



THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

Record No: 303/2016

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

ANDREJS TRIFONOV

Appellant

JUDGMENT of the Court (ex tempore) delivered 30th of January 2018 by Mr. Justice Edwards.

Introduction

1. On the 14th of June 2016 the appellant pleaded guilty in respect of one count of cultivation of plants of the genus cannabis contrary to s.17 of the Misuse of Drugs Act, 1977. On the 4th of October 2016 he was sentenced at Monaghan Circuit Criminal Court to three years' imprisonment with no part thereof suspended.

2. The appellant now appeals against the severity of the said sentence.

The relevant facts

3. On or about the 23rd of January 2015 the appellant commenced a tenancy in a house in Loughmourne, Castleblayney, Co. Monaghan. The owner of the property formed the opinion that some suspicious and unusual activity was taking place at the property and alerted Gardaí who attended at the property on the 30th of March 2015. Upon their arrival the appellant gave consent to the Gardaí to enter the premises. Gardaí found there was a very strong smell of various scents, air freshener and cannabis. Gardaí requested access to an upstairs room which was locked. The appellant told them he didn't have the key but had no objection to them forcing the door open. On forcing the door open Gardaí found a large, tent-like structure in the middle of the room with ventilation equipment, tubing, lighting and other paraphernalia normally associated with cannabis cultivation. In total there were 17 cannabis plants with an estimated value of €17,000.

4. Counsel for the prosecution told the sentencing court that the appellant was co-operative during the course of being interviewed. He made certain admissions in relation to plants being present at the premises and permitted Gardaí to gain entry. He also indicated that another person was involved in the activity with him and it appeared to suggest that they had a greater involvement than himself. He indicated that his role was to watch the plants when they were small, to keep an eye on them and in fact, tend to the plants.

5. When asked by the sentencing judge whether the appellant was "involved in the cultivation or simply a caretaker" counsel for the prosecution indicated that he was "involved in the cultivation because he was tending to the plants that were in the room. He indicated that he got the seeds from this person, where his instruction appeared to be general sort of gardening insofar as the plants were concerned. He said to the guards also that he was told that the person who he was involved with ... wanted them for some sort of medical purpose." The appellant told Gardaí that the other individual rented the room in question from him for €200 per month. He also said that he was only involved in cultivation in the initial stages of growing, and that after a certain stage the other individual changed the locks to the room, and to the front door of the house. Thereafter the appellant was provided with a key to the front door but not to the room.

The appellant's personal circumstances

6. The appellant is a Latvian National who was born on the 7th of October 1969. He came to Ireland in 2012 and speaks very little English. He had been employed in a chicken factory in Co. Monaghan for several years prior to his conviction. His employers indicated in a testimonial that he was a good worker, that they were aware of his court case and that they would continue to employ him. He is in a relationship and has a ten year old daughter who attends school in Monaghan.

7. The appellant cooperated fully with Gardaí and assisted them in attempting to find the other individual. He entered a plea at the earliest possible time. He has two previous convictions in this jurisdiction, one for theft and one for no insurance contrary to s.56 of the Road Traffic Act, 1961 as amended. These were dealt with in Carrickmacross District Court on the 18th of May 2016 and he was given 180 hours community service. A probation report dated the 22nd of September 2016 indicated that he was at low risk of reoffending within the following 12 months.

8. At the time of sentence he was subject to a European Arrest Warrant ("EAW") in Latvia which had been endorsed by the High Court. The warrant was not contested by the appellant and he is due to be surrendered to the Latvian authorities on completion of his prison sentence.

The sentence imposed

9. In imposing sentence the sentencing judge made the following remarks:

JUDGE: Well, Mr Trifonovs is a 47 year old man. He has got a partner and he has got a 10 year old child by another relationship apparently. On the 30th of March 2015, a visit was made to a house in the Castleblayney area and arising out of a search out of that house, it was found to be what's known commonly as a grow house, where cannabis plants were in the early stages of growth. The plants were seized and the approximate worth of the plants was €17,000 at the stage they were at, at that particular time. The guards found nothing less than the paraphernalia that they find every time they make a raid such as this. But the general public, if you like, should know that the paraphernalia involved is very, very sophisticated indeed. It takes the form of, (a), somebody renting a house unbeknownst to the landlord totally

and converting the house into a grow house. That conversion consists of introducing growing areas for the plants, irrigation for the plants, electricity and heat to allow the plants to grow and the introduction of people to cultivate those plants, sometimes known in looser language as "gardeners", who go in and they look after these particular plants until their maturity.

