



THE COURT OF APPEAL

Record No. 169/2015

Birmingham J.  
Mahon J.  
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PATRICK O'DONOVAN

APPELLANT

**JUDGMENT of the Court delivered on the 6th day of March 2018 by Mr. Justice Mahon**

1. The appellant pleaded guilty and was convicted on the 16th June 2015 at Cork Circuit Criminal Court to one count of possessing drugs with a market value of €13,000 or more contrary to s. 15A (as inserted by s. 4 of the Criminal Justice Act 1999) and s. 27 (as amended by s. 5 of the Criminal Justice Act 1999) of the Misuse of Drugs Act 1977 (as amended by s. 1 of the Euro Change Over (Amounts) Act 2001). On the 16th June 2015 the appellant was sentenced to a term of imprisonment of eleven years, with the final four years suspended for a period of four years post release, subject to certain conditions. He has appealed against that sentence.
2. On the 26th March 2006, a particular individual then under observation by the gardaí was seen to place a rucksack in the rear seat of a car driven by the appellant at North Main Street, Cork. The appellant then drove the vehicle to another location, Mount Carmel Road, when it was stopped and searched by the gardaí. When confronted by the gardaí, while appearing to be initially co-operative, the appellant then locked the car and threw away the key. When the car was taken to Togher Garda Station and searched, one kilogramme of cocaine was found, with a street value of €70,000. Subsequently, the appellant admitted possession of the drugs and told the gardaí that he was acting as a courier, and was to receive a fee of €2,000.
3. The appellant was charged and bailed to appear at Cork Circuit Criminal Court in 2006. He failed to do so, left the jurisdiction and was subsequently arrested in Spain on the 9th May 2015 pursuant to a European Arrest Warrant. He then voluntarily agreed to be extradited back to Ireland. He is in custody since the 9th May 2015 and his sentence was backdated to that date.
4. The appellant was twenty six years old at the time of the offence. He was unemployed but had previously run his own car cleaning business. He has no previous or subsequent convictions. His plea of guilty to the instant offence occurred late in the day and after a jury had been empanelled for his trial.
5. The learned sentencing judge was urged to impose a sentence less than the mandatory ten year sentence provided for by legislation on the basis that the appellant had pleaded guilty and had co-operated with the gardaí in terms of acknowledging his involvement in the offence.
6. The grounds on which this appeal is taken are as follows;-

(i) In relation to what is described as an error *in the manner of sentencing* it is contended that the learned sentencing judge deemed an eleven year prison sentence to be appropriate without first fixing the offence on the scale of gravity in accordance with a guideline advocated by this court.

(ii) It is contended on behalf of the appellant that the learned sentencing judge failed to engage with the provisions of s. 27 of the Misuse of Drugs Act 1977. Section 27(3c) of the Act of 1977 as substituted, provides for the imposition of a sentence of not less than ten years in relation to an offence under ss. 15A or B. Section 27(3d) of the Act states as follows:-

"(a) The purpose of this subsection is to provide that in the view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person, (other than a person under the age of eighteen years), for an offence under s. 15A or 15B of this Act, shall specify a term of not less than ten years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.

(b) Subsection (3c) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than ten years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this sub-section have regard to any matters it considers appropriate, including:

(i) whether that person pleaded guilty to the offence, and, if so:

(I) the stage at which he or she indicated the intention to plead guilty, and

(II) the circumstances in which the indication was given, and

(ii) whether that person materially assisted in the investigation of the offence.

(c) The court in considering for the purposes of para (b) of this sub-section whether a sentence of not less than

ten years imprisonment is unjust in all the circumstances, may have regard, in particular to:

(i) whether the person convicted of the offence concerned was previously convicted of a drug offence, and

(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence"

(iii) It is contended that the learned sentencing judge was in error by reason of his *misapplication of mitigating* factors. In effect, it is argued that there was a failure to suspend a portion of the sentence to facilitate rehabilitation.

(iv) It is contended that the learned sentencing judge failed to attach any or any sufficient weight to the fact that the appellant had no relevant previous convictions and was therefore previously of good character. The reference by the learned trial judge to the fact that the appellant had not been a *player in the drug scene in Cork* for merely a period of eight or nine years between the commission of the offence in question and the date of sentence was taken account of.

(v) Insufficient account was taken by the learned sentencing judge of an alternative manner for assessing the street value of the drugs in question. It is contended that if the cocaine purity of the material was only 18% the appropriate valuation of the material seized by the gardaí was just under €13,000 rather than the figure contended for by the gardaí.

