THE COURT OF APPEAL

[178/2018]

The President

Irvine J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GRZEGORZ OSINSKI

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 18th day of October 2018 by Birmingham P.

1. This is an appeal against severity of sentence.

2. The sentences under appeal are ones of five years' imprisonment with the final three and half years of the sentence suspended that was imposed in respect of a s. 15 Misuse of Drugs Act case and a concurrent sentence of 12 months' imprisonment that was imposed in respect of possession of a stun gun.

3. The background to the case is to be found in the fact that on 9th September 2015, Gardaí in possession of a search warrant searched the appellant's apartment at The Moorings, Millard Street, Cork. There, Gardaí found 58 bags of Cannabis and a stun gun. The Cannabis weighed 294 grams and was valued at €5,880.

4. The appellant was arrested and made full admissions which included admissions to the fact that he was involved in selling the drugs. He was released without charge as a file was being prepared for the DPP, and having been released, left for Poland. He is a Polish national. After a period in his home country, the appellant returned from there and secured employment as a security guard at Elvery's in Cork city. At an earlier stage, he had held a similar positon in Smyths Toystores.

5. In written submissions, and here today, the focus has very much been on the drugs offence. So far as the stun gun is concerned, the sentencing Court appeared to be prepared to accept the statement that the appellant had not realised that possession of such a weapon was illegal under Irish law and also accepted that the possession was in some way related to his ambition to control his dogs. In the overall context of things, it must be said that the stun gun offence is really marginal and that the main focus of attention, both at the sentencing Court and here on appeal, has been on the drugs sentence. It was in respect of the drugs offence that the operative sentence was imposed.

6. In terms of his background and personal circumstances, the appellant is 34 years of age and is the father of a 3-year old son living in Poland. He has no previous convictions. He had been living in Ireland for some ten years at the time of the offence and he had not come to Garda notice between the commission of the offence and the sentence hearing in the Circuit Court in Cork. In response to a direct query from the Judge, the Court heard that this was a case where there had been material assistance.

The Sentence Hearing

7. The Circuit Court was told that it was Mr. Osinski's intention to return to Poland, and indeed, that he had a one-way ticket bought to fly there on 11th July. Counsel on his behalf at the sentence hearing urged the Judge to impose a suspended sentence and suggested that this might be made conditional on him leaving the jurisdiction. The Judge rejected that suggestion. In the course of his sentencing remarks, the Judge commented:

> "It is very easy for this Court to take the simple approach and say that it will impose a custodial sentence in this case and then suggest that if he leaves the country forthwith, he will not be sent to jail. That cannot be the case. There has to be an element of deterrence in these offences. If the word came out, that you can just go to Ireland from any part of Europe, involve yourself in the drugs trade, cause as much disruption to other people as you wish, make as much money as you can out of it, and that if you get caught, don't worry, you won't serve prison because you will just be deported. The level of deterrence in that situation would be practically nil. It is the Court's view that any person involved in the drugs trade, no matter how long ago, and even if it is the first offence, that a custodial sentence is the only appropriate penalty that the Court can impose."

8. In the course of written submissions, seven grounds were identified and argued. The respondent, for her part, grouped those seven

in to five headings and both sides, in the course of the oral appeal, have used that as the map to the submissions.

9. The five areas for debate, therefore, have been:

> (i) That the Judge erred in holding that all offences relating to the sale and supply of drugs necessitated a custodial sentence;
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> (ii) that the Judge erred by setting the headline sentence at seven years;
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> (iii) that the Judge did not give adequate weight to the mitigating factors present in the case, in particular, the appellant's early plea and his assistance during the investigation;
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> (iv) that the trial Judge did not facilitate the appellant's rehabilitation and
>
> (v) that the sentence imposed did not take into account the appellant's nationality.

10. In the course of the appeal, it has been submitted that the Judge erred in principle in taking the view that all offences relating to the sale and supply of drugs necessitated the imposition of a custodial sentence, that in doing so, he was adopting a fixed view that he was fettering his own discretion.

11. The Court sees that contention as really representing the gravamen of the case. The Court is prepared to accept that the Judge may have gone somewhat further than necessary when he commented that it was the Court's view that any person involved in the drugs trade, no matter how long ago and even if it was a first offence, that a custodial sentence was the only appropriate penalty that the Court can impose.