And after approximately I say this with judicial knowledge, because I have heard these case many, many times, I didn't have to hear evidence from a guard about it after about 12 weeks or thereabouts, the cannabis plant is grown, it's harvested, the plants that were there have cuttings taken from them and the whole process starts all over again. And there are huge amounts of money to be made by these people who are cultivating these plants. They are usually non nationals, some of them Oriental, some of them eastern European, but in any event, the whole idea of the exercise is to make as much money as possible in as short a space of time as possible and to avoid detection if at all possible.

The methods which they go to or the lengths to which they go to avoid detection is limitless and the cost of setting these things up is very, very expensive indeed. Where the money comes from not many people know, but it comes from somewhere and the system is set up. And the normal excuse is that, "Oh, I was at my wits end, I had a family at home and say in some eastern European country or whatever or Oriental country and I have no money and I want to send money, I want to make a new start and get money for my family, et cetera, and these people came along and approached me and told me that if I did this, that or the other in this particular house that I would get paid this, that and the other." And of course it never happens; they never get paid. They, become in fact prisoners in their environment, ie, as gardeners to the particular exercise.

In this case, the accused has said that I have nothing -- his initial approach is "I have nothing to do with this. This is some Russian guy who came along and told me that he wanted to rent a room and so on and so forth and when the plants came to a certain stage that he locked the room and wouldn't let him in." Well, now, I'm listening to that and I do listen to it, but I don't accept it. He knew darn well that he was in the process of cultivating cannabis and he knew that cannabis was an illegal substance and he was going to take part or take whatever profit he could in relation to it. He went so far as not alone to put the lease into his own name and his partner's name, but also to take part actively in the cultivation of the plants. So while Mr Fogarty has done his best to ameliorate his involvement, he was up to his neck in it and he must take the responsibility for it.

So one of the most aggravating factors in this case, is that he was involved in this very sophisticated operation and he was deeply involved in it. On the other side of course there are mitigating circumstances. The plea, the early plea which did occur after interview with the guards and he cooperated fully with the guards, which is another area of mitigation, but he saved the State a great deal of expense in relation to bringing the matter to trial, even though it could be said he was caught red-handed. He apparently we have no record in this country of any bad behaviour in Ireland in the past and indeed, we have a record of good behaviour in the past and that he was employed in the chicken industry and was a reliable worker and worked hard, so we have no evidence of any previous convictions at all, but there is evidence, of course, that he was a good and hard worker when he was working.

I am instructed by Mr Fogarty that an [surrender order on foot of an EAW] has been made, which would be probably brought into force later on this month and that he has no intention of appealing that. In other words, he is going to be deported. I appreciate that he has little English and that a period in custody is going to be difficult, but there are quite a few people now in custody in various areas who do speak the same language as himself and while the difficulty of communication may occur as between those that speak English, there are people within the system and custody at the moment who do speak the language that the accused in this case does speak.

I am very conscious of the fact that he has been on bail for had some very considerable time and that he has answered to his bail on all occasions. I'm also conscious of the fact that he has an up-to-date or a reasonably up to date probation and welfare report and in that report, it is suggested he is suitable for community service and that he is of a low risk of re offending. I take the view in all these cases, and I have not differed in any way to a lot of my colleagues, that this matter is a very serious matter and is not well suited or well purposed or well punished by community service orders. I will not be going down that road. In view of the fact that he is liable to be deported, I do propose to impose a custodial sentence. It is for the State to make up their mind as to what they wish to do and after this detention -- or, sorry, [EAW] has been re-presented; but in view of the -- the maximum sentence is 14 years' imprisonment, I put it in the range of -- the lower range, if you like. And my normal sentence in a case like this is four years' imprisonment; but in view of the mitigating circumstances and his behaviour to date, I want to reduce that to three years' imprisonment, so I'm sentencing him to a period of three years' imprisonment on the section 17 offence and he will appear then again before the courts on the appointed date relative to his [EAW].

10. The sentencing judge was then asked by defence counsel if he would consider suspending a portion of the sentence, and he declined to do so, saying:

"No, no. And the reason is he was up to his neck in this, he was involved in the leasing of the property, he was involved in the setting up of the whole affair, the one thing I haven't heard about, which is normally the case, is they bypass the electrical system for the purposes of that there was no evidence of that, so I've ignored that. So but he was absolutely these plants were in their infancy, but the purpose was that they should mature."

Grounds of appeal

11. The appellant appeals on the following grounds as set out in his written submissions:

- a) The learned sentencing Judge erred in principle and failed to attach sufficient weight to the Appellant's early plea of guilty and it respectfully submitted failed to have sufficient regard to section 29 of the Criminal Justice Act, 1999 in imposing the sentence of three years' imprisonment.
- b) The learned sentencing Judge erred in principle in sentencing the Appellant to three years' imprisonment having placed the offence on the lower end of the scale.
- c) The learned sentencing Judge erred in principle and failed to attach sufficient weight the findings and conclusions of the Probation and Welfare Report and the Appellant's character reference.

