



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.**

Record No. CCA250/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Jerzy Broszczack

Appellant

Judgment of the Court delivered on the 19th day of April, 2016, by Mr. Justice Edwards

Introduction

1. This is a case in which, on the 29th of October, 2014, the appellant pleaded guilty before Cork Circuit Criminal Court to one count of being in possession, on the 5th of February, 2014, of a controlled drug amounting to €13,000 or more, to wit, Cannabis, for the purpose of selling or otherwise supplying the said drug to another, contrary to section 15A of the Misuse of Drugs Act 1977 (the Act of 1977) as amended.
2. The appellant was sentenced to seven years imprisonment to date from the 6th of February, 2014, with the final three years of the said sentence suspended on conditions.
3. The appellant now appeals against the severity of his sentence.

The Facts of the Case

4. According to evidence led from Detective Garda Andrew Manning, members of An Garda Síochána had received a report of suspicious activity on the 29th of January, 2014, at Field's car park, Carrigfadda in Skibbereen, where the occupants of a Renault Mégane were observed to be engaged in some form of transaction with a man from Skibbereen, who was a known drug dealer. A surveillance operation was put in place. The following week, the same car arrived at the same location, and the same drug dealer from Skibbereen was observed to approach the car. He was observed receiving a package from the occupants of the car, following which he attempted to depart the scene. He was stopped by Gardaí, as were the occupants of the car, and all were searched. The package that had been handed over contained €6,000 worth of cannabis, and approximately €2,855 was found in the car.
5. The occupant's of the car were identified as two foreign nationals, the appellant Mr. Jerzy Broszczack and a Mr. David Majewski. They were both arrested on suspicion of having been in possession of drugs for sale or supply, and taken to Bandon Garda Station. They were detained there for the proper investigation of the offence for which they had each been arrested.
6. Both men were interviewed while in detention. Both, in the course of being interviewed, volunteered information that there was a large quantity of cannabis at Mr. Majewski's home at Crookstown, Pullerick, Co Cork. Mr. Majewski claimed that such cannabis was not his, and the Gardaí subsequently became satisfied that this assertion was correct. Following receipt of the information concerning a possible large quantity of cannabis at Mr. Majewski's home, Gardaí proceeded to that location and conducted a search of it. A quantity of cannabis was in fact found at that location, worth approximately €18,000.
7. Both men were charged with various drugs offences arising out of these events. The s. 15A offence to which the appellant pleaded guilty, which plea was acceptable to the respondent who later entered a *nolle prosequi* in relation to all other charges against the appellant, related to the finding of drugs at Mr. Majewski's home at Crookstown, Pullerick, Co Cork.
8. Mr. Majewski separately pleaded guilty to a charge of possession of drugs for the purpose of sale or supply contrary to s. 15 of the Act of 1977. This related to the incident in Field's car park. Again this plea was acceptable to the respondent, who later entered a *nolle prosequi* in relation to all other charges against Mr. Majewski. It was accepted at Mr. Majewski's sentencing that he had played a minor part in the enterprise. It was accepted that his role had been limited to allowing the appellant to keep his (the appellant's) drugs in his house and that he had driven the appellant to Skibbereen to sell cannabis. The evidence was that he was due to receive very little for his participation, and had been a pawn in the enterprise.
9. On the 4th day of November, 2014, Mr. David Majewski had been sentenced to a period of eighteen months imprisonment fully suspended on condition that he enter into a bond to be of good behaviour and keep the peace for a period of eighteen months.
10. In the present case, the sentencing court heard that the appellant was a 25 year old Polish national who had been in the jurisdiction for eight months prior to his arrest. The court was told that he had not worked in this country, was presently unemployed and was not in receipt of social welfare. He had no previous convictions. He was said to have a seven year old daughter in Poland. Both his parents had died when he was a young. The court was told he had only recently lost his 19 year old brother, who had died some weeks previously in a violent incident in Poland.

