



THE COURT OF APPEAL

[77CJA/18]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

ALYN MAGINN

RESPONDENT

JUDGMENT of the Court delivered on the 25th day of January 2019 by Birmingham P.

1. This is an application brought by the DPP pursuant to s. 2 of the Criminal Justice Act 1993 seeking to review a sentence on grounds of undue leniency. In the course of her submissions at the review hearing, counsel on behalf of the DPP described the case as "a difficult one" and as "an unusual one". Those observations are well made.
2. The sentence in question sought to be reviewed is one of five years imprisonment, suspended in full apart from the time spent in custody awaiting sentence that was imposed in the Dublin Circuit Criminal Court on 23rd February 2018 in respect of an offence contrary to s. 15A of the Misuse of Drugs Act.
3. The case related to events that occurred on 19th July 2017 at Dublin Airport. Surprisingly, however, given the location of the offence, it did not involve either the importation or the export of drugs. The Court was told that what was described as "routine profiling" identified the appellant flying from Malaga to Dublin on that day, he was booked on a return flight from Dublin to Malaga on the same day. He was subjected to surveillance and he was observed leaving Terminal 2 at Dublin Airport and going to and getting into a particular vehicle, a blue Seat Ibiza, at the surface car park. He remained in that vehicle from 15.41 hours until 18.06 hours. At that stage, he walked away from the vehicle and as he did so, was stopped by an Officer of Customs & Excise who informed him of his intention to search the vehicle.
4. It was noted that there was a loose panel in the vehicle and when that loose panel was pulled back, there was within a black wash bag containing two bags of brown powder which was suspected to be heroin, a suspicion which was subsequently confirmed. The vehicle was brought to New Customs House in Dublin Port where a further search was carried out. During that search, further wash bags with brown powder were found along with a bag of white powder which, on analysis, was confirmed to be cocaine. When the brown powder was found at the airport, the respondent, Mr. Maginn, was arrested and brought to Ballymun Garda station. There, he was interviewed on a number of occasions, having declined the services of a solicitor.
5. The trial Judge intervened during the course of the investigating Garda's evidence to ask "how did you find him when you interviewed him, Guard?" to which the Garda responded "very difficult to interview". Following a further intervention from the Judge, the Garda clarified that he said that because the interviewee was jumping from place to place in the interview, it was very difficult to get him to go through events bit by bit "when the interviewee was speaking, his voice would just tail off, he put his head down and he would just get emotional and he would come back and start again speaking, just start mumbling to himself. He just kept mumbling to himself at time and he became very emotional. It was very, very hard to understand his voice, when he would drop his voice, when he dropped it he could not keep eye contact, socially difficult to deal with, very difficult to build a rapport with, very emotional, was not capable of eye contact".
6. The Garda added that this was not because of the circumstances of the interview, it was just his nature. Unusually, the respondent indicated that the drugs belonged to a friend of his whom he named. Perhaps even more unusually, that friend then presented himself at Ballymun Garda station on the following day and indicated that the drugs were his and that he was taking responsibility for them. He subsequently pleaded guilty to offences under the Misuse of Drugs Act and was dealt with on a different occasion by the same Judge that sentenced Mr. Maginn and received a 7-year sentence.
7. The heroin in the car amounted to 4,226.8 grams and was valued at €591,752. The cocaine, of which there was 240.475 grams, was valued at €16,833. In the course of the sentence hearing, the Judge pressed the prosecution on a number of occasions for clarification as to what Mr. Maginn's role was in relation to the drugs and what the accused was expected to do with them. Little clarification emerged, though defence counsel interjected at one stage and volunteered that he thought his client was going to move them. Prosecution counsel, when pressed further, indicated that the accused was sitting in the car minding the drugs for the owner. CCTV footage from the airport revealed that the car had been parked at the surface car park by the respondent on the 8th July 2017.
8. In terms of the appellant's background and circumstances, he was born in July 1977, and so was forty years old at the time of the sentence hearing. He was from Keady, County Armagh and divided his time between Keady and Malaga where his wife had a

restaurant business. He had no previous convictions either in this or any other jurisdiction.

9. A psychologist's report was prepared and put before the Court. The report refers to a difficult and challenging personal history. The author explained that having regard to Mr. Maginn's highly idiosyncratic presentation during the assessment and, having regard to issues that had been highlighted by the appellant's mother when clinical interviews were conducted with her, it was regarded as appropriate to investigate whether Mr. Maginn met the diagnostic criteria for Autism Spectrum Disorder (ASD). The author was of the view that Mr. Maginn met all the diagnostic criteria for ASD and that the results of the tests administered with the author's observation of his presentation and the observations of the Gardaí of his behaviour during their interview of him, indicated that a diagnosis of ASD was appropriate.

