



## THE COURT OF APPEAL

Record Number: 92/2021  
Neutral Citation No: [2022] IECA 14

The President  
Kennedy J.  
Donnelly J.

# UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

ANTHONY FENNELL

APPELLANT

**JUDGMENT of the Court delivered (*ex tempore*) on the 17th day of January 2022 by Ms. Justice Kennedy.**

1. This is an appeal against severity of sentence. The appellant pleaded guilty before Galway Circuit Criminal Court to the offence of cultivation of cannabis plants without licence contrary to s. 17 of the Misuse of Drugs Act 1977 as substituted by s.11 of the Misuse of Drugs Act 1984 as amended by s.8 of the Irish Medicines Board (Miscellaneous Provisions) Act 2006. On the 23<sup>rd</sup> April 2021 the appellant was sentenced to three years' imprisonment with the final year suspended on terms.

## **Background**

2. On the 10<sup>th</sup> September 2019, Gardaí attended at an address in Ballinasloe, Co. Galway on foot of a search warrant. On arrival at the premises, one of the Gardaí noted a strong smell of cannabis emanating from the property, and found that the entire upstairs had been converted into a cannabis grow house. Numerous walls had been knocked through to create one large room which was sealed off by plastic sheeting. There were hydration and air filtration systems in place to assist the plants' growth. There was no one present at the property when the Garda arrived. It was confirmed that the appellant resided there.

49 cannabis plants in total with an estimated monetary value of €39,200 were discovered by the Garda during the search. The plants were in the mid-mature stage of growth.

3. Ultimately, the appellant was interviewed and accepted responsibility for the plants on his property. He entered a plea of guilty at an early stage in proceedings.

## **Personal circumstances of the appellant**

4. The appellant was born in 1969 and was 52 years of age at the time of sentencing. He has a number of previous convictions which were deemed to be of antiquity, none of which related to the Misuse of Drugs Act. The court below heard of his difficult upbringing. At ten weeks old he was sent to an industrial school, where he remained until he was collected by his mother at age twelve. When his mother proved unable to keep him, the appellant went to live in a care home in Wales. After an apprenticeship to become a plasterer, the appellant became a master plasterer and travelled to Europe with his work. He then worked on a US Air Force base in Germany and in Marks and Spencer's in Dublin after which he became involved in the pub industry.

5. The appellant sold a pub in 2016 and came to Galway in 2017 to assist a support group called the Tuam Home Survivors Network. Letters regarding his support and assistance to that group were furnished to the court below. It was accepted by the prosecuting Garda that he had savings when he returned to Ireland, which dissipated after a time, however he continued providing assistance to the support group. He then borrowed money from third parties on the condition that he permitted his rented property to be used as a cannabis grow house.

### **The sentence imposed**

6. The judge placed the offending at the mid-range and identified a headline sentence of four and a half years' imprisonment. In assessing the gravity of the offence, he pointed to the sophisticated nature of the operation, the volume of plants and the value just shy of €40,000.00. He considered that considerable internal modifications to the property were required for the purpose of this enterprise.

7. In terms of mitigation, the judge took into account the appellant's acceptance of responsibility for the drugs, his plea of guilty at an early stage and his complex social background. The judge also noted the fact that the appellant was otherwise a law-abiding citizen, his involvement in the Tuam support group and the connected testimonials and character references.

8. Despite deciding that the above factors did not mitigate to any significant degree the gravity of the offence, the judge reduced this sentence to a sentence of three years' imprisonment and suspended the final year of that sentence

### **Grounds of appeal**

9. The appellant appeals the severity of the sentence on three grounds, namely:

1. The sentence imposed was excessive in all the circumstances.
2. The trial judge erred in ruling that the appellant was “dealing drugs for profit” when there was no such evidence given by the prosecuting Garda and where the plea entered was to the offence of cultivation only.
3. The trial judge erred in not giving an appropriate allowance for the mitigating factors which included the testimonials provided, the guilty plea and that the appellant’s previous convictions dated to the 1980s, none of which was for drugs offences.

