



**THE COURT OF APPEAL**

**289/2018**

**Edwards J.  
Kennedy J.  
Donnelly J.  
BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**EOIN MORROW**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 22nd day of October 2019 by  
Ms. Justice Kennedy**

1. This is an appeal against severity of sentence imposed on the appellant in Dublin Circuit Criminal Court on the 7th November, 2018. The appellant pleaded guilty and received a sentence of eight years' imprisonment in respect of one count of unlawful possession of controlled drugs with a value of €13,000 or more contrary to s.15A of the Misuse of Drugs Act 1977 (as amended).

**Background**

2. On the 25th July, 2015 Detective Sergeant Donnellan received confidential information in relation to the transport of what was believed to be a consignment of controlled drugs. Acting upon this information, which concerned a Scania trailer/ tractor unit, several members of an Garda Síochána undertook surveillance in the relevant area and the vehicle was seen at around 6.08pm. It was followed by members of an Garda Síochána as it made its way to Newcourt Business Park in St Margaret's Road. A black Volkswagen Jetta was observed pulling in behind this vehicle and the driver of the Jetta, the appellant, was observed getting out of that vehicle. The appellant and the driver of the truck, a Mr. Needham, were then observed unloading pallets filled with boxes from the truck. The Gardaí intervened once the boxes had been moved inside a container unit and having conducted a search of the unit itself, boxes similar to those unloaded by the appellant which contained what appeared to be cannabis resin were found.
3. A full search was carried out and 96.7 kilogrammes of cannabis with a street value of €580,200 and 400,000 tablets of Zopiclone with a street value of €800,000 were seized. Both men were arrested, the appellant's co-accused, Mr Needham, received an eight-year sentence in relation to the s.15A offence. The appellant failed to appear and a bench warrant issued on the 31st January, 2017. It transpired that he had fled the jurisdiction. Subsequently he returned, his solicitor contacted the Gardaí and the warrant was executed by arrangement.
4. The appellant was then arraigned on the 15th June, 2018 and pleaded guilty and the matter was adjourned for sentence.

**The Sentence**

5. In imposing sentence, the trial judge departed from the presumptive mandatory minimum of 10 years in relation to Section 15A and did so on the following basis: -

“I have given this aspect of the case some considerable consideration, and I am of the view that in view of the efforts that have been made by the accused since his returning to this jurisdiction, the fact that he did in fact present himself, and that he has effected very significant improvements in terms of his own circumstances, and the efforts he's made towards his own rehabilitation, I'm of the view that these are aspects of the evidence that I can consider in concluding that the specific and exceptional circumstance test is met in this particular case, and that I am at liberty to depart from the 10-year mandatory sentence. However, I am of the view that, given the valuation of the cannabis involved, and also the value of the Zopiclone tablets, and the respective role taken by the accused, Mr Morrow, which was mirrored by that taken by his co-accused, Mr Needham, that they were trusted operatives within this particular venture. However, I do accept that he was not a beneficiary, and was not at the upper end of the hierarchy.

Therefore, in terms of the sentence, I am going to impose a headline sentence of 10 years, but I am going to give Mr Morrow credit for his plea of guilty. I am going to give him credit for the fact that he was somebody who had addictions at the time of the offence, and that he was not materially benefitting from his activities. I also take into account that there may have been an element of coercion involved in his commission of the offences. I take into account his personal circumstances, the fact that he has a supportive and decent family. I also take into account the matters which have been the subject of the many documents that have been submitted on his behalf, the letter from his GP outlining the mental health issues he has experienced in the past and in the recent past. I also note that he has not any previous convictions for drug offences, and that he has not offended since the commission of these offences. I also take into consideration the fact that he is embracing the opportunities that he is presented with in Clover Hill, and that he has, to a very large extent, undergone a complete rehabilitation, and that is evidenced in the urine analysis that has been presented to the Court.”

6. In light of the mitigating factors the headline sentence was reduced to a sentence of eight years' imprisonment.

**Personal circumstances**

7. The appellant was born on the 8th December 1979. He has fifteen previous convictions including four previous convictions for theft, a conviction under s.3 of the Non-Fatal Offences Against the Person Act 1997 and a conviction for aggravated burglary. In his plea in mitigation, the court heard, *inter alia*, that the appellant was progressing well in his rehabilitation and had engaged positively with the Prison Services.

