[2014] IECA 2

THE COURT OF APPEAL

Finlay Geoghegan J.
Sheehan J.
Hogan J.

[Appeal No. 4/2012]

The People (at the suit of the Director of Public Prosecutions)

RESPONDENT

and
Stephen Geraghty

APPELLANT

Judgment of the court delivered by Ms. Justice Finlay Geoghegan on the 10th December 2014

1. The appellant, Stephen Geraghty, was charged with two offences under s. 15A of the Misuse of Drugs Act 1977 ("the 1977 Act") (as amended). The first offence dates from 27th November 2003 and the second offence dates from 13th May 2004. It appears that Mr. Geraghty absconded while on bail and that he was re-arrested at some point in 2009. He pleaded guilty to the two s. 15A offences before Her Honour Judge Delahunt in the Circuit Court on 15th February 2010. He was sentenced in respect of the two charges by His Honour Judge Nolan on 13th December 2011. He received a two year sentence in respect of the first charge and he received a 10 year sentence in respect of the second charge to run consecutively. He was on bail when he committed the second offence.

2. The appellant appeals only in respect of the 10 year sentence. There is no appeal before the Court in respect of the two year sentence.

3. It is not in dispute but that Judge Nolan proceeded on the basis that, as submitted to him by counsel for both the Director of Public Prosecutions and the accused, as the appellant had already been convicted of a s. 15A offence in respect of the first charge, the mandatory sentencing provisions of s. 27(3F) of the 1977 Act (as inserted by s. 33 of the Criminal Justice Act 2007) thereby governed the sentencing on the second s. 15A charge. It followed, therefore, assuming that this understanding was correct, that the trial judge was obliged to impose the mandatory minimum sentence of at least ten years in respect of the second charge.

4. When this matter first came before this Court the principal issues were, first, whether these mandatory sentencing provisions applied (inasmuch as the appellant had not previously been convicted of any s. 15A offence prior to the commission of the second offence) and, second, even if these provisions did apply, whether the possibility of the suspension of any part of the sentence was expressly or impliedly precluded by the language ("the court shall….specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person…") of the sub-section. The Court reserved judgment on these questions. For reasons which we will now set out, it has not proved necessary to consider the second of these questions.

5. Following further consideration of the matter, however, it appeared to the Court that one essential issue had been overlooked by the parties. At the time of the commission of the two offences in question in 2003 and 2004, the applicable penalty for a s. 15A offence was to be found in s. 27 of the 1977 Act as inserted by s.5 of the Criminal Justice Act 1999 ("the 1999 Act"). Those penalty provisions did not, in terms, distinguish between first and second offences.

6. The distinction now drawn between the first and second or subsequent s. 15A offences is contained in s. 27(3F) of the 1977 Act, as inserted by s. 33 of the Criminal Justice Act 2007 ("the 2007 Act"). This distinction did not exist at the time of the commission of the second offence in 2004 and it was introduced for the first time only following the commencement of s. 33 of the 2007 Act on 18th May 2007: see Article 3 of the Criminal Justice Act 2007 (Commencement) Order 2007 (S.I. No. 236 of 2007).

7. As thus inserted by s. 33 of the 2007 Act, s. 27(3A) to s. 27(3F) now provides:

> "(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment –
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> (a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and
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> (b) at the court's discretion, to a fine of such amount as the court considers appropriate.
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> (3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.
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> (3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.
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> (3D)(a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.
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> (b) Subsection (3C) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including –
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> (i) whether that person pleaded guilty to the offence and, if so –
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> (I) the stage at which he or she indicated the intention to plead guilty, and

(II) the circumstances in which the indication was given,

and

(ii) whether that person materially assisted in the investigation of the offence.

(c) The court, in considering for the purposes of paragraph (b) of this subsection whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to –

(i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and

(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.

(3E) Subsections (3C) and (3D) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3F) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this Act are to be construed as references to a first such offence.

(3F) Where a person (other than a person under the age of 18 years) –

(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or

(b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections,

the court shall, in imposing sentence, specify a term of not less than 10 years

as the minimum term of imprisonment to be served by the person."