The Judge's Sentencing Remarks

11. In sentencing the appellant, the sentencing judge stated:-

"Mr. Broszczack has pleaded guilty to an offence of section 15A, the value of the drugs being approximately €18,000. Ms Farrelly is correct in that the value of the drugs is a relevant matter and it is not hugely over the threshold for a section 15A but it is a section 15A case. More importantly from my point of view, this man was selling drugs as a business

venture, and he was doing that after eight months in this country. It's an achievement to get within eight months of arrival to a car park in Skibbereen selling drugs. It's not a great achievement but it's an achievement that takes an amount of preparation and knowledge which I believe he had. There is no doubt that the level of his cooperation, admitting his guilt to this offence and cooperating about the amount and the placement of the drugs in the house is valuable and those two factors alone are sufficient to allow me to depart from the otherwise what's called the mandatory 10 year sentence. To impose a 10 year sentence in this case would in all the circumstances be unjust. I also have to regard the man's personal circumstances. He has no previous convictions. This is his first drugs conviction. And he's from Poland, now distant from family and he has had some tragedy in his family make up and background. I'll take all that into consideration. It is, however, a very serious offence to get involved in this level of dealing and I make no distinction in relation to the type of drug. I don't think I would be legally permitted to do that. I think the appropriate sentence with a deduction is one of seven years. I will suspend the final three years if on his release he departs from this country and remains outside of the country for a period of seven years from the date of his release."

Grounds of Appeal

12. The appellant appeals against the severity of his sentence on the following grounds:

- (i) *That the learned sentencing judge erred in all the circumstances in making it a condition of the suspension of a portion of the sentence that the Appellant enter into a bond to depart from the country and remain outside for a period of seven years from the date of release;*
- (ii) *That the learned sentencing judge did not give sufficient weight and balance to the evidence adduced in mitigation of sentence;*
- (iii) *That the learned sentencing judge did not give sufficient weight to the appellant's plea of guilty;*
- (iv) *That the learned sentencing judge did not give sufficient weight to the material assistance given by the appellant;*
- (v) *That the learned sentencing judge failed to give sufficient weight to the fact that the appellant had no previous convictions;*
- (vi) *That the learned sentencing judge failed to distinguish properly between the appellant and his co-defendant in imposing sentence;*
- (vii) *That the sentence imposed by the learned sentencing judge was, in all the circumstances, unduly severe.*

Submissions on Behalf of the Appellant

13. In oral submissions before this Court, counsel for the appellant conceded that his client would have had no problem if the sentencing judge had sentenced him to seven years imprisonment with the last three years thereof being suspended on the usual terms of entering into a bond to keep the peace and be of good behaviour for a specified period. However, the appellant contends that the sentence actually imposed was disproportionate and unduly severe because the condition imposed in order to avail of the suspended portion of the sentence, that he should immediately leave the country upon his release and remain outside the country for a period of seven years, was unduly onerous. Counsel indicated that whilst he was not abandoning any of his other formal grounds of appeal, they were all being advanced in the context of his central complaint concerning the structuring of his sentence so as to include a portion to be suspended subject to his agreement to comply with the objectionable condition previously referred to.

14. The appellant has drawn the Court's attention to the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513. He has done so for the purpose of seeking to distinguish his case from the *Alexiou* case, which indeed counsel for the respondent relies upon in her submissions as supporting her client's position.

15. The *Alexiou* case had concerned a South African national who had pleaded guilty in the Circuit Criminal Court to the offence of unlawful possession of a controlled drug for the purpose of selling or otherwise supplying the drug. He was sentenced to four years imprisonment suspended on the condition that he leave the State immediately. The Director of Public Prosecutions sought a review of the sentence on the grounds of undue leniency. Giving judgment on behalf of the Court of Criminal Appeal, dismissing the application, Murray J. stated *inter alia* (at pp. 524-527): (1) that the condition that the accused leave the State was not an executive act in the nature of the deportation order but was a condition of a suspended sentence which was within the discretion of the trial judge to impose; and (2) that there were no defined limits on the kind of conditions the courts could impose on a suspended sentence but they did usually reflect something which the accused was bound to do in any case or something which the court wished him to do and the condition imposed in this case was appropriate where the accused had no prior connection with this country and had expressed a wish to return home. However, Murray J. acknowledged (at p. 527) that it would have been better practice for the trial judge to have prescribed a defined period of time within which the accused could not return to the State.

