THE COURT OF APPEAL

[329/16]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

ANTHONY KELLEHER

APPELLANT

AND

[11/17]

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GERARD KELLEHER

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 7th day of February 2019 by Birmingham P.

Conviction

1. On 8th November 2016, following a lengthy trial in the Dublin Circuit Criminal Court, both appellants were convicted of offences contrary to s. 15A of the Misuse of Drugs Act. Subsequently, on 21st December 2016, the appellant, Gerard Kelleher, was sentenced to a term of 12 years imprisonment, and the appellant, Anthony Kelleher, to a term of 10 years imprisonment. Gerard Kelleher had been convicted on counts relating to two different quantities of drugs, while Anthony Kelleher had been convicted in relation to a single quantity. Both appellants have now appealed against conviction and sentence and the Court will deal first with the conviction aspect of the appeal, but before doing so, feels bound to express its dismay that a trial that was as straightforward and clear-cut as this one was, could have taken anything like as long as the trial did. It is the case that the jury returned its verdict on the 16th day of the trial.

2. The background to the case is to be found in events that occurred on 7th December 2012. The Gardaí were in possession of information that suggested that a particular individual, Karl Byrne, who, at the request of the defence, was referred to at trial throughout as KB, would engage in certain drugs-related activity on that day. As a result, a significant surveillance operation was put in place involving a number of members of the Gardaí. This saw a minivan, driven by KB, trailed and followed from the inner city across and through the city. Shortly before 11am, that minivan pulled up at Swiftwood Estate, which is a gated community near Citywest in Dublin. Gardaí who were maintaining surveillance on Mr. Byrne record that they saw him on his phone and that he then gained access to the gated area. Within the estate, two areas or units emerged as areas of particular interest to Gardaí – No. 3, which was described at trial as the drugs safe house, storehouse might be a better term, and No. 20, where Anthony Kelleher resided. Counsel for the prosecution says in written and oral submissions that the case they mounted against the two appellants involved two elements; one, observations from Gardaí who were carrying out the surveillance, and two, evidence of what was recovered from searches of the accused, now appellants, from examination of their phones and from the vehicles that they were associated with as well as a transit van into which drugs were loaded as well as examinations carried out at Nos. 3 and 20.

3. Three Gardaí in particular were involved in carrying out surveillance at Swiftwood Estate. Detective Garda Michael Ormond, who had been involved in the surveillance of KB as he made his way from the city centre, having gained entrance to the estate, went to a footbridge. According to Detective Garda Ormond's evidence, from there, he could observe No. 3. He saw the appellant, Gerard Kelleher, walking down and greeting Karl Byrne, and having greeted him, letting him into No. 3. Gerard Kelleher opened the door with the keys that he had and both men entered. After Gerard Kelleher and Karl Byrne came out, Gerard Kelleher walked back in the direction from which he had come. Karl Byrne reversed his van back towards No. 3 and then went into No. 3 and emerged from there with a number of boxes. These were white with a logo and, according to Detective Garda Ormond, he observed Karl Byrne place ten such boxes into the van. Subsequently, the van was followed from the scene, and some distance away, was intercepted and examined, and each of the boxes that had been seen to be placed within it contained cannabis. The cannabis in the van was some

20.5 kilos in weight and the trial Court was told that the value of the drugs in that van was some €413,260. This cannabis was the subject of Counts 1, 2 and 3 laid against the appellant, Gerard Kelleher. This cannabis was the first of the two consignments of drugs to which reference has been made.

4. Surveillance remained in place and Detective Garda Ormond observed Gerard Kelleher coming out of No. 20. Thereafter, Gardaí then took up positions in order to be able to observe Nos. 3 and 20. No. 20 was now a place of interest.

