

APPROVED



THE COURT OF APPEAL

Record Number: 187/2022

**Kennedy J.
Ní Raifeartaigh J.
Burns J.**

BETWEEN/

GEORGE FINGLAS

APPELLANT

- AND -

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of the Court delivered on the 19th day of December, 2023 by Ms. Justice Tara Burns.

1. This is an appeal against severity of sentence. On 28 January 2022, the appellant entered a guilty plea to count 3 on the indictment, namely possession of a controlled drug for the purpose of sale or supply, where the market value of the controlled drug amounts to €13,000 or more, contrary to s. 15A (as inserted by s.4 of the Criminal Justice Act 1999) and s. 27 (as inserted by s. 33 of the Criminal Justice Act 2007) of the Misuse of Drugs Act 1977.
2. On 12 October 2022, the sentence hearing took place. The appellant was sentenced to a term of imprisonment of 9 years simpliciter. The sentence was backdated to the 10 September 2021, to reflect when the appellant had voluntarily entered into custody. The remaining 3 counts on the indictment were taken into consideration.

Background

3. On 1 February 2021, the Customs and Revenue Officers at Dublin Port, with the assistance of a customs dog, detected suspicious plant material in two pallets of twenty four boxes. An Garda Síochána were notified of this discovery whereupon it was determined to conduct surveillance and a controlled delivery of the two pallets. The delivery of the two pallets occurred at a commercial premises at Western Industrial Estate, Dublin 12. The appellant arrived at the premises driving a

rented van. He engaged in conversation with another man who had arrived 10 minutes before him. This man directed that the two pallets be loaded onto the appellant's van by an employee at the premises.

4. The appellant then left the premises and drove to a commercial premises in Baldongan, Lusk, Co Dublin. As the appellant drove into the commercial premises, he was intercepted by Gardaí.
5. The van was searched. 128.45kg of cannabis worth €2.56 million was found in the two pallets together with three mobile phones on the passenger's seat. One of the mobile phones recovered was an encrypted device which was unlocked and contained text conversations between the appellant and unidentified parties. Text messages on the encrypted device referred to meeting points, collection of pallets and a reference to "129 bits" for collection, as well as a text which read "Another 13,000 wages for you this week, mate".
6. The appellant was arrested, detained and questioned. During his fifth interview in custody, the appellant provided a prepared statement which made admissions in respect of the drugs found. The appellant stated he was directed to collect the pallets containing the cannabis, bring them to the commercial premises, strip them down and count the quantity of drugs. The appellant stated he was in fear of the persons directing him to do so, and that he owed a gambling debt of €25,000, which would be reduced on completion of the job. This course of events was accepted by the investigating guard.

Grounds of Appeal

7. By notice of appeal dated 14 October 2022, the appellant appealed against his sentence and set out his grounds of appeal as follows:-

i. The Learned Trial Judge erred in law and in fact in placing excessive weight to the aggravating factors as outlined during the course of the Applicant's sentencing hearing.

ii. The Learned Trial Judge erred in law and in fact in determining the seriousness of the offences in of itself to be an aggravating factor.

iii. The Learned Trial Judge erred in law and in fact in determining the headline sentence to be one of 12 to 14 years before mitigation was considered.

iv. The Learned Trial Judge erred in law and in fact in failing to take into account the circumstances in which the fact of conviction meant that the possibility of future release on licence was delayed in the circumstances.

v. The sentence imposed by the Learned Trial Judge was excessive and oppressive in all the circumstances.

vi. The Learned Trial Judge erred in law and in fact in failing to have due regard to progress the defendant demonstrated having entered custody having surrendered his bail on the 18th November 2021."

Personal Circumstances of the Appellant

8. The appellant was 46 when sentenced. He had four previous convictions, namely drink driving in 2011; assault causing harm in 2011 when he received a 3 year suspended sentence; and two assault causing harm convictions in 2014 when he received a suspended sentence of 3 years and 2 years respectively. The appellant entered an early guilty plea in the matter. He has 7 children through different relationships, the youngest of whom was 4 years of age. The appellant had a good history of work from a young age. At the sentencing hearing it was asserted on the appellant's behalf that he had a serious gambling addiction in respect of which he amassed a debt of €25,000 and that his involvement in the offence before the Court was to repay the debt. The appellant voluntarily surrendered bail in November 2021 due to concerns regarding the safety of his family. He engaged in education and addiction counselling whilst in custody.

