



THE COURT OF APPEAL

**Birmingham J.
Edwards J.
Hedigan J.**

Record No: 2017/110

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

Respondent

V

EUGENE HAYES

Appellant

JUDGMENT of the Court (ex tempore) delivered 17th July 2017 by Mr. Justice Edwards.

Introduction

1. On the 6th of October 2016 the appellant pleaded guilty to an offence of permitting the unlawful cultivation of cannabis plants contrary to s.19 of the Misuse of Drugs Act 1977, as amended. On the 26th of April 2016 he was sentenced by Nenagh Circuit Criminal Court to four years' imprisonment with the final two years suspended upon conditions and to run from the date of expiry of the sentence he was serving at the time. He now appeals against the severity of his sentence.

The Relevant Background Facts

2. On the 7th of February 2014 the appellant was convicted by jury of two counts of sexual assault and two counts of defilement of child under the age of 15. On the 27th of June 2014 he was sentenced to concurrent terms of imprisonment in respect of the said offences, the longest of which was six years. The sentencing judge in the present case was told that his expected release date in respect of the 2014 conviction is in December 2018. He is separately appealing that conviction.

3. Garda Rob Sheehy told the sentencing court that on the 22nd of March 2013, he obtained a warrant at Nenagh District Court, pursuant to section 26 of the Misuse of Drugs Act 1977, as amended, to search the premises and lands of Eugene Hayes at Lisheen Mine, Thurles. During the search a sophisticated grow house was located in a shed at the back of Mr Hayes's house containing 48 independent growing stations with separate heating and plumbing attachments to each station. In addition there was further capacity for a further 30 plants in the early stage of growth. Ten cannabis plants in the early stages of growth were found in the shed. Garda Sheehy told the Court that the value of what was growing in the shed would have come to approximately €8,000. Upstairs in the property there was evidence of previous harvesting of cannabis.

4. Mr Hayes was arrested at the scene and detained at Thurles Garda Station. During the course of being interviewed by An Garda Síochána Mr Hayes admitted that he had come into contact with two males through the buy-and-sell website DoneDeal.ie. He said that a deal was struck with the two males where they would use his facilities in order to grow cannabis. The Gardaí were told that under the deal, Mr Hayes was to receive between €5,000 and €6,000 by June or July which would have been three to four months later. However, the Probation Report, which was received in evidence, indicated that the appellant had told the Probation Officer that he was receiving a monthly payment of €250 for the rent of the property, that he had also received an initial payment of €8,000 "to keep his mouth shut" and that he had received another similar payment during the rental period. He had told his wife about the rent but had kept the lump sum payments a secret from her.

5. One of the two men with whom the appellant had dealt after initially making contact on Donedeal.ie was also charged with an offence arising out of what was found in the Garda raid. However, the sentencing judge was told that this man, a foreign national, had since fled the jurisdiction.

The Appellant's Personal Circumstances

6. The appellant was almost 53 at the time of sentencing and it was submitted to the sentencing judge that the appellant's poor financial circumstances were a factor that had led to his involvement. At the date of sentencing he was living at the address where the offence was committed with his wife and two children, at the time aged ten and thirteen respectively. They had inherited the property from his wife's aunt and had then invested in it both financially and personally to turn it into a substantial family home. Up until 2006 the appellant had a good work record, having worked initially in construction, and then in machinery maintenance with Lisheen Mines, and latterly with a courier company repairing and delivering machinery.

7. The appellant has had significant physical and mental health difficulties, including triple heart by-pass surgery. As a result of his health difficulties, and in particular a heart attack in 2006, he had to give up his employment with the aforementioned courier company. This enforced withdrawal from gainful employment precipitated deterioration in his financial circumstances and eventually an inability to repay his mortgage.

8. A report from a Consultant Forensic Psychiatrist was submitted detailing certain mental health difficulties that the appellant has. It appears that on a number of occasions he has overdosed and attempted suicide. He has had at least four admissions to an acute psychiatric unit in the last decade due to recurrent depressive episodes. He has a history of adjustment disorder and has been prescribed anti-depressants and anxiolytic medication. The psychiatric report concluded that at the time of the index offence he was suffering some symptoms of a reactive depressive episode but was not suffering from a major mental disorder.

9. A probation report assessed his risk of reoffending within the next twelve months as moderate. Risk factors identified were his alcohol use, mental health issues and financial situation. The probation service also contacted his sister, who described him as "naïve" and was of the view that he gave in to an opportunity to improve his home and provide for his family at a time when he was suffering from ill health and under financial pressure. Though he had previous convictions (the sexual offences previously alluded to) for which he was currently serving sentences, none of them were for similar offences. Considering his age and the fact he was already serving a sentence, his counsel submitted that it had been "a steep learning curve for him" but that he had learnt his lesson.

