



THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Appeal No.: 232/13 and 51/14

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Martin McBride

Appellant

Judgment of the Court delivered on the 25th day of July 2016 by Mr. Justice Mahon

1. This is an appeal against sentences imposed at Cork Circuit Criminal Court on 29th November 2011 (the "Cork offence") and at Wexford Circuit Criminal Court on 24th October 2013 (the "Wexford offence"), of seven years and ten years imprisonment respectively. The latter was directed to be served consecutively to the former so that the total effective term of imprisonment is seventeen years.

2. On 12th May 2011 the appellant was found in possession of cannabis herb and resin with a combined street value of €97,680 when his car was searched by gardaí in Cork. He was charged with an offence under s. 15A of the Misuse of Drugs Act 1977 (as amended). He pleaded guilty in the District Court on 12th October 2011, and was sent forward for sentence to the Cork Circuit Criminal Court, where, on 7th November 2011 he affirmed his plea of guilty and was remanded on bail for sentencing. On 29th November 2011 the appellant was sentenced to seven years imprisonment.

3. On 16th November 2011, (subsequent to his plea of guilty on 7th November 2011 and before his sentencing in Cork on 29th November 2011), drugs, (mostly cannabis herb and resin), were found at the appellant's home in Enniscorthy, Co. Wexford following a search carried out on foot of a search warrant. The street value of the drugs haul was €44,052. The appellant was once again charged with an offence under s. 15A of the Act of 1977 (as amended), and was sent forward for trial to Wexford Circuit Criminal Court on 23rd April 2013. When an issue relating to the search warrant was ruled in favour of the prosecution, the appellant pleaded guilty to the s. 15A offence. He was sentenced on 24th October 2013 to ten years imprisonment.

4. Because the Wexford offence was committed while the appellant was on bail in respect of the Cork offence, the Wexford sentence, (being ten years), is required to be served consecutively to the Cork sentence, (being seven years), by virtue of s. 11(1) of the Criminal Justice Act 1984.

5. A sentence of at least ten years imprisonment was mandatory in respect of the Wexford offence because of the provisions of s. 27(3F) of the Act of 1977 (as amended), as it was a second s. 15(A) or s.15(B) offence. Furthermore there existed no scope for a sentence of less than ten years being imposed having regard to the provisions of s. 27(3E) of the Act of 1977 (as amended), again by virtue of it being a second s. 15(A) or s. 15(B) offence.

6. The appellant's appeal effectively raises three issues for consideration by this court, and they are:-

(1) Should the provisions of s. 27 of the Act of 1977 (as amended) be interpreted in such a way as to avoid a mandatory sentence in the circumstances of the present case (i.e. so as to provide for a mandatory sentence only where the accused has already been actually sentenced in respect of the first offence, at the time he committed the second or subsequent offence)?

(2) Should s. 27 of the 1977 Act (as amended) and s. 11(1) of the Criminal Justice Act 1984 be interpreted in such a way as to prevent them from operating simultaneously, where it is not explicitly provided in statute that they should apply with a combined effect (and in effect to the exclusion of the principle of totality or any other common law sentencing principles)?

(3) Assuming a mandatory ten year sentence arose in respect of the offence which occurred later in time (being the Wexford offence), was the sentencing judge entitled to suspend a portion of the ten years so imposed or is s. 27 of the 1977 Act (as amended) to be interpreted as requiring an actual and effective sentence of ten years?

7. In relation to the Cork offence the sentencing judge noted that the appellant was a transporter of drugs for which he was due to receive a fee of €1,000. He indicated that the plea of guilty, his co-operation, his lack of previous convictions and the fact that he was highly thought of within his community, were mitigating factors. He noted that s. 15(A) required the imposition of a statutory minimum sentence of ten years imprisonment unless there were *exceptional and specific circumstances* present which would render a sentence of ten years or more unjust. In this regard the sentencing judge placed particular emphasis on the appellant's plea of guilty and his co-operation, (which he distinguished from providing material assistance). The sentencing judge was satisfied that there was good reason to depart from the requirement to impose the minimum mandatory sentence, and proceeded to impose a sentence of seven years imprisonment.

8. In relation to the Wexford offence the sentencing judge imposed a ten year consecutive sentence on the appellant having been informed of the existence of the previous s. 15A offence (the Cork offence) in respect of which he had been sentenced to seven years imprisonment. The learned sentencing judge stated:-

".. I am obliged in law to impose a sentence of not less than ten years imprisonment for the offence under s. 15(A) and, as the offence was committed whilst this man was on bail, it must be consecutive to the sentence of seven years which he is now serving which expires on 25th February 2017, and I must so do. I make his term of imprisonment consecutive

to the term that he is serving which expires on 25th February 2017."