(vi) It is contended that the learned trial judge erred in adding a *premium* to the sentence because the appellant absconded. It is argued that his absconding ought not to have been treated as an aggravating factor.

### **Error in the manner of sentencing**

7. It is argued on behalf of the appellant that the learned sentencing judge erred in the manner in which he calculated the appropriate sentence to be imposed. Having outlined the background to the offence and the appellant's personal circumstances, he stated as follows:-

*"I think the appropriate sentence in this case is a sentence of 11 years. However, taking into account, and in this regard I am taking into account the fact that there is a plea of guilty, the fact that he is not or has not been, in the last eight, nine years, a player in the drug scene in Cork, I think it would be manifestly unjust not to suspend a sizeable portion of that sentence..."*

8. The eleven year sentence was then imposed but with the last four years of that term suspended for a period of four years on conditions.

9. It is unfortunate that the learned sentencing judge did not, as this court has frequently stated ought to be done, first, assessed the gravity of the offence and then identified where it lay on that scale before reducing the actual sentence to be imposed to take account of the relevant mitigating factors. Approaching sentence in this manner provides a degree of clarity not only for the person being sentenced and the Director but it also assists this court in reviewing a sentence if requested to do so.

10. In *DPP v. M.* [1994] 3 I.R. 306 at p. 315, Egan J. stated in the course of his judgment:-

*"It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made."*

11. That said, a failure to approach sentencing in this manner will not necessarily result in a sentence being quashed and this court re-sentencing an appellant. Ultimately, the court will consider the actual sentence imposed in order to determine if it was appropriate in all the circumstances and within the discretion of the sentencing judge.

12. For reasons stated later in this judgment, the court is satisfied that, in the particular circumstances of this case, including the appellant's own personal circumstances, a headline sentence or starting point of eleven years was excessive, and was, in general terms, out of kilter with the range of sentences imposed for a first time offender who was acting as a transporter or courier in relation to a drugs haul with a street value of approximately €70,000.

### **Failure to engage with the provisions of s. 27 of the Misuse of Drugs Act 1977 as amended**

13. In submissions made to the learned sentencing judge sentence, counsel for the appellant strongly urged that a sentence less than the so-called prescribed mandatory minimum of ten years be imposed on the basis that it would be manifestly unjust to impose a sentence at that level or greater. It was submitted that the appellant pleaded guilty, albeit at a late stage, that he had co-operated with the gardaí at the time of his arrest, that it had been accepted by gardaí that the appellant was unwilling to provide names of others involved because of fear, and was extremely remorseful.

14. In the course of his sentencing judgment, the learned sentencing judge briefly referred to the relevant statutory provisions, and in particular s. 27(3D) of the Misuse of Drugs Act 1977, as amended. He said, having noted that the value of the drugs haul was in the region of €70,000:-

*"...It certainly brings it within the ambit of the sentencing policy as enunciated in section 15A and subsequent statutes. One can depart from what is often referred to, but it is not a mandatory minimum sentence of 10 years, but colloquialism says that it is a mandatory minimum sentence. Well, it isn't. The sentence is life but not less than 10 years, unless there are extenuating circumstances. In other words, if it would be manifestly unjust. I accept, by the way, I should say in passing, that at the time that he was arrested, I would have little doubt that he would have been in fear, as he said, of the other people with whom he was involved. And as so often in the case, couriers, bagmen, call them what you wish, do not disclose names."*

15. The learned sentencing judge did not proceed to specifically invoke the provisions of s. 27(3D) such as permitted him to specify a term of less than ten years if satisfied of the existence of "exceptional and specific circumstances relating to the offence, or the

person convicted of the offence..". However, in reality, it does appear that he did indeed accede to this application given the remarks he made, and the fact that he proceeded to impose a custodial sentence of less than ten years. It is evident that he accepted that there were in existence exceptional and specific circumstances, which justified the imposition of a custodial sentence of less than ten years.