**Submissions of the appellant**

8. The appellant submits that the trial judge erred in treating the fact that the appellant had left the jurisdiction as an aggravating factor. It is also submitted that the trial judge erred

in comparing the sentence imposed on Mr Needham and the appellant in that she incorrectly held that the appellant had taken a trial date after he had presented himself to the Gardaí. Furthermore, it is submitted that a prior conviction for a similar offence, which would have attracted a mandatory minimum sentence if it had occurred in this jurisdiction, is far more significant than a late guilty plea in circumstances where there is no evidence that the respondent had had to prepare for a trial, considering the appellant was not in the jurisdiction.

9. The appellant says that the trial judge did not attach sufficient weight to the fact that the appellant had not taken part in the transportation for financial gain. In this regard the appellant refers to *The People (DPP) v. Ryan & Rooney* [2015] IECA 2 where this Court imposed a sentence of three years' imprisonment in respect of an offence concerning the transportation of heroin and cocaine with an approximate value of 1.3 million euro. It is submitted that, whilst the value of the drugs in the instant case is similar to *Rooney*, there are a number of distinct differences in terms of the absence of certain aggravating factors highlighted in *Rooney*. Firstly, the drugs here are, arguably, of a less "serious" nature than heroin and cocaine. Secondly, the appellant did not take part for financial gain but was acting under coercion due to a debt accumulated on foot of numerous addictions.
10. The appellant also refers to *The People (DPP) v. Devlin* [2016] IECA 125 where this Court also remarked on the fact that the appellants in *Devlin* could be distinguished from many other section 15A offences on the basis that they had not acted "against a background of addiction or debt to transport a consignment from place A to place B". Accordingly, it is submitted that the learned sentencing judge erred in not giving any/sufficient weight to the factors highlighted in *The People (DPP) v. Ryan & Rooney* [2015] IECA 2 and *Devlin*.
11. The appellant submits that the trial judge did not give enough weight to several mitigating factors including the presence of duress and the significant rehabilitation the appellant has undergone.

#### **Submissions of the Respondent**

12. The respondent submits that the appellant has mischaracterised the trial judge's remarks and she did not classify the appellant leaving the jurisdiction as an aggravating factor but rather was correct in finding that his plea could not be considered to be an early plea. The respondent further submits that the Court was entitled to consider the various factors relating to Mr Needham and the sentence received in his case.
13. In relation to the mitigating factors the respondent submits that the trial judge at all times carefully considered mitigation and the appellant's personal circumstances with the due consideration required by the statutory provisions in question. The respondent emphasises that the street value of the drugs involved is an important consideration to be weighed by a court in cases of this type. The respondent refers to the remarks of Kearns J. in *The People (DPP) v. Long* [2008] IECCA 133: -

“At the very outset, the Court has no hesitation in concluding that the quantity and value of drugs seized are critical factors to be taken into account in evaluating the overall seriousness of the offence. That is implicit from the terms of s.15(A) itself which provides a separate and more draconian regime of sentencing for a person found in possession of controlled drugs which exceed a certain value. The Court thus rejects as mistaken the views of the Circuit Court judge in this case which were unambiguously to the effect that the value of a particular haul or the difference in value of a particular haul between €35,000 and €111,370 was “not a material factor” when it came to sentencing.”

14. The respondent submits that the cases referred to by the appellant, *The People (DPP) v. Ryan & Rooney* [2015] IECA 2 and *The People (DPP) v. Devlin* [2016] IECA 125 have a number of distinguishing factors which differentiate them from the case at hand and undermine their value as comparators.

### **Discussion and conclusion**

15. It is important to consider the sequence of events as they transpired. The offence occurred on the 25th July, 2015. The appellant was arrested at the scene in the context of a surveillance operation and the discovery of illegal substances and was detained in the usual manner. Nothing of evidential value arose in the course of his detention in garda custody. The matter then came before the Circuit Criminal Court, a trial date was fixed on behalf of the appellant and on the 31st January, 2017 he failed to appear and a bench warrant issued. It transpired that he had fled the jurisdiction and remained at large until he contacted his solicitor who then made arrangements for the bench warrant to be executed. This was duly done and he came before the Circuit Criminal Court on the 15th June, 2018 on which date he pleaded guilty and the matter was adjourned for sentence.
16. Mr Morrow is a person with fifteen previous convictions including those for theft, s. 3 assault, aggravated burglary, public order offences and offences under the Road Traffic legislation. He has no recorded convictions under the Misuse of Drugs legislation. The Court heard that he had multiple substance abuse issues and a gambling problem and it was accepted that he was operating under instructions to participate in the operation and that he owed a debt due to his multiple substance abuse issues.
17. Moreover, it was accepted at the sentence hearing that he had fled the jurisdiction due to threats arising from the loss of the drugs in question. Mr Morrow worked in the building trade. The Court heard that he made efforts to resolve his substance abuse issues whilst he was at large and also that he has family support. The evidence disclosed that he suffers from anxiety and depression and documents were furnished to the Court in this respect. He also attended a counselling service whilst he was at large and it was indicated to the Circuit Criminal Court that he was eager to achieve enhanced prisoner status.
18. The sentencing judge adjourned the sentence for urinalysis and on the 7th November, 2018 having received the results thereof, which results were negative, evidence was also

given of courses he had undertaken in pursuit of rehabilitation and the sentencing judge then proceeded to sentence.