9. In effect the sentencing judge felt constrained to, firstly, impose a sentence of at least ten years imprisonment because the appellant had a previous s. 15(A) conviction, and, secondly, such sentence, (being the sentence of ten years imprisonment actually imposed), had to be consecutive to the earlier (Cork) sentence because of the provisions of s. 11(1) of the Criminal Justice Act 1984.

10. The sentencing judge then went on to make an order pursuant to s. 27(3J) providing for a review of the ten year sentence once half the sentence had been completed..

11. The appellant was convicted at Wexford Circuit Criminal Court on 23rd April 2013 in respect of an offence committed on 16th November 2011. This offence was committed some months following the commission of the Cork offence (on 12th May 2011) in respect of which he pleaded guilty in the District Court on 12th October 2011, and affirmed that guilty plea in Cork Circuit Criminal Court on 7th November 2011. It is therefore the position that the appellant committed the Wexford offence (on 16th November 2011) approximately one month after pleading guilty in the District Court in respect of the Cork offence, and approximately four days after the affirmation of that plea of guilty in Cork Circuit Criminal Court, and while he was on bail in respect of the Cork offence. The commission of the Wexford offence (on 16th November 2011) pre-dated by approximately two weeks the sentencing at Cork Circuit Criminal Court.

12. The decision to invoke s. 27(3J) of the Act of 1977 (as amended), and thus provide for a review of the ten year term after one half of that term has expired has the potential to reduce an effective term of seventeen years (as the effective sentence currently stands) to an effective term of twelve years. It is of course not certain that this review will result in any reduction of the effective seventeen year term.

13. It is appropriate at this juncture to quote the relevant legislative provisions of s. 27 of the Misuse of Drugs Act 1977 (as amended) and s. 11(1) of the Criminal Justice Act 1984 in their entirety.

Section 27 of the Misuse of Drugs Act 1977 (as amended)

(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment:-

(a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and

(b) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.

(3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3D)

(a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.

(b) Subsection (3C) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including:-

(i) whether that person pleaded guilty to the offence and, if so:-

(I) the stage at which he or she indicated the intention to plead guilty, and

(II) the circumstances in which the indication was given,

and

(ii) whether that person materially assisted in the investigation of the offence.

(c) The court, in considering for the purposes of paragraph (b) of this subsection whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to:-

(i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and

(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.

(3E) Subsections (3C) and (3D) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3F) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this

Act are to be construed as references to a first such offence.

(3F) Where a person (other than a person under the age of 18 years):-

(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or

(b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3G) The power conferred by section 23 of the Criminal Justice Act 1951 to commute or remit a punishment shall not, in the case of a person serving a sentence imposed under subsection (3A) of this section, be exercised before the expiry of the minimum term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section less any reduction of that term under subsection (3H) of this section.

(3H) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct shall apply in the case of a person serving a sentence imposed under subsection (3A) of this section and the minimum term specified by the court under subsection (3C) of this section shall be reduced by the amount of any remission so earned by the person.

(3I) Any powers conferred by rules made under section 2 of the Criminal Justice Act 1960 to release temporarily a person serving a sentence of imprisonment shall not, in the case of a person serving a sentence imposed under subsection (3A) of this section, be exercised during the term for which the commutation or remission of his or her punishment is prohibited by subsection (3G) of this section unless for a grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by such reason.

(3J) In imposing a sentence on a person convicted of an offence under section 15A or 15B of this Act, a court:-

(a) may inquire whether at the time of the commission of the offence the person was addicted to one or more controlled drugs, and

(b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section.

(3K) On reviewing a sentence listed under subsection (3J)(b) of this section, the court:-

(a) may suspend the remainder of the sentence on any conditions it considers fit, and

(b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate.

Section 11(1) of the Criminal Justice Act 1984

11.(1) Any sentence of imprisonment passed on a person for an offence committed after the commencement of this section while he was on bail shall be consecutive on any sentence passed on him for a previous offence, or, if he is sentenced in respect of two or more previous offences, on the sentence last due to expire...

