



THE COURT OF APPEAL

**Mr. Justice Sheehan
Mr. Justice Mahon
Mr. Justice Edwards**

Appeal No. 23/14

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Shane Ferguson

Appellant

Judgment of the Court (ex tempore) delivered on the 22nd day of June 2015 by Mr. Justice John Edwards

1. This is a case in which the appellant pleaded guilty on 19th April 2013 to three drug offences before Limerick Circuit Criminal Court, comprising one count of possession of a controlled drug, the market value of which amounted to €13,000 or more for the purposes of selling or otherwise supplying it to another contrary to s.15A of the Misuse of Drugs Act 1977 as amended, one count of possession of a controlled drug for the purposes of selling or otherwise supplying it to others contrary to s.15 of the Misuse of Drugs Act 1977 and one count of possession of a controlled drug contrary to s.3 of the Misuse of Drugs Act 1977.

2. The appellant was sentenced on 17th January 2014 to seven years' imprisonment on count number 1, this being the s.15A count, and the sentence was to run from 25th May 2012. No order was made on the other two counts they being effectively taken into consideration. The appellant now appeals against the severity of his sentence.

Relevant background

3. On 25th May 2011 the gardaí observed a navy Ford Transit van delivering boxes to a cottage situated in the Lisnagry area of rural Co. Limerick about five miles from the centre of Limerick city. It was established that this Ford Transit van had been hired by the appellant from Hire A Van on the Ballysimon Road in Limerick on the morning of 25th May 2012. Prior to hiring the van the appellant had obtained insurance for his intended use of this van from an insurance broker in Limerick city. Both of these transactions were captured on CCTV. The appellant had to procure insurance for the use of this van as his existing insurance was not sufficient.

4. The appellant then drove the van to Poyntzpass, Newry, Co. Down where he collected a significant quantity of cannabis, that is the cannabis that is the subject matter of this prosecutions. A number of stickers were torn from the exterior of the van and were found in a bin at the address from where the cannabis was collected in Poyntzpass in Newry. The appellant drove the van from Newry south to Co. Limerick. The progress of the van was tracked on the motorway system. The appellant was also captured on CCTV paying at a toll station in the course of his journey. At about 7 p.m. the van was observed close to Ahane school in Co. Limerick.

5. The appellant met an accomplice, Ciaran Nevin, who was driving a Mazda 626 motor car. The two individuals swapped vehicles, Mr. Nevin drove away in the van towards a cottage in Murroe, Co. Limerick. Mr. Ferguson drove away in the Mazda 626. CCTV footage taken from Finnegans, which is a well known licensed premises, connected the appellant to Mr. Nevin's Mazda. Mr. Nevin moved five large cardboard boxes from the van into the aforementioned cottage. When Mr. Nevin drove away from the cottage his vehicle was stopped and searched by members of an garda síochaná. Later armed with a search warrant the gardaí entered the cottage using a key that Mr. Nevin had in his possession.

6. It was ascertained that the boxes, which contained the cannabis and which were located in the cottage, had stickers placed on them from UPS which is a well known delivery company. It was possible having regard to the labelling on the boxes to reconstruct the movements of the consignment. It was noted that the boxes had travelled by air from Eindhoven in the Netherlands having left at 9.20 a.m. on 24th May 2011. The consignment passed through Cologne and Germany and arrived at Castle Donnington airport in England on 25th May 2011 at 04.38 a.m. The consignment then arrived at Newtownabbey airport on 25th May 2011 at 07.44 a.m. and it was possible then to establish that the boxes had been delivered to an address at Poyntzpass at 10.05 a.m. – all on 25th May 2011.

7. It was established in evidence that a consignment of cannabis, the subject matter of this prosecution, was delivered as part of a sophisticated operation involving the supply and distribution of cannabis. The quantity involved was very large. It amounted to in excess of 52.2 kilos with an established street value of €1,450,138.

The sentencing hearing

8. The court heard evidence of the relevant facts from Det. Gda. Crawley, who is based at Roxboro Garda Station in Limerick. In response to a query from the sentencing judge the Det. Gda. Crawley opined that the appellant's culpability was higher than that of his associate, Mr. Nevin.

