THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 163

Record Number: 280/18

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

RICHARD FARRELL

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 12th day of June 2020 by Ms. Justice Kennedy.

1. This is an appeal against sentence. On the 18th October 2018, a sentence of four and a half years' imprisonment with the final eighteen months suspended was imposed on the appellant who had entered pleas of guilty in respect of counts on two Bills of Indictment. The offences in question were all counts of possession of controlled drugs for sale or supply contrary to section 15 of the Misuse of Drugs Act 1977, as amended.

Background

2. The first Bill of Indictment was Bill no. 29/2017 and the appellant entered a plea of guilty in relation to four counts of possession of controlled drugs for unlawful sale or supply contrary to section 15 of the Misuse of Drugs Act 1977. A *nolle prosequi* was entered on the remaining counts. On four separate occasions between the 20th April 2016 and the 24th May

2016, the appellant sold quantities of diamorphine to undercover gardaí, ranging from values of €20.00 to €40.00. A search warrant was then obtained for the appellant's address and during the search a mobile phone, a tick list and a small quantity of diamorphine was recovered. On the 29th November 2016 the appellant was arrested and he made full admissions to selling drugs on the dates in question.

3. In respect of Bill no. 14/2017 this relates to investigations carried out in July 2016. On the 25th July 2016, a search warrant was obtained for the appellant's address. Diamorphine with a value of €2,000 was recovered. The appellant was arrested and he made full admissions to selling diamorphine to his friends. The appellant pleaded guilty to a count of possession of controlled drugs for unlawful sale or supply contrary to section 15 of the Misuse of Drugs Act 1977. A *nolle prosequi* was entered on the remaining counts.

Personal circumstances of the appellant

4. The appellant was 34 years of age at the time of sentencing. The appellant has 25 previous convictions for summary offences including four relating to section four theft offences and 19 relating to public order offences. The appellant has no previous drug-related convictions. The Court heard that the appellant is a chronic heroin addict who was dealing drugs to feed his own habit. The appellant has little family support and he had a difficult upbringing, including suffering the loss of two brothers when he was young. The appellant was one of the main drug dealers in Carlow but he did not earn a profit from his dealing but rather he did it to feed his own addiction. The Court heard evidence from Garda Cleary that Mr Farrell was effectively a runner for persons who were higher up the chain of criminality in Carlow.

5. In terms of rehabilitation the Court heard that the appellant has made various attempts to treat his addiction issues. At the time of sentencing the appellant was on a methadone programme and had reduced his heroin use from six bags a day to one bag a day.

The sentence

6. On the 18th October 2018, the appellant received a sentence of four and a half years' imprisonment with the final eighteen months suspended on terms.

7. In terms of mitigation, the sentencing judge noted that the appellant cooperated at interview and gave full admissions as well as an early plea of guilty. The sentencing judge further noted that the appellant has unfortunate personal circumstances including a history of chronic addiction which led him to be employed by others who he lived with who saw economic gain by engaging with him and he was under their dominion.

8. In respect of Bill 14/17 the sentencing judge identified a headline sentence of seven years' imprisonment, taking into account the guilty plea this was reduced to five and a half years and taking into account the other mitigation present, the sentence was reduced to four and a half years. The Court then said that having looked at the offender, the offence and the prospect of rehabilitation, the final 18 months of the sentence would be suspended on terms.

9. In respect of Bill 29/17, the same sentence was to run concurrently on each count

Grounds of appeal

10. The appellant puts forward the following grounds of appeal:-

I. It is submitted the trial judge erred in principle by setting an unduly harsh headline sentence of seven years which was disproportionate in the circumstances.

II. It is submitted the trial judge failed to adequately discount in sentence for the appellant's entry of a guilty plea.

III. It is submitted the trial judge failed to sufficiently cater for rehabilitation in the sentence imposed.

IV. It is submitted the trial judge failed to adequately discount in sentence given that the appellant was under the dominion of more nefarious people.

