



THE COURT OF APPEAL

[40/2018]

**Birmingham P.
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)

APPLICANT

AND

DEREK NAYLOR

RESPONDENT

AND

[41/2018]

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

AND

PAUL GODDARD

RESPONDENT

JUDGMENT of the Court delivered on the 13th day of March 2020 by Mr. Justice McCarthy

1. This is an application by the Director of Public Prosecutions seeking to review sentences on grounds of undue leniency pursuant to section 2 of the Criminal Justice Act, 1993. The underlying prosecution arises from events that occurred on 24th August 2016. For unknown reasons Messrs. Naylor and Goddard were dealt with in the Circuit Court at the same time but on separate indictments. Mr. Naylor pleaded guilty to count one on the indictment preferred in relation to him, being an offence contrary to s.15A of the Misuse of Drugs Act, 1977, as inserted by the Criminal Justice Act, 1999. The controlled drug in question was cannabis resin and was valued at the estimated sum of €147,498. Mr. Goddard also pleaded guilty to the same offence (Count 7 on the indictment preferred against him) and two further offences contrary to s.15 of the same Act in respect of possession of amphetamine and cannabis. Each of the respondents were sentenced to four years' imprisonment on the counts under s.15A and in respect of the offences relating to cannabis and amphetamine, two years' imprisonment (to run concurrently)

was imposed on Mr. Goddard; the offence of possession of amphetamine was marked as taken into consideration. In what the sentencing judge accepted was an "unusual step", she suspended both sentences in their entirety. It is this aspect of the sentence with which the DPP takes particular umbrage.

Factual Background

2. At the sentencing hearing on 9th October 2017 the trial court was told that confidential information had been received by An Garda Síochána and surveillance had been carried out. On the 24th August 2016 Gardaí were in possession of confidential information in relation to the driver of a gold Skoda Octavia taxi registration number 09 D 8909 and an operation was put in place monitoring the movements of one Derek Naylor. At approximately 12.20pm Mr. Naylor was observed parking outside 16 Dunmanus Road, Finglas by Garda Brendan Mynes. At approximately 12.25pm Garda Mynes observed Mr. Naylor leave that address driving that 09 vehicle. The vehicle was then observed at approximately 1.10pm entering the car park at Clearwater Shopping Centre, and the driver stopped his vehicle beside a silver Ford Transit 06 MH 10102. Mr. Naylor was again observed conversing with the driver of the silver Ford Transit, one Paul Goddard, taking three bags from the side of the van, and placing them into the boot of the Skoda Octavia. Mr. Goddard then exited Clearwater Shopping Centre in the 06 vehicle and the movements of this vehicle were monitored while members of the Special Crime Task Force stopped Mr. Naylor's vehicle.
3. At approximately 1.20pm on Ratoath Road, Detective Garda Ivor Scully stopped and searched Mr. Naylor and his vehicle. He was cautioned at the scene by Detective Garda Scully and made admissions to knowing that there was cannabis in the boot of his vehicle. During the course of this search Garda David Howard located three bags in the boot of the vehicle. The items were believed to be cannabis resin. Mr. Naylor was arrested and conveyed to Blanchardstown Garda Station and detained and interviewed. During this time he accounted for three bags in the boot of his vehicle and stated that he was to collect the items in the Clearwater shopping centre in Finglas and await further instructions on their destination. He indicated that he had a debt of €800 and he was to receive €300 for doing this. He further stated that the reason for his involvement was to pay off an outstanding drugs debt that he owed. He was shown exhibits namely: - 4 x 5 blocks of cannabis resin to include the bags in which the drugs were found. The court heard that the value of the cannabis found in the vehicle was €147,498 and it was cannabis resin. The premises of Derek Naylor at 16 Dunmanus Road, Cabra were searched by Gardaí and nothing of evidential value was found.
4. At approximately 10.37pm on 24th August, 2016 Mr. Naylor was charged by Sergeant Lee Gavin. It was accepted by Detective Garda Scully at one point during his evidence that Mr. Naylor was a cocaine user but later appeared to accept that he was an addict and that an outstanding drug debt at the time of the arrest was the root of his involvement in the offence. The garda witness confirmed that Mr. Naylor was not someone who was otherwise suspected of involvement in the drug business.

