THE COURT OF APPEAL

[108/21]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

(DPP)

RESPONDENT

AND

TONY MCINERNEY

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 16th day of May 2023 by Birmingham P.

Introduction

1. Before the Court is an appeal against severity of sentence. The sentence under appeal is an aggregate sentence of 14 years imprisonment, with the final two years of the sentence suspended, that was imposed in respect of two offences, one contrary to s. 15A of the Misuse of Drugs Act 1977 ("the 1977 Act"), as amended, and one in relation to an offence of possession of property being the proceeds of criminal conduct, contrary to s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 ("the 2010 Act"). The sentences were imposed on 12th May 2021 at the Circuit Criminal Court in Ennis.

Background

2. The background to the sentence hearing and now to this appeal is to be found in events that occurred on 23rd September 2020, at Spancilhill, County Clare. On that occasion, Gardaí obtained a search warrant in respect of a premises at Kilfilum, Spancilhill. The property we understand is located on the outskirts of Ennis. It is a residence with a garage attached. When Gardaí in possession of the search warrant entered the garage, it was noted that cocaine was being prepared there. There were three individuals present at the search location. One was the

appellant, Mr. McInerney, and it was noted that he was wearing orange gloves and holding a bag of cocaine in his hand. As Gardaí approached, he threw this bag of cocaine into a black bucket containing water. The evidence at the sentence hearing was that for those experienced in and with a knowledge of working with cocaine, to have a water bucket to hand to be utilised if surprised was standard practice.

3. In the premises that the Gardaí entered was a quantity of cocaine, a mixing agent, Benzocaine, in tubs and in bags, some of this new, some of this old. Also located was a weighing scale, knife and spoon. When Gardaí entered there was a blender in operation. Cash to the value of €2,500 was found. The Gardaí belief was that the €2,500 found represented the amount that had been agreed by the appellant for the use of the premises with the occupants. Also located was what was described as a "burner phone", and when that phone was examined forensically, what emerged was the presence on the phone of an electronic tick list. The cocaine that was located was valued at €50,028.02, or, in weight, 714.686g. In the course of a follow up search at a premises at Quinn Gardens, also in County Clare, €2,000 in cash was located.

Personal Circumstances of the Appellant

4. In terms of the appellant's background and personal circumstances, his date of birth is July 1995, he is unmarried, but is in a long-term relationship and is the father of two children. He is originally from Dublin but he moved to Clare a number of years ago. The Court heard that he did not hold down a job, nor was he in receipt of social welfare or any benefits. The Court also heard that he was the target of the operation that was mounted by the Clare Divisional Drugs Unit team.

5. In terms of previous convictions, these included a conviction at Ennis Circuit Court, contrary to the 1977 Act, on 9th January 2013. The matter was dealt with by way of a suspended sentence: a sentence of two years imprisonment, but suspended for four years, was imposed. Before the Court on that same day was an offence contrary to the Firearms and Offensive Weapons Act 1990, which was taken into consideration. The firearms offence related to a pipe bomb.

The Sentence

6. So far as the present case is concerned, it came before the court on foot of a plea of guilty, the intention to plead having been notified in advance of the date when the case was listed for trial. In the course of sentencing remarks, the judge referred to sentencing objectives, instancing, retribution, punishment, deterrence, incapacitation, and rehabilitation. He said that for the Court to go the "extra mile in fostering such rehabilitation, there must be a solid evidential basis for so intervening". It then went on to say that, in the view of the sentencing Court, there was no such evidence in this case.

7. The Court then indicated that it regarded that the appropriate headline or pre-mitigation sentence in respect of the s. 15A offence under the 1977 Act as being one of 14 years imprisonment. The Court indicated that it was of the view that this was the appropriate headline sentence, even though the value of the drugs, some €60,000 or €50,000, was lower than had

been encountered in some other cases. Having identified the headline sentence of fourteen years, the Court then reduced this to eleven, and in doing so referred to the plea, though noting that the plea was one that was entered in circumstances where the appellant had been caught red handed.

