THE COURT OF APPEAL

Ryan P.
Mahon J.
Edwards J.

171/13

The People at the Suit of the Director of Public Prosecutions

v

Marie Troy

Appellant

Judgment of the Court (ex tempore) delivered on the 15th day of December 2014 by Mr. Justice Edwards

1. This is an appeal against the severity of the sentence imposed on this appellant on the 1st of July 2013, at Limerick Circuit Criminal Court in respect of four counts of being in possession, on the 22nd of December 2010, of controlled drugs for the purpose of selling or otherwise supplying them to another. The drugs in question comprised five pieces of cannabis resin, a block of cannabis and smaller quantities' of cocaine and amphetamines, the monetary value of the cannabis being €900, the cocaine being €304 and the amphetamines €16.

2. The trial judge sentenced the appellant to a term of imprisonment of four years on Count No 1, backdated to the date of her remand in custody, which was the 17th May, 2013, and took the other counts into consideration. It requires to be stated that the appellant was sentenced for these matters following her conviction by a jury on the 17th of May 2013, and that she had pleaded not guilty.

3. Before this case came on for sentencing, a second case involving the appellant also came on before the same Circuit Court. In this second case, the appellant pleaded guilty to a further three counts of possession for controlled drugs for the purpose of selling or otherwise supplying them to another. In this instance, the drugs were cocaine, amphetamine and cannabis, and the value of the cocaine amounted to €848, the value of the cannabis amounted to €304 and the value of the amphetamine amounted to €295.

4. Accordingly, the appellant was sentenced in respect of both cases at the same time. In respect of the second case, the appellant was sentenced to a period of two years imprisonment on all counts to run concurrently with the four years that she received in respect of the offences to which she had pleaded not guilty and had been convicted by a jury. The sentence in the second case was also backdated to the same date as the other matter, namely to the 17th May, 2013.

5. The appeal lies only in respect of the sentence imposed in the first case, i.e., the matters committed on the 22nd of December 2010 in respect of which the appellant was convicted by the jury and for which she received four years. There is no appeal in respect of the sentence in the second case. The sentencing in respect of both matters is dealt with on the one transcript.

6. One of the grounds of appeal is based upon the fact that when the first case was before the District Court at an early stage of the criminal proceedings, the appellant had been made aware that the Director of Public Prosecutions was prepared to consent to summary disposition of the case in the District Court in the event that it was her intention to take a certain course, namely to plead guilty. She was made aware of that fact before the matter came on in the District Court and in the event she elected to plead not guilty as was her absolute entitlement. The matter was returned for trial to the Circuit Court, the trial proceeded before a jury, she was convicted, and she was subsequently sentenced to the sentence now under appeal.

7. The case is made that because the Director of Public Prosecutions was prepared to consent to summary disposal in the District Court on a certain basis that the appropriate tariff for the case was no more than twelve months imprisonment, being the maximum that the District Court could have imposed, and that in circumstances where she opted to go forward for trial to the Circuit Court it was an error of principle for the learned judge to then proceed to sentence her to four years imprisonment.

8. There were copious references in the course of the submissions to the appellant being penalised for having exercised her right to go forward for trial. The Court rejects any such suggestion as being unfounded and untenable. There is simply no evidence to support any suggestion of the sentencing judge having been so motivated.

9. The more appropriate question for this Court to have to consider is whether or not the learned trial judge in proceeding to sentence her to four years was in error in failing to take into account what had happened in the District Court and in treating the case as being one that merited a sentence of four years imprisonment in all the circumstances.

10. The appellant pointed to the Director of Public Prosecution's guidelines and in particular para. 13.9 of those guidelines in which it is stated that in deciding whether to elect for or consent to summary disposal, whether on a plea or otherwise, the main factor to be taken into account is whether the sentencing options open to the District Court would be adequate to deal with the alleged conduct complained of, having regard to all the circumstances of the case and in particular the seriousness of the offence. The guidelines as published acknowledge that whether or not a person intends to plead guilty may indeed be a relevant factor as to whether the sentencing options open to the District Court would be adequate. In the case of H.T. v. DPP [2004] which is quoted in the appellant's submissions, McKechnie J. has made the following comments:

> "In order however, to allay any fears in this respect, I would say that any indication by the DPP of its views should be expressed carefully so as to avoid even the remotest implication of the same amounting to, whether directly or indirectly,

actually or potentially, an inducement, threat or other illegality. I would not however, interfere with its operations."