5. Approximately an hour and a half after the incident involving the van driven by KB, Detective Garda Ormond saw Gerard Kelleher drive a large white transit van down to No. 3 where he met with Anthony Kelleher who had walked down from No. 20. Both appellants were observed by Gardaí entering No. 3 before coming out and then loading seven cardboard boxes which had come from the house into the white transit van. Gerard Kelleher then drove the white transit van to another area of the estate, past No. 20, while Anthony Kelleher walked back in the direction of No. 20. Gerard Kelleher was then observed going to a Hyundai Santa Fe Jeep-style vehicle and that vehicle was then seen to leave the estate soon thereafter and that vehicle was followed. The vehicle was trailed and it was intercepted when it had stopped at a garage, a Topaz garage, at Brownsbarn on the Naas road. When Gardaí approached the vehicle, the driver was Anthony Kelleher and Gerard Kelleher was the passenger. Back at the estate, the transit van was examined, and, in particular, the seven boxes that had been seen to be placed in it were examined. These boxes, too, contained cannabis and the Court heard that the value of this cannabis was €276,000.

6. In addition to the evidence of Detective Garda Ormond, there was also evidence from Detective Garda Crotty and Detective Garda Grimes of the surveillance team as to what they observed. Detective Garda Crotty had positioned himself in the back of a van with tinted rear windows which meant that he could look out and observe, but he himself while in the van could not be seen. He parked directly opposite No. 3 with a view to monitoring the house. He observed Gerard Kelleher arrive at No. 3 in the white transit van. He also identified a second male arriving on foot. However, on foot of a ruling from the trial Judge, he was not allowed name the individual seen arriving on foot, Anthony Kelleher, as the person he had seen. This was because Anthony Kelleher was not previously known to him and he did not have dealings with him subsequently.

7. There was also evidence from a third member of the observation team, Detective Garda Grimes. At around midday, Detective Garda Grimes took up a position so that he could observe No. 20. He saw a green Lexus driven by an individual who was referred to at trial as GK, not being the appellant, Gerard Kelleher, coming. A little later, he saw a white transit van driven by the appellant, Gerard Kelleher, arrive and park close to No. 20. He saw Gerard Kelleher enter No. 20. He saw him come out, get into the white transit van and then saw him being followed on foot by Anthony Kelleher. He saw Gerard Kelleher drive the white transit van to a place near No. 3 and he saw Anthony Kelleher following on foot. A little later, the white transit van was moved. He saw the van parked and then saw Gerard Kelleher walking to another vehicle, a Santa Fe, he thought.

8. It is to be noted that Gerard Kelleher and Anthony Kelleher were not known to the surveillance team Gardaí prior to 7th December 2012. This was a point that was stressed by both defence counsel, both in cross-examination throughout the trial and in their closing addresses to the jury and it was also a matter that was dealt with very fully by the trial Judge in her charge. It provided the basis why Detective Garda Crotty was not permitted to name the person that he saw arriving on foot as Anthony Kelleher.

9. Apart from the observations of the three Gardaí who were in Swiftwood Estate, a considerable amount of other evidence was adduced by the prosecution. When Gardaí approached the Hyundai Santa Fe, driven by Anthony Kelleher with Gerard Kelleher as a passenger, a key for the Ford transit van was recovered from Gerard Kelleher. There were keys for No. 3, the safe house or storehouse, on the central console of the Hyndai Santa Fe. Fingerprints of both accused were found inside No. 3 and the fingerprints of Gerard Kelleher found inside the transit van into which the seven boxes of cannabis had been loaded. The transit van was registered to a third party and a phone number of that individual was noted to be on a phone located on the seat where Gerard Kelleher was when he was arrested. Both accused were in possession of gloves. The Gardaí had noted that when the appellants were packing the boxes into the transit van, that they were wearing gloves. In addition, a sum in excess of €13,000 in cash was taken from Anthony Kelleher. This sum of cash is now central to what is effectively the sole live remaining ground of appeal. It is also of note that the cardboard boxes in which the drugs were located had the word 'Gourmet' on them, it was described as emblazoned on them, and four boxes similarly made up, but containing biscuits, were found in No. 3.

