



THE COURT OF APPEAL

Record Number: 01/2021

**Edwards J.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

MICHAEL FLYNN

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 20th day of June 2022 by Ms. Justice Kennedy.

1. This is an appeal against severity of sentence. The appellant pleaded guilty to an offence contrary to s. 15A of the Misuse of Drugs Act, 1977, as amended, being the possession of drugs with a value of €13,000 or more for the purpose of sale or supply. On the 3rd December 2020, the appellant was sentenced to 5 years' imprisonment with the final 12 months suspended, in arriving at the sentence, the judge took into consideration an offence relating to the possession of cannabis.

Background

2. The background facts are that, on the 5th October 2018, Gardaí received confidential information that the appellant was in possession of an amount of controlled drugs, having collected them in Dublin, and that he was making his return to Tipperary driving a Dacia duster.

3. Patrols were set up to intercept the appellant as he travelled back from Dublin and he was so intercepted at the bypass of Knocktopher. A search ensued pursuant to s. 23 of the 1977 Act and whilst nothing was found on his person, a package containing what was believed to be diamorphine was found within the steering column of the appellant's jeep.
4. The appellant was arrested for an offence contrary to s. 15 of the 1977 Act. He was interviewed and in interview he cooperated fully with the investigation and made admissions that the purpose of his trip was to collect drugs. The appellant claimed he was not aware of the nature of the drug, but knew it was concealed somewhere in his jeep.
5. The appellant stated that collection of the drugs was the extent of his involvement. The drugs were to be left in the jeep and people would come to his property and remove the drugs from the jeep. He further detailed the route he took to Dublin and the location at which he collected the drugs. Gardaí corroborated the appellant's path up and down to Dublin using CCTV footage.
6. On analysis of the powder substance, it was found to be diamorphine, the total weight of which was 625.8 grams with a street value of €87,612.
7. The day after the appellant's arrest, a search was carried out on his property, pursuant to a search warrant and a small amount of cannabis was recovered. It was valued at around €60/€70.

Personal circumstances of the appellant

8. The appellant was 50 years of age at the time of sentencing. He is a man with 27 previous convictions, including three previous convictions under the Misuse of Drugs Act and a previous conviction for possession of knives.
9. The appellant has an addiction to heroin. It is said that the appellant's involvement in the offending herein arose as a result of him having acquired a drug debt and he was under pressure to repay that debt. The appellant previously held employment as a lifeguard and in the car repair business. It is said that he had offered cars in lieu of his debt but that that was not acceptable to those to whom he owed money and so he was put under pressure to act as a "courier" or "mule" in the events which are the subject of this appeal.
10. The appellant was formerly married and is the father of three children. It is said that his addiction to heroin caused the breakdown of his marriage. The appellant is living with his eldest son whom he cares for. His son suffers from mental health issues.
11. Evidence that the appellant was, at that stage, drug free, was furnished to the court below.

The sentence imposed

12. The judge identified a pre-mitigation headline sentence of six years' imprisonment and considered as aggravating factors that the appellant knowingly participated in a criminal enterprise, that he was in possession of a large amount of the drug and that, being an

addict himself and aware of the effects of the drug industry on people, he still proceeded to bring drugs from Dublin into Tipperary.

13. In terms of mitigation, the court took into account, the appellant's early plea of guilty, his co-operation with the Gardaí, the efforts he had made to address his drug addiction, the fact that he was not making material gain from the offending herein but rather doing it in an attempt to wipe out his drugs debt and the absence of the trappings of wealth one might associate with high level drug dealing in the appellant's home. The judge further noted that the appellant is the primary carer for his son.
14. Having considered the mitigating factors, the judge reduced the headline sentence by a year to five years' imprisonment and suspended the final 12 months of that sentence on conditions.

Grounds of appeal

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

- a. The learned trial Judge erred in principle and in law in imposing a headline sentence of six years, reduced to five years after mitigation, with 12 months suspended, in respect of Count 1, such being unduly harsh and not proportionate in the circumstances.
- b. The learned trial Judge erred in principle and in law in failing to properly consider the impact on others, in particular on the Appellant's son, that such a sentence would have.
- c. The learned trial Judge erred in principle and in law in failing to properly assess the accused's employment history.
- d. The learned trial Judge erred in principle and in law in failing to give sufficient weight to the Appellant's early guilty plea.
- e. That the learned trial Judge erred in principle and in law in failing to give sufficient weight to the material assistance given to An Garda Síochána by the accused.
- f. That the learned trial Judge erred in principle and in law in failing to give sufficient weight to the accused's cooperation with An Garda Síochána.
- g. That the learned trial Judge erred in principle and in law in assessing the Appellant's limited role in the overall operation.
- h. It is thus submitted that the learned trial Judge erred in law and in fact in imposing a sentence that was excessive given all the circumstances of the case."

Submissions of the appellant

16. The appeal is confined to the discount allowed for mitigation and as to how the judge incentivised rehabilitation. No issue is therefore taken with the nomination of 6 years for the headline sentence.

