



THE COURT OF APPEAL

Record Number: 252/2017

**Edwards J.
Kennedy J.
Donnelly J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

RICHARD FOLAN

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 22nd day of October 2019 by Mr. Justice Edwards

1. Now, this matter comes before the Court by way of an appeal against severity of sentence. On the 8th November 2017 the appellant received a sentence of ten years' imprisonment with the final three years suspended in respect of the offence of possession of controlled drugs contrary to s.15A of the Misuse of Drugs Act 1977 (as amended).

The circumstances of the crime

2. The sentencing court heard evidence from Sergeant Máire Connelly who told the court that she was involved in investigating the sale of controlled drugs in the Meath area, and as a consequence had carried out surveillance at the accused's father home in Stamullen, County Meath, where the accused also resided. Arising from that surveillance she had applied for a search warrant to search that premises. The search was conducted on the 29th of June 2017 at about 3pm.
3. In the course of that search investigating gardaí found a substantial quantity of controlled drugs that were concealed in the attic of the premises and in a van parked there.
4. The appellant was co-operative with the garda search and assisted them in locating the drugs. The drugs found were 7.6 kilograms of cannabis, 4.2 kilograms of cannabis resin, and approximately 8.7 kilograms of MDMA. The total value of the drugs seized was stated to be €3,500,000.
5. Upon being arrested he fully cooperated with the investigation and made lengthy and incriminating admissions in which he fully detailed his involvement in this offence and in other offences of a similar nature. He indicated

- a) He was targeted by a third party, agreeing to store the drugs one evening when drunk and buying cocaine and thereafter felt unable to back out.
 - b) The initial consignment was 50 kilograms.
 - c) Initially he stored the drugs but this progressed to making deliveries, being told the quantity, location and recipient.
 - d) He was paid a couple of hundred euro for the first consignment, upon receipt of the second consignment, approximately 50 kilograms, he received €1,300.
 - e) When he tried to back out of the third consignment they began to threaten him.
 - f) In total, it appears there was five or six deliveries.
 - g) He was aware the value of the drugs ran into hundreds of thousands of euro.
6. The appellant indicated a plea of guilty at an early stage in the prosecution and entered such a plea shortly after the first listing in the Circuit Court.

The appellant's personal circumstances

7. The appellant was born in July 1986, was of previous good character in that he had no relevant previous convictions and had a good work history. At the material time, the appellant was suffering from alcoholism, a fact which made him vulnerable to agreeing to become involved in the storage and movement of large quantities of drugs. The evidence was that the appellant had been a good citizen who had emigrated to Australia with his partner when the economic difficulties occurred in Ireland in 2008. The relationship broke up partly because of his drinking. The appellant had returned to Ireland but was in financial difficulties owing to the state of the economy and mortgage arrears and negative equity on a property that he had bought with his former partner.
8. The prosecuting Garda accepted that the immediate background to the offending was that the appellant was drinking excessively. He was accepted as being a somewhat pathetic figure who was drinking alone in a local bar. It was suggested that he was brought into offending initially by being given small sums of money for drink. Once the appellant had taken one delivery of drugs, he was unable to back out of engaging in other transactions. This had a very detrimental effect on the appellant's mental health and he began engaging in odd behaviour. He was described as a "nervous wreck" at the time of the offences.
9. There was no evidence to suggest that the appellant had materially benefitted in any significant way from the offences.
10. A large number of positive testimonials concerning the appellant were presented to the court below.

