



THE COURT OF APPEAL

**Birmingham P.
Hedigan J.
McCarthy J.**

18/2018

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

- AND -

DANIEL MUSZAK

Appellant

JUDGMENT (ex tempore) of the Court delivered on the 5th day of October 2018 by

Mr. Justice McCarthy

1. This is an appeal against a sentence of six years (the final three years of which was suspended on condition that the appellant be of good behaviour) imposed by Cork Circuit Criminal Court on the 31st October 2017 for possession of cannabis to the value of €39,000 contrary to s. 15A of the Misuse of Drugs Act 1977 following a plea of guilty.

2. The cannabis was brought to his home by a second male – this was seen as a result of a surveillance operation and the gardai immediately entered the apartment under warrant finding the cannabis in the kitchen next to a weighing scales where the accused and the unidentified male were standing. He admitted responsibility for possession but only after what Detective Sergeant O'Brien called by the prosecution described as "some time". He told him that he was only holding the cannabis for a short period of time and then passing it on to Detective Sergeant O'Brien said to the accused:-

"gave a somewhat dubious account of how the cannabis came to be in his house. He claimed that he had met a man outside a shop on Patrick Street who he didn't know very well and this arrangement was put in place. He claimed he did so for monetary gain and that he needed the money, he had planned a trip to Poland for Christmas and he was going to get money from this activity. He claimed that he was only going to have this item for a short period of time and he was going to get a phone call and it was going to be moved elsewhere. He failed otherwise to materially assist"

3. The accused is 38 years of age, described as a storeman, a foreign national and has been living and working in Ireland for nine years. He is in a long-term relationship with one Katrina Magdova (who gave evidence) by whom he has a seven year old son. She works full-time and he was closely involved in the care of their child. He has no previous convictions and there is no suggestion that he is of anything except of good character. Favourable references were received. He is not a man of wealth.

4. The learned trial judge dealt with the matter as follows:-

"So Mr Mustek has pleaded guilty to having in his possession or control over approximately €49,000 worth of drugs (a figure subsequently corrected by the judge). The circumstances in which the find was made was that the guard, acting on information, applied for a warrant. The warrant was to be executed on Mr Muzak's home, not elsewhere, and when the surveillance was put in place, the incident happened, the warrant was executed and Mr Mustek and another man were seen with these drugs on a countertop in the kitchen. So there is no doubt that any jury properly charged would have found him guilty...

So, he was found in his house. Now the length of time, which the defence are apparently placing a lot of emphasis on is completely irrelevant. He was a material part in the distribution of drugs. The aggravating factor undoubtedly is he was doing this for money. It's quite clear he has a very supportive partner, they have a child. She is a hard-working unfortunate who is now going to have the consequences of this and he was doing it in part to fund a trip back to Poland. That is not acceptable behaviour in anyone's lexicography. So, the aggravating factor of doing it for money, not being a drug addict are known to the guards for taking drugs, even on a casual basis according to his partner is a seriously aggravating factor it's did not diminish by the fact that it was only in the house would only be in the house for a short period of time. He knew well what he was doing, and he knew it was illegal. These drugs do enormous damage to society and the consequences are there set o in statute and he faces a section 15 A (offence) . . . and the consequences for that, according to statute, are that I must consider the length of sentence with an indicative 10 year sentence. Now, a 10 year sentence would, in my opinion, be unjust in the circumstances, considering, first of all, the amount involved which is large but not huge.. he pleaded guilty, he admitted his own part in it, so for those reasons alone I think a 10 year sentence would be unjustified and unjust. He did, however, according to the sergeant, give us some dubious account of meeting a man on Patrick Street and how this thing was set up. Taking that dubious account, taking the fact that he did it for money as an aggravating factor, that he had no significant need for money himself, he was not a drug addict or an occasional drug user, I will set a headline sentence of six years. Now he has pleaded guilty, cooperated to some extent by admitting his own part, so the circumstances I will suspend three years of that sentence on condition that on his release he will keep the peace and be of good behaviour."

5. The grounds of appeal are as follows:-

(i) the learned sentencing judge did not give sufficient weight and balance to the evidence adduced in mitigation of sentence.

(ii) the sentence imposed by the learned sentencing judge was, in all the circumstances, unduly severe.

(iii) the learned sentencing judge did not give sufficient weight to the plea of guilty.

6. Grounds of appeal (i) and (ii) are of a high degree of generality and need not detain us but, more specifically, it is now submitted on behalf of the accused that due to the fact that there is no mention thereof in the grounds of appeal the learned sentencing judge fell into error when he "failed to take into consideration the fact that the accused/appellant was of previous good character and had no previous convictions" and similarly "erred in principle in considering the appellant's stance as a non-drug user to be an aggravating factor. The fact that the appellant does not suffer from addiction and was not there under the duress of his dealer on in order to maintain his drug habit, is not in itself an aggravating factor but merely the absence of a mitigating factor".

7. There is no basis for any assertion or supposition that the sentencing judge did not give sufficient weight to the plea of guilty in as much as it is explicitly referred to by him. There is no explicit reference to the fact of the previous good character and absence of previous convictions in what he said when specifically addressing the issue of sentence but having regard to the fact that he himself felt at liberty to depart from the presumptive minimum of 10 years imprisonment, the tenor and straightforward nature of the hearing as well as the judgment itself cannot but have been that case that he did so. Examination of the transcript shows the judge's referred to the fact that there were no previous convictions, doing so shortly before he formally gave judgment.

8. As to the issue of whether or not the judge erroneously took the view that the offence was aggravated by virtue of the fact that he was not a drug addict his reference to that fact was in the context of rightly saying that the accused's possession for money was an aggravating factor in distinction to a case where an individual might, due to such a habit, be less culpable, perhaps he might have made the distinction clearer. While the reference to this as associating was not ideal, we are satisfied he was merely stating the fact that the mitigating factor of possession by a drug user for the purpose of feeding or associated with his habit did not exist: we repeat that the hearing and judgment must be taken as a whole!

9. In the Court's view the sentence cannot be regarded as a severe one, still less an unduly severe one. Indeed counsel opened the appeal by referring to the fact that the reason for the appeal was the appellant's father's grave illness in Poland. This was an *ad misericordiam* plea but unfortunately from her client's point of view the court may only interfere where there is no error in principle and there is none here so we must dismiss the appeal.