10. In what was a very unusual case, the Judge's sentencing remarks bear repeating:

"[t]his is a tangled tale. It seems Mr. Gilroy [the person who took responsibility for the drugs] had drugs. It seems Mr. Gilroy, for reasons only known to him, did not want to have possession of these drugs. It seems these drugs were put in a car and it seems the defendant drove this car. It seems, when he was encountered by the Officers, he was getting out of the car. The car was searched. A large amount of drugs were found, both Cocaine and particularly heroin [he then referred to the value of the drugs, engaging with counsel for that purpose]. Now, I remember Mr. Gilroy pretty well. I dealt with him on a particular basis. It seems he understood exactly what he was doing and he was in it for himself and he received a sentence of 7 years. He had some convictions at least. Now, in relation to Mr. Maginn's involvement, it seems he did have possession of these drugs for a period of time. It seems he was useful to Mr. Gilroy. It is not clear to me what Mr. Maginn was getting out of it. It seems he was friendly with Mr. Gilroy, and obviously when Mr. Gilroy asked him to do this, he acceded to his request. Now, Mr. Gilroy, it seems to me, since he knew him quite well, knew what he was dealing with and he knew, I think, that Mr. Maginn would accede to any request that he made. It seems if Mr. Maginn is friendly with you, I would say that he would be easy to manipulate. Now, in dealing with Mr. Maginn, I have to take into account Mr. Maginn himself. Obviously, moral culpability is what this Court sentences for mostly and I suppose moral culpability depends upon the abilities of the defendant before the court. I have looked at the report that has been handed in. It is a detailed report. I think the findings in the report accord with how the investigating Garda found him. Now, it seems that he has borderline, I think he is not the brightest, and obviously people who are not bright perceive differences between right and wrong: there is no difficulty with that. What complicates the issue in this case is that he is on the Autism spectrum. I think probably Mr. Maginn finds it difficult to interact properly with other people. I think Mr. Gilroy used this situation and Mr. Maginn did what he thought Mr. Gilroy wanted him to do. It seems that life can be particularly difficult for Mr. Maginn. Now, the question is, I can depart from the mandatory minimum sentence of ten years by reason of his plea of guilty and cooperation. The question is, what is the just sentence for Mr. Maginn, despite the fact that he had possession, technically, of a huge amount of drugs? I think his level of involvement in the scheme was low. I think he had little abilities to withstand the requests of Mr. Gilroy by reason of his particular psychological makeup. Therefore, I have considered, I think, a non-custodial disposition. Where does the justice lie? I think, despite the serious amount of drugs in this case, I think by reason of Mr. Maginn's particular psychological makeup, it would be unjust to imprison him for his involvement in the scheme. I think the appropriate sentence for Mr. Maginn is a term of imprisonment of five years, which I am going to suspend on the following basis."

The Judge then dealt with the terms of suspending the sentence, and in further exchanges with counsel commented:

"[a]nd I am not sure that he is the best candidate for custody. I have been watching him for a while. I am not sure that he has a particular understanding of what is happening – he knows enough, but that is my judgment in the case. I think, in fairness to Mr. Gilroy and I will say this about Mr. Gilroy, he did come in the next morning. He realised who he was dealing with and he had a certain amount of, I suppose, decency to take responsibility for most of this escapade."

11. On behalf of the DPP, it is submitted that suspending the entirety of the sentence imposed was unduly lenient. It is said that the sentence imposed, suspended in its entirety as it was, represented a substantial departure from what would be regarded as the appropriate sentence in all the circumstances of the case. The Director argues that this case lacked the rare, special and wholly exceptional specific circumstances that are required in order to justify a non-custodial sentence. Counsel further submits that the sentence imposed was manifestly inadequate. On behalf of the respondent, it is said that the sentencing Judge observed the evidence at first hand and his approach was influenced in part by his direct observations of the accused and his knowledge of the co-accused. So, it is said that the Judge's approach to sentencing should carry great weight.

