



**THE COURT OF APPEAL**

**[44/19]**

**The President  
McCarthy J.  
Kennedy J.**

**IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPELLANT**

**AND**

**TOMAS WITKOWSKI**

**RESPONDENT**

**AND**

**[45/19]**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPELLANT**

**AND**

**MARIUSZ SOWA**

**RESPONDENT**

**JUDGMENT (Ex tempore) of the Court delivered on the 16th day of January 2020 by Birmingham P**

1. This is an application brought by the DPP pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review sentences on grounds of undue leniency. The sentences sought to be reviewed were sentences of 7 years imprisonment in each case, but with the final four and half years of each sentence suspended. A condition of the suspended element of the sentence was that prior to their release from custody, that both men would make arrangements to leave Ireland and not to return to Ireland for a period of 20 years. The sentences were imposed in respect of a s. 15A Misuse of Drugs Act offence to which both had pleaded guilty.
2. The case concerned events that occurred on 30th March 2018. On that occasion, Gardaí in possession of a search warrant, raided a residential property in an isolated rural area of County Carlow. While the residence was somewhat isolated, it was in fact close to the main motorway network and was protected by security gates. It appears that Gardaí had the premises under observation for some time. Some days prior to the occasion of the

Garda raid, Mr. Sowa had been observed leaving Dublin Airport where he had collected an individual who was thought to be a senior figure in Polish organised crime circles. That person went to the Carlow premises with Mr. Sowa, but that individual was not present at the time of the raid on 30th March 2018. The indication is that the Gardaí viewed this particular individual as a central figure in this operation.

3. When Gardaí entered the premises, they found drugs, cannabis, with a street value of €1.3m or, in weight, 65kg. The drugs were contained in 77 packets. A sum of cash in the amount of €21,440 was found on the property. It was in open view and close to the cannabis. At the property, Gardaí found large tractor-type tyres which had been used to smuggle the drugs into the country. Cannabis was then removed from the tractor tyres and was vacuum packed and the vacuum packs were then placed into holdall bags or gym-style bags. Mr. Witkowski had been seen purchasing these bags in a local store some days earlier. Thereafter, the drugs were to be distributed throughout the country.
4. On 16th October 2018, both men entered early pleas of guilty. Both were remanded in custody following their arrest and they remained in custody until the sentence hearing in the Circuit Court.
5. In relation to the personal circumstances of the respondents, both are Polish nationals. Mr. Sowa, at the time of the sentence hearing, was a 38-year old man who had previously worked as a delivery man in Poland. The Court heard that he had found his remand in custody extremely difficult and that he had a supportive family with whom he maintained contact. The sentencing Court was told that he had used his time in prison constructively and a number of references from the prison dealing with his involvement in various educational programmes were put before the Court. In the course of outlining the facts of the case, the Detective Garda in charge of the investigation indicated that he had satisfied that Mr. Sowa was the “delivery man” and that he was not the person who had masterminded the importation of the cannabis. His sole function, in the view of the Detective Garda, was to distribute the cannabis throughout the country. The Garda was inclined to place Mr. Sowa at a somewhat lower point on the scale than his co-accused, Mr. Witkowski.
6. So far as Mr. Witkowski is concerned, at the time of the sentence hearing, he was 40 years of age. He was a family man with three children. He had previously worked in both Italy and in Germany and had come to Ireland only shortly before his arrest. The Court was told that he had accrued a gambling debt in German, apparently he had been afforded credit by a casino there, in the amount of €20,000 and had become involved in this exercise in order to obtain monies to clear that debt. Again, it was the case that he had no previous convictions.
7. The approach of the trial judge involved, first, concluding that there were factors present which permitted a departure from the mandatory presumptive minimum. The Court then identified a sentence of 7 years. It referred to it as the “appropriate sentence”, but it appears that so identifying, that the Court was actually identifying a headline or pre-mitigation sentence. The Court then indicated that a portion of that sentence should be

suspended, and in doing so, referred to the particular difficulties experienced by foreign nationals in an Irish jail. The judge then indicated that he felt that the sentence should be two and a half years, but that he would backdate that to the time when the respondents went into custody, which was some 11 months earlier.