V. It is submitted the trial judge failed to sufficiently consider the appellant's drug and alcohol addiction present and operative through all offences before the Court.

VI. It is submitted the trial judge failed to impose a fair and proportionate sentence in light of all the mitigating factors.

Submissions

Ground one- Headline sentence

11. The appellant submits that the sentencing judge erred in identifying a headline sentence of seven years. The appellant argues that the Court overestimated the culpability of the appellant and the appellant refers to *The People (DPP) v. Derek Long* [2009] 3 IR 486 where the Court stated that the quantity and value of the drugs seized is a critical factor in assessing the gravity of an offence. By way of comparator, the appellant refers to the headline sentences imposed in *The People (DPP) v. Xiao Fei Weng and Shi Dong He* [2015] IECA 261 and *The People (DPP) v. Sarsfield* [2019] IECA 260. In *The People (DPP) v. Xiao Fei Weng and Shi Dong He*, the appellants' position in the drug dealing enterprise was lower than the present case but the value of the drugs amounted to €1.2 million. It was also accepted that the appellants were under the dominion of more nefarious people. In these circumstances, a headline sentence of 11 years was considered too high.

12. In *Sarsfield* the value of drugs seized was €4.1 million and it was a section 15A charge, justifying the setting of a 15-year headline sentence. The appellant submits that given the

low value of the drugs involved in the present case, a headline sentence of seven years was unduly harsh.

13. It is submitted that having regard to the assessment of the gravity of the offence by reference to the harm caused by drug dealing of this nature and the subjective culpability of the offender, the sentencing judge arrived at a proportionate sentence that was within her available discretion.

14. Although the value of the drugs found in this case was low, the evidence established that the culpability of the appellant was high, in that he had established himself as one of the main dealers of drugs in the area and it was also concerning that there was evidence of the easy availability of drugs from the home of the appellant and the harm caused by the diamorphine in the area. It is submitted that although the value of the drugs was low, it has been made clear that value of the drugs, is not, in and of itself determinative of the sentence to be imposed.

Ground two-Guilty plea

15. The appellant submits that the guilty plea was entered at the first possible opportunity and this should have resulted in the greatest possible level of reduction that could have been afforded for a guilty plea in the circumstances. The appellant notes that the range available to the sentencing judge ranged from a non-custodial sentence to the sentence imposed and above.

16. The respondent submits that a significant reduction was afforded to the appellant for his plea of guilty in circumstances where he was effectively caught red-handed. The respondent refers to *The People (DPP) v. Kenny* [2011] IECCA 16 where the Court stated that in such cases a guilty plea merits less in terms of consideration than it might otherwise.

Ground three-Rehabilitation

17. The appellant refers to *The People (DPP) v. O'Brien* [2018] IECA 2 where the Court stated as follows at para 46:-

> "In the past it has been suggested by the former Court of Criminal Appeal in People (DPP) v GK[2008] IECCA 110 that a court in sentencing, or an appellate court in reviewing a sentence, 'must examine the matter from three aspects in the following order of priority, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence' (this Court's emphasis), thereby suggesting that the penal objective of rehabilitation is always to be afforded the highest priority. While we do not now think that this is necessarily a correct statement of principle and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence, or retribution and incapacitation."

18. The appellant submits that this was a case where the most important sentencing principle ought to have been rehabilitation, given the evidence of the appellant's efforts thus far, his addiction being the catalyst for the offending in question and the offence being carried out in a situation where the appellant was under the dominion of others due to their exploitation of his addiction. The appellant submits that the sentencing judge erred in seemingly placing the interests of society and the rehabilitation of the appellant as opposing principles in sentencing. The appellant refers to *The People (DPP) v. Byrne* [2018] IECA 120 where the Court stated that the rehabilitation of offenders is in the interests of society.