12. At an earlier stage in this judgment, this Court quoted the remarks of prosecuting counsel about the fact that this was a difficult and unusual case. This Court agrees wholeheartedly. There are unusual aspects to both the offence and the offender. So far as the offence is concerned, there is an unusual degree of ambiguity about the role being played and to be played by the respondent. He was minding the drugs for a friend by sitting in the car and it seems that the intention may have been that he would move the car to a nearby location in Clongriffin where he would meet the drugs owner. The Judge formed the view that if Mr. Maginn was asked to do a favour by someone that he regarded as a friend, that he would be likely to comply. Mr. Maginn's background and personal circumstances were also unusual. The account given by the experienced Detective Garda who conducted the interviews of how difficult that process was, was a very striking one. Then, the Detective Garda's experience was mirrored by that of the psychologist who conducted the interviews. The psychologist who conducted three clinical sessions with Mr. Maginn observed that the client was oriented to person, place and time, was dishevelled in appearance and held a used, bloodied tissue in his hand through each clinical session. She described Mr. Maginn carrying a small scrap of paper in his pocket on which multiple phone numbers were written in a small space. She comments that Mr. Maginn presented with a notably idiosyncratic engagement style, avoided eye contact throughout each clinical session and at times was incomprehensible and engaged in tangential speech. She found that it was thus difficult to ascertain a clear account of his personal history and of the index offences. Further to that, Mr. Maginn was limited in his ability to reflect on events in his life and how he was emotionally affected by them. She added that it was her impression that Mr. Maginn was not purposefully defensive or evasive in that regard, but rather, struggled to recall elements of his life and to identify and connect with his emotional experience.

13. Mr. Maginn is married and he and his wife have three children, born in 2005, 2007, and 2012. He is also has a son from a previous relationship. When asked by the psychologist what he found attractive about his wife, he responded that he did not feel the need to speak when in her company. He explained to the psychologist that he did not want to live in Spain as he was uncomfortable with strangers kissing him on the cheek.

14. The psychologist also conducted interviews with the accused's mother. She reported on his difficult childhood, his difficulty in forming friendships and the fact that his self-care has been poor throughout his life. His clothes are often unclean, he is frequently unshaven and is generally dishevelled in appearance.

15. Insofar as his relationship with Mr. Gilroy is concerned, Mr. Maginn told the psychologist that he had first met him in his early 20s and that they shared a love of cars. He was aware that Mr. Gilroy was involved in criminal activity and had served a number of custodial sentences. Mr. Maginn described Martin Gilroy as a close friend, confidante, and a person who had his best interests at heart. When asked to provide examples of this, Mr. Maginn reported that when his grandfather died, he inherited a significant sum of money from him which he subsequently gave to Martin Gilroy to keep safe. Mr. Maginn stated that he did so on the advice of Martin Gilroy in order to ensure that he would not spend it recklessly. Mr. Maginn reported that having provided Martin Gilroy with the money, Mr. Gilroy would then choose when to give over small amounts of same. Mr. Maginn described this as caring behaviour on Martin Gilroy's part.

16. Based on this account, the trial Judge's view that Mr. Gilroy was in a position to ask Mr. Maginn to do him a favour, with the expectation that the request would be complied with was a very understandable one and a very rational one.

Discussion

17. As we have already stated, in expressing our agreement with prosecution counsel, this is an unusual and difficult case. The amount of drugs involved is very considerable indeed and that the drugs were heroin and cocaine adds a further dimension of seriousness. In the ordinary course of events, it would seem inevitable that anyone involved in such an offence could expect to receive a substantial prison sentence and that would be the case even if there were circumstances present which permitted a departure from the mandatory presumptive minimum. Yet here, the very experienced sentencing Judge took what was, for him, the highly unusual step of suspending the sentence other than the period served in custody between his arrest on 19th July 2017 and the sentence hearing on 23rd February 2018. Not every Judge would have adopted the same approach, but the Court has concluded that there were sufficiently unusual features present relating to both the offence and the offender which meant that it cannot be said that the Judge's approach was an impermissible one. A wholly or an almost wholly suspended sentence for a s. 15A Misuse of Drugs Act offence is and will remain highly unusual. There were, however, highly unusual and specific circumstances that might properly be described as wholly exceptional in issue in the present case. The unusual combination of the factors present, in relation to both the offence and the offender, are such that it is unlikely that this case will prove a useful comparator in the future.

18. However, faced with a very unusual set of circumstances that he was, we are not prepared to condemn as impermissible the approach taking by the sentencing Judge. He was entitled to reach the decision that he did.

19. Accordingly, we refuse the application of the Director for a review of sentence.