



THE COURT OF APPEAL

Record Number 91 CJA/21
Neutral Citation No: [2021] IECA 350

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

APPLICANT

- AND -

KEITH QUINN

RESPONDENT

UNAPPROVED

JUDGMENT of the Court (*ex tempore*) delivered on the 10th day of December 2021 by Ms. Justice Kennedy

1. This is an application by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review on grounds of undue leniency a sentence imposed on the respondent on the 14th April 2021. The respondent pleaded guilty to an offence contrary to s. 15A of the Misuse of Drugs Act 1977 (as amended) being the possession of drugs with a value of €13,000 or more, with an intention to supply. A seven and a half year sentence was imposed, with the final three and a half years of that sentence suspended on terms.

Background

2. On the 1st August 2020, authorities in the UK became suspicious of a package which transited through the UK to Ireland from the Netherlands. The package was found to contain twenty wrapped rolls of material which transpired on analysis to be diamorphine. The Gardaí were contacted, and an operation was put in place to continue with the delivery. The label on the package bore the respondent's first name, and it was delivered to a logistics and distribution warehouse in Dublin where the respondent worked. The package was received by the respondent, who took a photograph of it and sent it to his co-accused. The respondent put the package in his personal vehicle, following which the co-accused arrived in a vehicle, and both drove to another premises nearby. The respondent brought the package inside and emerged empty-handed.

3. The respondent and the other individual drove away and were arrested and detained. The contents of package were analysed, and approximately 19.8kg of diamorphine was found, with a street value of €2,769,130. The respondent was arrested and detained. During interview, he provided his personal circumstances, his phone number, agreed he had received the package, identified the facility where he worked, and provided the access codes to his phone. It was accepted that the latter greatly assisted the Gardaí. He also indicated on interview that he had a gambling addiction.

4. It was accepted that the respondent had a gambling problem, and that he was not significantly enriched by his actions in relation to the package. It was also accepted that he was acting as a conduit. The prosecuting Garda agreed that he was reluctant to discuss other individuals, but that the provision of his phone assisted the Gardaí. His brother testified as to the difficulties suffered by the respondent, and as to his previous good character.

Personal circumstances of the respondent

5. The respondent is 33 years old and has no relevant previous convictions. The sentencing judge considered he was a person of previously good character, with a good work history, coming from a good family. His brother gave evidence of the devastating impact on him of the deaths of his parents when he was a young man, which was also outlined in a psychological report. The respondent went down a road of gambling, and his involvement in the criminal activity appears to have been as a result of this addiction.

The sentence imposed

6. The sentencing judge began by noting the seriousness of an offence contrary to s. 15A of the 1977 Act. She considered the value and the nature of the substance to be significant aggravating factors in this case, placing the offence in the upper range of offences of this nature. The sentencing judge then considered the role of the accused, in that he was a “cog in the distribution” of the drugs, and while it was accepted that although he was not benefiting greatly financially, he was considered to be an important part of the distribution. The sentencing judge considered that the acts of the respondent also involved a breach of the trust of his employer, and while he wasn’t specifically aware of what was in the package, the circumstances were sufficient to give rise to suspicion, as his involvement appears to have arisen in the context of pressures as to debts he owed as a result of his gambling addiction.

7. The judge considered his motivation leading to his involvement in the offence related to his gambling addiction and some element of duress as a result, without which she would have imposed a higher sentence. She considered a headline sentence of twelve and a half years appropriate.

8. By way of mitigation, she considered the accused’s guilty plea and his expressions of remorse and shame, as well as his personal circumstances, his gambling addiction, his psychological pressures, the absence of previous convictions, and his work history. She

considered it appropriate to depart from the presumptive mandatory minimum sentence of ten years, the exceptional and specific circumstances in that regard being *inter alia* the guilty plea, his vulnerabilities which led to the gambling addiction, the debts accrued as a consequence, and an element of fear. Ultimately, she reduced the sentence to one of seven and a half years, with the final three and a half years suspended on terms.

Grounds of application

9. Whilst several grounds of application have been filed, in essence, the Director contends that the judge erred in not having due regard to the nature of the charges and the circumstances attending the commission of the offences. It is alleged that the sentence did not adequately reflect the value, weight and nature of the controlled substance, and that the sentencing judge erred in principle in departing from the presumptive minimum sentence. It is alleged that she did not give sufficient weight to the aggravating factors, and gave undue weight to the mitigating factors. It is also said that she erred in allowing a total discount of – in reality – eight and a half years from the headline sentence of twelve and a half years.

Submissions of the applicant

10. The applicant begins by stating the principles concerning undue leniency applications outlined by McKechnie J. in *DPP v. Derrick Stronge* [2011] 5 JIC 2301. The guideline set by the Oireachtas as to sentencing for s. 15A offences is underlined, with particular attention to the presumptive ten-year minimum sentence, “in view of the harm caused to society”. The applicant refers to the judgment of Birmingham P. in *The People (DPP) v. Sarsfield* [2019] IECA 260, wherein it was noted that in cases of large quantities of drugs, the pre-mitigation sentence is likely to be of “fourteen or fifteen years, and in some exceptional cases, significantly higher”.

11. The Director also refers to the publication in *Sarsfield* of the results of survey of the custodial portions of 104 sentences imposed for s. 15A offences. The applicant highlights that, exclusive of fully suspended sentences, the lowest sentences for valuations similar to the one in the instance case was between seven and a half and eight years – significantly in excess of the sentence imposed in this case.