5. The premises of Paul Goddard at 20 Cloonlara Road, Finglas were searched by Gardaí pursuant to s. 26 of the Misuse of Drugs Act, 1977 / 1984. During the course of the search a number of items were seized which included cash to the value of €4,545 along with cannabis and an unknown orange powder. Several other exhibits were found in the rear garden of 21 Cloonlara Road and Gardaí observed Mr. Goddard dropping a bag over the rear wall of his premises.
6. Mr. Goddard was arrested at 6.18pm by Garda Redmond O'Leary and was conveyed to Blanchardstown Garda Station. He was detained and interviewed and during the course of interview was shown exhibits found at 20 and 21 Cloonlara Road which he was asked to account for namely a jacket with €3,065 found in its pocket, a wallet containing €480, Bank of Ireland money bag containing €1,000, a plastic bag containing powder, plastic bagging, a black carrier bag discarded by Mr. Goddard at the search, a bag containing cannabis, large sandwich bags for bagging and a bag of suspected cannabis herb. Mr. Goddard stated at the end of the interview that three bags were left in his unlocked van by arrangement and that he was to receive €1,000 payment for delivering these three bags to a man at Clearwater Shopping Centre on 24th August 2016 at lunchtime, which he did. Mr. Goddard was shown exhibits that were found in the boot of Mr. Naylor's car and confessed to his involvement in the distribution of cannabis resin at Clearwater shopping centre on 24th August 2016. The narrative advanced by Mr. Goddard was that although he was to receive a payment of €1,000 for his involvement, he was doing it mainly to stop a threat on his family's life for a drugs debt that was incurred by his daughter's former partner: it was accepted that there been a previous incident in which a family member's house had been attacked with an explosive device, said to be a petrol bomb, and that he had taken the initiative in order to try to clear the threat against his daughter's life which led to the offending in question. Mr. Goddard was subsequently released and re-arrested for the purpose of charge by Sergeant Rob Carey at 5.58pm on 25th August 2016.
7. One of the noteworthy features of the case was that the Garda evidence was particularly sympathetic towards both respondents. We are much struck (as the sentencing judge must have been) that he said during the examination-in-chief, that both the accused were: -

"...just mules in relation to the scale of their involvement in relation to the sales via drugs Judge they're very much at the bottom end of it in relation to just used, and, taken advantage of when they've drug debts and so forth."

The garda witness did not think that Mr. Goddard would appear before the court again, and had "learnt a strong lesson out of his involvement". It was accepted that his involvement was due to concern for his daughter's life due to debts owed by her former partner. He was not "on the garda radar at all, in any shape or form."

Sentence

8. The sentencing judge considered that there was a basis for departing from the presumptive minimum sentence of ten years imprisonment for s.15A offences: the

Director agrees with that conclusion. Having set the headline sentence at five years, the court proceeded to impose a sentence of four years' imprisonment to be suspended entirely in respect of both appellants. The judge identified a number of mitigating and exceptional factors present which justified a deviation from the presumptive minimum sentence. In respect of Mr. Naylor, the court was presented with a letter of remorse taking full responsibility for his activity. The judge accepted that he was involved in this activity as a result of a debt he had accrued with regard to addiction to cocaine. The court received a letter from a Mr. Fitzgerald from the Coolmine Therapeutic Community Programme describing Mr Naylor as being a mentor to new clients having completed a course with Coolmine Addiction Services. The court received various testaments from family and friends of Mr. Naylor attesting to his good character, and references from previous employers. The court stated that Mr. Naylor was at a low risk of reoffending.

9. As for Mr. Goddard, the court received a letter from a friend and neighbour, regarding Mr. Goddard as an obliging and generous kind person. The court also received a letter from Bridges of Hope with regard to his charitable activities in helping homeless persons and carrying out outreach activities. It was noted that Mr. Goddard was part of a team of volunteers who drive food and clothing to the homeless in society. The court further received a letter concerning Mr. Goddard's involvement in his church, and a letter from a counsellor, who described the stress and anxiety Mr. Goddard has suffered as a result of threats which have been made to a member of his family, whose home was attacked as a result of threats regarding a drug debt. The court also received documentation from Men's Networking Resource Centre of Ireland. The probation report which was presented referred to the death of Mr. Goddard's son, who tragically died in 1999.
10. The sentencing judge noted that Mr. Goddard involved himself in this type of criminality in unusual circumstances. It was accepted that Mr. Goddard had been motivated by way of desperation on his part in respect of a threat made to a very close family member whose home was attacked as a result of a debt which this person had accrued. The judge said it appears that Mr. Goddard has in the past paid off drugs debts in respect of a family member, and he has involved himself as a person with no previous convictions in this activity, motivated by fear in respect of a family member. The judge stated that he is a person who has had an impressive work record in the past, he was engaging in a community employment scheme. She noted that he has been sober from alcohol for over twenty years. The judge also considered the fact that he was a 58-year-old man with no previous convictions.
11. In these circumstances, the judge decided not to impose the presumptive minimum sentence of ten years' imprisonment, and instead imposed a sentence of four years for both of the accused with each being wholly suspended. The judge stated her reasons for doing so were the ample mitigation evident in this case, the early pleas of guilty, their cooperation with the investigation, their previous good character, their personal circumstances, and the absence of previous convictions in respect of both accused. The judge noted that she adopted this approach in "the most unusual of circumstances" as outlined above.