9. The court was told that the appellant was born on 6th July 1967 and was forty four at the time of the offence. He was a married man, but separated, and was an un-employed carpenter. He had eleven previous convictions, the majority of which were for road traffic offences. However, he had two convictions for assault causing harm contrary to s.3 of the Non Fatal Offences against the Person Act 1990 and one conviction for producing an article capable of inflicting serious injury in the course of a dispute contrary to s.11 of the Firearms and Offensive Weapons Act 1990. All three of these charges arose out of the same incident. He received suspended sentences of four months on each of the assault charges and the s.11 charge was taken into consideration.

10. The court heard evidence from a Mr. Duggan, a building contractor, who had previously employed the appellant for a number of years before the downturn in the building trade had forced him to let the appellant go. Mr. Duggan spoke highly of his skills as a carpenter, expressed shock at the appellant's involvement in these drug offences and stated that when the appellant became free

again he would be in a position to offer him work.

11. The court was also furnished with a number of documents consisting of certificates of participation and achievement on a programme of drug counselling and a report concerning the appellant's involvement with the Bedford Row project.

12. However, in response to a question to Det. Gda. Crawley from prosecuting counsel concerning whether the appellant in the course of being interviewed following his arrest had offered drug addiction as an excuse or explanation for being involved in these offences the Det. Gda. replied 'no'.

13. The following matters were highlighted on behalf of the appellant:-

- (a) The appellant had entered an early plea of guilty.
- (b) The appellant had made admissions in respect of the offence.
- (c) The appellant did not own the drugs.
- (d) The appellant had spent time in custody participating in educational studies and obtaining certificates in addiction studies.
- (e) The appellant was abusing drugs at the time of the offence, but that he had dealt with his addiction by the time of the sentencing hearing.
- (f) The appellant did not display any trappings of wealth.
- (g) The appellant had no previous convictions for any offence related to the drugs.

14. In the course of sentencing the appellant the trial judge said the following, *inter alia*,

"Now, a judge in deciding on a sentence has to do a number of different things. He has to take into account the aggravating factors which are to be held against the accused and also the mitigating factors, the factors that are taken into account in favour of an accused, balance the two and then arrive at the appropriate sentence. It is also a factor to be taken into account by the judge as the strength of the case of the prosecution in giving a value to the plea of guilty, because the plea of guilty is clearly a mitigating factor. The strength of the case for the prosecution in this case is the prosecution submits that it had, of course, a case against the two accused. There was CCTV which showed which caught Mr. Ferguson hiring and insuring the van in question. There was CCTV footage of Mr. Ferguson travelling to Poyntzpass in Northern Ireland. The CCTV cameras caught him at the various toll gates which were on the motorway between Limerick and Newry. CCTV footage caught Mr. Ferguson arriving at Finnegan's Public House in Poyntzpass. Here, it appears, that Mr. Ferguson threw stickers into a waste paper basket, which were discovered later which connected stickers which had a connection to the van. Finally, the gardaí were able to gain access to the cottage in question in Lisnagry with a key which had been found on Mr. Nevin. Now the mitigating factors are in respect of both accused – that they had pleaded guilty and in addition to that there gave an early indication of that plea. They also made admissions in the course of the gardaí interviews. But the value of the plea has to be considered in the context of the strength of the case for the prosecution, as I have said. Neither man has any trappings of wealth. In other words, they do not seem to have a life style of wealth consistent with drug trafficking on a large scale. It is conceded by the prosecution that both men were of material assistance to the prosecution. It is conceded by the prosecution that both men were acting as couriers, rather than as owners of the drugs, what are often called mules. The aggravating factors in respect of both accused are, as Mr. O'Sullivan has said, this was a sophisticated operation and this find of a large amount of drugs by the gardaí was important to the gardaí in the disruption of this operation. Secondly, the amount found of 52 kilos at a value of over a €1m was a very large amount of drugs and this is a fact to be taken into account as a prescriptive minimum sentence of ten years, which has to be imposed if the value of the drugs found is €13,000 or more. That has to be imposed unless there is a reason which would make it unjust to do so. A €1m is many times the factor of 13,000 and that is the reason I mentioned that prescriptive minimum. There are aggravating factors too in respect of Mr. Ferguson alone. That is to say that he was the more involved of the two, according to gardaí evidence. It seems that while it is said that he has a drug addiction, Mr. Ferguson that is, which is has addressed and cured while he is in prison, he never said in any of the interviews that feeding of an addiction was a motivation behind the commission of these offences. Mr. Nevin, it appears, did not have a drug addiction at all. Mr. Ferguson was born on 6th July 1967 and he is now forty six years old. He is separated from his wife. He is a carpenter but because of the economic circumstances at the moment he is unemployed. He has eleven previous convictions, one of which is for an assault causing harm. Mr. Duggan, a plasterer running a maintenance business for public houses, gave character evidence on his behalf. He said Mr. Ferguson is an excellent carpenter, has been working for him for four years and that he will offer him employment again."