Sentencing Determination

9. On the 12 October 2022, the sentencing judge pronounced judgment in the matter stating the following:-

"128 Kilogrammes to 129 kilogrammes of cannabis, the value attributed to these drugs by the guards is in the region of 2.5 to 2.6 million. So therefore, he was transporting a serious amount of drugs.

He was interviewed extensively; in the fifth interview... he gave a statement... where he admitted his involvement. It seems I can infer from what I heard that he knew he was transporting drugs and it seems he was promised a sum of €13,000 for his services. [Counsel] submits to me that he wasn't going to receive this money, but this sum was going to be deducted from what he owed to these third parties. I can accept that.

[T]here is also a text which would indicate that this wasn't his first, let's say, service to these third parties. Obviously, that's a small matter this Court will take into account to some degree. Now, he has pleaded guilty, it's a valuable plea. He did cooperate with the guards. He made admissions in the case. He has a record of conviction, but unrelated type of crime, but he knows, I suppose, the justice system. He has seven children; they're doing very well. It seems he has particular responsibilities in relation to one child who has autism. It seems he's an intelligent man and he's making the best of prison life. He's doing courses and getting on very, very well. Now, obviously the probation officer has produced a report. I've looked at that report and it indicates that there's a moderate risk of reoffending, but I'm going to take it that it's unlikely that after he finishes a prison term in relation to this matter, he'll reoffend to any degree in the future. So, there is good mitigation but the crime is serious.

This is a 15-year offence. There's a mandatory minimum sentence of ten years. This Court has been given a discretion to depart where it finds suitable and excusing circumstances. Now there is, I suppose, suitable circumstances in the sense that he's pleaded guilty and cooperated with the investigation. The question is, how far should I depart or depart at all. Obviously, the maximum sentence in this type of case is a life sentence, and obviously, because this is a very serious offence now because of the amount of drugs involved, this is at the higher level or close to the higher level of 15 years. If I was asked to indicate a headline sentence, I would say 12 to 14 years for this headline sentence. The question is, how far should I bring it down by reason of the mitigation advanced? I think I can depart somewhat from the mandatory minimum sentence of ten years, but I'm not going to go too far down because I think this man was involved in this. He knew what he was doing, while he was a transporter, he wasn't the most naïve of transporters. He was a mature man who knew exactly what he was doing. So, I think the appropriate sentence for him, taking everything into account, his term imprisonment of nine years from the date he went into custody"

Submissions of the Parties

10. The appellant's submission is that the sentence imposed on him is excessive in all the circumstances. Counsel for the appellant submits that the sentencing judge erred in determining the headline sentence; placed excessive weight on the aggravating factors in the case; erred in law by determining the seriousness of the matter to be an aggravating factor; failed to take account of the progress made by the appellant since entering custody; and failed to provide any light at the end of the tunnel for the appellant. At the oral hearing before this Court, the focus of the appellant's argument was that the headline sentence was excessive. It was acknowledged that the sentencing judge had reflected the mitigating factors in his substantial reduction from the headline sentence identified by him.
11. The respondent submits that the sentencing judge has not committed any error of principle in sentencing the appellant. Counsel for the respondent submits that the correct headline sentence was identified, and that the sentence imposed was proportionate in light of the gravity of the offending behaviour and the mitigating factors present.

Discussion and Determination

Sentencing principles in a s. 15A offence

12. Section 27 of the Misuse of Drugs Act 1977 ("the 1977 Act"), as amended, prescribes the following in relation to sentencing for a s.15A offence:-

"(3A) Every person guilty of an offence under section 15A ... of this Act shall be liable, on conviction on indictment—

- (a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and
- (b) at the court's discretion, to a fine of such amount as the court considers appropriate.

...

(3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A ... of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3D) (a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A ... of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.

(b) Subsection (3C) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including—

- (i) whether that person pleaded guilty to the offence and, if so—
 - (I) the stage at which he or she indicated the intention to plead guilty, and
 - (II) the circumstances in which the indication was given,
 and
- (ii) whether that person materially assisted in the investigation of the offence.