14. This appeal essentially relates to the overall sentence of seventeen years and the contention that a sentence of that magnitude is excessive and offends against the principle of totality. The two sentences of seven years and ten years respectively are not in themselves criticised, and it is not suggested that there was an error of principle in relation to either. The grounds of appeal can be summarised as follows:-

(i) That the term "conviction" in the context of its use in s. 27(3)(e) of the Act of 1977 (as amended), and more specifically, the reference to a person convicted of a first offence to a person convicted of a first offence under s. 15A or 15B of this Act should be read as meaning a conviction consisting of (in this case) the plea of guilty in Cork on 7th November 2001 and the completion of the sentencing process on 29th November 2011. If the term "conviction" requires the completion of both these processes (as the appellant claims it does) then the date of conviction is 29th November 2011.

(ii) If the date of the Cork conviction is 7th November 2011 (on the basis that it is severable and separate to the imposition of the sentence on 29th November 2011), then that conviction constitutes a conviction of a first offence under s. 15A as of the date of sentencing on 24th October 2013, and, as such, it would invoke s. 27(3E) and thereby require that the sentence imposed on 24th October 2013 had to be (as indeed it was) at least a term of ten years imprisonment.

(iii) If, on the other hand, the contrary was correct so that at the time of the sentencing on 24th October 2013 there did not exist a conviction for a s. 15(A) offence prior to 29th November 2011, it was open to the court below to consider the imposition of a sentence of less than ten years.

(iv) The activation of the second offence provision, (3E), and the provisions relating to the commission of an offence while on bail should not both apply at the same time. This constituted, as described by counsel for the appellant, a "double whammy" for the appellant, and what he suggested was an unintended outcome, and one which offended against the principle of totality in sentencing, namely an effective prison sentence of seventeen years. .

(v) A portion of the ten year sentence imposed for the Wexford offence should be suspended.

(vi) The application of the totality principle provides this Court with jurisdiction to reduce the seven year sentence in respect of the Cork offence, notwithstanding the fact that no error of principle had been identified in relation to that sentence.

The meaning of 'Conviction'

15. It is contended on behalf of the appellant that the date of conviction is the date on which sentence is imposed for the offence in respect of which a person has pleaded guilty or has been found guilty.

16. If that submission is correct, it would mean that the date of conviction for the Cork offence is 29th November 2011. If so, it would follow that the Cork conviction post dated the commission of the Wexford offence, being 16th November 2011. If correct, the Wexford offence constitutes a first s. 15A offence and as such there existed a discretion on the part of the sentencing judge (in relation to the Wexford offence) to impose a sentence of less than ten years where there were present *exceptional and specific* circumstances sufficient to justify a departure from the statutory requirement to impose a sentence of at least ten years imprisonment. If that was the case, it would follow that the sentencing judge might have imposed a sentence of less than ten years imprisonment, and although any such lesser term of imprisonment as imposed in those circumstances would necessarily have been consecutive to the sentence imposed in respect of the Cork offence, the overall effective prison sentence may have been less than, and possibly considerably less than, an effective custodial term of seventeen years. It is contended that conviction and sentence cannot exist independently of each other.

17. The argument that *conviction* is capable of meaning the determination of guilt alone, rather than the combined processes of the determination of guilt and the imposition of a sentence was considered in *S (Infant) v. Recorder of Manchester* [1971] AC481 (emphasis added). In his judgment in that case (at p. 506), Lord Upjohn said:-

"But the word "conviction" is used also in a secondary sense, that is to express a verdict of guilty or acceptance of a plea of guilty before the adjudication which is only completed by sentence. Not only is the word used frequently in this sense in many judgments, but also in many places and statutes dealing with these matters. As Tindal C.J. said in Burgess's case, 7 Man and G 481504, "the word "conviction" is undoubtedly verbum equivocum. It is sometimes used as meaning the verdict of a jury, and at other times in its more strictly legal sense, for the sentence of the court".

Mr. Hodgson for the respondents drew our attention to a number of sections in the Magistrates Courts Act 1962, where the word "conviction" was used in its primary sense of an adjudication upon the whole matter and to other sections where it was used in the sense of verdict. Indeed, in s. 126(3) it is used in the one sense and in s. 126(9) in the other sense. So too, in the Coinage Offences Act 1861, the word "conviction" was used in a secondary sense. This was clearly pointed out by Hawkins J. in *R. v. Blaby* [1894] 2QB170/171/172 but for the purposes of that case it was not necessary that there should have been a judgment."

18. In *Blaby* it was stated:-

"From the language used it is as clear as anything well can be that the intention of the legislature in this section was that the finding of the jury that the accused was guilty should be treated as a conviction; "convicted" meant "found guilty" and the sentence was to follow on the conviction. And a plea of guilty would equally be a conviction."