8. The Director's position is not that this is a case where the mandatory presumptive minimum to be served had to be imposed. Rather, she takes issue with the headline or pre-mitigation sentence and says that thereafter, excess regard was had to the mitigating factors present which saw 60% of the headline sentence suspended. Thus a headline sentence that she says was itself lenient, indeed, unduly lenient, then resulted in an actual sentence which was clearly unduly lenient. A point on which the Director lays emphasis is that she says the sentence imposed failed to have regard to the requirement for general deterrent, and she says that this was a case where general deterrence was a very significant consideration indeed, involving, as it did, the fact that Ireland was the venue for this exercise.
9. The Director has referred to a number of comparators. In particular, she has referred to a case of DPP v. Petrauskas where this Court found unduly lenient a sentence of five years, which was suspended, in effect, in full, suspended apart from the period that had been spent in custody pending the sentence hearing, which was a period of some five and half months. Subsequently, the Court imposed the 5-year sentence as the appropriate sentence at the resentencing stage. It is said that by reference to Petrauskas, the sentence in the present case was clearly a substantial departure from what would have been an appropriate one. Reference is made too to DPP v. Sarsfield where it was pointed out that the average sentence between 2014 and 2019 for offences involving drugs to a value of excess of €1m was 9 years imprisonment with an average suspended portion of two and a quarter years so that the average time to be served was 6 years and three-quarters or 81 months.
10. In the Court's view, insofar as the trial judge appears to have identified a sentence of seven years as the headline or pre-mitigation sentence, he was in error in that regard. It is the Court's position that this was a case where the headline or pre-mitigation sentence could never have been set at a level less than the mandatory presumptive minimum. Indeed, a starting figure somewhat higher than the presumptive minimum could well have been justified. We say that fully conscious of the fact that neither man was the mastermind, but it is the case that both men were significantly committed to this exercise. It is true that there were factor present by way of mitigation in both cases. Indeed, it is an acknowledgement of that that the Director does not dispute that this was a case where there was a basis for departing from the statutory presumptive minimum to be served.
11. Without listing all of those factors that are present, we identify as particularly significant the very early pleas that were entered, the absence of any previous convictions in either case and the fact that both men were going to be required to serve their sentences apart from their family, friends and support structures. There was a time when Irish society was

a very homogenous one and the experience for a non-national required to spend time in an Irish prison was likely to be a very isolated one indeed. The reality is that Ireland is now much changed, Ireland is now much more diverse and that fact is reflected in our prison population. However, it is the situation that in this particular case, neither man has set down roots in this country, neither man has established the support base that would come with setting down roots. In those circumstances, the experience of incarceration was likely to be very difficult. Information was put before the sentencing Court that that was the situation up to that point in time, and information has been put before this Court today in the context of a possible requirement to engage in resentencing which indicates that that situation remains very much so up to this point.

12. In the Court's view, if full and generous credit was to be given for all the mitigating factors present, that would have resulted in a sentence of the order of 7 to 8 years, certainly not less than 7 years. There would have been, it seems to us, some scope for a limited differentiation between the two respondents, a differentiation in favour of Mr. Sowa. In resentencing, we resentence, as we are required to do, as of today's date. On behalf of both respondents, emphasis has been placed on the fact that since the sentence hearing in the Circuit Court, the respondents had a release date of February 2020 before them, albeit that they were aware that there was an application being brought by the DPP to review the sentences as unduly lenient.
13. This Court has, on many occasions, referred to the disappointment factor in being resented and having a sentence increased. This has meant that on a number of occasions, we have indicated that in recognition of that, we would impose a sentence somewhat less than we would have regarded as the appropriate sentence had we been sentencing at first instance. In this case, we recognise the disappointment factor as particularly acute. We also recognise that we are resentencing two people who have used their time in custody in a particularly productive and responsive fashion. In addition, information has been put before us today in relation to the medical situation of Mr. Sowa's father in Poland. Knowledge of that fact and that is removed from contact with his father must, we accept, be particularly difficult for Mr. Sowa.
14. In this context of the disappointment factor, we would observe that when the Director is seeking to review a sentence and the sentence which she seeks to review is such that any review is likely to come on when the sentence will have been very substantially served, that consideration should be given to seeking priority from the Court. There have been such applications on occasions, and where there have been, the Court has sought to accommodate such cases. In this case, we understand that situation was compounded somewhat by delays in obtaining the transcript from the Circuit Court in Carlow.
15. Reflecting the disappointment factor which, we repeat, we acknowledge must be acute, we will limit our intervention to quashing the sentence imposed in the Circuit Court which we are satisfied involved an error in principle, and instead, imposing a sentence of six years imprisonment. We regard a sentence of six years, even at this resentencing stage, as the minimum that could be considered. We have considered whether the sentence of

Mr. Witkowski should be set at a somewhat higher figure, but have concluded that given that this was a case that involved joint enterprise and common design, that the justice of the case would be met by imposing the same sentence in each case.

16. Accordingly, the order of the Court is to quash the sentence in the Circuit Court and substitute the sentence in each case of six years which will date from the same day as the sentences in the Circuit Court.