Grounds Relied Upon by the Applicant

12. The Director seeks the present review on a number of generic grounds. Principally, however, the Director took no issue with the pre-mitigation headline sentence of five years' imprisonment or, indeed, the post-mitigation of four years' imprisonment notwithstanding that they both represent a departure from the presumptive mandatory minimum. Instead, the criticism towards the sentencing judge's approach is focused on the suspension of the sentences in their entirety. Further, the Director took issue with the uniformity of the suspended portions of the respondents' respective sentences on the basis that Mr. Goddard's culpability was greater than that of Mr. Naylor (because of the additional offences which he had committed). As such, if part of the sentences imposed in respect of each accused were to be suspended, it ought not to have been the same portion, and the circumstances of Mr. Goddard's offending required that he serve a longer period in custody. A number of authorities have been cited to us but they do not assist us one way or another since this case depends on its own facts. Given the overlapping nature of the grounds advanced by the Director, we propose to with them together.

Summary of the Submissions

13. Counsel for the Director submits that while the sentencing judge did consider the evidence and mitigation before her in determining the sentence to be imposed, the suspension of the sentences in their entirety, even if both accused were first time offenders, was unduly lenient. In so arguing, particular reliance is placed on the significant quantity of drugs involved and the fact that both accused were caught red-handed. Further, in respect of Mr. Naylor, there was evidence that knew what he was doing was illegal. While the Director accepts that Mr. Naylor had a cocaine addiction, there was no evidence that this was a chronic addiction, there was an absence of any specific threat against Mr. Naylor, and no evidence of any financial destitution, to indicate that he had to resort to this offence. While it was accepted that credit was due for entering of a plea of guilty and the cooperation given, it was so exceptional as to warrant the imposition of wholly suspended sentence.
14. Insofar as Mr. Goddard is concerned, the Director suggests that the sentencing judge gave too much weight to the level of co-operation he provided in entering an early plea of guilty, the fact that he appeared remorseful, and was of prior good character. Indeed, counsel for the applicant noted that sentencing judge failed to have regard to the aggravating factor of his throwing evidence over a rear wall into an adjacent garden and initially denying that he did so to Gardaí who had witnessed this. Issue is also taken with the characterisation of Mr. Goddard as a mere "mule" by Garda Scully in circumstances where the accused was found in possession of drugs at three separate locations and was allowing his home to be used for criminality. The Court's attention was also drawn to the fact that a probation report from December 2017 described Mr. Goddard as being at a "moderate risk" of re-offending. While the Director accepted that Mr. Goddard's family had been under threat, this could not in her view amount to a justification for engaging in such conduct or support a wholly suspended sentence being imposed.

15. Counsel for the respondents are of one mind in their response to the arguments advanced by the Director. They submit that the final sentence reached by the very experienced sentencing judge was, in fact, proportionate to the gravity of the offence and the mitigating factors present. It was an approach which they say carefully considered the legislation and offered cogent reasons to support the conclusion that was reached. Further, it should also be borne in mind that the learned sentencing judge herself observed that it took the court "considerable time and effort" to arrive at the sentences imposed in what the court described as "a very difficult case". The sentencing judge clearly did not impose a wholly suspended sentence lightly and it is submitted that great weight should be given to her careful consideration of all the relevant factors in sentencing. It was an appropriate exercise of her discretion. On that basis, they claim that the Director has failed to discharge the burden placed upon her by the 1993 Act to demonstrate that the sentence was a substantial or gross departure from the norm and as such, the within applications should be dismissed.