8. The Court then issued a written direction to the parties drawing the attention of the parties to this issue and requesting further submissions on the following questions:

• First, should the sentencing of the appellant have been governed by the provisions of s. 27 of the 1977 Act (as amended) as they existed at the time of the commission of the offences in question in 2003 and 2004? Or do the penalty provisions of s. 27(3F) (as inserted by s. 33 of the 2007 Act) apply to the present case given that this was the sentencing regime in force at the date of the charging of the appellant with these offences and the subsequent imposition of sentence?

• Second, if the answer to the first question is that the sentencing of the appellant should have been governed exclusively by the pre-2007 law, what consequences follow from this conclusion?

9. The Court draw the parties' attention to the following provisions and authorities, albeit that it was indicative that this list was not in any sense intended to be exhaustive:

Constitution of Ireland, Article 15.5.1

European Convention of Human Rights, Article 7(1)

Interpretation Act 2005, s. 27(1)(e) and s. 27(2)

Hamilton v. Hamilton [1982] I.R. 466

Enright v. Ireland [2003] 2 I.R. 321

10. The Court invited the parties to lodge additional written submissions on these points. The appellant filed further submissions in which it was contended that the new sentencing provisions contained in the 2007 did not apply to sentences for offences committed prior to that date. No written submissions were filed by the Director of Public Prosecutions.

11. At the resumed hearing, counsel for the Director informed the Court that the Director considered that the sentencing of the appellant should have been governed exclusively by reference to the provisions of s. 27(3) of the 1977 Act, as they existed prior to the amendments effected by the 2007 Act. She further accepted – albeit that this was contrary to the argument expressly advanced to this Court at the first hearing that – that the reference to a second offence in s. 27(3F) only applied where the offender had already been convicted of s. 15A offence prior to committing the second such offence. She submitted, however, that this was a case where the proviso (i.e., s. 3 of the Criminal Procedure Act 1993) might nonetheless be applied so that the sentence actually imposed by the learned trial judge should be allowed to stand on the basis that the sentence actually imposed was a proportionate one, these errors of law notwithstanding.

12. At the conclusion of the resumed hearing the Court rejected this latter argument and allowed the appellant's appeal against sentence. The appellant was remanded in custody to await a new sentence hearing before this Court. We indicated that we would give our reasons in writing at a later date. This is now the judgment of the Court giving the reasons for that conclusion.

The potential application of the penalty provisions of s. 27(3F) of the 1977 Act (as inserted by s. 33 of the 2007 Act) to the 2004 offence.

13. In order to set out reasons for rejecting the submissions of the Director that notwithstanding what is now accepted to have been two errors of law made by the learned trial judge (with the concurrence of counsel for the Director and the accused) as to the sentencing regime which applied in respect of the sentence now under appeal this Court should now uphold this sentence, it is necessary for this Court to set out briefly our views on such errors of law.

14. The principle of legality is at the heart of the criminal justice system. This implies that a citizen is entitled to order his or her affairs based on a system of clear rules and penalties which prescribe criminal conduct and the penalties which apply thereto.

15. This principle finds expression in a variety of different ways within the criminal justice system. Article 15.5.1 of the Constitution expressly prohibits the creation of retroactive criminal offences. Laws which create criminal offences which are vague and uncertain have been held to be unconstitutional on the ground that they contravene a number of constitutional provisions, including the guarantee of trial in due course of law in Article 38.1: see, e.g., *King v. Attorney General* [1981] I.R 233, *Dokie v. Director of Public Prosecutions* [2011] IEHC 110, [2011] 1 I.R. 805*, Douglas v. Director of Public Prosecutions* [2013] IEHC 343, [2013] 2 I.L.R.M. 324 and *McInerney v. Director of Public Prosecutions* [2014] IEHC 181. There is, moreover, a strong presumption against either the creation of criminal offences or the extension of criminal liability through the use of lax or oblique language: see, e.g., *Director of Public Prosecutions v. Flanagan* [1979] I.R. 265, 281, per Henchy J. and *The People (Director of Public Prosecutions) v. Cagney* [2008] 2 I.R. 111, 120-121, per Hardiman J.