19. The respondent submits that while the appellant had made progress in his rehabilitation he was still engaged in drug-taking at the time of sentencing. Furthermore, the sentence

imposed did incentivise rehabilitation given that the final eighteen months were suspended. The respondent submits that the sentencing judge did not err in prioritising the other alternative objectives of sentencing including retribution, deterrence and the protection of the public.

Ground four- Dominion

20. The appellant refers to *The People (DPP) v. Nguyen* [2015] IECA 157 where the Court held that there was an error of principle in the sentencing judge's approach as he failed to adequately take into account that the appellants were merely workers in the organisation, brought into this country for that purpose and vulnerable to exploitation with no absolute freedom to walk away from their involvement. *Nguyen* was further considered in *The People (DPP) v. Purse* [2019] IECA 203 where a claim of being under the dominion of more nefarious persons was distinguished from *Nguyen* on the basis that the appellant had dominion and control and was the tenant of the premises in question. In light of this, the appellant submits that the trial judge failed to pay sufficient regard to the fact that the appellant was not involved in the management of the criminal enterprise and his only gain was the feeding of his heroin addiction. The appellant submits that this addiction was exploited by more nefarious individuals and in those circumstances the appellant was incapable of exercising any dominion over himself.

21. The respondent submits that the Court gave appropriate weight and consideration to the fact that the appellant worked for others higher up on the ladder in order to secure drugs to feed his habit. However the Court recognised that he was still one of the main dealers in the area as a result.

Ground five- Addiction

22. The appellant refers to *The People (DPP) v. Fitzgibbon* [2014] 2 ILRM 116 in submitting that the sentencing judge failed to fully consider the appellant's substance abuse as a mitigating factor, particularly where it stemmed from childhood trauma and it contributed to the offence. The appellant highlights the efforts at rehabilitation on his part which, while not perfect, are significant efforts.

23. The respondent submits that in sentencing the appellant the trial judge clearly laid out the addiction issues the appellant had struggled with from an early age and it was made clear that the judge took these considerations into account.

Ground six-Mitigation

24. The appellant refers to the general principles to be applied when sentencing, as set out by McKechnie J. in *The People (DPP) v. Begley* [2013] 2 I.R. 188 and summarised in *Ellis v. Minister for Justice and Equality* [2019] IESC 30 at para. 54 of the judgment of Finlay-Geoghegan J:-

> "Turning to the essential principles of sentencing law, as set out by the Court of Criminal Appeal in D.P.P. v Begley cited above, at a level of generality they require consideration of the following four matters to determine an appropriate sentence: (1) the gravity of the offence; (2) the circumstances in which it was committed; (3) the personal situation of the accused and (4) mitigating factors."

25. The appellant submits that, as can be seen by his previous submissions, the sentencing judge did not adequately weigh each of these factors and she failed to impose a fair and proportionate sentence in light of all the mitigating factors present in the case, placing excessive emphasis on the need for general deterrence, societal retribution and the position of the appellant within the larger criminal enterprise

26. The respondent refers to two cases which, it is submitted, show that the net sentence arrived at is within the range available in such cases. These are *The People (DPP) v. Crinnion*

[2016] IECA 401 and *The People (DPP) v. Russell* [2011] IECCA 23. In *Crinnion,* the accused pleaded guilty to three counts of possession contrary to s. 15 of the Misuse of Drugs Act, 1977. The accused received a sentence of fours years in respect of two counts, to run concurrently, and a further sentence of two years was imposed on the final count, to run consecutively but suspended on terms. The offences in question arose from three occasions on which the accused sold heroin, ranging from values of €30 to €50 to undercover gardaí. Evidence was given that the accused had gotten involved in drugs at a young age and had very limited educational attainments and no employment history. The accused had no previous convictions for drug related offences and had 45 previous convictions, 31 of which were road traffic matters. The accused had commenced rehabilitation. On appeal, the Court stated that it would impose concurrent sentences of four years on all three counts but would suspend the final year of those sentences both to reflect the mitigating factors in the case and to incentivise the appellant to continue his rehabilitation.