8. So far as count 7 on the indictment was concerned, the s. 7 offence under the 2010 Act, the Court stated that it was of the view that this was a standalone, separate and distinct offence, unrelated to the s. 15A offence. The Court then assessed the headline sentence in respect of this offence as five years imprisonment and reduced that to three years, in doing so, quoting with apparent approval from counsel for the appellant who had made the point that the plea was more than helpful in relation to this offence. The Court referred to the limited admissions made by the appellant at interview, and such is a reference to the fact that the appellant, in the course of one interview, departed from what was his usual practice of offering no comment, to acknowledge that he was the occupant of the premises at Quinn Gardens, that he was the sole occupant, and that it was not occupied by others. Counsel for the appellant pointed out that arguments that would sometimes arise in the case of a dwelling occupied by multiple people as to who was responsible and who was not did not arise in this instance, and therefore this was an admission that was of value.

9. The Court then addressed the question of concurrent or consecutive sentences and stated that it was its' strong view that what was called for were consecutive sentences, as the s. 7 offence was a separate, distinct, and standalone offence. The Court then proceeded to address the totality principle, and in addressing this principle, the Court reduced the sentence of 14 years that had been arrived at by way of suspending the final two years of the sentence.

The Appeal

10. Counsel on behalf of the appellant has indicated that he relies on three grounds of appeal: firstly, he says that the headline or pre-mitigation sentence of 14 years in respect of the s. 15A offence was too high; secondly, he says inadequate credit was given for the matters that were present by way of mitigation, instancing the plea and the expression of remorse; and, thirdly, he says that the decision to make the sentence in respect of the s. 7 offence consecutive instead of concurrent was an error and was wrong in law. We will deal with each of these grounds in reverse order and turn first to the question of consecutive sentences.

Consecutive Sentences

11. Having posed to itself the question of whether the sentences should be consecutive or concurrent, and having proceeded to answer its' own question by saying it was the Court's view that the sentence should be consecutive as it was a separate, distinct, and standalone offence, the Court was echoing an earlier observation of the trial judge, because earlier in the course of his sentencing remarks the judge had said:

> "As regards the Count No. 7, the section 7, you will note this Court has not referred at all to the cash found when dealing with the section 15(a), it is this Court's view that this is a standalone, separate and distinct offence unrelated to the section 15(a) offence, because this is an offence whereby the accused, the offender has said, he has over 4,000 in cash which are the proceeds of criminal conduct, clearly pre-dating September the 29th."

12. We find ourselves in disagreement with the trial judge in this regard, we cannot agree that this was a case where consecutive sentences were required, or indeed, appropriate. It has often been said that the resort to a consecutive sentence should be sparing, which of course is not to say that there will not be occasions where consecutive sentences are appropriate or required, or even is it to say that such a resort will take place on seldom occasions. However, it is clear that the cash found at the drugs crime scene was closely linked to the drug activity; it was there to facilitate the drug activity and it was part of the drug activity that was taking place. The matter was dealt with in the course of direct evidence by Detective Garda Paul Heaslip. He was asked at one point by prosecution counsel, having referred to the fact that cash was visible in one of the photos by reference to when he was giving his evidence:

> "Q: And what's the significance of that cash?
>
> A: The significance of this cash, Judge, is that gardaí believe that this cash of 2500 was agreed between Tony McInerney and the occupants of the property and this was in return for Tony McInerney to use their property in the preparation of the cocaine.
>
> Q: And what's the basis for that belief?
>
> A: The belief, Judge, is that during our investigation from interviews, it came to light that that was the agreeable situation between parties.
>
> Q: Now, I think you were viewing the -- and was that a job lot rate, or what was the 2500?
>
> A: The 2500, Judge, was -- it was agreed during interviews it would be established that this was done on more than two occasions. This wasn't their first time, that's what we believe from our investigation, Judge, as there was other quantity of cash seized in relation to this investigation.
>
> Q: Was the money in the way of a rental-type situation?
>
> A: Yes, yes."

13. In the circumstances where the Court was, in affect being asked to sentence on the basis that what the Gardaí had detected was not a once off incidence but rather the interruption of a pattern of ongoing criminal activity. It was clear that the cash found – certainly that found at Spancilhill – was not part of a separate and standalone offence but quite the contrary as it formed a significant and integral part of the drug dealing.