16. Against this general background in relation specifically to the imposition of a penalty increased after the commission of the offence Finlay Geoghegan J. concluded in the High Court in *Enright v. Ireland* [2003] 2 I.R. 321,331 that:-

> "…the rights guaranteed by Article 38.1 must include the right only to be punished for a crime in accordance with the law which existed at the date of the commission of the crime. This conclusion I consider to be supported firstly by the long standing view of the courts of the United States that the prohibition against ex post facto laws includes a prohibition against a law which increases the penalty after the commission of the offence. The unswerving acceptance of such a principle which has long historical origins supports the view that this is a long recognised and established right in relation to criminal trials in the common law world."

17. Quite independently of these considerations, there is, in any event, a general presumption against giving statutory provisions retroactive effect. This presumption operates with particular force where the legislation in question affects vested rights: see, e.g., *Hamilton v. Hamilton* [1982] I.R. 466, 476-477, per O'Higgins C.J. In the context of criminal cases this principle was expressed in the judgment of the Supreme Court in *Director of Public Prosecutions v. Flanagan* [1979] I.R. 265. In that case the Court rejected an argument that the subsequent repeal by the Gaming and Lotteries Act 1970 of a saver clause in the earlier Gaming and Lotteries Act 1956 had the indirect effect of criminalising all slot machines, even though such had never been the parliamentary intention.

18. O'Higgins C.J. said ([1979] I.R. 265,278) that:

> "It amounts to saying that a non-declared or silent amendment of s. 4(1)(c) was effected by the amending Act of 1970, and that this amendment had the effect of creating a new offence and of imposing a new penalty where none existed before."

19. Henchy J. took a similar view ([1979] I.R. 265,, 280-281):-

> "It is, in my view, a cardinal principle in the judicial interpretation of statutes that the range of criminal liability should not be held to have been statutorily extended except by clear, direct an unambiguous words. If the lawmakers wish to trench on personal liberty by extending the range of the criminal law, they may do so, within constitutional limitations; but an intention to do so should not be imputed to them when the statute has not used clear words to that effect. No man should be found guilty of a statutory offence when the words of the statute have not plainly indicated that the conduct in question will amount to an offence. The requirement of guilty knowledge for the commission of the offence pre-supposes as much."

20. There can be little doubt but that if the Oireachtas ever legislated so as to increase with retrospective effect the sentence applicable to a particular crime, this would raise important constitutional issues having regard to the provisions of both Article 15.5.1 and Article 38.1 of the Constitution. It is, however, unnecessary to decide this constitutional point in the circumstances of the present case. Nor is it necessary to consider whether any such legislation would be compatible with Article 7(1) of the European Convention of Human Rights.

21. It rather suffices for present purposes simply to say that there is nothing whatever in the general language of the amendments to the penalty provisions of the 1977 Act effected by the 2007 Act to express clearly an intention of the Oireachtas to apply these increased penalty provisions with retrospective effect. Indeed, it should be pointed out that the language of s. 27(3C) (as inserted by s. 33 of the 2007 Act) ("…Where a person ….is convicted of an offence under s.15A…..") is entirely prospective in nature, since the word "is" in this context "imports an event [which is] to happen [and] refers to any future offence": *Attorney General (McConville) v. Brannigan* [1962] I.R. 370, 382, per Teevan J.

22. It follows, therefore, that the sentencing for the 2004 offence (which is the only sentence under appeal) was not governed by the new enhanced penalty provisions contained in s. 33 of the subsequently enacted 2007 Act.

The meaning of the words "second or a subsequent offence" in s. 27(3F)

23. In the present case, the appellant pleaded guilty to two separate s. 15A offences within a few months of each other in 2003 and 2004. The appellant was not, however, actually convicted of the first offence at the time he committed the second offence. As we have just decided, the changes effected by the 2007 Act do not apply to these offences. But even if they had so applied, we nevertheless conclude that the mandatory provisions of s. 27(3F) still would not have applied in these circumstances.

24. The overall scheme of the changes effected by the 2007 Act is clear. Section 27(3C) provides that every adult convicted of an offence under s. 15A shall receive a ten year minimum term of imprisonment. The rigour of this provision is qualified somewhat by s. 27(3D) (b) which provides that s. 27(3C) does not apply where the court is satisfied that there are specific and exceptional circumstances relating to the offence or the person convicted of the offence "which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances."