10. There was also phone evidence laid before the Court of trial. Anthony Kelleher had a phone and three SIM cards, one broken, and there was also evidence that he was using two other phones, so a total of five phones. Some of these phones were cheap, the cheapest available, and the prosecution case was that they were effectively disposable. The SIM cards recovered recorded very limited activity. A small number of contacts were saved and those were designated with single letters. One of the SIM cards, which was described as JT2 at trial, had interacted with the phone recovered from Karl Byrne.

11. Documentation relating to the sale and purchase of the SIM cards was recovered from the bedroom of No. 20 where Anthony Kelleher resided. Also, in that bedroom, was bank documentation in the name 'Anthony Kelleher'. The contact between the SIM given the reference JT2 and the phone linked to Karl Byrne matched the observations by Gardaí on surveillance duty. The records establish that KB dialled the SIM card on a number of occasions on the day and night before. There was a call between the two phones at 10.51am on 7th December 2012, this was the same time as Detective Garda Ormond saw KB on the phone when he arrived at the gates into Swiftwood Estate. The records retrieved established that KB's phone had texted SIM card JT2 as follows:

> "Could we make that 11am?"
>
> Then, at 10.45am on the morning of the offence, the KB phone texted the JT2 SIM card as follows:
>
> "Have arrived. I am at the gate."
>
> SIM card JT2 responded:
>
> "Go to house, my mate will be there in two minutes."

Prosecution counsel points out, as was obvious, that this text was consistent with the meeting of Karl Byrne and Gerard Kelleher which took place at No. 3 and was observed by Gardaí carrying out surveillance. It was noted that there was another text to JT2 from another number. This text was:

> "Alright, man, my guy needs access to that early in the morning. Will you or the other lad be available? I need to get it all out of the way ASAP."

12. At 9.05am on the morning of the incident, that same number texted JT2 as follows:

> "Just had to cancel on someone who was taking some. Had not got paper for last lot. Leave it to me. By the way, my lads take it on tick. Does that suit you?"

13. On a further SIM card that was recovered from Anthony Kelleher, there was no activity whatever apart from a series of apparently coded text messages, each of which contained seven capital letters and those messages were linked to a number in Holland.

14. The written submissions on behalf of the appellants most recently filed, an earlier set had been withdrawn, had focused on two issues in particular, the fact that the prosecution was permitted to adduce evidence of the finding of a large sum of cash on Anthony Kelleher. This, in fact, was an issue which featured only in the Notice of Appeal of Anthony Kelleher. In this regard, it said that the Judge was in error in allowing evidence of the cash to be given. This was in a situation where neither accused was charged with an offence specific to the cash, such as money laundering, and it said that in those circumstances, it did not have a degree of relevance that would justify admission. That there should have been any controversy at trial about the admissibility of what was found was slightly surprising because prosecution counsel referred to this in his opening without objection, in effect, by agreement with the defence legal team. It cannot be the case that this took the defence by surprise because prosecution counsel had opened the case twice on successive days, the first trial aborting at an early stage. The point was and is made that Anthony Kelleher had an involvement with the motor trade and that this could provide an innocent explanation for the cash. That, notwithstanding, in the Court's view, the Judge was perfectly entitled to admit this evidence. The finding of the cash was something that might be regarded as significant by the jury. It was a piece of circumstantial evidence to be weighed in the balance alongside the other evidence in the case.

15. However, as leading counsel on behalf of the appellants, Mr. Hood, makes clear, there is a second limb to the defence case and that point is made notwithstanding the fact that only the Notice of Appeal of Anthony Kelleher had anything to say about the cash. As we have seen, the arguments have in effect been advanced as relevant to both appellants. It said that the evidence regarding the finding of cash and then how it was dealt with at trial must have been confusing for the jury. This is largely a reference to the fact that prosecution counsel was very careful when dealing with the issue of the cash found to refer to alternative innocent explanations, this a reference to Anthony Kelleher's involvement with the motor trade. It said on behalf of the appellants that the jury required careful assistance on this issue from the trial Judge. This Court is not persuaded that any very particular assistance was, in the circumstances of the case, required. The jury will have seen the prosecution introduce evidence of the finding and will have seen the prosecution place it as part of the jigsaw, but they must also have been fully aware that nobody was suggesting that the cash found could be positively linked to drugs activity.