19. The gravamen of the complaint advanced before this Court is that the sentencing judge misstated the circumstances leading to the plea of guilty, in that she stated that the appellant pleaded guilty having taken a trial date on his return to this jurisdiction. Moreover, it is argued that the sentencing judge erred in imposing the same sentence on this offender as on his co-accused in circumstances where his co-accused, Mr Needham, had a previous conviction for the importation of drugs in another jurisdiction.
20. The sentencing judge departed from the presumptive minimum sentence and assessed the gravity of the offence at ten years' imprisonment. While she properly considered Mr Morrow to be a trusted operative within the venture, she noted that he was not a beneficiary and was not at the upper end of the hierarchy. She took into consideration the value of the substance involved.
21. She then proceeded to give the appellant credit for his plea of guilty. She acknowledged that he did not benefit from the operation and she took into account the element of coercion. In relation to the latter two factors, these are matters which are more properly considered in the assessment of the culpability of the offender. The judge went on to consider his efforts as regards his rehabilitation and his health issues and she reduced the sentence to one of eight years' imprisonment. In so doing, she noted that he had no drug-related previous convictions. We observe that that is a factor more properly considered within the assessment of culpability. However, the appellant is a person with previous convictions and his previous convictions lead to a progressive loss in mitigation.
22. Issue is taken with the judge's account of the sequence of events wherein she placed a trial date as being taken after his return to this jurisdiction. We do not see this error as a material error. Clearly the judge was speaking in the context of assessing the weight to be given for his plea of guilty. The plea was undoubtedly, in the circumstances, a late plea. The trial date was taken before he fled the jurisdiction. This was certainly not a case of a plea entered at the first available opportunity, therefore the weight to be afforded to his plea of guilty was less than otherwise might be afforded in circumstances of an early plea of guilty. It is noted also that the appellant was caught red-handed.
23. The second point is made that the judge erred in imposing the same sentence as she imposed in respect of his co-accused, that is a pre-mitigation sentence of ten years' imprisonment and with a reduction to eight years' imprisonment having considered mitigation.
24. However, the sentencing judge carefully assessed the evidence and she drew a factual distinction between the co-accused and the appellant, that being that she considered the previous conviction for the importation of drugs in the instance of his co-accused but also considered that the co-accused had made admissions and had entered an early plea of guilty. As regards this appellant, the judge properly decided that he had not entered an

early plea of guilty and thus received a reduced discount for the plea of guilty than might otherwise be the case in the context of an early plea of guilty.

25. The overarching principle of sentencing is that of proportionality. The penalty in each case must be proportionate to the gravity of the offence and the circumstances of the offender. Gravity is measured by the assessment of culpability and the harm done or in the instance of a drugs offence the potential harm which is caused to society by the scourge of drugs. The fact that harm is at a future date does not lessen the seriousness of the offence. The market value of a drugs seizure is a relevant consideration when assessing the gravity of the offence, and in the present case, the value was a significant one.
26. The value of the substance is an important consideration when assessing this appellant's moral culpability. He must have been aware that the drugs were intended for onward distribution and the greater the amount of drugs the greater the harm to society, thus the greater an offender's moral culpability.
27. Other significant factors bearing on the issue of culpability are the elements of premeditation and planning and the level of involvement in the operation. While the appellant was not involved in the overall control or management of this operation, his role was greater than that of, say for example, a courier. He played an important part in the sequence of events, involved as he was in accepting and storing the drugs for their onward journey to society.
28. When we look at the ultimate sentence imposed by the sentencing judge we find no error in a sentence of eight years' imprisonment for the offence. While some of the factors the judge considered were more properly within the ambit of an assessment of culpability and were considered by the judge in the context of mitigation, nonetheless the overall sentence was the appropriate sentence and as a consequence we will not intervene in the sentence imposed. We find no error in principle.
29. Accordingly, the appeal is dismissed.