The Sentencing Judge's Remarks

11. Having rehearsed the facts as established in evidence, the sentencing judge commented:

"He was arrested, detained and interviewed, which is the normal procedure, and he fully cooperated with the interviews. He gave full details about his own involvement in the drugs. He had an alcohol addiction problem prior to, and at the date of this offence he was targeted and approached by a third party, and or, third parties, and these will be dangerous persons to be get involved with, to store the drugs. He refused the first request, but then, on another occasion, when he had consumed drink and was under the influence of drink, he agreed to store and hold drugs for this third party. And he got himself in so deep that he could not see himself getting out of this arrangement. He was informed of the names of persons to whom he would drop or make deliveries of the drugs. He tried to back out in respect of receiving a third assignment, but it was made clear to him that he had no option, that there was an arrangement made and that he had to comply or abide by such an arrangement, continue with these persons, that they decide when the arrangement is over or not. Unfortunately for Richard Folan, he wasn't aware when he was dealing with these persons that they set the terms and conditions and that, once he agreed unwisely to hold and store, and get involved in the drugs for this third party; that there was no way out until such time as the third party agreed to let him out or release him from this arrangement. As I've already set out, his involvement in the drugs at the particular time, he would have been vulnerable due to his alcohol addiction. He was an easy target by reason of his weakness due to alcohol addiction, and this was exploited by the third party, but he did nevertheless allow himself to get involved, holding and storing, which can only be described as substantial, indeed very vast amount of drugs. Garda Connolly very fairly sets out, he didn't know or appreciate the actual amount of drugs, but certainly would have known that what he was receiving was in substantial it would amount to substantial sums of money, indeed running into hundreds of thousands of money, having regard to the amount of stuff that he was holding or storing. It's interesting that Garda Connolly describes his demeanour. On arrival at the property, she describes him as a "nervous wreck". A combination of factors, the fact that he was being pressurised to hold the drugs in his house, that he had no way of escaping the clutches of this evil and dangerous person, and what does a person do in these circumstances? Well, he was simply caught by reason of the excellent surveillance and it detective work by the guards, and the matter then being brought to court.

... He has no relevant previous convictions. ... Richard Folan, when I use the word "unwisely" getting involved in these drugs, there was some degree of pressure on him due to his alcohol addiction, but he ought to have been aware, or should have been aware, that when you get involved with this type of person or persons involved in drugs that there are serious consequences if you are caught or found with drugs on your person or on your property. He would have known it the minute the drugs were stored in his house. I accept there was difficulties in escaping, getting away from the person who I described as being dangerous - indeed very dangerous - type of person that was dealing with. But by reason of holding and storing the drugs, as he was doing on the occasion when the guard executed the search warrant, he was an important link or conduit in the sale or supply of drugs.

You have to store them somewhere. You have to keep them somewhere. Then they have to be moved on. So, he was involved in he was the conduit, he was acting as the conduit and he was acting as a link in the overall context of the drugs. I accept, in the overall range of the category of persons involved, that he would have been in the lower rung.

In respect of count No. 1, the maximum custodial sentence is life imprisonment; that is a starting base. Then I must decide where does this count lie in respect of the maximum sentence; I am satisfied would be in the higher range. Then I must have regard to his personal circumstances. He is aged 31 years of age. He is a qualified plumber, my understanding is. He would have some work history, but in that years it would appear that he wasn't working, that drink had taken over his life and he had a chronic history of alcohol, substance abuse. He did go to Australia with his partner but, unfortunately, that broke up and he came back to Ireland.

In mitigation, there was the plea of guilty. He fully cooperated with the guards when the property was being searched and the search warrant being executed, and informed the guards where the drugs were to be found. He fully cooperated with the investigation when he was being interviewed in respect of his involvement in the drugs, he made admissions. He gave as much information as he could in the circumstances, and that would amount to materially assisting in the investigation. He expressed remorse.

I am satisfied, in the overall context of his involvement in the drugs, that there was a degree, indeed a substantial degree and pressure put on him in respect of the drugs and then, in respect of having to store and keep the drugs. There was really little or no financial gain or profit for his involvement in the drugs. While in custody, he has taken positive steps. He's engaged with counselling services, and this seems to have been extremely positive. He's also on enhanced status while in custody. He works the staff mess and resides in the substance-free landing. It also appears from Noel Dowling's counselling service that he has insight into his offending behaviour, that's in respect of this offence, and he has no previous convictions for any drug related offences.

Now, the aggravating factors in the case: there's the serious nature of the offence, the manner of his involvement in the offence. He was holding/storing the drugs for a third party in his house and in his van. By holding them and storing the drugs, he played an important link or conduit in the sale or supply of drugs, a substantial amount of drugs, substantial street value of the drugs, the effect of drugs on society which has a destructive effect on society. In respect of 15A, the maximum custodial sentence is life imprisonment; that is the starting base. Then I must have regard to the provisions of section 27(3) of the Misuse of Drugs Act 1977, as amended by section 5 of the Criminal Justice Act 1999."