11. In the Irish Criminal Process by Thomas O'Malley also quoted in submissions, the following comment is made by the author and he says:-

> "It follows therefore, that while the prosecution is not precluded from indicating its attitude in relation to the mode of trial, it should desist from giving an impression of using s. 13 as a lever to secure a guilty plea in the District Court. The accused person should be able to make a free and voluntary decision as to plea and venue."

12. The Court is satisfied that in this case the appellant made a free and voluntary decision as to plea and venue. She was fully legally advised. The Court has taken note of McKechnie J.'s view, with which it is in agreement, that a D.P.P.'s indication of his/her views should be expressed carefully. However, there is no complaint made in the case before this Court as to the manner in which the DPP's views was expressed. The appellant was apprised of her options in regard to whether or not the matter would be dealt with in the District Court, and made her choice on an informed basis. She elected to go forward for trial to the Circuit Court in circumstances where she was fully legally advised. She did not plead guilty in this case and that is an important point. Rather, she exercised her right to go to trial which is her absolute entitlement. There was no impropriety as far as this Court is concerned in terms of anything that may have happened in the District Court.

13. However, having been convicted in the Circuit Court she then faced sentencing in accordance with the range of sentencing options open to the trial judge in circumstances where the matter had been prosecuted on indictment. The Circuit Court judge when the matter came on before him, had to deal with the matter on the basis that the case was properly returned for trial to him and that he had a statutory sentencing range within which to operate. He measured the seriousness of the offence at four years, and did so in circumstances where he identified, correctly in this Court's view, bothe the aggravating and the mitigating features of the case, and he arrived in an appropriate way at the correct sentence to apply. The court does not find any error in principle with respect to the sentence in terms of the complaint that, simply because the DPP had been prepared to consent to summary disposal in the event of a plea, the Circuit Court judge was precluded from imposing a sentence in excess of twelve months imprisonment. That is manifestly not so.

14. A complaint is also made that there was an unjustifiable and disproportionate disparity as between the sentence imposed for the first offence and that imposed for the second offence. Three points required to be made in regard to this complaint.

15. The first is that there was a major difference in mitigating circumstances as between the two cases in that, in the second case, the appellant had pleaded guilty. In the first case she had not pleaded guilty, and by virtue of doing so lost the substantial mitigation to which she might have been entitled had she pleaded. She had also not co-operated in the sense of disavowing at interviews any knowledge of the drugs, and associated paraphernalia such as a weighing scales, plastic bags, a tick list and a substantial quantity of cash found during the same search as had led to discovery of the drugs. Moreover she had gone into evidence at her trial and reiterated this and had been disbelieved by the jury.

16. Secondly, the appellant has argued that the offending behaviour in that case was more culpable than in the first case. The Court rejects that submission. While slightly more drugs were found in the second case than in the first case, as well as drugs paraphernalia including plastic bags, a tick list and cash, the amount of cash found was significantly less than in the first case. Basically the cases were very similar, involving the same range and types of drugs, the same modus operandi, and overall the enterprise detected on each occasion was on the same scale.

17. Thirdly, rather than the first sentence having been unduly severe, the view can legitimately be taken that the second sentence was very lenient, particularly in circumstances where there was, as the Court has been informed, strong evidence against the appellant. It might be said that she should perhaps have been entitled to relatively little credit for her plea in those circumstances. However, that was a matter for the sentencing judge to assess. Moreover, there was a recidivist or repeat offending dimension in that this was a second instance of offending in a similar way This Court has not asked by the respondent to review and interfere with the sentence in the second case on the basis that it was unduly lenient. Accordingly, in circumstances where the validity of the second sentence is not challenged, the Court can only approach the matter on the basis that it is ostensibly at the lenient end of the spectrum of sentences that might legitimately have been imposed. The fact that it was lenient is something which benefits this accused and in respect of which she can make no complaint now.

18. The sentencing judge is a careful and experienced judge and he was also required to have regard to the totality principle in imposing the sentence in the second case. In circumstances where the appellant was being sentenced at the same time for similar crimes in respect of which there was less mitigation, it would have been legitimate for him to be more generous in affording weight to the mitigating factors in the second case in order to give effect to the totality principle.