13. In *DPP v. Sarsfield* [2019] IECA 260, the Court of Appeal set out sentencing guidelines in relation to s. 15A offences. In the course of so doing, it set out the approach which should be adopted by a sentencing judge when considering this offence. Birmingham P. stated at paras 18-21 of the judgment:-

"18. ... It has long been recognised that the proper approach to sentencing is for a judge to identify the appropriate sentence without reference to the presumptive minimum. If the appropriate sentence is at or in excess of the statutory minimum, nothing further is required. If the sentence under contemplation is below the presumptive minimum, the Court will have

to address the presumptive minimum and consider whether the imposition of the mandatory presumptive minimum would, in all the circumstances of the case, be unjust. Where the offence involves significant involvement in a very high-level drug offence, the headline or pre-mitigation sentence is likely to be well in excess of the statutory presumptive minimum. In the case of high-level commercial drug dealing involving very large quantities of drugs, we would expect that the headline or pre-mitigation sentence is likely to be of the order of fourteen or fifteen years, and in some exceptional cases, significantly higher.

19. What we have to say about the ultimate sentence is more tentative still, having regard to the very wide variation in the circumstances of offenders coming before the Courts. The Court would, however, observe that in the sort of very high-end commercial drug trafficking cases to which we have been referring, a plea of guilty, of itself, without something more, is unlikely to justify a reduction below the presumptive minimum sentence. Such a situation is particularly likely if the plea was entered against a backdrop of very strong or overwhelming evidence, not an unusual situation in the context of s. 15A cases.

20. The non-exhaustive list of factors which a sentencing court may have regard to in determining whether to deviate from the presumptive minimum are set out in s. 27(3D)(b)-(c)...

21. The wording of these sections shows that a particular emphasis is placed on the assistance, if any, provided by the offender to the Gardaí in combating drug trafficking. Mr. Sarsfield did offer what has been described by both parties as an "early plea", albeit it was one which was provided in a context where he was caught "red-handed". However, beyond the plea, nothing very much was put forward by way of material assistance. There is also, however, the substantial mitigation which was put before the sentencing judge to consider."

14. It is of significance to note in the instant case, that despite the significant amount of drugs involved and the appellant's envisaged role with respect to the handling of these drugs which was described as collecting, transporting, dropping off, stripping down and counting the quantity of drugs, the presumptive mandatory sentence was not applied to the appellant, with exceptional and specific circumstances identified as existing by the sentencing judge to permit him to depart from a presumptive mandatory term of 10 years imprisonment.

Headline Sentence together with aggravating factors

15. In accordance with *The People (DPP) v. Sarsfield*, the sentencing judge identified this offence as falling within the serious band of offending for offences of this nature.
16. In light of the amount and value of drugs involved; the appellant's significantly involved role in their handling which was described by himself in his prepared statement provided to the investigating guards as collecting, transporting, dropping off, stripping down and counting the quantity of drugs thereby reflecting him to be a person viewed with trust by the proprietor of the drugs; and the benefit which the appellant was acquiring by being involved with these drugs with €13,000 being

deducted from a gambling debt, the Court is of the view that the sentencing judge did not err in principle in nominating 12 – 14 years as the appropriate headline sentence in this matter.

17. While the appellant did not have a proprietary interest in the drugs, this was a very serious offence, for the reasons outlined, with very serious intended involvement by the appellant and with a significant benefit accruing to the appellant. The sentencing judge correctly identified the offence as falling into the category of serious offending which should attract a headline sentence of the length identified by him.
18. While the sentencing judge did not refer to the appellant's gambling addiction in the course of his sentencing remarks this does not affect the correct assessment by the sentencing judge of this being serious offending.

Proportionate Sentence and Mitigating Factors

19. While the appellant did not take issue with the reduction provided by the sentencing judge by way of mitigation in oral submissions, it is appropriate for the Court to state that the reduction provided by the sentencing judge in respect of the mitigatory factors identified was appropriate.

Conclusion

20. The Court is of the opinion that an error in principle has not been established by the appellant in the sentence imposed upon him. Accordingly, his appeal against sentence is dismissed.