16. At trial, neither defence counsel advanced any criticism of how the matter was dealt with by the trial Judge in her charge and no requisitions on this issue were made. It is true that the trial Judge made one error of fact in that she referred to Gerard Kelleher rather than Anthony Kelleher as the person on whom the cash was found, referred to Gerard Kelleher's involvement in the motor trade, but her error was drawn to her attention and was quickly corrected.

17. Insofar as it is now said that the trial Judge's charge was inadequate and so inadequate as to call into question the safety of the conviction, the long-established jurisprudence of this Court, including the Supreme Court decision in DPP v. Cronin, would indicate that the failure to raise the issue at trial and the failure to requisition would be fatal. However, in the circumstances of this case, we are reinforced in that view by the relatively limited significance that the cash find had. Yes, it was a piece of circumstantial evidence, but its significance in the context of the trial pales into relative insignificance in the context of the surveillance evidence and the other evidence to which reference has earlier been made.

18. We have referred to the fact that the most recent version of the written submissions referred to issues relating to identification. When the case was being opened by leading counsel for the appellants, the Court, in the course of an intervention, expressed some bemusement about the extent to which identification was featuring as an issue, either at trial or on the appeal. The Court will just observe that it found the arguments that had been advanced in the written submissions in relation to identification totally lacking in substance. This was neither an identification or recognition case as those terms are usually understood. This was a situation of a number Gardaí present in the estate for a particular purpose – to carry out observation. The arguments at trial, and as set out in the written submissions, in the Court's view were not grounded in reality, and, in truth, did a disservice to the emphasis that Irish criminal law has, for more than 60 years now, placed on highlighting the dangers inherent in identification or recognition.

19. In any event, notwithstanding our view that this was not in any true sense a recognition or identification case, in fact, the trial Judge, in her charge, was at pains to put before the jury all the arguments in relation to the dangers of recognition which had been canvassed by the defence, including the point made that this was a case where there had been no formal identification parades, notwithstanding that it was a case where it is inconceivable that identification parades could ever have served any useful purposes. However, when the Court expressed some observations in relation to the relevance of the identification/recognition issue, counsel who was to deal with this topic, there had been a division of labour of counsel, sought time to discuss the issue with his clients, his leader and his solicitor and in the event, the point has not been argued. Insofar as it was a point raised in the written submissions, the Court makes clear that it sees it as utterly without substance.

20. That being so, the only ground relied on was the point in relation to the cash and the Court has already indicated its view in that regard.

21. In summary, the Court has not been persuaded that the verdict is unsafe or that the trial was in any way unsatisfactory.

22. The Court dismisses the appeal against conviction.

Sentence

23. Earlier today, the Court delivered judgment dismissing appeals against conviction by both appellants. In the course of that judgment, we referred in some detail to the factual background to the case and we will not repeat that exercise. Sufficient at this stage to recall that Gerard Kelleher received a sentence of 12 years imprisonment in the Dublin Circuit Criminal Court having been convicted of two s. 15A charges which had been committed on the same day. The charges related to two different quantities of drugs. Mr. Anthony Kelleher had received a sentence of 10 years imprisonment in respect of a single count. The two appellants are cousins. The question of the statutory sentencing regime, and in particular, the statutory presumptive minimum loomed large in the

Circuit Court, and again, has been at the forefront of the hearing of this appeal.