12. The sentencing judge then recites the terms of subss. (3A), 3(B) and 3(C) as inserted, before continuing:

"I am satisfied, having regard to the totality of matters and to the mitigating and the personal circumstances that I have referred to, and to the totality of matters, that there are exceptional and specific circumstances relating to the offence that come within the ambit of section 27(3) of the said Act. And that the maximum minimum sentence to be served, imposed and served in the circumstances, would be unjust to serve the 10 years if it is to be applied and to be served. However, it still remains an extremely, extremely serious case. I must have regard to the substantial I must have regard to the serious nature of the offence and to the substantial aggravating factors in the case and to have regard to the mitigating and the personal circumstances, and I will have regard to the mitigating and the personal circumstances. And in respect of count No. 1, I'm imposing a 10 years custodial prison sentence, the 10 years to run from the 29th of June 2017. However, having regard to the mitigating and the personal circumstances and that I've included that it's a case that the exceptional, specific circumstances relate to this case, having regard to the totality of matters, I propose and will suspend the last three years of the 10 years on the following terms: that the accused, Mr Richard Folan, enters into a bond before this Court, the bond being €200, to be good behaviour for a period of three years from the date of release from prison in the respect of the sentence that has been imposed. So I'm imposing a 10 year sentence to run from the 29th of June 2017 but, however, I'm suspending the last three years for the reasons so stated."

The Grounds of Appeal

13. The Notice of Appeal makes five separate complaints as follows:

1. The learned trial judge erred in imposing a sentence which was excess having regard to:
 - a. The personal circumstances of the appellant;
 - b. How the appellant came to be involved in the commission of the offence;
and,
 - c. The testimonials offered in support of the appellant.
2. The learned trial judge did not attach sufficient weight to the fact that the appellant had pleaded guilty at the earliest possible stage of proceedings and had no previous convictions.
3. The learned trial judge did not attach sufficient weight to the level of co-operation and the detailed admissions of guilt made by the appellant.
4. The learned trial judge had excessive regard to the valuation of the drugs as an aggravating factor in circumstances where it was accepted that the appellant had no knowledge of the value of the drugs.
5. The learned trial judge erred in failing to give adequate credit for the rehabilitative efforts of the appellant and the prospect of rehabilitation upon release.

Discussion and Decision

14. Grounds of appeal numbers 1, 2, 3 and 5 all relate to the discount afforded for mitigation and may be dealt with together as representing on a rolled-up basis a complaint that the sentencing judge failed to take adequate account of the mitigating circumstances in the case and that the suspension of a three-year portion of the headline sentence was insufficient to adequately reflect that mitigation.
15. In contrast ground of appeal number 4 relates to the headline sentence and may be taken as representing a complaint that the headline sentence of ten years nominated by the sentencing judge was excessive.
16. It was indicated at the oral hearing of this appeal by counsel for the appellant that in the light of the recent judgment of this court in *The People (Director of Public Prosecutions) v. Sarsfield* he was not inclined to press any complaint based on the headline sentence.
17. Accordingly, it is now unnecessary to deal with ground of appeal number 4 save and insofar as to say that but for the fact that the appellant's culpability was somewhat reduced on account of duress and also on account of his general vulnerability at the time that he became involved, and associated inter alia with his profound alcoholism and other adversities in his life, a sentencing court might justifiably have nominated a significantly higher headline sentence than was in fact nominated.
18. We therefore think that the withdrawal of this ground was wise in the circumstances.
19. Insofar as discounting for mitigation was concerned, it cannot be gainsaid that there was significant mitigation available to this appellant beyond that which the sentencing judge was obliged to take into account in his assessment of gravity and to which we have already alluded.
20. Before looking at that it should be stated at the outset in dealing with the mitigation side of the case that it was accepted on behalf of the prosecution that circumstances exist in this case which would have allowed the sentencing judge to exercise his discretion to depart from the presumptive mandatory minimum sentence of ten years' imprisonment.
21. By far the most significant mitigating factor was the early plea of guilty. In the circumstances in which it was proffered at the earliest opportunity it was indicative of true remorse and of a willingness on the part of the appellant to take responsibility for his actions. It is true that he was effectively caught red-handed and that the evidence that might have been brought to bear against him was strong. Nevertheless, by pleading guilty in the manner in which he did he saved the prosecution the expense of making detailed preparations for a trial and saved the cost of the trial itself. In addition, by responsibly pleading at the earliest opportunity he freed up court time for the benefit of other litigants. The plea was therefore still of significant value.
22. The appellant was also a person who was largely of previous good character. It was initially indicated to the sentencing court by prosecution counsel that he had no previous convictions at all and that assertion was subsequently corrected to acknowledge that he

had a previous conviction for a road traffic matter although no details of that were provided. It is reasonable to infer that it was not a matter of great significance. It was certainly not a relevant previous conviction in terms of being for the same offence or for a similar offence as the one for which he was being sentenced.

