



THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

Record No: 204/2017

BETWEEN/

THE PEOPLE AT THE SUIT OF THE
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-V-

CONOR CALDWELL

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 14th day of June, 2018 by

Mr. Justice Edwards.

Introduction

1. On the 25th of May 2017, the appellant in this appeal pleaded guilty in Cork Circuit Criminal Court to one count of unlawful possession of a controlled drug, namely cannabis plants, worth in excess of €13,000 contrary, to s. 15A of the Misuse of Drugs Act, 1977, as amended by s. 4 of the Criminal Justice Act 1999.
2. On the 28th of July 2017, the appellant was sentenced to a period of seven years' imprisonment with the last three years suspended on the condition that the appellant remain under the direction of the Probation and Welfare Service for a period of 3 years and obey their lawful directions.
3. The appellant now appeals against the severity of this sentence.

Background facts

4. At the sentence hearing, Detective Garda Manning gave evidence that, on the 18th of January 2016, the Cork West Divisional Drugs Unit searched a residence at The Rock, Dunmanway, Co. Cork. In the house there were two grow rooms on either side of the house and a large quantity of cannabis inside. There was approximately 7.2 kilos of cannabis inside the house and there was 33 fully mature cannabis plants in one of the grow rooms. The total value of the cannabis and cannabis plants was approximately €170,000.
5. Detective Garda Manning's evidence was that there were three people in the house at the time of the search, all of whom were arrested. The appellant was subsequently arrested at his residence and later in interview he admitted that he had rented the house; that he had invested €5,000 in equipment to set up the grow house and that he planned to make €50,000 to €60,000 profit from it. The evidence before the sentencing court was that the operation *"didn't get to the stage where there was money involved"*.
6. Under-cross examination, Detective Garda Manning accepted that the appellant had over-emphasised his role in the operation in that, during questioning with Gardai, he indicated that he was essentially the boss of the operation with the other three working for him, whereas the position in fact seemed to be that the appellant and one of the other men arrested were jointly in charge and the other two were working for them. The Probation Report, dated 20th of July 2017, indicates that the appellant's *"version of this charge is at complete odds to his statements in the book of evidence"*. He described his role to the probation officer as merely *"to collect money from other team members and pay the rent of the premises which was being used to grow cannabis"*.
7. The evidence before the sentencing court was that the other three involved in the operation had fled the jurisdiction whilst awaiting trial and that European Arrest Warrants were being applied for in respect of them. The evidence was that two of the others involve were men in their thirties, one of whom *"was seriously, seriously involved"*, while the third person was a woman, a little younger than the appellant.

Appellant's personal circumstances

8. The appellant was 24 years old at the time of sentencing. He was raised in Kilmichael, Co. Cork. The sentencing court heard that he had had a difficult upbringing, precipitated by the loss of his father when he was six years old. His father was thirty seven years old when he died and alcohol abuse contributed to his death. His parents had separated prior to his father's death. The appellant lives in Kilmichael with his mother, brother and sister, with whom he reports to have a good relationship with.
9. The probation report before the sentencing court, dated 20th of July 2017, indicates that the appellant is dyslexic and did not enjoy mainstream education as a result. He completed the Leaving Certificate Applied course. There was a GP's letter before the sentencing court which indicated that he (the GP) had been seeing the appellant for treatment of anxiety which had gradually escalated into depression.
10. The evidence before the court was that the appellant was someone who had never been in prison before and would find such an experience very difficult. Under-cross examination, Detective Garda Manning accepted that there was a certain level of naivety on the part of the appellant in terms of describing his role in the operation.
11. Detective Garda Manning accepted that the appellant was co-operative and easy to deal with, despite requiring a bit of patience initially. It was also accepted that the appellant was not a person of violent disposition.
12. The appellant has no previous convictions.

13. The sentencing court heard that the appellant was abusing cannabis at the time of the offence, but that he is now dealing with this issue. Detective Garda Manning confirmed that his most recent urinalysis had come back clear. The appellant is also working so as to "keep himself occupied". The court heard that he is working ten hours a day with a neighbour who restores classic cars and has informed the Department of Social Welfare about this employment.

Sentencing judge's remarks

14. During the course of sentencing, the sentencing judge made the following remarks:

"This man has pleaded guilty to possession for sale or supply, the value of the drugs in question being in excess of €120,000 (sic). The amount in itself is very significant and is a factor in the sentencing. The statutory background is well known and I have to be satisfied initially that there are sufficient grounds to depart from the indicative mandatory 10-year sentence. In this case, given the level of his cooperation, the nature of his admissions and the fact of his early plea, I think those, combined together, are sufficient to allow for a departure from any consideration of a 10-year sentence and a 10-year sentence in this case, given his age, the level of cooperation and his admissions, would be unjust. Therefore, I have to look at the case. As I say, the amount is very significant. He was fully involved. He was doing it for money, apart from feeding some habit of his. I accept what Ms O'Connell says, that perhaps he was a bit grandiose in relation to his own estimation of the level of his involvement, but he was fully involved and he fully knew what he was doing and why he was doing it was for -- in part for substantial money.

