THE COURT OF APPEAL

[319/2016]

Birmingham J
Mahon J
Hedigan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PATRICK PURCELL

APPELLANT

JUDGMENT of the Court delivered on 26th April 2018 by Mr Justice Hedigan

1. The appellant pleaded guilty to a charge of possession of drugs for the purpose of sale or supply with a value of greater than €13,000 contrary to s. 15A of the Misuse of Drugs Act. A sentence of nine years' imprisonment with the final two years suspended was imposed. This is an appeal against the severity of that sentence.

Background
2. The relevant facts were set out by Detective Garda O'Toole on 14th November 2016 as follows. The offences relate to a significant amount of drugs which were in the possession of the accused on 4th June 2015. It involved possession of €1,087,138 worth of Ketamine found in a lockup in Straffan. In that lockup was also found, and the appellant admitted possession of €14,896 worth of Cocaine. That involved 212 grams of Cocaine with a street value assessed at €70 per gram. The offences also include the possession of €103,122 worth of Ketamine which would have been taken from the lockup and was handed over to one of the other co-accused. There was 18kg of Ketamine in storage in Straffan and also 212 grams of Cocaine.

3. The Gardaí, acting on confidential information, observed the appellant driving a van in which one Jordan Maher was a passenger. Following a visit to a storage unit in Straffan, County Kildare, which was being rented to the appellant, a number of items were seen being moved in and out of the van. The appellant then drove Mr. Maher to Maiden's Row at Chapelizod, County Dublin. At this location, a third man, one Mr. Larrissey, approached the vehicle. Mr. Maher handed a package through the window to Mr. Larrissey. At this point, Gardaí intervened. All three men were arrested. The package in question was found to contain Ketamine to the value of €103,000. The appellant made admissions at the scene to being in possession of Ketamine and to being present at the scene. He said he had been paid to do a delivery. He informed Gardaí that he was being paid €500 for this. The storage unit was subsequently searched and found to contain 18kg of Ketamine, a quarter kilo of Cocaine, some Benzocaine, which was described as a mixing agent, and weighing scales. The appellant's house was searched and found to contain a small quantity of Cocaine and further weighing scales with traces of Cocaine, MDMA and Ketamine.

4. The appellant was cooperative in interview and made full admissions. He exonerated Mr. Maher by informing the Gardaí that Mr. Maher did not know what was in the bag in his possession. The appellant informed the Gardaí that he was engaged in this activity as he was in debt in respect of €1,500 for Cocaine as he was a Cocaine user himself. The appellant informed Gardaí that he had a chronic drug problem.

5. Mr. Maher was charged with possession of the drugs in the storage unit. Mr. Purcell informed Gardaí that Mr. Maher did not know about those drugs and that charge was not proceeded with. Mr. Maher was convicted in respect of his involvement with the drugs at Maiden's Row and sentenced to four years' imprisonment suspended. He was 19 years of age and had no previous convictions. Mr. Larrissey had a previous conviction for s. 15A and received a mandatory sentence of ten years' imprisonment.

6. The appellant's previous convictions were outlined by Detective Garda O'Toole as follows.

> Four previous convictions:
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> > On 10th November 2005 at Dublin Circuit Court for s. 15 of the Misuse of Drugs Act, he received a 3-year suspended sentence and a community service order of 240 hours. In relation to s. 3 of the Misuse of Drugs Act, a sentence of three years suspended was also imposed and another s. 3 was taken into consideration on the same date. These were all on 10th November 2005 at Dublin Circuit Court.
> >
> > On 8th September 2005 at Sligo District Court for s. 3 of the Misuse of Drugs Act, he was fined €500.

7. Detective Garda O'Toole accepted that the appellant's admissions in interview and his ultimate plea of guilty were of value to the prosecution. Detective Garda O'Toole also accepted as a possibility that others were primarily responsible for the drugs and that the appellant was being used to store them and to assist in distribution.

The Sentence
8. Having regard to the appellant's plea of guilty and to the admissions he made, the learned sentencing judge found that she could depart from the presumptive minimum sentence of ten years' imprisonment. By reason of the value of the drugs involved and the active role played by the appellant in the storage and distribution of the drugs for reward, the learned sentencing judge placed the offence at the lower end of the upper range of s. 15A offences and applied a headline sentence of 12 years. The learned sentencing judge gave the appellant credit for his plea of guilty; his admissions; his domestic circumstances; his supportive family circle; his longstanding addictions and his efforts to address the same; his remorse; his financial difficulties and the many testimonials submitted on his behalf. In all circumstances of the case, the learned sentencing judge imposed a sentence of 9 years' imprisonment with the final two years suspended.