#### **Submissions of the appellant**

10. It is submitted that the sentence imposed was excessive in all circumstances. Reliance is placed on the well-known case of *The People(DPP) v. McCormack* [2004] IR 359 wherein it was stated that:

“the appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by the accused.”

11. Ms. Foyne SC for the appellant makes two points, first, that the judge erred in indicating that the appellant was dealing for profit and second that insufficient regard was had to the mitigating factors.

Reference is made to the case of *The People at the suit of the Director of Public Prosecutions v. Stephen Sarsfield* [2019] IECA 260 wherein the court stated:

“In assessing the gravity of a particular offence, the value and quantity of drugs seized have long been regarded as critical factors to be taken into account in evaluating where on the scale of seriousness the offence falls.”

**12.** The appellant refers to *Sarsfield* to support his contention that a sentence of three years is excessive in this instance.

**13.** Furthermore, the appellant relies on paragraph 16.24 of O’Malley’s *Sentencing Law and Practice, 3<sup>rd</sup> ed*, in relation to cultivation cases as follows: “suspended sentences and reasonably short custodial sentences have been imposed for offences in the middle range.”

**14.** It is submitted that the judge erred in stating that the appellant was dealing drugs for profit. The appellant relies on the cross-examination of the investigating Garda, wherein he explained that the appellant returned home to Galway in 2017 to assist the people in Tuam but that his savings expired on account of the Mother and Baby Homes Inquiry lasting longer than he had expected, leading him to borrow money on the condition that his rented property was to be used as a grow house for third parties. It is submitted that when interviewed by the investigating Garda, the appellant stated that he was “not in control of this situation anymore” and that the judge acknowledged that what was keeping the appellant in the house was the loan he received from these third parties.

**15.** The appellant, taking issue with the judge’s finding of “dealing”, argues that he pleaded guilty to cultivation and thusly that he is entitled to be sentenced only for that offence.

**16.** On the second issue, it is argued that the judge failed to have sufficient regard to the mitigating factors and that the judge ought to have given more credit to the appellant in accordance with the *McCormack* decision. The appellant highlights the mitigating factors, being his involvement with the Tuam Survivors Network, the appellant’s difficult childhood and the many adversities he had to overcome including the conditions in industrial schools in Ireland and Wales, his early guilty plea and the absence of relevant or recent convictions (since

the 1980s) which it is said merited a greater reduction in sentence. The appellant also submits that as the plea was entered during the Covid 19 pandemic and must be considered as a meaningful plea. The appellant submits that this, coupled with the evidence that the appellant was acting to pay off a debt should have led the judge to suspend a greater portion of the appellant's three year sentence to permit him to resume his voluntary work with the Tuam Home Survivors Network.

### **Submissions of the respondent**

17. The respondent draws attention to the statement made by the judge in nominating the headline sentence and refers to paragraph 4.11 of O'Malley's *Sentencing Law and Practice*, 3<sup>rd</sup> ed. wherein it is noted that a court, in determining the headline sentence, will have regard primarily to the gravity of the offence as measured by the harm caused and the offender's culpability.

18. Insofar as it is said that judge erred in ruling that the appellant was "dealing drugs for profit", the respondent outlines that the property in question was rented by the appellant and that the rent was paid for in cash, that there was no evidence put before the court that the appellant was gainfully employed and that considerable internal alterations were made to the premises for the purpose of the grow house enterprise.

19. The Director acknowledges that evidence was not led at the hearing to the effect that the appellant was dealing drugs for profit, however, she notes that it was accepted that the appellant got involved with the enterprise in consideration of a monetary loan.

The respondent also quotes from paragraph 16.24 of O'Malley's *Sentencing Law and Practice*, 3<sup>rd</sup> ed:

"In terms of offender profile, at one end of the spectrum are those who grow a small number of cannabis plants in their own homes for personal use and, at the

other, those who operate “grow factories”, clearly intending to supply cannabis to others for gain... The more extensive the operation, the greater the offender’s involvement and commitment, and the more likely the cultivation was for commercial gain, the heavier the deserved punishment becomes.”