16. The appellant contends that his case can be distinguished from that of *Alexiou* on four grounds:

- (a) The appellant had evinced no desire to return to his home country. On the contrary, he had formed the intention to settle in Ireland and make it his permanent home;
- (b) The sentencing judge had given no prior indication that he was considering such a condition, and had not invited submissions on the issue from the appellant's counsel;
- (c) The appellant had not been apprehended at point of ingress to the State unlike Mr. *Alexiou*;
- (d) The appellant is an EU citizen, unlike Mr. *Alexiou* and he lays emphasis on Murray J's comment at p. 525 in his judgment in the *Alexiou* case that:-

"Different considerations obviously arise in relation to citizens and European Union nationals."

17. In development of the last point, the appellant places reliance on the concept of European citizenship introduced by the

Maastricht Treaty of 1992 and now governed by the Treaty on the Functioning of the European Union (Part Two). Every national of an EU member state is automatically a citizen of the European Union. Article 21(1) of the Treaty on the Functioning of the European Union provides:-

"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

18. It was further submitted that the sentencing judge, in making the suspension of a portion of the sentence imposed conditional upon the appellant departing from the State upon his release, and remaining outside the State for seven years, acted in disregard of the citizenship rights conferred upon the appellant by the Treaty on the Functioning of the European Union.

19. Grounds (ii) to (v) inclusive can be addressed together. In summary, they allege that while the sentencing judge was entitled to seek to reflect mitigation by suspending a portion of the sentence, the very onerous condition attaching to the proposed suspended portion greatly devalued the benefit being conferred, and did so to such an extent as to result in insufficient weight being afforded to the mitigating factors in the case, including the plea of guilty, the appellant's material assistance and the absence of previous convictions.

20. Finally, in so far as it is complained that the sentencing judge failed to have regard to the principal of parity between offenders, whilst it is accepted on behalf of the appellant that he was culpable to a greater degree than that of his co-accused, and that the offence which he had pleaded guilty to was an offence contrary to section 15A whereas his co-accused had pleaded guilty to an offence contrary to section 15, it was submitted that these distinguishing characteristics were insufficient to justify the strikingly different sentences imposed on the two co-accused. Neither accused had any previous convictions; both pleaded guilty at an early stage, and both were of relatively similar age and background. It was submitted that the sentence imposed by the sentencing judge, containing as it did a suspension of the last three years upon the objectionable condition that the appellant should leave the country upon his release and not return for seven years, was disproportionately severe relative to that imposed on his co-accused.

Submissions on Behalf of the Respondent.

21. Counsel for the respondent has argued in response that the decision in *The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513 establishes that the sentencing judge certainly had power to impose the condition which the appellant finds so objectionable.

22. On the secondary question as to whether the sentencing judge ought, in the circumstances of this case, to have imposed that condition in part suspending the sentence, particularly having regard to the appellant's status as an EU citizen with Free Movement rights, it was submitted that the imposition of such a condition was not the equivalent of, or tantamount to, an expulsion or deportation by a host member state. The appellant was not obliged to agree to it.

23. The point was further made that even under European Parliament and Council Directive 2004/38/EC of 29th April, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states [2004] O.J. L158/77, which seeks to give practical effect to Article 21(1) of the Treaty on the Functioning of the European Union, an EU citizen is required to be resident in a host member state for 10 years before they get enhanced protection. Even then, the expulsion of EU citizens and their family members from host states is permitted in certain limited circumstances.