15. And there is a short additional quotation which follows a little bit further on in the judgment as follows:-

"Now, as I have said, that is I should say the maximum for these offences is life imprisonment and as I have said there is a prescriptive minimum of ten years which I must impose unless there are reasons which would make it unjust to do so. Reasons connected with the offence and reasons connected with the accused. Having regard to, in particular, the sophisticated nature of this operation of Mr. Ferguson I am going to impose a sentence of seven years. Mr. Nevin's involvement is considerably less and I impose a sentence of five year, because of, first, there plea of guilty, second, that there were of material assistance to the gardaí in their investigations, it would be unjust to impose the prescriptive minimum."

Grounds of appeal

16. The appellant contends that his sentence ought to be set aside on the grounds that it was excessive and specifically:-

- 1. The sentencing judge erred in differentiating to the extent that he did between the appellant and his co-accused in circumstances where the appellant contends that the difference in degree of involvement between the two was marginal.
- 2. The sentencing judge erred in treating the appellant's failure to mention his drug addiction when interviewed as an aggravating factor.

Discussion

17. Counsel for the respondent submitted that this case raises a number of issues for consideration by this court. These include:-

- (a) the manner in which the sentencing judge should resolve factual disputes in assessing the evidence;
- (b) the principles governing the sentencing of both offenders;
- (c) the principles applicable to s. 15A drugs offences.

18. The court broadly agrees with this submission. However, in this case there is not so much a factual dispute as a contention that there was no sound evidential basis for the sentencing judge to have justifiably differentiated between the co-accused in assessing the culpability of each of them respectively.

19. It was urged on the court on behalf of Mr. Ferguson that Mr. Nevin's culpability was, if anything, greater than the appellant's in circumstances where he had rented the cottage under a false name specifically for the purposes of warehousing the drugs pending their ongoing distribution, where he had received the contraband and placed it in storage, where he had admitted to have also done so on other occasions in the recent past and where he had, that very morning, collected a mobile phone specially for use in connection with the handling of these drugs and which he admitted it was intended to be disposed of in a nearby river once delivery was taken.

20. Conversely, counsel for the respondent pointed to the detail of the appellant's involvement as disclosed in the evidence, much of which has been summarised earlier in this judgment. This included evidence that the appellant had been contacted in advance by those who were clearly the owners of the drug shipment, that he was told on the morning what to do, that he was given money to do it, that he had rented the van in his own name and taken out additional insurance to facilitate the rental, that he had made the round trip to Newry, that he had removed stickers from the van to make it less identifiable, that he had rendezvoused with Mr. Nevin on his return, that he had swapped vehicles with Mr. Nevin and that he had then proceeded to Finnegans ostensibly to await the return of Mr. Nevin with the van.

21. Counsel for the respondent also submitted that it was uniquely for the sentencing judge to analyse the evidence. He submitted that the trial judge had taken great care. He submitted that the trial judge's decision was grounded on the facts. The trial judge did not just act on the garda's opinion as to where the greater culpability lay, rather he carefully assessed all of the evidence and arrived at a view that he could, and should, differentiate between the involvement of the two accused.

22. In counsel's submission, there was a rational basis for differentiation. Moreover, it was submitted that a sentencing judge must be afforded a substantial margin of appreciation in his assessment of the evidence.

23. This court readily accepts that an appellant court should be slow to seek to look behind any assessment of the evidence by a sentencing judge. By the same token, it is clear from *The People Director of Public Prosecutions v. Poyning* [1972] Irish Report 402 and also the decision in *The People DPP v. Conroy No. 2* that where an appellant court has concerns about ostensibly disparate sentences imposed on parties to the commission of the same offence, it is entitled to investigate if different sentences were, in fact, justified having regard to the character and antecedents and the respective culpability of the individual offenders. The court has such concerns in the present case.

24. Having examined the character and antecedents and the respective culpabilities of the individual offenders in this case, the court is not satisfied that there was, in fact, a rational basis for differentiating between them, at least to the extent that the sentencing judge did.

