THE COURT OF APPEAL

Edwards J.
McCarthy J.
Kennedy J.

Record No: 212/2019

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

GABRIEL OLATUNBOSUN

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 1st day of July 2020 by Mr. Justice Edwards

Introduction

1. On the 22nd of October, 2018, the appellant came before Cork Circuit Criminal Court and pleaded guilty to one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, and to one count of possession of a knife contrary to s. 9(1) of the Firearms and Offensive Weapons Act, 1990. Sentencing was adjourned to the 17th of May, 2019.

2. On the 14th of May, 2019, the appellant again appeared before Cork Circuit Criminal Court, having been returned on a signed plea to the following six charges: three counts of unlawful possession of a controlled drug (one each in respect of quantities of cannabis, cocaine and MDMA respectively), contrary to s.3 and s. 27 of the Misuse of Drugs Act, 1977 ("the Act of 1977") (as amended by Section 6 of the Misuse of Drugs Act 1984); three counts of unlawful possession of a controlled drug for the purpose on selling it or otherwise supplying it to another (again, one each in respect of quantities of cannabis, cocaine and MDMA respectively), contrary to s. 15 and s. 27 of the 1977 Act. Each charge arises from essentially the same set of circumstances occurring on the 8th of October, 2018, while the appellant was on bail in respect of the s. 3 and s. 9(1) offences.

3. The appellant affirmed his signed plea and was remanded in custody to appear for sentencing on the 17th May, 2019, the same date as the sentence hearing in respect of the s. 3 and s. 9(1) offences.

4. The appellant appeared before Cork Circuit Criminal Court on the 17th of May, 2019, and received a sentence of 18 months imprisonment in respect of the s. 3 assault charge, and 6 months imprisonment in respect of the s. 9(1) Firearms and Offensive Weapons charge. In respect of the drug charges, the appellant was sentenced to 4 years imprisonment in respect of each of the three s. 15 charges with the final 12 months suspended. These three sentences were to run concurrently to each other but consecutive to the sentence imposed in respect of the s. 3 assault charge. The three s. 3 drug possession charges were marked as taken into consideration.

5. The appellant now appeals against the severity of the sentences imposed in respect of the drugs offences.

Background Facts

6. After hearing evidence from Garda Brian Murphy in relation to the assault and weapon charges, the court heard evidence from Detective Garda Declan Keane in respect of the drugs charges.

7. Detective Garda Keane confirmed that on the 8th of October, 2018, he obtained a warrant to search the dwelling of the appellant at Doonlea, Union Quay, Cork, on foot of an intelligence-led operation concerning drug-dealing activities. Upon searching the premises, gardaí noted that it was a communal shared house, in which the appellant had a bedroom. In this bedroom, gardaí found a mixing agent, cannabis, cocaine and MDMA. In total, €6,107 worth of controlled drugs were seized, as well as two-and-a-half ounces of mixing agent. In addition to this, €3,900 in cash was found, along with weighing scales, drug bags, and tick lists of customers. The appellant was arrested and brought to the Bridewell Garda Station. He was detained under s. 2 and interviewed on two occasions, during the course of which he was co-operative to the extent of making admissions in relation to the extent of his drug dealing although he was not prepared to name his supplier or the person who had provided the apartment to him. The appellant revealed he was actively selling to around 50 or 60 customers in Cork city centre. He employed a two-shift system wherein what Detective Garda Keane colloquially termed as the "class A" drugs (i.e., those comprising MDMA and cocaine) were sold at night, and the "class B" drug, (i.e. cannabis), was sold during the day. While it is clear what the Detective Garda was referring to, it should be observed that unlike in some other countries, the Irish Misuse of Drugs legislation does not formally assign specific classifications such as "A", "B" etc to different types of drugs. In any event, the appellant took full responsibility for all the weighing, quality control, bagging and selling, associated with his drug trading, and admitted that he was making around €4,000 a month, and had been running the operation for around 12 months. At the time of his arrest, the appellant claimed to have owed other parties €2,000 for drugs, and that he was owed €10,000 for drugs, and that he had a profit of €8,000 to collect. While his bank account would show negative funds, the appellant did not keep his money in financial institutions.