17. It is submitted that there was substantial mitigation in the within case and while it is accepted that the appellant has previous convictions, it is pointed out that these were all dealt with in the District Court.
18. The appellant further submits that one of the other factors to be considered by a sentencing judge is the impact of a custodial sentence on other persons, in the instant case, the impact of the appellant's sentence on his son who is suffering from psychiatric illness and has been diagnosed with schizophrenia. The appellant is described as the primary carer of his son and his principal point of contact with the relevant medical professionals. Reference is made to *The People (DPP) v Jervis and Doyle* [2014] IECCA 14 at para. 66 where this Court said that:

"The effect of the breaking up of a family unit by separating children from one or both of their parents is a highly material consideration in sentencing. This proposition is so obvious that it is only to be stated for it to be accepted. There are, however, some crimes so serious that this necessary consequence follows from the commission of the crime itself. Everything depends on the circumstances of the case."

Prof. O'Malley in his text on Sentencing law and Practice, 3rd ed. at para. 6-69 comments;-

"What is noteworthy about this statement, which was quoted with approval by the present Court of Appeal in *People (DPP) v Douche*, is that it does not differentiate between cases where the offender is the sole carer and those in which he or she is joint carer of young children. Admittedly, *Jervis and Doyle* was unusual to the extent that the co-defendants were a couple in a long-term relationship with two children aged seven and 14 years. This was one reason, among others, why suspended sentences were upheld even though they pleaded guilty to a s.15A drug offence."

19. In summary, it is contended on behalf of the appellant that the judge did not permit a sufficient discount for mitigation or to incentivise rehabilitation. It is accepted, however, that a custodial element was warranted and that the appellant is not seeking a wholly suspended sentence as was the position in the court below.

Submissions of the respondent

20. The respondent does not accept ground (a), namely that the sentence imposed was disproportionate. It is the Director's position that the trial judge gave a careful and reasoned judgment during which both aggravating and mitigating factors were referenced. The respondent relies upon *The People (DPP) v Sarsfield* [2019] IECA 260 and submits that the appellant was caught "red handed", an aspect which is relevant in terms of *Sarsfield* and that the ultimate sentence accords with that decision.

21. In response to ground (b), it is said that the trial judge did, in fact, consider the impact of the sentence on the appellant's son, on three separate occasions. The occasions are listed and cited in the footnotes.
22. The respondent takes issue with all grounds and contends in essence that the judge afforded an effective discount of 1/3 sufficient to recognise the mitigation present and to incentivise rehabilitation.
23. It is the Director's position that each of the specific criticisms made of the trial judge in terms of failing to give sufficient weight to the various mitigating aspects set out at grounds (b) to (g) are not consistent with the carefully reasoned judgment of the trial judge.

Discussion

24. In the case of offences contrary to s.15A, the circumstances surrounding the offending will vary from person to person.
25. In the present case, no issue is taken with the headline nominated and we consider this to be the correct approach. It is accepted that the appellant owed a drug debt and as a result was under some pressure to discharge that debt, that he acted as a courier, and he was not to derive any financial benefit from the enterprise. These factors operate to mitigate his culpability.
26. However, it cannot be gainsaid but that the value of the substance was significant, and whilst it is the position that the value of the substance is not determinative, it is of course a factor to be considered in conjunction with the role played by the appellant in the conveyance of the substance.
27. In this case, the appellant was fully aware that he was conveying drugs even if he was unaware of the nature of the drugs or the precise quantity. The judge properly identified the aggravating factors, including the value, and the societal impact of drugs, she found herself in a position on the evidence to depart from the presumptive mandatory minimum sentence in light of the appellant's admissions, co-operation and early plea of guilty. No error in principle arises and indeed none is suggested. The focus of this appeal centres on the credit allowed for mitigation and consideration of the prospect of rehabilitation.
28. Insofar as mitigation is concerned, it is clear that the judge took great care in her assessment of the material before her. The transcript shows that she specified all relevant factors in some detail to include the appellant's personal circumstances. She took account of the admissions, early plea and co-operation. She acknowledged the appellant's efforts to address his underlying addiction by virtue of his participation in a methadone program. She reduced the sentence to one of 5 years and suspended the final year of that sentence on terms. Thus, giving the appellant credit for mitigation and in order to incentivise his ongoing rehabilitation. It must also be recalled that the appellant is a man with 27 previous convictions which operate as a progressive loss in mitigation.

29. In the circumstances, we do not find any error in principle, the judge allowed an effective discount of a 1/3 where the actual time to be served is one of 4 years' imprisonment. The question of rehabilitation is addressed in that she suspended the final 12 months of the 5-year sentence, dependent upon the appellant engaging with the probation services following his release, clearly in the hope that he will continue with his efforts to address his drug addiction and avoid further infractions.
30. The sentence is one entirely within the margin of appreciation afforded to a sentencing judge and accordingly, the appeal is dismissed.