24. In illustration of this, the Court's attention was drawn to the decision of the European Court of Justice (ECJ) in *Land Baden-Württemberg v. Panagiotis Tsakouridis* [2010] ECR I-11979, the circumstances of which concerned a Greek citizen with an unlimited residence permit in Germany who, having been charged, *inter alia*, with trafficking in narcotics as part of an organised group, was convicted in that member state on eight counts of dealing in substantial quantities of controlled drugs. The accused was sentenced to six and a half years in prison. German law provides that a foreign national resident in that state who is sentenced to a term of imprisonment of five years or greater is liable to expulsion from Germany. Shortly after that sentence was imposed upon him, the German state then sought to expel and return him to his country of origin, namely Greece. Germany sought to justify his expulsion on the grounds that he represented a genuine threat to public security. Mr. Tsakouridis challenged his proposed expulsion before the German courts, *inter alia*, on the grounds that he had been resident in Germany for more than ten years and therefore had enhanced protection under Directive 2004/38/EC. In the course of dealing with the case the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court of Baden-Württemberg) requested a preliminary ruling from the ECJ concerning a number of issues, including asking under what conditions can the right to enhanced protection against expulsion be lost?

25. The ECJ held, *inter alia*, that Article 28(3) of Directive 2004/38 must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of "*imperative grounds of public security*" which may justify a measure expelling a European Union citizen who has resided in the host member state for the preceding ten years.

26. The respondent submitted that an offence under s. 15A of the Act of 1977 represents criminal conduct that seriously offends against strongly stated public policy in this jurisdiction and, in the particular circumstances of this case where the appellant had only the most tenuous links to this State, that the sentencing judge was justified in attaching the condition in question to his proposed part suspension of the sentence imposed on the appellant.

27. It was further submitted that the appellant received an appropriate discount in mitigation in circumstances where he had not just avoided the presumptive mandatory minimum sentence of ten years by a margin of some three years, the sentencing judge having considered himself at liberty on account of the appellant's early plea and material assistance to depart from the presumptive mandatory minimum, but in addition had been afforded the opportunity of not having to serve the final three years of the remaining seven years identified by the sentencing judge as being the appropriate headline sentence.

28. Moreover, it was pointed out that the sentencing judge, in passing sentence, expressly made reference to the appellant's plea of guilty, to his co-operation, and to his absence of previous convictions.

29. Dealing with the claim that the sentencing judge had failed to differentiate sufficiently between the appellant and Mr. Majewski in passing sentence, the respondent submitted that the differentiation was justified on the basis that the appellant and his co-accused had pleaded guilty to different offences. Moreover, there was evidence that Mr. Majewski had played a much lesser role than the appellant in the overall scheme giving rise to the charges against both men.

Discussion and Analysis

30. It is clear from the decision of the Court of Criminal Appeal in the case of *The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513 that a sentencing court has jurisdiction, in deciding to partly suspend a sentence, to impose a condition such as that imposed in this case, and which the appellant finds objectionable.

31. As to whether it was appropriate to impose such a condition in the circumstances of this case, the following passages from the judgment of Murray J. in the *Alexiou* case (at pp. 525-526) are of considerable assistance:-

"When imposing a suspended sentence, courts invariably attach a condition that the accused be of good behaviour for a specified period of time. In addition there may be conditions of a more general nature. Those conditions usually reflect some course of action which the accused has told the court he proposes to follow, in mitigation of his circumstances, such as his intention to undergo a particular course of treatment or participate in a particular form of rehabilitation, or that he has concrete plans to move and take up work elsewhere away from the locality or persons which had an influencing effect on him becoming involved in the crime. Frequently, the courts adjourn final sentence in order to ascertain whether the accused follows through with his proposed course of action and sometimes a suspended sentence is imposed on condition that the accused follows such a course of action. As Mr. O'Malley observes in Sentencing Law and Practice (2000), there do not exist defined limits, as such, as to the kind of conditions which can be imposed.

The court is only concerned with the circumstances of this case and not with an abstract review of the kind of conditions which can be imposed when a sentence is suspended. However, for the purposes of this case it may be said that conditions which are attached to suspended sentences usually reflect either something which the accused is bound to do in any case, such as to be of good behaviour and observe the law, or something which he has told the court he intends or wishes to do. This approach undoubtedly reflects a prudent concern on the part of the courts to avoid the risk of imposing a condition which would be tantamount to imposing a penalty not envisaged by the law. This could arise in the case for example of a non-national who was habitually resident in the State and in which he had worked for many years and raised his family. Where the only penalty prescribed by law was a fine or imprisonment, a suspended sentence conditional on such a person leaving the State against his express wishes, could be considered so extraneous to the penalties imposed by law and beyond the discretionary powers of sentencing vested in a trial judge. If, in such a case, the nature of the offence appeared to the judge to be one which called in question the appropriateness of the accused being permitted to reside in the country, then he would have available to him the statutory power to make a recommendation to the Minister for Justice, Equality and Law Reform that he be deported. It would then be for the Minister, in his executive discretion, to decide on that matter.