**20.** It is argued by the Director that sufficient consideration was given by the sentencing judge to the mitigating factors, that these factors caused the judge to reduce the pre-mitigation sentence by approximately a third and that the imposed sentence of three years imprisonment is approximately 21.5% of the maximum tariff of 14 years for cultivation. Furthermore, it is submitted that the appellant’s contention that the judge did not give appropriate allowance for the mitigating factors in the case is at variance with the determination of the court. In support of this, it is argued that the court had regard to the mitigating factors, noted the testimonial evidence and specifically disregarded the appellant’s previous convictions noting that “he is otherwise a law-abiding citizen.”

**21.** Attention is also drawn to the fact that the judge suspended the final 12 months of the sentence. In this regard, the respondent submits that the sentence imposed was balanced and proportionate.

**22.** Reference is also made to the judgment of this court in *The People (DPP) v. Cunningham* [2015] IECCA 2 that the Court will only interfere where there is sufficient error in sentencing to render the sentence either so severe or so lenient that the court must intervene to correct an error in principle. Similarly, reference is made to *The People (DPP) v. Maughan* [2018] IECA 343.

**23.** Reference is made by the respondent to *The People (DPP) v. Stanescu* [2020] IECA 55 to emphasise the judge’s wide margin of discretion as regards sentencing. Reference is also made to *The People (DPP) v. Broe* [2020] IECA 140 which describes the purpose of a suspended sentence as a reflection of mitigating circumstances and a reward of an appellant’s

progress towards rehabilitation or reform which incentivises continuation along this path. The respondent notes that the judge had regard to the Probation Report in deciding to suspend the final year of the sentence and argues that the court in so doing struck an appropriate balance between the elements of punishment, deterrence and rehabilitation.

### **Discussion**

24. It is correct to say that the offence of cultivation covers a broad spectrum of offending; at one end of the scale, as pointed out by Prof. O'Malley, one may have an offender who grows a small number of plants, clearly not for commercial purposes, and at the other end, those who are involved in a substantial operation which can only be for commercial gain.

25. To suggest that the appellant was not involved in a commercial enterprise is to ignore the facts of this case. This was undoubtedly a significant commercial operation, which required considerable modification to the property, there was a large volume of plants to the value of €39,200.00, and the enterprise involved a hydration system and an air filtration system. Accordingly, no issue could be taken with the judge categorising this as a sophisticated grow house.

26. Whilst it is so that the judge's remark that it was "not unreasonable to conclude on the evidence that he was simply in the business of dealing drugs for profit" might have been phrased in a different manner, it is readily apparent that this was a substantial commercial enterprise and we are quite satisfied that it is to this that the judge was referring.

27. Whilst it is argued that the judge presumed that the appellant was dealing in drugs we find that we cannot agree with the submission that he was in effect, sentenced for an offence to which he did not plead guilty. The judge could not have ignored the surrounding relevant facts in this case, it was necessary to put the offending in context and he was entitled to take account of the extensive nature of this operation and the appellant's significant involvement in



it. This was clearly, as stated, a commercial operation and the judge was entitled to take account of that factor in determining the pre- mitigation sentence and we find no error in this respect.

**28.** On the second substantive issue that the judge failed to take adequate account of the mitigating factors, it is clear that there was significant mitigation present. The nominated pre-mitigation or notional sentence was that of 4 ½ years where the maximum sentence prescribed by statute is 14 years. In light of the mitigating factors, to which the judge made specific reference, he reduced the sentence to one of 3 years imprisonment, a reduction of 1/3 which in our view, constitutes a significant reduction. He then proceeded to suspend the final year of that sentence to incentivise his rehabilitation, thus resulting in an actual prison term of two years' imprisonment.

**29.** Whilst the appellant had strong mitigation, we are satisfied that judge properly applied those factors and properly reduced accordingly. The ultimate sentence imposed of 3 years with the final year suspended is within the margin of appreciation afforded to a judge and we do not find an error in principle.

**30.** Accordingly the appeal is dismissed.