



THE COURT OF APPEAL

[9/2018]

**The President
McCarthy J.
Kennedy J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DARREN O'MAHONEY

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 25th day of February 2019 by Ms. Justice Kennedy

Introduction

1. This is an appeal against severity of sentence. The sentence under appeal was imposed in Clonmel Circuit Court on the 15th December, 2017 following pleas of guilty by the appellant.

2. By way of background, on the 18th May, 2015, a search warrant was issued in respect of the accused's address at Clonmel in County Tipperary. This warrant was executed on the 30th May, 2015 when the Gardaí conducted a search of that property. In the course of this search, a variety of drugs were seized. These findings resulted in the appellant being charged with offences pursuant to s.15 of the Misuse of Drugs Act 1977 (as amended) concerning which, on the 1st March, 2017, he entered pleas of guilty to three counts on a full facts basis. The respective counts concerned cannabis herb, fluoroamphetamines and methylenedioxymethamphetamine with a combined value of €7,593.28. The court heard of two additional controlled substances and so the total value of the drugs was in excess of €10,000.

3. In the course of the search of the appellant's home, a variety of drugs were found together with a mobile phone, which when analysed was found to contain a large volume of text messages indicative of the sale of controlled drugs. Packaging material and a digital weighing scales were also found. The appellant was arrested and detained and co-operated to an extent with the investigation.

4. On the 15th December, 2017, the appellant was sentenced to five years' imprisonment on each count to run concurrently with the final two years suspended. The Court heard that the appellant was thirty-three years of age at the time of sentencing and had a history of substance abuse. He has nine previous convictions, the majority of which were committed over ten years ago. A probation report was put before the Court which included a risk assessment that placed the appellant at a moderate risk of re-offending.

5. In terms of aggravating factors, the sentencing judge properly identified those factors to be, the quantity of controlled substances found, the impact of drugs on society in general and the fact that the appellant was dealing in drugs. In having regard to the appellant's previous convictions, the judge took into account a 2016 conviction under s.3 of the Misuse of Drugs Act 1977.

6. In considering sentence, the sentencing judge placed the offence at the lower end of the mid-range of sentence. It is advanced on behalf of the appellant that the judge considered the appropriate range for the offences as being in the lower mid-range as an aggravating factor in itself. This court does not find any merit in that suggestion. The judge in his sentencing remarks considers the aggravating factors, he assessed the gravity of the offences and he then proceeded in the usual manner to identify the mitigating factors before proceeding to impose sentence. In that respect, the judge took note of the appellant's plea of guilty and his co-operation with the Gardaí. He noted his good family support and his excellent work record. He accepted that the appellant has developed an insight concerning the deleterious effects of drugs on society and whilst he expressed a preference for documentary evidence of the appellant's sobriety the judge accepted that the appellant has showed an intent to reform having stayed out of trouble for the previous two and a half years.

7. The appellant put forward four grounds of appeal:-

(a) the learned sentencing judge erred in principle and in law in imposing a sentence of such severity in all the circumstances of the case;

(b) further and in the alternative, the learned sentencing judge erred in finding that the offences committed by the appellant lay in the middle range for such offences;

(c) further and in the alternative, the learned sentencing judge erred in law and in principle in failing to give any or any adequate weight to the mitigating factors; and

(d) finally, in the alternative, that the learned sentencing judge gave undue weight to the aggravating factors in the case.

8. The appellant submits that the sentencing judge imposed a sentence that was disproportionate in the circumstances. In particular, the appellant submits that the sentencing judge did not give adequate consideration to the principle of rehabilitation in light of the

probation report which highlighted the positive steps he has taken.

9. Moreover, it is submitted that the judge erred in placing the offence in the mid-range (albeit at the lower end) as the appellant was a lower level member of an operation, the combined value of the drugs involved and the appellant's admission that he was acting under a level of fear.

10. It is also said that the judge did not have due regard to the mitigating factors and placed undue weight on the aggravating factors

11. In response, it is submitted on behalf of the respondent that there was no error in principle in the sentence and that while much is made of the various matters advanced in a plea of mitigation, there is no indication by reference to the transcript that the trial judge failed to take those matters into account.

12. These are serious offences. The appellant was involved in drug dealing. A substantial quantity and variety of controlled substances were found in the appellant's home, together with items indicative of preparing drugs for sale. His mobile phone showed text messages clearly indicative of supply for profit. He is a man with a recent previous conviction for an offence under s.3 of the Misuse of Drugs Act 1977. This court can find no error in the sentencing judge's assessment that the matter fell within the mid-range of sentence for such offences. Whilst the evidence was that the appellant was at the low end of the enterprise, nonetheless, he was a vital member and on the evidence actively selling controlled substances with the consequential effect on society in general.

13. In imposing a sentence of five years' imprisonment with the final two years suspended, the judge gave the appellant credit for the matters pressed in mitigation and permitted of the rehabilitation of the appellant. We can find no error in this respect.

14. Accordingly, the appeal is dismissed