Different considerations arise where an accused, who, prior to his conviction, had little or no connection with this country and he is required, as a condition of a suspended sentence, to return to the country of which he is a citizen or in which he has been habitually resident. Although it may be a subsidiary part of the trial judge's considerations, such an order does have the advantage of further eliminating the risk that the offender might commit further offences in this country or be a further burden on the tax payer. Of course all these matters depend on the circumstances of the case including any declared intention of an accused to return to his own country as soon as he is free to do so."

(This Court's emphasis)

32. It is clear from the *Alexiou* judgment that there is a requirement of reasonableness and proportionality in the attachment of conditions to suspended sentences. That it should be so is hardly surprising, having regard to constitutional and indeed European law requirements.

33. Although we are not concerned here with an expulsion or deportation by the executive, but rather the attachment of a condition to the suspension of a sentence by a judge in the exercise of his judicial function, the practical effect of what the sentencing judge did in this case is, in certain respects, broadly analogous to an expulsion or deportation.

34. In expulsion or deportation cases considerations of reasonableness and proportionality also apply. Given this Court's acceptance that the practical effect of what the sentencing judge did in this case is, in certain respects, broadly analogous to an expulsion or deportation, it may be of relevance in considering whether the impugned condition was in fact proportionate and reasonable in the circumstances of the case to have regard to the factors which the law requires the executive to take into account in considering an expulsion or deportation.

35. As has been pointed out by counsel for the respondent, Directive 2004/38/EC, as interpreted by the ECJ in *Tsakouridis* [2010] ECR I-11979, does allow for the expulsion of a person, notwithstanding that he/she has enhanced status as an EU citizen, on the grounds of public policy or public security. However, before it can avail of that possibility the host member state is required by Article 28(1) of the said Directive to

"take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin."

Directive 2004/38/EC has been transposed into Irish law by the European Communities (Free Movement of Persons) (No.2) Regulations 2006, S.I. 656/2006, as amended by S.I. 310/2008 and S.I. 146/2011, and the reasonableness and proportionality requirements of Article 28(1) of the Directive are reflected almost word for word in Regulation 20(3)(a) of those regulations.

36. The first thing to be said about the appellant in this case is that, although he is an EU citizen, he does not enjoy enhanced status as a foreign national resident in this country. He had not been resident here for 10 years at the date of sentencing, or anything remotely approaching it. The evidence before the sentencing judge was that he had been resident here for eight months, approximately.

37. The appellant is 25 years of age, and accordingly is not a person who, by virtue of his age, is likely to have particular adjustment difficulties in the event of moving back to his country of origin. He will have none of the exceptional adjustment difficulties that either the very young or the very old can sometimes experience on account of their age when required to cope with disruptive change.

38. There is nothing in the evidence before the Circuit Judge to suggest that the appellant has any health difficulty.

39. As regards the appellant's family situation, the evidence was that he has no family in this jurisdiction. To the extent that he has

any family at all, the only evidence in that regard was that he has a seven year old daughter, who is in Poland. There was no evidence at all as to whether or not he is in contact with her, or as to whether he is contributing to her support.

40. As regards the appellant's economic situation, he has no visible means of support. He is currently unemployed, and there is no evidence that he has ever had a job in this country. Moreover, he has not been in receipt of social welfare. The Garda stated his belief that the appellant had been in the business of selling drugs. It was put to the prosecuting Garda in cross-examination that he had been working from time to time in the "*black economy*". However, the Garda said he had no knowledge of this and was not prepared to accept it. The appellant did not offer any evidence concerning his means of support during the sentencing hearing, or as to any efforts that he had made to find work.