16. In order to determine if there are present *exceptional and "specific circumstances"* a sentencing judge may have regard to matters he or she considers appropriate, including:-

*"(i) whether that person pleaded guilty to the offence and, if so:-*

*(II) the stage at which he or she indicated the intention to plead guilty, and*

*(III) the circumstances in which the indication was given, and*

*(ii) whether that person materially assisted in the investigation of the offence."*

17. Consideration of the following is also relevant:-

*"(i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and*

*(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence."*

18. In the particular circumstances of this case, the learned sentencing judge was entitled, based on the evidence disclosed, to find the existence of *"exceptional and specific circumstances"*. These included:-

*(i) The plea of guilty, albeit very late and after he had returned from Spain. However, immediately following his arrest the appellant admitted his involvement with the drugs. While he absconded to Spain it appears that he returned voluntarily following the issue of the European Arrest Warrant and his arrest in Spain.*

*(ii) He co-operated with the gardaí following his arrest. The learned sentencing judge accepted that he did not name names to the gardaí because of fear.*

*(iii) The appellant was a first time offender.*

*(iv) The appellant was acting as a courier in return for a fee and did not have a proprietary interest in the drugs.*

### **The mitigating factors**

19. The learned sentencing judge clearly took into account the various relevant mitigating factors. He accepted that the appellant was a first time offender although he commented that this was somewhat unusual. In any event he appears to have given the appellant credit for being in this, as he considered, unusual position. It is contended that insufficient weight was given for the lack of previous convictions and previous good character. The learned sentencing judge expressly gave credit to the appellant for his lack of involvement in the *"drugs scene in Cork"*, and the comment made by him in this respect does not suggest, as is contended by the appellant, that the lack of convictions beyond the eight or nine years specifically referred to was ignored. The learned sentencing judge also appears to have specifically provided for the potential for rehabilitation. He specifically stated that in his view there had already been a *fair element of rehabilitation*.

### **The value of the drugs**

20. It was argued on behalf of the appellant that what might be described as the purity of the drugs was such that its actual street value was less than €13,000. On this point the learned sentencing judge stated:-

*"I hear what has been offered in relation to the legal issue which might or might not have affected the outcome of this case, that the quantity of mix that he was found in possession of would have indicated 18% cocaine, which would have amounted to 180.3 grams, with a potential street value in excess of €12,000. But the mix is what one is dealing with here, and I accept what is offered in evidence by Detective Sergeant O'Brien, that the reality of the trading value of the drugs is in the region of €70,000."*

21. The learned trial judge was entitled to, and indeed was correct, to treat the value of the consignment of drugs as being in the region of €70,000. This was the value placed by Detective Sergeant O'Brien on the consignment on the basis of what he believed it would sell for on the open market. It was this value therefore that was relevant.

### **Absconding**

22. When passing sentence the learned trial judge referred to the fact that the appellant had absconded to Spain while on bail. He commented as follows:-

*"I think that the appropriate sentence in this case - taking into account the fact that he did abscond, and because of that, I think the sentencing should have a premium - I think the appropriate sentence in this case is a sentence of 11 years."*

23. It is contended on behalf of the appellant that the learned sentencing judge's comments confirmed that he was treating the fact that the appellant had absconded as an aggravating factor, and that he was in error in doing so. The respondent effectively agrees that this was so, and says in her written submissions:-

*"While the appellant is strictly speaking correct in saying that, as the abscondion post dates the offence, it is not in fact an aggravating factor of the offence but should have been treated to minimise litigation. According the learned sentencing judge should not have treated it as a factor to give a "premium to the sentence".*

24. However, while making this concession, the respondent maintains that the sentence as ultimately imposed was the appropriate one in the circumstances.

25. The court is satisfied that the addition of a so called *premium* on the sentence because the appellant absconded after the commission of the offence was indeed an error. While it is unclear as to what *premium* was in fact included or added in the calculation of the sentence, it has to be assumed that it was increased to some extent on this basis. The appropriate approach was to reduce the extent to which the sentence ought to be discounted in relation to the relevant mitigating factors.

#### **Conclusion and sentence**

26. The court is satisfied that for the reasons stated the sentence imposed on the appellant ought to be quashed and that it should re-sentence him as of now. It will do so with due regard to the various mitigating factors, many of which were specifically referred to in the court below, and the impressive educational and other achievements of the appellant in his now almost three years in prison.

27. In the court's view, the offence as committed was, in terms of its gravity, in the middle range for that offence and should attract a sentence of eight years imprisonment. The court will impose that sentence and will suspend the final three years of that term to account for the various mitigating factors. Because the appellant was a first time offender and because of his personal circumstances the court would have considered a slightly greater suspended element but for the fact that he absconded, although it is to his credit that he did not contest extradition and voluntarily returned to Ireland. While absconding when on bail should not be considered an aggravating factor for the purposes of calculating a sentence it may act to reduce the extent to which a court would otherwise discount a headline sentence to take account of mitigating factors. In this manner a decision to abscond may have consequences in addition to those directly arising from a breach of the conditions on which bail was granted.

28. In summary therefore, the sentence will be eight years imprisonment with the final three years suspended for a period of four years subject to similar conditions to those imposed by the court below.