The Sentence Imposed

10. When sentencing the appellant, the learned sentencing judge made the following remarks:

"JUDGE: Well, the aggravating factors here are, first of all, that the offence was committed whilst on bail in relation to another offence, and I have to have regard to that. Now, I have to [have] regard too to his previous convictions, although they are -- they -- he had, at the time of committing this offence, he had no convictions against his name, and I do note that the convictions were for entirely -- an entirely different type of offence. So, as an aggravating factor, that is not a hugely aggravating factor but it is nonetheless something which I must take into account. Then there is the fact that on the -- on the basis of tests carried out by the Probation Service, and these are objective tests, as I understand it, Mr Hayes is placed at a moderate risk of re-offending. Mr Madden has quite rightly pointed out the basis on which that assessment is obviously made and, again, I do not regard this as a hugely aggravating factor in the case. Now, the maximum sentence for this offence is 14 years. Where does this come in the scale of gravity? It comes, in my view, in the middle range, and in all the circumstances, perhaps towards the bottom of the middle range. It would, in the ordinary way, in my view, warrant a sentence of five years' imprisonment.

Now, in mitigation, there is the very important factor of a plea of guilty here. We do not have, as we have in relation to this issue when there is -- we do not have a direct victim. Nonetheless, I regard the plea of guilty, as I do in every case where it occurs, as being a significant factor. Undoubtedly, the State have been saved a good deal of time and effort, and indeed financially there is a saving as regards this also. And I note that there may have been evidential issues which might have made the -- might have cast some doubt on the probability of a conviction by a jury. So, Mr Hayes gets very considerable credit for his plea of guilty.

In prison, he has been doing extremely well, as is clear from the reports that I've had. He has adapted quite well to the prison regime, and acquitted himself well there, and that is to his credit. The offence was carried out -- I should say that of course in addition to the plea of guilty, that came after admissions made whilst under detention pursuant to section -- either section 2 of the Drug Trafficking Act or section 4 of the 1984 Act, but in any event whilst detained, and these are obviously an important mitigating factor in the case. His financial circumstances at the time, it seems, were quite perilous and no doubt this informed his decision to get involved with these people who had -- who set up in his shed what is very obviously a sophisticated system for cultivating cannabis.

His health, and I know this indeed from the previous trial, his health -- his physical health has not been good, and that is fleshed out in the various reports, and his mental health has also suffered in the last 15 to 20 years.

I note the family circumstances of Mr Hayes. Clearly his wife and children have suffered considerably as a result of what has happened here, and this is yet again an indication of what occurs when crime is committed; the tentacles reach out very far to affect a lot of people, and most certainly Mr Hayes's wife and children have been significantly affected by what has happened here, and they have my considerable sympathy, I have to say, but they are in this position because Mr Hayes, very foolishly, allowed his premises to be used in this way.

He is now 52 years of age, and not many people of that age or older come before these courts - indeed not many people over the age of 40 come before the criminal courts. And having regard to the fact that the other convictions relate to matters which occurred at a broadly similar time, I do take into account that he had reached his late 40s before he became involved in criminal activities, and I do accept that it is highly likely he has learnt a salutary lesson from this. But, in all the circumstances, while I consider a headline sentence for this offence would be five years, I have to have regard to the totality principle, and I have to have regard in arriving at a sentence which is proportionate, to the likelihood of re-offending and to the time which he will actually spend in prison, and I have to have regard to the likelihood of his keeping on the right side of the law once he emerges from prison. So, in all the circumstances, I am imposing a sentence of four years, the last two years of which will be suspended on very strict terms."

The Grounds of Appeal

11. The appellant relies on seven grounds, enumerated in the notice of appeal as follows:

- i. The learned sentencing Judge erred by failing to have any or any adequate regard to the personal circumstances of the appellant;
- ii. The sentencing judge erred by failing to give any or any adequate weight to the mitigating factors advanced on behalf of the appellant;
- iii. The sentencing judge erred in law and in principle in calculating the appropriate sentence;
- iv. The sentencing judge erred in law in failing to correctly assess the offences in this case as being towards the lower level of seriousness in relation to these types of offences and/or wrongly assessed the level of seriousness of the offences as being too high on the scale of such offences;
- v. The learned sentencing judge erred by failing to consider all relevant factors which may indicate a reduction when imposing sentence;
- vi. The sentencing judge erred in law by imposing a sentence that is not just and proportionate to the offending behaviour;
- vii. The sentencing judge erred in law and in principle by declining to backdate the appellant's sentence.

The Appellant's Arguments

12. It was submitted on behalf of the appellant that he had pleaded guilty to an unusual offence, one that is rarely encountered by the courts, namely the offence of knowingly permitting or suffering the unlawful cultivation of plants of the genus cannabis on lands of which he was the occupier.