19. In *McCabe v. The Governor of Mountjoy Prison* [2014] IEHC 309. Hogan J. stated:-

"But if, in general, the law (and specifically the statutory law) treats conviction and sentence as inseparable, this does not mean that this is so for all purposes or, more particularly, that the Oireachtas is not free to depart from these concepts. It follows that the meaning of the word "conviction" has not been fixed unalterably by some sacred legal tablet of stone which has permanently abridged the capacity of the Oireachtas to give this word any different meaning, even in the plainly different legal context of the 2006 Act."

20. In *McCabe* the meaning of the term "convicted of an offence" as used in s. 99(9) of the Criminal Justice Act 2006 fell to be determined.

21. The judgment of Hogan J. in the *McCabe* case was appealed to the Court of Appeal. In the course of delivering the judgment of the court on 22nd July 2015 Mahon J. in agreeing with the decision of Hogan J. stated:-

"In its true and ordinary meaning, s. 99(9) of the 2006 Act (as amended) can only operate and make sense if, in circumstances where an individual commits an offence while enjoying a suspended sentence relating to a previous offence, the court which imposed the suspended sentence is in a position to decide whether all or part (or none) of the suspended sentence should be activated prior to the new sentence for the new offence being imposed. There has to be a separation in the processes that lead to a conviction and sentence in those circumstances. It could not be necessary in those circumstances that a conviction must include a sentence, in order for it to be a conviction."

22. Yet another example of an instance where the Oireachtas has intended the word "convicted" to bear a meaning other than one in which conviction and sentence are to be regarded as inseparable is to be found in s. 10(c) of the European Arrest Warrant Act 2003 (as amended by s. 71 of the Criminal Justice (Terrorist Offences) Act 2005 and by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 2009). The said s. 10(c) creates an obligation to surrender where a judicial authority has issued a European arrest warrant in respect of a person who has been "*convicted of, but not yet sentenced in respect of, an offence ...*".

23. The court is satisfied that the word/term "convicted" as used in ss. (3E) and (3F) of the Act of 1977 (as amended) is a reference to the determination of the guilt of an individual either at the time the offender pleads guilty in the court in which he is to be sentenced, or when a jury brings in a verdict of guilty. The term is not a reference to the completion of the process of the determination of guilt and the imposition of sentence.

24. If the word/term "convicted" was to have such a meaning, sub sections 3(E) and 3(F) would make little sense in practice. There is more often than not a gap in time, (and sometimes a very significant gap), between the date on which a determination of guilt is made and the date of sentencing, and for good reason. Indeed, in a small number of cases persons found guilty of offences and given bail pending sentence abscond, and consequently are not formally sentenced for a lengthy period, or, indeed, at all. It could not be said that a person who is never found, having absconded in such circumstances, has not been convicted of criminal offence.

25. The purpose of the legislative provisions is to enable a sentencing judge determine if an offender has committed an offence of a similar nature in respect of which he has pleaded guilty, or has been found guilty, prior to the commission of the offence in respect of which he is then being sentenced. To deem such a person to be conviction free simply because his sentencing had been delayed to a date post dating the commission of a second offence would amount to no more than a technical and artificial distortion of the facts, and a rejection of the intention of the legislature. If such was the case there would exist the potential, and indeed the incentive, for offenders to seek to delay the completion of the sentencing process.

26. The purpose and intent of the legislature in its formulation of ss. 27(3E) and (3F) of the Act of 1977 (as amended) is unequivocal in providing that the judicial discretion to depart from the imposition of a sentence of at least ten years for a s. 15(A) or 15(B) offence, because of the existence of exceptional and specific circumstances, is only available in the case of a first offence under either section.

27. In this case, the imposition of the ten year sentence in respect of the Wexford offence, it being a second conviction for a s. 15(A) offence, was in compliance with the relevant statutory requirements.