27. In *Russell,* the accused was sentenced to five years' imprisonment with the last two suspended for possession of cocaine which was found in a search of his home. The quality was small with a value of €875. There was evidence that the accused had being selling drugs over a period. He entered an early plea of guilty and rehabilitated himself from drugs and gambling. A *nolle prosequi* had been entered on other related charges. He lived with his mother and he was in receipt of disability benefit. The Court, in dismissing the appeal, found that the trial judge had not erred in principle in sentencing him bearing in mind the maximum sentence for the offence and taking into account the other related charges.

28. The respondent submits that the net sentence of four years in the *Crinnion* case and five years in the *Russell* decision demonstrate that the sentence imposed in this case was within the range available.

Discussion

29. We will address firstly the appeal against sentence on Bill number 29/2017, which offences were committed first in time. The headline sentence nominated by the judge was that of seven years on each of these counts. It is said that the judge erred in this assessment. Indeed this is the essence of the appeal concerning both Bills of Indictment.

30. When one examines the gravity of these offences, it is clear that the appellant was engaged in a pattern of the sale and supply of controlled drugs over the period of April/May 2016 with a value of €20.00 - €40.00. While the evidence adduced disclosed that the appellant was one of the main dealers in drugs in this area, this was mitigated by the evidence that the appellant was involved in the drug trade in order to feed his chronic addiction and did not benefit from his trade other than to this effect. The appellant was clearly operating under a degree of coercion as a result of his addiction and this is something which is relevant to the assessment of gravity in that the element of coercion operates to mitigate his moral culpability.

31. It was accepted in evidence that the appellant was effectively 'a runner' for other persons higher on the chain of criminality. This factor was also relevant in the assessment of the appellant's moral culpability. Moreover, the values of the substance in question are low and while value is not determinative of the sentence to be imposed, it is nonetheless a factor to be considered in the assessment of gravity.

32. In those circumstances, we are satisfied that the judge fell into error in nominating a headline sentence of seven years on these counts. Moreover, we consider that the judge ought to have differentiated in the sentence imposed on this Bill and on Bill number 14/2017. This is because the latter offence was second in time and while the value is not, as we have said, determinative of the sentence to be imposed, it is a factor to consider. We are of the view that the appropriate pre-mitigation sentence in the instance of Bill number 29/17 is one of 18 months on each count. We are not at all persuaded that the judge failed to take proper

account of the mitigating factors, indeed she gave a substantial reduction for these factors and it could be said that the reduction was too generous.

33. However, as the judge erred in nominating the pre-mitigation sentence, this impacts on the ultimate sentence. As we are satisfied that the judge erred, we will quash the sentence on this Bill and will substitute a sentence of 12 months' imprisonment on each count.

34. We now move to the second Bill number. This offence was committed in July 2016 and the value of the drugs was greater, being that of €2000.00. While, as we have said, value is not determinative, it is nonetheless a factor in the assessment of gravity. Again, we believe that the judge erred in the nomination of the pre-mitigation sentence of seven years in this instance for the reasons stated above. When one looks to the circumstances of the offending, the appellant's moral culpability or blameworthiness and also to the value of the drugs, we are satisfied that the judge erred in nominating seven years' imprisonment and so we will also quash that sentence.

35. In the circumstances we are of the view that the appropriate pre-mitigation sentence, for this offence is one of four years' imprisonment. The appropriate downward reduction for mitigation results in a sentence of two and a half years. In order to incentivise rehabilitation, we will suspend the final six months of that sentence, the appellant to enter into a bond in the sum of €100.00 before the Prison Governor in the usual terms for a period of two years and also on the condition that he remain under the supervision of the Probation Service and comply with all directions from that service. The sentences are imposed concurrently.

36. Liberty to re-enter should any difficulty arise regarding the taking of the bond.

Isolde Kennedy

16th June 2020