25. That having been said, the court is entirely satisfied that the sentence of seven years imprisonment imposed on the appellant was, in fact, appropriate and in accordance with recent jurisprudence of this court such as in *The People DPP v. Ryan* [2015] IECA 10 (unreported, Court of Appeal, 19th January 2015) and *The People DPP v. Bowen* [2015] IECA 95 (unreported, Court of Appeal, 1st May 2015).

26. The difficulty in this case is that the sentence imposed on Mr. Nevin was arguably very lenient, possibly even unduly lenient, although this court has not been asked to review it. One of the principles underlining *Poyning's* case was what Finlay J. referred to as "*The substantial sense of grievance at unfair treatment.*" which may be caused by disparate sentences. It is clear from the case of *The People (Director of Public Prosecutions) v. Duffy* [2003] 2 I.R.192 that this court has jurisdiction to intervene in such circumstances in the interest of justices but also for the maintenance of public confidence in the administration of justice. Consistency in sentencing and predictability are important values in the law of sentencing.

27. This court therefore finds that the sentencing judge erred in principle in differentiating between the two accused to the extent that he did and will uphold the appeal on the first ground. The court is not disposed to uphold the second ground of appeal.

28. The court is satisfied that what the trial judge was concerned about was the fact that the appellant had not been coerced or motivated in any way by circumstances of addiction to drugs to become involved in this crime, and that, on the contrary, the evidence suggested that he had done so for financial gain. Although the judge's remarks were somewhat infelicitously expressed the court is satisfied that the judge did not, in fact, regard the failure to mention his drug addiction at interviews as being an aggravating circumstance. Rather, he was legitimately pointing to the fact that the appellant himself had failed to produce any evidence that he had been motivated by, or had acted on foot of, his drug addiction, and that to have become involved purely for financial gain was an aggravating factor.

29. Moreover, the evidence of the appellant's own witness, Mr. Duggan, indicated that the appellant had been holding down a full time job until some months before the incident in which he was arrested, and was ostensibly functioning normally and displaying none of the usual symptoms of severe addiction difficulties.

30. Accordingly, in circumstances where the court has found an error of principle as indicated, it will now proceed to quash the sentence of seven years imposed on the appellant and to sentence him afresh.

31. In accordance with established jurisprudence the parties were invited on a contingent basis to place any additional materials before the Court that they might wish to have taken into account. A number of testimonials were submitted on behalf of the appellant

indicating how he had been getting on in prison and these will be taken into account.

32. The aggravating and mitigating factors are well rehearsed at this point. Suffice to say that the court wishes to indicate that it regards this as being a very serious case. The quantity of drugs was really very large and the street value was in the seven figure range. Any offence involving that level of drug trafficking and drug possession and supply must necessarily attract a substantial custodial sentence.

33. The court has already indicated that it does not consider that there was a rational basis for differentiating between the circumstances of Mr. Ferguson and his co-accused, and also that Mr. Nevin, the co-accused, was dealt with significantly more leniently than Mr. Ferguson. The court recognises that in those circumstances Mr. Ferguson may harbour some sense of grievance along the lines referred to by Finlay C.J. in the *Poyning's* case.

34. Nevertheless, it is the court's view that the sentence of seven years imprisonment imposed on Mr. Ferguson's was, in fact, an entirely appropriate sentence having regard to the gravity of the crime and the court's view of his culpability. But in recognition of the possibility that a sense of grievance is harboured and in recognition of the need to maintain public confidence in the administration of justice and to promote consistency and predictability in sentencing, the court, as a matter of discretion, has decided to reduce the sentence imposed by the learned trial judge by one year and will impose a sentence of six years in substitution for the sentence of seven years imposed by the sentencing judge.

35. The court has been very strongly influenced in deciding to exercise its discretion in this respect by the positive testimonials that have been handed in this afternoon showing a high level of positive engagement and work by Mr. Ferguson while in custody. The court is impressed by the efforts that Mr. Ferguson has been making towards his rehabilitation and that, amongst other things, has influenced this court in deciding to exercise its discretion in the manner in which it has done so.

36. The message must still go out, however, that insofar as this Court is concerned seven years was not an inappropriate sentence for this crime. The problem was that for recognisable reasons a sense of grievance might be harboured as between the two accused in circumstances where one was treated more leniently than the other despite there being no ostensibly rational basis for that differentiation.