Grounds of Appeal

1. The placement of the offending behaviour at the lower end of the upper range of offending in a case such as this, having indicated at an earlier stage it was at the upper level of the midrange;

2. erring in assessing aggravating circumstances;

3. failing to have appropriate regard to the mitigating factors present in the case and

4. failing to impose a sentence that took account of the principle of parity in sentencing of persons accused of the same offence.

Submissions of the Appellant

9. The learned sentencing judge, following an exchange with Senior Counsel for the appellant, indicated that her view of the case was that the headline sentence could be found very much in the upper middle range. The appellant submits that this was significant as it indicated the view which the learned sentencing judge had at the gravity of the offence. Defence counsel agreed with the categorisation at this level. This, it is submitted, created a legitimate expectation that the appellant would ultimately be sentenced on the basis that the offence would be so categorised by the learned sentencing judge. Notwithstanding this, when the learned sentencing judge delivered her reserved sentence on 28th November 2016, she placed the offence at the lower end of the upper range for s. 15A offences and identified a headline sentence of 12 years. The appellant submits that this was an error of principle for two reasons. Firstly, it placed the offence at too high a point on the scale of gravity. Secondly, it was unfair in the context of the learned sentencing judge having previously indicated that the appellant would be sentenced on the basis that his offence was at the upper middle range on the scale of gravity.

10. The appellant further submits that the judge was in error in assessing the aggravating circumstances. These were expressed by her as the value of the drugs involved and the active role played by the accused in the storage and distribution of the drugs in return for financial reward. It is submitted that the learned sentencing judge did not appear to take into account that the appellant was not the prime mover in the enterprise, that he was suffering from a chronic drug and alcohol addiction and that he was acting in furtherance of clearing a drug debt of €1,500.

11. The appellant further submits that the learned sentencing judge failed to give adequate credit for the mitigating circumstances which were his plea of guilty; his admissions; his domestic circumstances; his supportive family circle; his longstanding addiction to alcohol and drugs and the steps that he was taking to address them; his expressions of remorse; his financial difficulties and the many impressive testimonials submitted on his behalf. In arriving at the sentence ultimately imposed, and in particular by reducing the headline sentence by only 25%, the learned sentencing judge failed to attach sufficient weight to the appellant's above mitigating circumstances.

12. The court is referred by way of a comparator to the case of *DPP v. Ryan and Rooney* [2015] IECA 2.

Submissions of the Respondent

13. In relation to the apparently conflicting statements of the learned sentencing judge as to where on the scale she placed the headline sentence, the respondent refers the court to the context in which the initial remark was made by the learned sentencing judge. The appellant's then Senior Counsel was advising the court that an expert engaged on behalf of the defence had placed a lower valuation on the drugs seized than that contained in the book of evidence. She was informed that he was not making much of this difference because either way, the sum was vastly in excess of the statutory amount. The learned sentencing judge indicated that the lower value did not change the categorisation of the offence. Counsel for the defence agreed with this. She went on to say that the offence could be located very much in the upper range. The respondent submits that the offence was not in fact re-categorised. Even if this were not so, the respondent submits that the practical import of placing an offence such as this in the upper end of the middle range or the lower end of the upper range is minimal.

14. As to the criticism of the learned sentencing judge's assessment of the aggravating factors, the court is referred to the appellant's interview with the Gardaí where he says that he was paid to store and distribute the drugs at a lockup and would receive anything from €200 to €500 for each drop, depending on weight. He had arranged to rent out a storage facility; he was weighting out drugs at the facility and was distributing them and being paid for each individual drop. There was sufficient evidence entitling the judge to find that he had an active role in the storage and distribution of a significant quantity of drugs. The claim that the appellant was not given credit for the longstanding difficulties with drugs and the associated debt, it is submitted, is clearly incorrect. The learned sentencing judge referred to those very issues in her sentence.