Circumstances of the Appellant

8. The appellant at the date of sentencing was 22 years old. He had no previous convictions before the charge of s. 3 assault. He was born in Nigeria and moved to Ireland at the age of around 3 or 4 with his parents and siblings. He moved with his family to Canada several years ago after completing the leaving certificate at age 17, but returned alone to Ireland as he feels at home here. Although he has been employed in various jobs, he was unemployed at the time of sentencing. At the time when the appellant was arrested for the drug offences, he was on bail in respect of the s. 3 assault, although the appellant did come forward on a signed plea of guilt.

9. Although the appellant is not addicted to any drug in the traditional sense, it may be said that he has had issues with cocaine use, which has had a negative impact on his life. He

began taking cocaine in 2016, at the age of 19. He was at that time employed in a call centre. He lost that job due to bad attendance and falling asleep. The appellant claimed that he encountered difficulty paying rent where he had been living at that time. He claimed to have at this stage owed money to a drug dealer due to his cocaine usage, and to have been unable to afford his rent, leading to him being offered a room in the Union Quay house rent-free on the condition that he use it as a base from which to start dealing drugs. However, this was not mentioned by the appellant during the course of his interview with gardaí, and Garda Keane was sceptical of this narrative of drug dealing due to financial necessity because the appellant had neglected to claim the social welfare he was entitled to, which would have comprised €206 of the €255 per week which he says he was previously required to pay for accommodation and which he claimed not to have been able to afford without recourse to drug dealing.

Remarks of Sentencing Judge

10. The sentencing judge made the following remarks in respect of both Bills of Indictment that were before him for sentencing. It is necessary to include the remarks referable to Bill No CKDP 275/2018 even though those sentences are not appealed because they are nonetheless relevant in one particular respect, to be alluded to later.

> *"The first matter to be dealt with is the assault in the nightclub in November of 2017. That has a number of aggravating factors. There's the fact that the assault was perpetuated or continued with a bottle or glass, and then the significantly aggravating factor, that he kicked the person while down and defenceless. They are significant and serious aggravating factors, and even with the plea I will take those factors into account; I will set a sentence of three years. He has pleaded guilty, he did give a good level of co-operation, including identifying himself on the night, and his friends, and I stress it comes from his friends in view of what I have to deal with subsequently, have offered some element of compensation, and I direct that that be paid over to the victim. There is no doubt that the victim suffered very nasty injuries, including permanent scarring, in what was for him a completely unprovoked, vicious assault; but I think, doing the best I can, an 18-month sentence backdated to whatever day he went into custody for the assault, and that is taking into account the fact that he has had no previous convictions. The level of violence offered on that night deserves, even with this man's history, a custodial sentence. Now, the possession of the knife: I haven't seen it, but it looks, even on the photograph a vicious looking item. I'll impose a six-month concurrent sentence for that.*
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> *Now, while he was on bail, he came to the notice of the drug squad, and they got a warrant, searched his premises, and found quite an extraordinary setup, a fully established drug-making system, a mixture of drugs, a mixture of mixing agent, and the cash and accoutrements of the drug trade. He was full in the details he gave as to what he was doing, and those details would suggest and only lead to the conclusion that he was active, significantly involved and a provider of drugs on a continuous basis in the city. He was doing this without any remorse, without any*

consideration of the effect, and whereas he may have been a casual drug user himself Detective Keane is satisfied that he was not an addict. He appears to have been making significant sums of money out of his drug-dealing. It was funding a lifestyle that he found appropriate and which was otherwise well beyond his means, funding it to such an extent that he couldn't even be bothered either to keep up employment or seek social welfare. So, this is a significant and a serious case which, in all the circumstances, even with a plea, I think the appropriate sentence is six years. Now, I am aware and I accept what Mr Justice McCarthy says in relation to, "Special consideration must be given to persons who come forward on a signed plea". So, what I will do is I will vary, as it were, a headline sentence of six years to one of four years in this case. I am aware that that has to be consecutive to the sentence that I've just imposed on him for the assault. Mr O'Flynn says that he has some drug habits, the extent of that I'm of the view that Detective Keane is correct, but for the protection of the public it may be of benefit to structure the sentence in the following way, to suspend the final year of the consecutive sentence on condition that on his release he will be under the care of the probation service and obey all their directions for a period of 12 months".