24. Before addressing that, it is convenient to refer to the background and personal circumstances of the two appellants. As regards the appellant, Anthony Kelleher, he is now 43 years of age. He is the father of three children, one of those children we have heard and the Circuit Court heard has health problems. The Judge in the Circuit Court commented that those problems were distressing for the child and for her parents. The sentencing Court was told that he was involved in buying and selling cars. He had no relevant prior record. It is true there were four convictions recorded, but one was a public order offence in 2001 and one a common assault case going back to 1995. So, in reality, no relevant previous convictions.

25. So far as Gerard Kelleher is concerned, he is now 37 years of age and the Court heard that he was in receipt of Social Welfare. In his case, there were ten previous convictions recorded, some were in the nature of public order, but others involved offences such as possession of knives. Most significantly was one conviction in respect of the offence of membership of the INLA where he received a sentence of four years imprisonment that was imposed on 21st July 2009.

26. The question of the applicable statutory regime and, in particular, the relevance of the statutory presumptive minimum was very much to the fore in the sentencing Judge's mind. In the course of her sentencing remarks, she quoted from the statutory provision and then commented as follows:

> "Those matters that are set out in the legislation are not applicable to this trial. The Court has carefully considered whether there are exceptional and specific circumstances, not in relation to the offence, but to the person convicted of that offence and the Court determines that there are not particular and exceptional specific circumstances relating to the offence or to the offender in these cases."

The Judge went on to analyse the aggravating factors, those that went towards the seriousness of the offence and such factors as were present by way of mitigation.

27. On the hearing of this appeal, counsel on behalf of the appellants invites the Court to approach the case on the basis that there was a disparity in how the Court dealt with his crimes and how the Circuit Court, and as it happened, it was the same Circuit Judge, dealt with Mr. Byrne.

28. It is submitted that the disparity was such as to constitute exceptional circumstances. It is the nature of cases raising issues in relation to disparity of sentence and the requirement for parity that the expectation is that like offenders will be treated alike. Here, the Circuit Court Judge who was dealing with the situation of Mr. Anthony Kelleher and Mr. Gerard Kelleher following their conviction was exceptionally well placed to address those issues having dealt with the situation of Mr. Byrne. His situation, it must be said immediately, was significantly different. He had entered a plea, we are told it was an early plea, and he, we are told, had engaged when interviewed by the authorities. However, in respect of the two appellants today, the bases which would often be available to provide a basis for departing from the statutory minimum are entirely lacking.

29. The evidence at trial, which was reviewed in the course of our judgment on the conviction aspect, in relation to Anthony Kelleher, in particular, the phone traffic evidence, indicates that he was significantly and deeply involved in these matters. It is to be acknowledged that he was charged only in respect of one quantity of drugs and that the smaller of the two quantities that were in issue. By way of contrast, it must be said that the one s. 15A offence in respect of which Mr. Byrne was sentenced involved the larger of the two quantities of drugs, the drugs that were in the back of the van that he was driving.

30. In the case of Gerard Kelleher, the position is that he was convicted of not one count of s. 15A of the Misuse of Drugs Act, but two counts. It is also the situation that in his case, there was recorded a significant previous conviction which had resulted in the imposition of a significant prison sentence.

31. The Court has considered the matter and cannot disagree with the analysis of the Circuit Court Judge that there was no basis for departing from the statutory presumptive minimum. The nature and the extent of the involvement of Anthony Kelleher, as indicated by the phone traffic, means that it cannot be said that a sentence of ten years was inappropriate. So far as Gerard Kelleher is concerned, the fact that he was convicted of two s. 15A offences and that in his case, there was a significant prior record meant that it was to be expected that there would be a differentiation made between his situation and that of his cousin and co-appellant, Anthony Kelleher. The differentiation made was not, in our view, an inappropriate one.

32. In summary, we have not been able to conclude that there was any error or principle on the part of the sentencing Judge. The sentences imposed were not, in our view, inappropriate and did not fall outside the available.

33. In the circumstances, we dismiss the appeal against sentence.