41. There was no evidence of any social or cultural integration by the appellant in the eight months while he was in Ireland. There was no evidence that he had formed any friendships, had joined any clubs, societies or organisations, participated in any sports, participated in any church or religious activities, or participated in education or training.

42. Finally, although it was contended on behalf of the appellant at the sentencing hearing that he had cut his ties with Poland and that he wished to make his home in Ireland, the fact remains that he is Polish by nationality, and is ethnically and culturally Polish. It is understood that he speaks predominantly Polish (although there was no evidence as such concerning his language skills, his defence counsel informed the sentencing judge that his English was relatively poor). He grew up in Poland. Most importantly, his sole living relative as identified to the Circuit Court, namely his seven year old daughter, currently resides in Poland.

43. In summary therefore, there was no evidence before the sentencing judge that he had put down any meaningful roots in this country. On the contrary, the evidence was all the other way. In the circumstances we are satisfied that the Circuit Court judge had all the necessary information to enable him to make a proportionate judgment concerning whether or not to impose a condition, such as that which the appellant seeks to impugn, in deciding to suspend part of the appellant's sentence. We are satisfied that the imposition of such a condition was reasonable and proportionate in the circumstances of the present case. The fact that the appellant had expressed no desire to return to Poland, and indeed did not wish to do so, is immaterial in the particular circumstances of this case where his links to this jurisdiction were of the most tenuous nature.

44. Further, we do not consider that the sentencing judge was obliged to canvas the views of the appellant before proceeding to set such a condition. Until the appellant had actually entered into the bond, it was open to him to have addressed the court through his counsel, and to have requested an amelioration or variation of the proposed condition, if he considered it to be disproportionate or unreasonable. It was also open to him to refuse to enter into the required bond. The transcript reveals that no application for an amelioration or variation was made. Rather, after sentence was pronounced, the proposed terms of the bond having been indicated in the course of that pronouncement, all that occurred was that some discussions took place between counsel and the judge concerning ancillary orders being sought by the prosecution for the forfeiture of the monies seized at the time of the arrests, and for the destruction of the drugs. The appellant was then invited by the court to enter into the proposed bond, and he did so without demur.

45. Proceeding then on the basis that the sentencing judge had jurisdiction to impose the condition in question, and also on the basis that it was a proportionate and reasonable measure in the circumstances of the case, it remains to be considered whether, taking into account that the ultimate sentence comprised both a custodial element of four years duration and a suspended element of three years duration, subject *inter alia* to the condition that the appellant should leave this country and not return for seven years, the sentencing judge had adequately reflected the mitigating factors in the case. In considering this issue, this Court bears in mind counsel for the appellant's concession that if his client had received a seven year sentence, with the last three years thereof suspended on the usual terms of an undertaking to keep the peace and be of good behaviour, he could have had no objection. We do not consider that the imposition of the condition that the appellant should leave this country and not return for seven years was so onerous as to fundamentally impact upon, and undermine, the exercise that the sentencing judge had been engaged in, *i.e.*, seeking to adequately reflect the mitigating circumstances in the case by the suspension of the final three years of the headline sentence. We are satisfied that in all the circumstances of this case an effective three year discount, even with such a condition attached, was sufficient bearing in mind the margin of appreciation which must be afforded to the sentencing judge to adequately reflect the mitigating factors in the case, all of which mitigating factors were correctly identified and expressly mentioned by the sentencing judge in his remarks.

46. As regards the final point, namely that the sentencing judge had failed to differentiate sufficiently between the appellant and Mr. Majewski in passing sentence, this Court finds itself in complete agreement with submissions made by counsel for the respondent. The differentiation was justified on the basis that the appellant and his co-accused had pleaded guilty to different offences. Moreover, there was evidence that Mr. Majewski had played a much lesser role than the appellant in the overall scheme giving rise to the charges against both men.

47. In the circumstances, we are satisfied that the appellant has not demonstrated that the sentencing judge committed any error of principle and we dismiss the appeal on all grounds.