13. It was submitted that such an offence is qualitatively different from being actually involved in cultivation, being one step at least removed from it, although counsel acknowledges that it carries the same maximum potential penalty as the offence of actual cultivation.

14. Moreover, it was submitted, the scale of the operation was in fact modest notwithstanding its description by the prosecuting Garda as being a "*sophisticated grow house*" and his description of there being "48 independent growing stations". In truth there were only ten cannabis plants present, albeit that if they all reached maturity they could be worth in aggregate up to €8,000. While clearly over time multiples of that could be expected to be earned, and there was evidence of at least one previous harvest, the evidence indicated that the appellant had received relatively modest recompense for making the facility available.

15. It was submitted that in the circumstances the case did not merit an initial headline sentence of five years imprisonment and the sentencing judge had been wrong to locate it at the bottom of the middle range. This was, it was submitted, an error of principle. Moreover, in assessing the gravity of the case as meriting an initial headline sentence of five years the sentencing judge had further erred in principle in wrongly treating the previous convictions for sexual offences as an aggravating factor (although, to quote him accurately, he did say it was "*not a hugely aggravating factor*") and in also wrongly treating the fact that the appellant had been assessed as being of moderate risk of re-offending as being as an aggravating factor (although, again, he ultimately qualified this by saying "*I do not regard this as a hugely aggravating factor*").

16. The secondary point made at the hearing of the appeal was that there had been insufficient credit for the mitigating factors which were substantial, and this was also said to represent an error of principle. There had been an early plea and co-operation, the appellant was remorseful, there were no previous convictions for drugs offences, and the offences had been committed in circumstances where the appellant had been under severe financial pressure and against a background of him being unable to work due to deterioration in his health, both physical and mental. It was suggested that he was deserving of a greater discount than that actually afforded.

The Respondent's Arguments

17. Counsel for the respondent pointed to the commercial nature of the operation and that fact that the appellant had committed the offence for personal profit and reward. This was not in any sense a minor offence and it was properly located by the sentencing judge as belonging at the lower end of the middle range.

18. It was stressed on behalf of the respondent that this was a case in which the sentencing judge was obliged to have particular regard to the penal objective of deterrence, both general and specific, while of course also bearing in mind the other penal objectives of retribution and rehabilitation. It was very important to send the message that involvement at any level in the cultivation of cannabis, even as a passive occupier who merely knowingly permits or suffers his premises to be used for that purpose, is unacceptable in our society having regard to the well recognised social ills associated with drug abuse.

Discussion and Decision

19. We agree with counsel for the respondent that this was not a minor offence and that it was properly located by the sentencing judge as belonging at the lower end of the middle range. In saying this we acknowledge that the sentencing judge was wrong to regard the previous convictions for sexual offences, and the fact that the appellant had been assessed as being at moderate risk of re-offending, as aggravating the appellant's culpability. However, in circumstances, where in both instances the sentencing judge went on to state expressly that he did not regard them as "hugely aggravating", we are satisfied that these errors had only a minimal influence on how the sentencing judge viewed the overall gravity of the case. We are therefore satisfied that the offence was correctly located at the lower end of the middle range and that the sentencing judge was correct to initially assess the headline sentence at five years, and then to adjust that downwards by a year to one of four years to take account of totality, in circumstances where the ultimate sentence was going to have to be consecutive, the offence having been committed while on bail.

20. We consider that counsel for the respondent was right to focus on the commercial nature of the operation and the appellant's involvement for profit and reward. Further, we do not consider the prosecuting Garda's description of the operation to have been in any way misleading. While the scale may not have been large, this was nonetheless a professional and commercial set up and it was sophisticated in that sense.

21. We also agree that the trial judge was obliged to keep in focus the penal objective of deterrence. It has been said more than once by the former Court of Criminal Appeal in the context of prosecutions for possession of drugs for sale or supply that there would be no drug lords without drug couriers, and that it is necessary to deter persons from providing the assistance in the distribution of drugs that drug couriers provide, notwithstanding their lesser culpability. The same logic applies to occupiers who knowing permit or suffer their lands to be used for the cultivation of cannabis plants.

22. Finally we are not satisfied that insufficient credit was given for the mitigating factors in the case. While the appellant did plea guilty, was co-operative, is remorseful and has suffered and has experienced significant adversities in recent years, both as regards his health and his financial circumstances, we are satisfied that the effective discount from the custodial element represented by the suspension of 50% of the final headline sentence of four years was a sufficient reflection of the available mitigation.

23. Because of the breach of bail, and the consequential requirement that the sentence should be consecutive, there was no possibility of this sentence being backdated.

24. In the circumstances the appeal against severity is dismissed.