12. In fairness to the Judge, the reference in that sentence to the drugs trade may suggest that his remarks were directed to individuals involved on a continuous basis rather than somebody involved in a one-off offence, but whether that is right or wrong, and be that as it may, really, this Court feels that its focus should be on the Judge's approach to the particular offence and to the particular offender before him.

13. In that regard, the Court sees considerable substance in the earlier comments of the Judge that has been quoted, his comment that it cannot be the case that if somebody says they will leave the country forthwith, that they will not be sent to jail, that there has to be an element of deterrence in these offences and if the word goes out that one can come to Ireland from any part of Europe, involve oneself in the drugs trade, cause as much disruption to other people as you wish, make as much money as you can out of it and then, if caught, no need to worry because you will not be required to sentence because you will just be deported, that in those circumstances, the level of deterrence would be practically nil.

14. The Judge was criticised for his identification of 7 years as the headline or pre-mitigation sentence. In that regard, both sides have referred to a number of comparators. However, the Court does not feel it necessary to engage in a detailed analysis of all of those cases to which we have referred. We are prepared to accept that a somewhat lower starting point might well have been selected. But the real question for this Court is the appropriateness and the availability of the sentence that was ultimately imposed which was one of five years' imprisonment with three and a half suspended.

15. In that regard, Counsel for the appellant has looked at each step taken by the Judge. His decision in the first instance to reduce the pre-mitigation sentence of 7 years to 5 years and then, as a second step, to suspend three and half years of the 5 years and is critical of each stage in the process.

16. The Court sees that approach as being somewhat artificial and feels that the focus has to be on the ultimate sentence, that of 5 years with three and a half suspended, or put another way, on the net sentence of 18 months that was required to be actually served. That ultimate sentence, that net sentence, represents a very substantial reduction indeed from the starting point. The movement from the starting point to the ultimate or net sentence indicates that very considerable mitigation was afforded.

17. The Judge is criticised for not placing an emphasis on rehabilitation, and indeed, for indicating that he did not see it as a case where rehabilitation was to the forefront. The Court feels that what the Judge was saying there was, this was not a man who, because of addiction to drugs or alcohol or for other reasons, was at risk of becoming involved in a life of crime from which he had to be weaned away. It is also the case that the Judge was being told that the appellant was planning to return to Poland and to leave Ireland.

18. In those circumstances, that the Judge saw that as not being to the forefront of his considerations is perhaps understandable. Again, the complaint has been made that inadequate account was taken of the fact that the appellant was a non-national.

19. It is the case that there have been a number of decisions of the Irish courts, particularly of the Court of Criminal Appeal, the predecessor of this Court, which identifies the fact that prison for a non-national can be more difficult than for an Irish national and says that that is matter that a sentencing Court can take into account. However, it must be said that those early statements to that effect were made at a time when Irish society was a great deal more homogenous than it is today. Irish society today is now something of a melting pot and there are people of many nationalities catered for in our prison system. The appellant now before this Court was somebody who had been in Ireland for some ten years before offending. The extent to which he has integrated is shown by the fact that he was able to seek out and obtain employment with two different companies. There is the fact that after the offence, he returned to Poland and then decided, having been home in Poland, to come back to Ireland. Again, the Court does not see that as being a matter that was likely to be at the forefront of the Judge's mind, but it is also the case that it is abundantly clear that he was very conscious indeed that he was dealing with a Polish national and a Polish national who was anxious to return home.

20. Moving, then, from the particular arguments that were identified, what the Court does is it steps back from the sentence and looks at the sentence that was imposed. When it does that, it is very firmly of the view that the sentence that was imposed was one that fell within the available range, was a sentence that was open to the Judge in the Circuit Court to impose. This Court has often said that that would be sufficient to dispose of an appeal, that because a sentence was within the available range, that, ordinarily, no error of principle will arise and that will often see the appeal disposed of. It has gone on to say that the fact that had it been imposing sentence, it might have imposed a somewhat different sentence, would not provide a basis for intervention.

21. In this case, the Court is quite satisfied that the sentence was well within the available range, but the Court would go further and say that if the Judge had acceded to the application, put in the terms that it was in the Circuit Court, it might well be that there

would have been a basis for criticism of the Judge. That does not arise on the facts. What does arise is that the Judge imposed a sentence that he was fully entitled to impose, a sentence which, in the Court's view, was an entirely appropriate one.

22. The Court will therefore dismiss the appeal.