So, I will measure a sentence of seven years from today's date. There are a number of factors which I can, in addition, take into account. He is a person who will most definitely need supervision in the community. He is a person who will have to deal with a drug addiction problem and he has a number of personal problems that will need supervision in the future. So, in taking everything into account, I will suspend three years of that sentence of condition that, on his release, he will remain under the care of the Probation Service, obey all their directions for a period of three years, otherwise keep the peace and be of good behaviour"

Grounds of Appeal

15. The appellant appeals against the severity of the sentence on the following grounds:

I. The learned sentencing Judge failed to give any or any adequate weight to mitigation and too much weight to aggravating factors when measuring a sentence of 7 years' imprisonment.

II. The learned sentencing Judge placed too much reliance on the value of the drug seized.

III. The learned sentencing judge failed to have adequate regard to matters of mitigation:

- a) He was addicted to cannabis but provided clear urinalysis to the court.
- b) He had co-operated fully and entered the earliest possible plea.
- c) He was young and naïve.
- d) He had a difficult background and his father dying young had affected him.
- e) He had no relevant previous convictions.
- f) He had not come to adverse notice since then
- g) He was working.
- h) The drug was cannabis as opposed to, say, heroin and was found in a state of cultivation.

Submissions

16. Counsel for the appellant submits that the present case is less serious than some of the comparisons examined by this Court in *the People (DPP) v. Peng Fei He* [2017] IECA 313 on the basis that the offence in the present case was less sophisticated. It was submitted that the appellant was only 22 when the offence took place and demonstrated naiveté in his response to questioning; that there was proper co-operation in interview from the beginning; that he had an addiction and was not just doing it for money; and that he had taken real steps to overcome that addiction before the case came on for sentence. Counsel for the appellant further submitted that the final sentence of 6 years with 18 months imposed in *People (DPP) v. Peng Fei He* would be unduly severe on the facts of the present case. We were in addition referred to the comparative cases cited in the *He* judgment (at paras.15 to 20 thereof) in further support of the contention that the sentence in the present case was excessive.

17. In written submissions it was suggested by counsel for the appellant that a headline sentence of seven years was not an appropriate headline sentence in the present case, and that a more appropriate headline sentence would have been one of 4 or 5 years' imprisonment, and that when mitigation was applied to that the suspension of two years of it would have been justified. However, the complaint about the headline sentence was not pressed in oral argument.

18. Counsel for the appellant also submits that the sentencing judge was in error in appearing to utilise the suspension of three years as mitigation, whereas, as is well-established, a suspended sentence is still a punishment.

19. In reply, counsel for the respondent contended that the sentence imposed was in all respects a proportionate one and that it should be upheld.

Discussion and Decision

20. We wish in the first instance to say that the headline sentence of seven years' imprisonment was entirely appropriate having regard to the gravity of the offence. We find no error of principle in the nomination of seven years as a headline sentence. It was appropriate taking into account the culpability of the appellant, and the harm to society caused by the illicit production and supply of drugs of this type. We have noted the range of penalties and that no issue is taken by the DPP with the sentencing judge's

conclusion that circumstances existed that would have justified him in departing from the presumptive mandatory minimum sentence. We further consider that the headline sentence ultimately settled upon, namely seven years' imprisonment, was within the range of the sentencing judge's margin of appreciation.

21. There is no doubt but that the appellant was entitled to a substantial discount on whatever headline sentence was selected to reflect the considerable mitigation in his case.

22. In circumstances where the headline sentence was to be seven years, it is then necessary to consider the effective discount actually afforded in the circumstances of the case. The suspension of the final three years of that seven-year term represented an effective discount of just under 43% on the headline sentence. Was this sufficient? Counsel for the appellant says "No", her opponent says "Yes".

23. We do not consider that the comparators referred to in *People (DPP) v. Peng Fei He* are of any assistance on the issue of the adequacy of the discount for mitigation. While comparators may sometimes be of some assistance in determining an appropriate headline sentence in the first stage of sentencing, on the basis that there may be some degree of commonality of factors relevant to the assessment of gravity as between different cases; they are rarely of any significant utility in considering how much discount should be afforded to reflect mitigation in an individual's case as the personal circumstances of each offender will be unique in every case.

24. We have given careful consideration to the submissions on both sides, both written and oral, and have concluded that the sentence in this case was not unduly severe and that the discount to reflect mitigation that was afforded, notwithstanding that another court might have been more generous, was within the range of the sentencing judge's legitimate margin of appreciation. We therefore find no error of principle.

25. In the circumstances the appeal is dismissed.