28. Equally, s. 11(1) of the Act of 1984 does not provide for the exercise of judicial discretion to depart from its clear requirement that a sentence imposed for an offence committed while on bail for another offence must be served consecutively to the sentence imposed for that other offence. The wording of the statutory provision is clear and unequivocal. The legislature, in its wisdom, has provided for only two exceptions to this provision, those being where any such sentence is one of imprisonment for life, and where a sentence of detention is made under s. 103 of the Children Act 1908. The legislature's reasoning for these, (as they might be described), hard hitting measures requires little explanation. Insofar as s. 27 of the Act of 1977 (as amended) is concerned, the legislature deemed it necessary to address in strident and punitive terms the scourge of repeated dealing in or possession of substantial quantities of illicit drugs having regard to the enormous damage such activity inflicts on society. Section 11(1) of the Act of 1984 was introduced to assuage public concern arising from the frequency of offending by persons while on bail, and in circumstances where the granting of bail is the norm. In both instances the measures, (and particularly the fact that they are mandatory), are intended to act as a strong deterrent.

29. There is no statutory provision expressly enabling a court to dilute these legislative provisions simply for the purpose of effecting the reduction of an overall lengthy custodial term, even in circumstances where, arguably, the legislature may not have intended that such would result in the particular circumstances of this case, or in circumstances where, again arguably, the outcome is an especially harsh overall or total sentence.

30. It has been argued that this court should, for the purposes of reducing the overall aggregate sentence of seventeen years in the interests of giving effect to the totality principle, review the sentence for the Cork offence albeit in the absence of a conclusion that an error of principle has occurred in relation to the imposition of that particular sentence. It is accepted by the appellant that there was no error of principle in respect of his sentencing for the Cork offence. It is also contended by the respondent that the overall sentence (of seventeen years) was appropriate.

31. The totality principle requires a court to consider the overall sentence to be imposed on an offender, particularly where a multiplicity of offences is concerned. If the cumulative effect of the imposition of what are appropriate sentences for individual offences is an overall sentence which, having regard to all the circumstances, (including the nature of the offences and the offender's personal circumstances), is unduly harsh, it will be appropriate to reduce the overall sentence to take account of the principle. This can normally be done in different ways; for example directing sentences be served concurrently or reducing particular sentences, but such options were not understood by the learned sentencing judge to have been open in this case..

32. It is clear from the remarks of the learned sentencing judge in relation to the Wexford offence that he was greatly impressed with a number of mitigating factors, but felt that his hands were *tied* in terms of sentencing and, indeed, expressed regret that he was in that position. This court has read a number of testimonials, some of which were available at the time the appellant was sentenced in relation to the Cork offence, and all of which were available and considered at the time of sentencing for the Wexford offence. These include impressive testimonials from a number of former employers, excellent reports from the Prison Governor and the Prison Education Service, the results of prison courses successfully completed by the appellant and evidence of steps taken by the appellant to address his drug addiction. The appellant has no previous convictions prior to the Cork offence. He pleaded guilty in respect of the offences and expressed remorse in relation thereto. The court has read an undated letter from the appellant provided at the time of his sentencing in relation to the Wexford offence, and it must be said that that letter is particularly impressive. For these reasons, the court is satisfied that the overall sentence of seventeen years is, when considered objectively and as a whole, unduly harsh.

33. Undoubtedly, the appellant was unfortunate that the particular circumstances relevant to his situation have conspired together to produce an overall sentence of such length. Had there not been a statutory requirement for the imposition of a sentence of at least ten years in respect of the Wexford offence, and a further statutory requirement that that sentence be directed to be served consecutively to the seven year Cork sentence, it is likely that the Wexford sentence would have been imposed and structured in a manner which resulted in an overall period of imprisonment less than seventeen years in recognition of the principles of totality and proportionality.

34. Helpful additional submissions have been provided to the court, at its request, in relation to the issue of whether the court has jurisdiction to adjust the Cork sentence in the absence of a finding that there was an error of principle in relation to it, in recognition of, and with due regard to, the principles of totality and proportionality, both of which are well acknowledged concepts of the administration of justice. There are many examples where these have been applied by the courts. An early example is to be found in the judgment of Flood J. in *DPP v. W.C.* [1992] 1 ILRM 321, where he stated:-

"The constitution not only protects the independence of a judge in the selection of a particular sentence but, in addition, places on him a constitutional duty to impose a sentence which is appropriate to the degree of guilt, taking into account all relevant circumstances which may arise in that case.

...In my view, the selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality. By this, I mean that the imposition of a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person sentenced. It is not open to a judge in a criminal case, when imposing sentence, whether for particular type of offence, or in respect of a particular class of offender, to fetter the exercise of his judicial discretion through the operation of a fixed policy, or to otherwise pre-determine that issue."

35. In *Whelan v. Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1, the Supreme Court stated:-

"The court is satisfied, as O Dálaigh C.J. explained in that case, that the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called into question if there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified."