15. The respondent contends that the comparator case of the *DPP v. Ryan* and *Rooney* was entirely distinguishable. Those accused persons came before the court with no record of conviction, much less any convictions recorded under the Misuse of Drugs legislation. The appellant herein had a conviction for selling and supplying drugs although it dated back a long time. The role played by the accused persons in the comparator case was a lesser one than that of the appellant in this case. They were essentially mules. On the other hand, the appellant in this case was deeply involved in the storage, weighing out and distribution of these drugs. The pleas in the comparator case were entered earlier than in this case. They were also reported as unlikely to reoffend. The respondent itself refers the court to the cases of the *DPP v. Michael Devlin Jnr. and Michael Devlin Snr*. [2016] IECA 125, and to the case of *DPP v. Christopher Seery* [2015] IECA 229. Both cases seemed similar to this one in terms of the value of the drugs and the 12-year headline sentence was found. In relation to the second case, the accused received a sentence of 9 and a half years' imprisonment involving drugs to the value of €400,000 together with a sum of cash of €144,000. The accused had no relevant previous convictions. The court suspended the final two years of the 9 and a half years' imprisonment. In all the circumstances, *Seery* showed a close comparison with this case, taking account of the lower sums involved and the absence of any previous convictions.

Decision of the Court

16. In relation to the judge's stating at the sentence hearing that she thought the headline sentence was in the upper middle range, and then at sentencing stating that she thought it was at the lower end of the upper range, the court does not find any error of principle. In the first place, following the hearing, the learned sentencing judge reserved her judgment on sentence. Although she did not state that she had changed her mind, she was entitled to alter her perception of where precisely the headline sentence should lie. That, after all, is what reserving judgment is all about: it is to give the learned sentencing judge the opportunity to reflect upon and consider the appropriate headline sentence. Moreover, it is accepted, correctly so, that the difference between the upper end of one range and the lower end in the next may be slight. The real question is whether the 12-year headline sentence was appropriate.

We consider the *Ryan and Rooney* case to be a poor comparator. They were more in the nature of mules. Here, the appellant was the store man of a vast quantity of drugs. He was involved in weighing them and delivering and receiving payment for them. He admitted to a low level of dealing himself. His involvement was of a very different order. It was an active role in the storage and distribution of drugs in return for financial reward. In all the circumstances, we do not consider the 12-year headline sentence to be outside the range available to the learned sentencing judge and we find it in line with the cases to which we were referred by the respondent i.e. *the DPP v. Devlin* [2006] IECA 125, and *DPP v. Seery* [2015] IECA 229.

17. As to credit for mitigating circumstances, the learned sentencing judge, as appears at p. 3 of the transcript of 28th November 2016, gave full credit to all the factors opened to the court. At lines 9 to 17, she stated as follows:

> *"I am placing the offence at lower end of the upper range for s. 15A offences and I am applying a headline sentence of 12 years. I am giving the accused credit for his plea of guilty, his admissions, his domestic circumstances, his supportive family circle, his longstanding addiction to alcohol and drugs and the steps is taking to address them, his expressions of remorse, his financial difficulties and, lastly, the very many impressive testimonials which have been submitted on his behalf. In all of the circumstances of the case, I am imposing a sentence of 9 years' imprisonment, but I am suspending the final two years on the condition that the accused keep the peace and be of good behaviour for a period of two years."*

18. As to the parity issue, it seems to us that in relation to both co-accused, it is important to note that both pleaded guilty to a s. 15A charge in respect of the Ketamine to the value of €103,000 handed over at Maiden's Row. This places their offending behaviour in a different category to that of the appellant as regards the valuation of the drugs. In relation to Mr. Maher, it was accepted in evidence, through admissions made by the appellant at the scene of his arrest in Maiden's Row, that he was not involved in the enterprise at all. For Mr. Larrissey, the position was very different in that he had a previous conviction for a s. 15A offence. Thus, the sentencing judge in his case had no option but to impose a 10-year sentence of imprisonment. The appellant's argument that there is only one year in the difference between Mr. Larrissey's sentence and the sentence imposed on him is rejected. Whilst the 2-year suspended period does form part of the punishment of the appellant, it is still the case that it is not a period of imprisonment so that there is a clear difference in the two sentences. Moreover, Jordan Maher was a 19-year old and had no previous convictions. Thus, in our view, there were good and substantial reasons for the difference in the sentences imposed on these two co-accused by comparison with the appellant.

19. All the grounds of appeal herein are rejected and the appeal is dismissed.