Grounds of appeal

1. The appellant's Notice of Appeal complains about the severity of his sentence on four substantive grounds:

    1) The sentencing judge failed to give due weight the appellant's early plea of guilty;

    2) The sentencing judge failed to give due consideration to the principles of totality when imposing the sentence under appeal;

    3) The sentencing judge failed to give due consideration to the appellant's lack of previous convictions for similar offences;

    4) The sentence imposed was excessive in all the circumstances.

2. However, the written submissions filed by the appellant address additional matters not pleaded. When this was pointed out to counsel for the appellant he indicated that in the circumstances he wished to making a late application to amend his grounds. We indicated that we would allow him to proceed de bene esse and would rule on his application in the course of our judgment at the end of the case. Counsel for the DPP offered no observations on the application to amend the grounds.

3. The grounds as reformulated in the appellant's written submissions are that:

    i. The sentencing judge erred in settling the headline sentence at too high a level, and consequently the sentence ultimately imposed was disproportionate in all the circumstances.

    ii. The sentencing judge did not sufficiently take into account the personal circumstances of the appellant.

iii. The sentencing judge did not apply due consideration to the principle of totality when sentencing the appellant.

Ruling.

4. No explanation was offered as to why a formal motion to amend the grounds was not brought. The Rules of the Superior Courts should be adhered to, and it is not satisfactory that a party should seek to argue grounds different from those pleaded without having received leave to do so. We are not therefore disposed to allow any amendments at this stage. That having been said we wish to offer the following observations. Item (iii) in the reformulated grounds is clearly covered by original ground (2), so there is no difficulty there. We are also prepared to view item (i) in the reformulated grounds as being embraced by original ground (4), on the understanding that the reference therein to a "headline" sentence relates to the sentencing judge's starting point, i.e., his provisional post mitigation sentence of six years. We are not, however, prepared to allow reformulated ground (ii) to be argued, save to the extent that it relates to the early plea, and the absence of previous convictions for the same type of offending which complaints are already specifically made in grounds (1) and (3) in the original Notice of Appeal. The Court is not prepared to contemplate an expansion at this point to include complaints such as those which counsel for the appellant now seeks to advance concerning alleged insufficient consideration of the appellant' age, foreign nationality, lack of friends or relations or social network of any sort in the country, and so forth. If it was considered that the sentencing judge had erred in that respect these complaints should either have been included in, or embraced by, a suitable plea or pleas in the original Notice of Appeal, or, if overlooked, a formal motion on notice to the DPP should have been brought seeking to add additional grounds, grounded upon an affidavit explaining why they were not included in the original grounds.

Discussion and Decision.

5. The first thing to be said is that the sentences imposed on Bill No CKDP 275/2018 have not been appealed, and in particular the most significant of those sentences, namely the eighteen-month sentence in respect of the s. 3 assault has very wisely not been appealed. This was a manifestly proportionate sentence. The sentencing judge had nominated a headline sentence of three years that was undeniably appropriate to the gravity of the offence given the aggravating factors correctly identified in the judges sentencing remarks. However, in circumstances where the appellant was of previous good character, had been co-operative and had pleaded guilty he was entitled to a significant discount for mitigation. The sentencing judge discounted by 50% which was generous but within the range of his discretion. Accordingly, the appellant could have had no complaint about that sentence.

6. Be that as it may, the eighteen months sentence nevertheless assumes a relevance in the context of the sentences imposed for the matters which are the subject of the present appeal, namely the three concurrent four-year sentences imposed in respect of the s.15 drugs offences, with the final one year thereof suspended, because they were each made consecutive to the longest sentence imposed on Bill No CKDP 275/2018, i.e. to the eighteen-month net sentence imposed for the s. 3 assault. The judge had no discretion

regarding consecutivity because the drugs offences were committed while the appellant was on bail for the offences on Bill No CKDP 275/2018. The aggregate or total sentence to be served by the appellant, and in respect of which he now appeals, was therefore one of five and a half years imprisonment with the final year thereof suspended.

7. Insofar as the appellant's specific grounds of appeal are concerned his first complaint is that the trial judge failed to give due weight to his early plea of guilty. We are satisfied that there is absolutely no substance to this complaint for reasons which we will elaborate upon.