Discussion

16. In any application for review such as this, the Court has always emphasised that the burden lies with the Director to show not only the sentence imposed was lenient but that it was undue leniency so as to amount to an error in principle. We have also noted at great length the mere fact that this court might, if it were treating the matter at first instance, or indeed re-sentencing after a successful appeal by either parties, be inclined to impose a higher sentence, even a considerably higher one, does not mean that the threshold imposed on the Director has been reached. These are principles that were first articulated in *DPP v. Byrne* [2001] 3 IR 390 and have not really been in dispute since then. Indeed, it is worth re-iterating those principles here for the avoidance of doubt:
- "(i) The DPP bears the onus of proof in showing that the sentence was unduly lenient.
 - (ii) The appeal Court should always accord great weight to the trial judge's reasons for imposing the challenged sentence.
 - (iii) It is unlikely to be of help to the appeal Court to ask if, in the event that a more severe sentence had been imposed, it would have been upheld in a defence appeal based on error of principle. Different criteria apply to prosecution appeals.
 - (iv) It is clear from the wording of s. 2 of the 1993 Act that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the appeal Court's intervention."
17. While we acknowledge the factors present that led the trial judge to conclude that this was a case for unusual, indeed, exceptional leniency, we are, nonetheless, of the view that this was a case where, such was its seriousness, that a custodial disposal could not have been avoided. Given the harm done to society as a result of drug dealing, there is a clear and obvious requirement for general deterrence. In a situation where the DPP has not taken serious issue with the identification of a headline or pre-mitigation sentence of five years, and then the reduction of this sentence to four years, we will take this as our

starting point. However, where we would diverge from the trial judge is that unlike her, we do not believe that this was a case where the sentence could or should have been suspended in its entirety. In the case of Mr. Naylor, the factors present in his favour were undoubtedly significant, indeed, compelling, and we think could have provided a basis for a suspension of up to half of the four-year sentence. We agree with the Director that this is a case where it was appropriate to draw a distinction between Mr. Naylor's sentence and Mr. Goddard's sentence. Having regard to the fact that it was accepted that Mr. Goddard was prompted to act as he did, in part, at least, because of concerns for his family, there is scope for limiting the divergence and we would suggest that in his case, a suspension of 15 months of the four-year sentence would have been appropriate.

18. These are not, however, ordinary circumstances and there remains a further complicating factor to consider. We are quite concerned in this case about the level of delay which has arisen on the part of the Director in ensuring that the present reviews were dealt with expeditiously. This court has for a number of years given priority to undue leniency applications with a view to avoiding a situation where a respondent might have finished the custodial portion of a sentence before the review came on or, as here, where the matter was disposed on a non-custodial basis at first instance and the respondents face the prospect of a term of imprisonment a number of years after the fact. This must have a direct bearing on whether or not the Court should intervene and proceed to re-sentence the respondents.
19. The offences here occurred on 24th August 2016. The appellants were charged on the same day. We are not told when the return for trial took place but in any event the pleas were accepted to be early pleas for the purpose of mitigation and in particular in Mr. Naylor's case it was explicitly stated by Garda Scully that at all times it was anticipated that he would plead guilty. Neither in truth, had any real basis for doing otherwise. In any event, the sentencing hearing took place on 9th October 2017 and judgment was given on 23rd January 2018. The Director lodged the within applications for review on 8th February 2018 but we are informed that it was not until July 2019 that the matter was ready to proceed. Despite an early date being given, when the matter came before this court on 9th October 2019 there remained issues with the failure to provide certain documents. Consequently, the Court was constrained to adjourn the matter and afford the Director an additional period of four weeks to file such documents, with a similar period for Mr. Goddard to furnish any medical report which he might wish us to consider in circumstances where we were told he had a heart attack in August 2019. The Director filed the requested documents on 11th December 2019 with Mr. Goddard providing a medical report on 7th February 2020.
20. We think that because of the delay in this matter from the time the offences were committed to 11th December (when the papers were filed) in his case, we are constrained not to impose a custodial sentence. This is all the more so in Mr. Naylor's case in light of the un-contradicted submission to us that he has been fully rehabilitated as anticipated. In theory we could quash the decision of the trial court on the basis of the fact that the sentencing judge fell into error in failing to have regard to the necessity for a custodial

sentence in cases of this kind, but that would be a pointless exercise since we would not propose on any re-sentencing to change the effective outcome and accordingly we decline to intervene.

21. We accordingly dismiss these applications.