Discussion & Decision

12. The first thing the sentencing judge had to do was to assess the gravity of the offending conduct and locate it on the range or spectrum of available penalties. As we pointed out in *People (DPP) v Choung Vu & others* [2016] IECA 36, at para 63 of our judgment, in circumstances where the range is from zero to 14 years (or 169 months), dividing that range into a lower range, a mid range and an upper range, suggests a lower range from zero (being non-custodial options) to 56 months (i.e., 4 years and 8 months); a mid range from 57 months to 112 months (i.e., 9 years and 4 months), and an upper range from 113 months to 169 months (i.e., 14 years).

13. The sentencing judge assessed the offending conduct as coming within the lower range, and we do not consider that he was in error in doing so. While the sentencing judge did not initially indicate precisely where within that range it was to be located, it is clear from his final sentencing remarks and from where he ended up, that he had in mind a headline sentence of four years, and that he ended up with an ultimate sentence of 3 years' imprisonment after discounting for mitigation. It follows that he therefore regarded it as belonging towards the upper end of the lower range. It has been submitted by counsel for the appellant that this was an error. We do not agree.

14. This was not a case of a single cannabis plant, or a small number of plants, being grown in a flowerpot on a window sill for personal consumption. This was a commercial operation, albeit small by the standards of some of the grow houses that have featured in prosecutions before our courts in recent years. It was carefully planned and executed, and engaged in for profit and reward. Moreover, it is clear from the evidence that the appellant's involvement was considerable. After all, he procured a rental of the property, he assisted in bringing in and setting up the paraphernalia, and he tended to the crop. It seems to have been a two-person operation, and while the evidence is inconclusive as to the exact division of responsibility, and the control exercised by the appellant, it is clear that he was significantly involved. The sentencing judge characterised the set up as sophisticated, and we agree.

15. Counsel for the appellant referred to him as "a gardener", but the evidence suggests he was much more than that. The term "gardener" as often used in these cases has become almost a term of art to describe low level menial workers, frequently trafficked from another jurisdiction, with little or no English, working as enforced labour employed to tend the plants in a grow house, often working for food and accommodation alone, or for very, very, low wages, almost as slave labour, indeed. The appellant's circumstances were entirely different, as is properly conceded by his counsel.

16. He was the tenant of the building in which the operation was established, he dealt with the landlord, and he permitted and facilitated the alterations to the property effected in connection with the enterprise, including the changing of the locks without notice to the landlord, or the provision of keys to the landlord. Moreover, the appellant's disavowal of any knowledge that the plant that was being cultivated was cannabis defies credulity. It was not accepted by the Gardaí, by the appellant's Probation Officer, or by the sentencing judge, who characterised the appellant as being "up to his neck in it", and we regard that as fair comment in the light of the evidence. In the circumstances we consider that the offending conduct in this case properly belonged towards the upper end of the lower range.

17. The trial judge expressly noted the appellant's plea of guilty, that it was an early plea and that he had made admissions and co-operated fully with the Gardaí. He also noted that the appellant had no previous criminal record, that he had a good employment record, his family circumstances, and the fact that he was a foreign national with poor English. The trial judge, having indicated a headline sentence of four years, decided to reflect the mitigating circumstances in the case by discounting from that by 25%. In circumstances where the biggest mitigating factor, i.e., the guilty plea, albeit offered at an early stage, was offered in circumstances where the appellant had in effect been caught "red handed", a discount of 25% in respect of the cumulative mitigating circumstances in the case was not inappropriate, and was within the sentencing judge's legitimate margin of appreciation. While another judge might equally have afforded a somewhat more generous discount, we are satisfied that the discount that was afforded was within the scope of the judge's legitimate discretion, and was not so low as to represent an error of principle.

18. In so far as the final ground of appeal is concerned, the Court understands the real complaint to be that the sentencing judge was not prepared to consider a suspended sentence, either in whole or in part, or other non-custodial options. We note the trial judge's reasons for not considering a suspended sentence, and cannot fault them. Moreover, in circumstances where the appellant was due to be surrendered to the Latvian authorities upon an EAW immediately upon the completion of any period he would be required to serve in custody in this jurisdiction, there was no reality whatever to seeking a suspended sentence or other non-custodial option such as community service. He would not be amenable to supervision, or be available for community service, once surrendered to Latvia.

19. In the circumstances we would dismiss the appeal.