8. A close examination of the sentencing judge's remarks indicates that, on this occasion and unlike when he was sentencing for the s. 3 assault, he did not fix a headline sentence in the sense in which it is normally spoken of in the jurisprudence of this court, i.e., a pre-mitigation sentence nominated in the first stage of our commended semi-structured approach to sentencing. Rather, on this occasion, applying the instinctive synthesis approach, he initially determined upon a post mitigation sentence of six years imprisonment, remarking that this was "*a significant and a serious case*" and that "*even with a plea, I think the appropriate sentence is six years*".

9. However, the sentencing judge did not stop there. Although his post mitigation figure was one of six years initially, this was to prove to be a provisional figure only as he later revisited the unspoken degree to which he had already discounted for mitigation in circumstances where there was a specific additional factor to be taken into account in the appellant's favour, which he had not thus far taken into account; namely, that the appellant had not only pleaded guilty but had in fact signed a plea in the District Court. Accordingly, the plea in this case was the earliest possible plea of guilty. To take account of this the sentencing judge reduced his initial, or provisional, post mitigation sentence of six years imprisonment by an additional one third, or 331/3 per cent, leaving a net sentence for the drugs offences of four years imprisonment. This was a very generous level of additional discount. We stress that this was ***additional*** discount.

10. It is unclear as to how much initial discount was given for the basic circumstance of having pleaded guilty (ignoring that it was at the earliest possible opportunity) in the determination of the provisional post mitigation sentence of six years because the sentencing judge opted to sentence on an instinctive synthesis basis. However, given the existence of the plea, no previous convictions and some co-operation (albeit limited) the overall discount could not reasonably have been less than 25%, at least half of which would have been attributable to the plea. A six year post-mitigation sentence approached on that basis would imply a headline sentence of eight years if a semi-structured approach had been adopted, which would have been an appropriate starting point for offending of this type given the explicit sentencing policy statements of the Oireachtas with respect to possession of drugs for sale or supply, and the specific circumstances of this case including the nature and scale of the operation, and the range and value of the drugs involved. The gravity of the offending would have merited an eight-year starting point.

11. In the circumstances we are satisfied that, if anything, the sentencing judge was generous towards the appellant in the total discount that he afforded to the appellant for his plea. While we cannot be certain as to the exact overall percentage discount specifically attributable to the plea, we think it very likely that the sentencing judge more than adequately discounted for this factor. There is nothing before us to suggest that the plea was not properly considered. Moreover, the transcript establishes unequivocally that the early nature of it was specifically and additionally rewarded. We find no error of principle and accordingly reject this ground of appeal.

12. The second ground of appeal complains that the trial judge failed to give due consideration to the principle of totality when imposing the sentence under appeal. We are not impressed with this ground in circumstances where the sentencing judge suspended the final year of the aggregate sentence. The aggregate of the two sentences was not greatly disproportionate but we are of the view that some modest adjustment was required to ensure proportionality. The suspension of the final year of the sentence was enough to ensure proportionality.

13. We accept that in doing so the sentencing judge did not specifically allude to the totality principle. Moreover, while purporting to suspend a sentence ostensibly to incentivise future behaviour modification, the sentencing judge made it clear that he was not persuaded that the appellant required rehabilitation in the sense of some positivistic intervention to address an addiction problem or such like. He indicated that he accepted the evidence of Detective Garda Keane to the effect that the appellant is a social drug user rather than a drug addict. However, he added "*but for the protection of the public it may be of benefit to structure the sentence in the following way, to suspend the final year of the consecutive sentence on condition that on his release he will be under the care of the probation service and obey all their directions for a period of twelve months*."

14. Manifestly, the sentencing judge was equivocal about the need for rehabilitation in this case. Despite this, he suspended the last year, although there was little evidential basis for doing so on strictly rehabilitative grounds, whatever about on some other grounds such as, possibly, incentivising reform and/or to ensure proportionality. As best it can be divined, the sentencing judge's thinking appears to have been that suspending a portion of the sentence, although not required to incentivise rehabilitation, would nevertheless be in the public interest in that it might none the less incentivise the offender him to reform through a "carrot and stick effect" (by, on the one hand, addressing the offender as a moral agent and appealing to him to agree not to re-offend, in return for which he would receive the incentive of having a year of his sentence suspended (the "carrot"); while at the same time, and in a pragmatic way, seeking to also deter him from re-offending by holding over him the threat of having to serve the extra year in the event of getting into trouble again (the "stick"). This approach was certainly within the sentencing judge's discretion.