25. Section 27(3E) then provides that the provisions of s. 27(3C) and s. 27(3D) "apply and have effect only in relation to [an adult] convicted of a first offence under s. 15A." Section 27(3F) then provides that where an adult

> "(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or
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> (b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections,

the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person."

26. It is quite clear from the actual language of s. 27(3F) ("…convicted of a first offence…") that the entire context of these provisions is that the mandatory ten year imprisonment applies only where the accused has previously been convicted of either a s.15A (or, for that matter, a s. 15B) offence prior to the commission of the second s. 15A (or, as the case may be, s. 15B) offence. This is underscored by the use of similar language ("….in relation to a person convicted of a first offence….") in the saving clause provisions of s. 27(3E). The entire object of this provision is to deter a further breach of the law after an earlier conviction.

27. It follows, therefore, that the Court considers that the Director of Public Prosecutions is correct in her view that even if the provisions of the 2007 Act had governed the sentencing of these offences, the mandatory sentencing provisions of s. 27(3F) did not apply to the appellant, since he had not been actually convicted of a prior s. 15A (or s. 15B) offence at the time he committed the second such offence.

Whether the proviso should be applied to the present case

28. As we have previously indicated, counsel for the Director urged the Court not to set aside the sentence actually imposed and that this was a case where the proviso could be applied. The power to dismiss an appeal on the basis that the appellant was not prejudiced by an identifiable error of law was first contained in s. 5(1)(a) of the Courts of Justice Act 1928. This provision was subsequently repealed and re-stated in s. 3 of the Criminal Procedure Act 1993 ("the 1993 Act"). This section provides:

"(1) On the hearing of an appeal against conviction of an offence the Court may—

(a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred), or

(b) quash the conviction and make no further order, or

(c) quash the conviction and order the applicant to be re-tried for the offence, or

(d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence and that the jury must have been satisfied of facts which proved him guilty of the other offence—

(i) substitute for the verdict a verdict of guilty of the other offence, and

(ii) impose such sentence in substitution for the sentence imposed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.

(2) On the hearing of an appeal against sentence for an offence the Court may quash the sentence and in place of it impose such sentence or make such order as it considers appropriate, being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial."

29. It must be immediately observed that the statutory power to apply the proviso is in terms confined to appeals against conviction only: see s. 3(1) (a) of the 1993 Act. It does not, as such, extend to an appeal such as the present one where the appeal is simply against sentence: see s. 3(2) of the 1993 Act. In the circumstances of the present case it is unnecessary for this Court to express any view as to whether it has the jurisdiction to uphold the validity of a sentence even in circumstances where it was clear that the sentencing judge committed an error of principle.

30. It might also be observed in passing that this Court is in a different position to that of the former Court of Criminal Appeal. That Court was, of course, a purely statutory court with no inherent jurisdiction. While it is true that in accordance with Article 34.4.1 of the Constitution, this Court's jurisdiction to hear appeals from courts other than the High Court derives from statute, this does not mean that when hearing appeals from the Circuit Court in matters of indictable crime it is simply a statutory court confined to such powers as have been expressly granted by statute. This Court, on the contrary, enjoys an inherent power by virtue of Article 34.4.1 to give effect to that appellate jurisdiction in such manner as is consistent with the proper administration of justice. Beyond noting this important difference between the respective jurisdictions of the former Court of Criminal Appeal and this Court, it is unnecessary for present purposes to explore this matter any further.

31. It is again sufficient to say for present purposes that even if this Court enjoys a jurisdiction to affirm a sentence, notwithstanding the existence of an error of principle on the part of the sentencing judge, this would not be an appropriate case to do so given the nature of the errors of law in the present case which we have identified in this judgment.

Conclusion

32. It was for these reasons that the Court allowed the appellant's appeal against sentence on the ground that the incorrect sentencing regime was applied and it accordingly quashed the 10 year sentence which was imposed in respect of the s. 15A offence committed in 2004. The Court has fixed 15th December for a hearing as to the appropriate sentence now to be imposed for the 2004 offence. Specifically the Court invites submissions as to how, in now imposing sentence, it should treat the sentence imposed for the 2003 offence which is not under appeal to this Court.