19. A complaint is also made that the trial judge failed to have any or any adequate regard to the delay in prosecuting the appellant, and ought to have afforded her a reduction in sentence on account of that delay. The subject offences occurred on 22nd December 2010 and the appellant did not receive a trial until May of 2013. While the delay which occurred was regrettable, and no explanation for it has been furnished, the Court has received no evidence that the appellant was substantially prejudiced by that delay as was contended. The appellant was on bail awaiting her trial. While the Court accepts that she had a longer period of uncertainty as to her fate than was ideal, such delay as occurred was not gross or egregious delay and in the circumstances it was a matter for the trial judge to determine whether such delay as occurred was sufficient to justify a reduction in sentence. He was not obliged to reduce the sentence he would otherwise have imposed. It was a matter for his discretion which this Court has no grounds for believing was improperly exercised. The Court finds no error of principle in the fact that no discount was given on account of delay.

20. Finally, complaint is made that the learned judge erred in law in sentencing the appellant on account of an alleged system of on-going drug dealing whereas and in fact the offences related to a single occasion, and also that he took into account extraneous matters and indulged in speculation.

21. What the learned judge in fact said appears at pages 17 and 18 of the transcript of the sentencing hearing. At page 17 he stated "Now, the case for the prosecution is that while the amounts are small the real seriousness of this matter is that this was, what [counsel for the prosecution] called, a systems case". Moreover, at page 18 he concluded "It's reasonable to come to the conclusion, to draw the inference that she was a – in the regular business of dealing in drugs even though the amounts on each occasion were relatively small." In addition, he stated later on page 18, at line 29 that "One can be dealing in drugs in quite a level and only at any one point have a very small amount"

22. Insofar as the comments of the learned trial judge concerning systems and systemic dealing are concerned, the court wishes to

say that it is necessary to put those remarks in context. While the case concerned a single detection, the Court is satisfied that the fact that system evidence suggestive of regular dealing had been uncovered at the time of the detection was not evidence that the trial judge could have ignored. To take it into account was not to sentence the appellant in respect of crimes for which she was not before the Court. On the contrary, it went to her culpability in respect of the single occasion of offending that had been detected in that it clarified that the offending behaviour was not to be viewed as an isolated incident, a one off, or perhaps even aberrational, occasion. It was rather a situation of ongoing offending behaviour having been detected and exposed.

23. In so far as the remarks at p.18, line 29 are concerned, these also need to be put in context. The learned trial judge was considering the implications of the fact that the appellant had received a sentence in 2007 of two years for a similar course of offending and he pointed out that on that occasion she was found with drugs of a value of €13,300, in respect of cannabis resin and €3,400 worth of amphetamines. He noted that that was a substantial amount. He then stated: "it was in theory over the €13,000 threshold for which a prescriptive minimum of ten years is there, but I assume the prosecution didn't move on section 15A because the question of value would have been an issue in the case and there could be a reasonable doubt that it was actually over the threshold. I mention it here only to show that it is important but aggravating factor in consideration of this case. Now, the Oireachtas has enacted that for very serious drugs offences there should be a prescriptive minimum of ten years and that has measured -- the seriousness of the offences measured by the value of the amount of drugs found, the bar being €13,000 or just under it. But value is not always – it's not the only indicator of the level of culpability, one can be dealing in drugs in quite a level and only at one point have a very small amount. Taking into account everything, including the mitigating factors, I am going to impose a sentence of four years on Bill 110/1 backdated to the date she went into custody on the 17th May."

24. Complaint is made about the remark of the learned trial judge with respect to value being not the only indicator of the level of culpability and that one can be dealing in drugs at quite a level and only at one point have a very small amount, the suggestion being that the learned judge took extraneous matters into account and failed to sentence this offender solely for the small quantities that she had in her possession on this particular occasion. However, as the Court has already said, the sentencing judge was entitled to take into account that it was a systems case. His comments, when seen in context, were intended to do no more that to highlight that although the Oireachtas had enacted mandatory minimum penalty provisions in the context of s. 15A offences, and that s. 15A offences are defined by reference to the accused having possession of drugs having a minimum value, that value is not the only indicator of culpability, and that offences charged under s.15 rather than s. 15A may still be serious and significantly culpable offences even where the amount and value of the drugs is modest. The learned trial judge was correct in the point that he was making, and the Court regards his remarks as having being unobjectionable and as not being indicative of the judge going beyond the evidence, taking into account extraneous matters or engaging in speculation.

25. In conclusion, we believe that the proper and appropriate sentence was imposed in respect of the sentence under appeal and we find no error of principle.

26. For these reasons we will dismiss the appeal and confirm the sentence of the Circuit Court.

Insofar as the second sentence is concerned, that is not under appeal. While on the face of it, it would appear to be a lenient sentence, the court will say no more than that, the court is not entitled to look at the sentence at all in a sense, because it is not under appeal.