15. While it would have been better if the sentencing judge had specifically referenced the totality principle, and if he had stated that the suspension of the final year was also partly

intended to give effect to that, we are satisfied that no additional degree of suspension was required, nor indeed would it have been merited. To the extent that the appellant got the benefit of the suspension of a year of his sentence, albeit on stated grounds which did not specifically refer to totality, any slight disproportionality in the original aggregate of the two sentences was de facto adequately adjusted for by this suspension regardless of the stated basis for it. With the suspension of the final year, the aggregate sentence was then unquestionably proportionate in our view. We therefore reject this ground of appeal, also.

16. The third stated ground of appeal is that the trial judge failed to give due consideration to the appellant's lack of previous convictions for similar offences. It has never been the law that a lack of previous convictions for similar offences gives rise to mitigation. A lack of any previous convictions simpliciter is, of course, a mitigating factor in that the person being sentenced is entitled to be treated as being of previous good character. Moreover, an offender may suffer progressive loss of the mitigation that goes with this, if he/she has accrued convictions at the time of sentencing. However, that was not the case here. It was specifically acknowledged by the trial judge in this case, in his combined sentencing remarks which addressed both bills of indictment, that the appellant had no previous convictions. We are therefore satisfied that the sentencing judge was alive to, and did give due consideration to, the fact that the appellant was of previous good character. Accordingly, we reject this ground of appeal also.

17. The final ground of appeal is a generic ground suggesting that the sentences imposed were excessive in all the circumstances. As already stated, we interpret this as a complaint that the sentencing judge started at too high a point on the scale. We do not agree. Given, the evils of drug dealing generally and the harm that it does; the specific legislative policy outlined by the Oireachtas in the Misuse of Drugs Acts with respect to the unlawful sale and supply of controlled drugs; the fact that the appellant's drug dealing enterprise was being conducted for purely commercial reasons, the extent of the appellant's dealing, and the several different types of drugs that he was dealing in, the fact that these offences were committed while the appellant was on bail for the assault matter, and the fact that he exhibits no remorse, we consider this offending to have been in the mid-range in terms of its gravity. We have already said that if the semi-structured approach to sentencing was being adopted the case would merit a headline sentence of eight years imprisonment as a starting point.

18. We have considered the comparators put before us but reject them on the basis that the circumstances of this case are distinguishable, and that in any case they represent an insufficiently extensive survey to reliably indicate any trend. Moreover, many of the comparators proffered are quite old and they pre-date recent recalibration by this court of its assessment of the seriousness of drug dealing for sale or supply generally, reflected in our recent judgment in *Director of Public Prosecutions v Sarsfield* [2019] IECA 260, although we readily accepted that the circumstances of that case, which involved s.15A, were much more serious than this case. We specifically reject the submission that this appellant was little more than a street dealer. This was a commercial operation using a

fixed base in which the appellant kept and maintained paraphernalia for mixing and cutting a variety of drugs supplied to him on the illicit wholesale market before then retailing them to persons on the street. He was motivated purely by profit, and his offending was not in any sense coerced by duress of circumstances, or chemical compulsion, or the need to feed a habit borne of addiction. Accordingly, his moral culpability was significant, and he required to be sentenced on that basis.

19. While the appellant was entitled to significant discount for the mitigating circumstances on which he was entitled to rely, he was treated generously and fairly in that regard. The sentences ultimately imposed upon him for the drugs offences were very significantly less than they would have been but for those mitigating factors. The ultimate post mitigation sentences imposed for the drugs offences of four years imprisonment were in our view entirely appropriate given the gravity of the offending conduct and the circumstances of the accused. The fact that those sentences were made consecutive to the proportionate and reasonable sentence imposed upon him for the assault offence was a statutory consequence which the sentencing judge could not avoid implementing. Any slight disproportionality arising from the aggregation of both sentences was in our view adequately catered for and ameliorated by the suspension of the final year of the drugs sentences. In the circumstances we do not consider that the overall sentences imposed upon the appellant were excessive, and we also reject this ground of appeal.

20. The appeal is therefore dismissed.