23. Accordingly, there was no question of his previous conviction operating as an aggravating factor in the case, rather applying the progressive loss of mitigation principle it would have had some modest impact on his ability to rely on previous good character. It is fair to say, however, that a conviction for a single minor road traffic offence would not have greatly influenced this aspect of matters.
24. Accordingly, he could justifiably be treated as a person who was essentially of previous good character.
25. There was also evidence before the sentencing court of co-operation on the appellant's part in the context of the search and of the fact that he made admissions. In addition, there was a large number of testimonials concerning the appellant coming from his parents, his siblings, the wider members of his family, from friends, from neighbours and from other persons in the community in which he lived. While not condoning his involvement in this crime they all speak highly on him in terms of his worth as a person and of previous positive contributions that he has made to society and to his community. They also revealed that he has faced considerable adversities in his life.
26. It is clear that he had resorted to alcohol as a coping mechanism but regrettably developed a dependency on it and is now an alcoholic. He has sought unsuccessfully in the past to address this, and in particular in that context the testimonials include one from Cuan Mhuire which confirms this.
27. These factors are said to have given rise to the vulnerability and susceptibility to being subjected to duress that led to him being taken advantage of in lead up to the offence. He has received credit for that duress and vulnerability insofar as it reduced his culpability for the offending.
28. But quite apart from that, his alcoholism, and the adversities he has had to face in his life generally, even if he had never been involved in this crime, are part of his personal circumstances and make-up and he was entitled to have those taken into account.
29. Moreover, the sentencing court was told that he was truly remorseful and determined to rehabilitate both with respect to his alcoholism and in terms of assuaging and avoiding any further involvement with drug trafficking or another form of criminality.
30. Amongst the documents furnished to the Court was a certificate from Merchants Quay Ireland confirming that the appellant had engaged well with rehabilitative services while a prisoner on remand.
31. While the sentencing judge did state that he was taking the factors mentioned into account, we are not satisfied that he attached sufficient weight to them. We are also

somewhat concerned that he used the mechanism of a suspended sentence to reflect all of the mitigation due to this offender in circumstances where he is an alcoholic. It is not unknown for recovering alcoholics to relapse even when doing their best. That has already happened in this case. The appellant underwent a twelve-week course of treatment in Cuan Muire, Athy, in 2015. Despite this he relapsed and regrettably became involved in the matter now before the Court.

32. The difficulty with reflecting all of the appellant's mitigation in a decision to suspend the last three years of the headline sentence is that if he relapses and gets involved even in minor offending he will lose, or may potentially lose, all of his discount for mitigation. It would have been better in our view to have given a straight discount for mitigation, or a straight discount for the great majority of the mitigation and perhaps a short-suspended period in addition to incentivise continued rehabilitation.
33. In circumstances where we are not satisfied that the discount for mitigation was adequate and in circumstances where we also have concerns about the way in which the sentence was structured, we are satisfied to find an error of principle.
34. We therefore will quash the sentence imposed by the Court below and proceed to a re-sentencing of the appellant. We are heartened to note that he is continuing to do well in prison. We have received additional testimonials which speak to that and we also take those into account. It is clear that the appellant's resolve to reform is genuine and we are anxious to incentivise his continuation along the path of rehabilitation.
35. In the circumstances of the case we will again nominate a headline sentence of ten years' imprisonment. We are satisfied that circumstances exist to permit us to depart from the presumptive mandatory minimum sentence. In all the circumstances of the case we will afford the appellant a straight discount of three years from the ten-year headline sentence but in addition and to reward him for progress towards rehabilitation to date as well as incentivising his continued rehabilitation we will also suspend a further eighteen months of the sentence. Accordingly, the final sentence is one of seven years' imprisonment with the final eighteen months thereof suspended.
36. Now in respect of the terms on which the sentence is to be part suspended, there will be the usual term: that he enters into a bond in the sum of €100 to keep the peace and be of good behaviour towards all citizens for a period of eighteen months from the date of his release. However, we will also make it a further condition of the suspension that he is to submit to supervision by the Probation Service and that he must comply with all of their recommendations and requests.