the event the matter was re-entered with the authorities having a deportation proposal, if the Court is required I would be prepared to suspend any balance of a sentence at that stage to facilitate it, just to make that clear. But I'm not suspending any part of the sentence at this stage."*

The re-entry
20. As expected, the immigration authorities duly made deportation orders against both appellants, and the matter was then re-entered before the sentencing judge pursuant to the liberty to do so that she had granted in that regard. However, on this occasion counsel for the respondent, while stressing that the Director considered that sentencing was a matter for the court, stated that his client wished him to bring to the court's attention the decision of the Supreme Court in *The People (Director of Public Prosecutions) v Finn* [2001] 2 I.R. 25.

21. The *Finn* case had arisen at a time when it was commonplace for sentencing judges to incorporate a review clause in a sentence on foot of which an accused could be brought back before the sentencing judge after a certain period of time had been served in prison for a review of how he or she had been getting on with the possibility that the outstanding balance of the sentence might then be suspended. The circumstances giving rise to the appeal before the Supreme Court concerned whether, in relation to a sentence

containing a review clause, any appeal taken by the Director of Public Prosecutions on the ground of undue leniency was to be taken within 28 days from the imposition of the sentence and not of the order implementing the review procedure.

22. In considering this issue the Supreme Court did not declare the practice of imposing reviewable sentences to be unconstitutional, illegal or invalid but did state *obiter dictum* that, as the substance of the order made by the court at the review date was an order which released the convicted person before the completion of the sentence which the judicial arm of government considered appropriate, it must be regarded as the exercise by the court of the power of commutation or remission which, during the currency of the sentence imposed by the court, was vested exclusively in the executive and the court was exercising the power of commutation or remission which the Oireachtas had entrusted exclusively to the government or the Minister for Justice. The making of such orders was not merely inconsistent with the provisions of s. 23 of the Criminal Justice Act, 1951; it offended the separation of powers in this area mandated by Article 13.6 of the Constitution. The practice of imposing such sentences was undesirable and ought to be discontinued.

23. The *Finn* case having been opened to the sentencing judge she concluded that it would be inappropriate for her to suspend any balance of the appellants' respective sentences to facilitate their deportation, and notwithstanding her previous indication of a willingness to do so, was not now prepared to do so.

24. In the circumstances the appellants sought liberty to appeal against the severity of their sentences. Although they were out of time to do so, no objection was raised in the circumstances by the respondent. Moreover, the respondent did not oppose the application, which was acceded to in both cases by the sentencing judge.

The grounds of appeal
25. Both appellants now seek to rely on identical grounds of appeal that are pleaded in the following terms:

> 1. The learned trial judge erred in giving insufficient weight to the mitigating factors in the case.
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> 2. The learned trial judge erred in giving insufficient weight to the relatively young age of the appellant at the time of the offence.
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> 3. The learned trial judge erred in giving insufficient weight to the expression of remorse by the appellant.
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> 4. The learned trial judge erred in giving insufficient weight to the early guilty plea entered by the appellant, thereby avoiding the necessity for a lengthy trial.
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> 5. The learned trial judge erred in taking into account evidence offered by Sergeant McIntyre of the level of involvement of the co-accused in the crimes in question and effectively penalised the appellant on foot of evidence which was given against the co-accused only.
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> 6. The learned trial judge erred in failing to take sufficient account of the fact that the appellant was a foreign national with no English and therefore his imprisonment in those circumstances would, by its nature, be of a very serious import.
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> 7. The learned trial judge erred in failing to take into account the lack of any education, training and language skills of the appellant in assessing his level of culpability.
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> 8. The learned trial judge erred in failing to take sufficient account of the low position on the 'food chain' occupied by the appellant who was effectively a "gardener" living in the warehouse for low wages and in severe conditions.
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> 9. The learned trial judge erred in failing to leave some "light at the end of the tunnel" in sentencing the appellant and instead imposing a straight six year term of imprisonment.
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> 10. The learned trial judge erred by appearing to agree with counsel for the appellant (and without any demur from counsel for the prosecution) that the appellant's deportation would be facilitated provided there was State consent (a proposition that when tested proved impossible and met with State resistance).
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> 11. The learned trial judge erred in failing to have sufficient regard for the effect of her sentence on the appellant's family in China.
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> 12. The learned trial judge was over influenced by the fact that the offence carried a maximum sentence of life imprisonment.
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> 13. The learned trial judge failed to give sufficient credit to the appellant for his lack of previous convictions and previous good character.
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> 14. Such further or other grounds as may be advanced by counsel on behalf of the appellant at the hearing of this appeal.

Submissions
26. In advance of the case coming on for hearing before this Court the appellants filed written submissions contending that their respective sentences were excessive on the basis of the various alleged errors of principle on the part of the sentencing identified in their grounds of appeal. With some justification, the respondent's replying submissions make the point that none of the points now relied on were raised before the matter was re-entered before the sentencing judge, and indeed neither appellant had expressed unhappiness with the sentences imposed upon them. According to counsel for the respondent, the appellant's true complaint, and only real complaint, is that the sentencing judge, having indicated a willingness to suspend their sentences to facilitate their deportations, had subsequently found that her hands were tied having regard to the judgment in the *Finn* case and that she could not do so. It was submitted that while that was regrettable there was nothing to suggest that the custodial sentences actually imposed were other than appropriate and proportionate.

The appeal hearing
27. A further complication then arose at the appeal hearing. It was indicated by counsel representing the appellants that their

respective clients were no longer of a mind to voluntarily co-operate upon their release, whenever that might be, with the deportation orders made by the Irish immigration authorities.

28. The appeals were therefore argued on the basis of, and were confined to, complaints that the six year custodial sentences imposed were excessive in all the circumstances, particularly having regard to the appellants' lowly roles as "gardeners". It was suggested that the sentencing judge had located the offending conduct at too high a point on the scale of potential penalties before application of mitigating factors, and had given insufficient discount for mitigation, particularly their early pleas, their co-operation, the fact that they were poor and had become involved out of financial necessity and the fact that prison would be harder for then as foreign nationals with limited English.

Decision

29. This Court agrees with the submission on behalf of the appellants that the sentencing judge located the offending conduct at too high a point on the scale of potential penalties before application of mitigating factors. The available penalties ranged from a non-custodial sentence to life imprisonment in the case of the s.15 offence and from a non-custodial sentence to 14 years imprisonment in the case of the s.17 offence. It is, however, considered to be a matter of some significance that the respondent did not proceed with s. 15A charges against the appellants, which would have carried a presumptive mandatory minimum sentence of ten years imprisonment, notwithstanding that the value of the drugs involved was of the order of approximately €1.2 million.

30. The sentencing judge indicated that her starting point before giving a discount for mitigation was eleven years. In this Court's view her starting point was clearly too high in the circumstances of this case, and that represented an error of principle. In the circumstances the Court will quash the sentences of 6 years imprisonment in both cases.

31. In fairness to the sentencing judge it is clear from her expression of willingness to facilitate deportations with which the appellants were prepared to co-operate at that point, that she never expected that the appellant's would actually have to serve a 6 year sentence. She was generous in discounting for mitigation and the Court considers that no legitimate criticism can be levelled with respect to that aspect of matters.

32. The Court must now re-sentence the appellants and impose upon them a proportionate sentence that reflects on the one hand the seriousness of the offending conduct as committed by them, and on the other hand takes account of their personal circumstances. In circumstances where they have not sought to put any further materials before us the Court will substitute in each case sentences of 4 years imprisonment for the 6 year sentences imposed by the trial judge.