36. Kearns J. (as he then was) in *DPP v. Yusef* [2008] 4 I.R. 2014, said:-

"41. Can it be said that the provision inhibits the application of the test of totality and sentencing? This concept must be viewed only as an aspect of the fundamental principle of proportionality. The totality concept is a form of check to ensure that, where appropriate sentences are chosen for each offence, the court may, when appropriate, adjust that overall sentence, or the last sentence imposed, in order to achieve proportionality and overall fairness. An authority from the Court of Criminal Appeal demonstrates how this balancing test applies in practice. In the People (DPP) v. Healy, [1990] I.R. 388 the court observed that, in a proper case, a sentencing court might even in the case of a grave offence, adjust the sentence downwards where not to do so would "impose a manifestly unjust punishment on the accused."

42. This test applies irrespective of the gravity of the offences. Save in the case of truly mandatory sentences then, this totality check would apply when sentences are applied by different courts in which the later court, or appeal court, may have regard to the punishment appropriate for the overall level of criminal conduct involved. It applies when separate trials are held for several related charges following a severance of the indictment. The fact that a custodial sentence may run consequently to another, does not preclude its imposition by a sentencing court; nor does it inhibit a court in exercising its discretion, from imposing that sentence that is just and appropriate having regard to all the circumstances. At its simplest, therefore, there is no reason why a court, applying the overall principle of proportionality, could not consider from the range provided under the applicable statute: a fine; a suspended sentence; or an appropriate prison sentence. In fact, applying the presumption of compliance with the constitutional principles, that is precisely what a sentencing court must do."

37. An overriding principle in the Constitution is that justice be administered by judges in courts established by law. Article 34 states:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

38. Article 47.1 states:-

"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

39. Section 3.3(e) of the Criminal Procedure Act 1993 provides as follows:-

"The Court, on the hearing of an appeal, or, as the case may be, of an application for leave to appeal, against a conviction or a sentence made:

(e) generally make such order as may be necessary for the purpose of doing justice in the case before the court."

40. This provision was considered by the Supreme Court in *DPP v. Cunningham* [2002] 2 I.R. 712. In her judgment, Denham J. (as she then was) stated:-

"Irish statute law itself has provided the basis to include the exceptional case. The statute provides for such order as may be necessary "for the purpose of doing justice in the case". Thus, the general rule may be altered in the exceptional case where it is required for the purpose of doing justice in the case. The general rule that additional evidence (that is evidence additional to that before the sentencing judge and relating to events which are alleged to have occurred after sentence) may not be heard in the Court of Criminal Appeal on appeal against a sentence is varied in the exceptional case where such additional evidence is necessary for the purpose of doing justice in the case."

41. Under the Court of Appeal Act 2014 the appellate jurisdiction previously exercised by the Court of Criminal Appeal is now exercised by this court. This court, established by the Constitution, has an inherent jurisdiction to correct, review or adjust sentences imposed by lower courts in order to ensure that they fully reflect constitutional principles.

42. It is acknowledged in this case that the only means by which the overall sentence of seventeen years, a sentence which this court believes is unduly harsh, can be brought into line with the principles of totality and proportionality is to reduce the Cork sentence and thereby reduce the overall sentence. This course of action is urged on the court on behalf of the appellant, and 5.3.3(e) of the Criminal Procedure Act 1993 is said to be a statutory basis for so doing. For her part the respondent, while maintaining that the overall sentence of seventeen years is not unduly harsh, has not sought to argue otherwise.

Conclusion

43. The court is satisfied that it has jurisdiction to reduce the Cork sentence in the interests of totality and proportionality, notwithstanding the fact that there was no error of principle in relation to that sentence, and that it has a duty to do so in the interests of justice and the appellant's constitutional rights. In so doing, the court does not seek to undermine the statutory requirement to impose either a mandatory minimum sentence or a consecutive sentence as required in this case. The imposition of the mandatory minimum sentence and the direction that it be served consecutively to the Cork sentence remain unaffected. In reducing the Cork sentence it is reducing a sentence in respect of which a statutory minimum sentence was not, in the circumstances, required to be imposed, nor was that sentenced required to be served consecutively to any other sentence.

44. Accordingly, the Court will quash the seven year prison sentence imposed at Cork Circuit Criminal Court on 29th November 2011 and in its place impose a prison sentence of four years, and will to this extent allow the appeal. The sentences, and their structuring, as imposed at Wexford Circuit Criminal Court on 24th October 2014 remain unaltered.