Credit Given for Mitigating Factors

14. We will continue to deal with the three grounds in reverse order. We can deal quickly with the argument that inadequate credit was given for the factors present by way of mitigation. We see no merit in the criticism of the judge as having given inadequate weight to the factors that were present by way of mitigation. Quite simply, there was very little present by way of mitigation. The accused came before the Court with previous convictions, including one that was directly relevant – an offence under the 1977 Act, to which there has already been reference. It is true that the s. 15 under the 1977 Act and the firearms offence involving the pipe bomb, which was dealt with on the same day, where committed when the accused was seventeen, but as against that, this present offending occurred soon after the bond he had entered into in order to avail of a suspended sentence had come to an end. What was there in terms of mitigation? Well, there was of course a plea, which the judge correctly said had to be acknowledged in mitigation. It is the

case that the plea was offered in circumstances where the accused had been caught red-handed and in circumstances where the trial date had been sought initially; on the other side of the coin, it must be noted that the plea was entered into during the Covid-19 period, when mounting a trial presented particular difficulties.

15. Overall, we do not believe that there is any substance to criticism of the trial judge in relation to failing to afford sufficient credit to the mitigating factors that were present.

The Headline Sentence

16. We come then to the final issue which was the first identified by counsel, that of the headline or pre-mitigation sentence. It is worth noting what the judge had to say:

> "The nature of the offending is of particular concern to this Court, and should be. A tick list; this was a premeditated, planned operation, high-end operation, sophisticated."

The Court then made some other remarks and further stated stated:

> "This man was not acting under any duress, he was not acting under the influence of any addiction. This man was involved in this activity for the sole purpose of greed. He was in it for the money and what that money he thinks brings to him. As I have said, through the good actions of the drugs unit, this man was caught red handed."

17. Now, as emerges from the sentence hearing at the Circuit Court, there have been a great number of decisions in this area, decisions both from courts of first instance and decisions from appellate courts. It must be said that the headline or pre-mitigation sentence nominated here of 14 years certainly was high, relative to the sentences that have been imposed in other cases. The Director, it might be noted, in the course of her written submissions, commented:

> "Whilst the overall sentence imposed might be considered at the higher range of potential outcomes, bearing in mind the seriousness of the offending and the limited mitigation it was an outcome that cannot be said to derive from errors on the part of the learned sentencing Judge and is not such as would warrant interference by this Appellate Court it is submitted."

18. As we have already indicated, we would view the headline sentence as being somewhat out of line with the sentences that have been imposed in other cases. In expressing that view, we have no doubt that this was really serious offending and was properly so regarded by the judge in the Circuit Court. We are of the view that we have indicated, notwithstanding that the quantity of drugs involved was not as high as Courts are sometimes required to deal with. Value, is of course, a highly relevant consideration but it is by no means the only consideration. In that regard, we draw attention to what we had to say in *DPP v. Sarsfield* [2019] IECA 260. At para. 12 we stated:

> "On the other hand, there may be cases where the quantity of drugs is less, though perhaps still substantial, but the manner in which the individual dealt with the drugs left no room for doubt that he was the actual owner, was in effective control, and/or was the individual, or one of the individuals, who stood to make major profit from the exercise. In general, the greater the authority exercised, the greater the culpability. Where the decision to become involved in drug trafficking was one taken in order to make a financial gain, that too will increase the level of culpability."

Decision

19. It seems to us that the observations made in *Sarsfield* apply with great force to the facts of the present case. By reference to the headline sentences that have been imposed in other cases, it seems to us, that a headline sentence of 12 years, or, perhaps, 12 and a half years, would have been appropriate. The only real factor available by way of mitigation was the plea of guilty, giving every possible credit for the plea that was entered could not possibly result in a sentence to be served of less than ten years imprisonment, and we see no basis for part suspension.

Resentencing

20. In the circumstances we are going to deal with the matter by quashing the sentence imposed in respect of the s. 15A offence under the 1977 Act in the Circuit Court and substitute therefor a sentence of ten years imprisonment. The sentence in respect of the other offence being dealt with – the s. 7 offence under the 2010 Act – will now be concurrent and the sentences will date from the same date as the sentences in the Circuit Court.