12. It is submitted that, on the basis of *Stronge*, this sentence was a significant departure from the norm, referring to the high valuation of the drugs in this case and the disparity between its sentence and sentences in the above-mentioned table. It is argued that the degree of involvement of the respondent was not reflected in the sentence imposed, particularly with regard to the “pattern of communication” between him and his co-accused. It is also argued that the degree of mitigation given in relation to the respondent’s gambling issue was overly generous considering it is not a drug addiction, which would better explain his involvement in the activity.

13. Using comparators of a number of similar offences, the Director argues that other custodial elements for offences under s. 15A have been far higher, using examples of *DPP v. O’Dwyer* [2020] IECA 353, *DPP v. Greene* [2011] IECCA 22, *DPP v. Witkowski* [2020] IECA 10, and *DPP v. O’Mahoney* [2014] IECA 57.

Submissions of the respondent

14. The respondent submits that, having regard to *DPP v. Byrne* [1995] 1 ILRM 279, the sentence imposed in this case was not a “substantial departure” from the norm. The importance of the word “unduly” in the application is submitted on the basis of *DPP v. Jarosz* [2008] IECCA 151.

15. Reference is made to the seminal case of *DPP v. McCormack* [2000] 4 IR 356, wherein the consideration of special circumstances of a case, and the personal circumstances of the accused, was emphasised.

16. The respondent then proceeds to seek to assess the comparator cases submitted by the applicant. It is argued that the respondent did not make a free and conscious decision to engage in the activity, as was the case in *O'Dwyer*. In *Witkowski*, the respondent argues that the evidence of significant commitment to the activity differentiates it from the respondent's activity. With regard to *Greene*, it is argued the role of the respondent in this case is of a far lower order. In relation to the table in *Sarsfield*, the respondent notes that eleven fully suspended sentences were given for drug offences with a valuation of up to the value of the drugs in the instant case. In that context, it is argued that the sentence cannot be considered an error of principle.

17. It is submitted the respondent's knowledge was minimal, and noted that, in *Sarsfield*, it was held that the list of factors to be considered by a sentencing judge is non-exhaustive. It is argued on the basis of the substantial mitigation, a departure from the presumptive mandatory minimum was justified. It is finally submitted that the sentencing judge took full account of all the aggravating and mitigating circumstances and the structure of the sentence facilitates the respondent's ongoing rehabilitation.

Discussion

18. The applicant makes two primary submissions in oral argument in contending that the judge erred in principle. Firstly, it is argued that the judge erred in departing from the presumptive mandatory minimum sentence and, secondly, that she erred in imposing what is said to be an effective net sentence of four years' imprisonment.

19. This was a very serious offence, the aggravating factors of which were properly identified by the judge, including: the quantity of the drugs and the high value of the drugs; the nature of the drug itself; the element of planning that was required; the use of his place of employment with the consequent breach of trust; and, the respondent's role in the offending. The respondent's role in the enterprise is an important consideration in assessing his culpability; it was accepted that he was a conduit for the substance, however, he played an important and significant role in the operation, and must have been a trusted individual given the high value of the drugs in question. It appears that he did not benefit greatly from a financial perspective. All these are relevant factors in the assessment of moral culpability, and the judge ultimately assessed the headline sentence as one of twelve and a half years. We find no error in this respect.

20. We now move to the issue of the reduction afforded for mitigation. There were many mitigating factors present and, again, these were correctly identified by the judge: the guilty plea; his remorse and shame; his gambling addiction; the testimonials; his personal circumstances; the absence of relevant previous convictions; and, his own vulnerabilities and difficulties. Accordingly, the judge reduced the notional pre-mitigation sentence to that of seven and a half years. She then went a step further and suspended three and a half years of that sentence on the mandatory condition, and also that the respondent undertake residential treatment for his gambling addiction.

21. The jurisprudence applicable to applications by the Director for a review of sentence on grounds of undue leniency are well-established. This Court will not interfere unless the sentence imposed constitutes a substantial departure from the norm. Moreover, we must give considerable deference to the views of the sentencing judge. We are satisfied that the headline sentence nominated was entirely appropriate, and while we consider the reduction afforded for mitigation was very generous indeed, it is the suspension of a further three and a half years –

leaving a net sentence of four years to be served – which makes this case one where the sentence imposed was, in our view, a substantial departure from the norm.

22. Before proceeding to quash the sentence and re-sentence the respondent, we will now address the issue of the presumptive mandatory minimum sentence as argued by the Director. Insofar as this issue is concerned, the approach has been for a sentencing judge to nominate the appropriate sentence without having regard to the presumptive mandatory minimum sentence. Then, if the ultimate sentence is in excess of the presumptive mandatory minimum, that is the sentence. However, if it is not, it is necessary to step back (so to speak) and assess, in terms of the statute, whether imposing the mandatory minimum sentence would be unjust in all the circumstances of the case.

23. In that regard, we look to the exceptional and specific circumstance relating to the offence whereby the judge considered it appropriate to depart from the presumptive mandatory minimum. She relied upon the early plea of guilty, his gambling addiction, his debt as result, and his personal history. It is readily apparent from the transcript, and indeed from the oral submissions of counsel for the Director and the respondent, that the respondent provided assistance to the Gardaí in terms of giving the codes to his phone. The assistance provided was significant and worthwhile. Whilst a Court may consider additional factors other than those set out under statute, in the present case, the plea of guilty and the material assistance alone would have enabled the judge to properly exercise her discretion to depart from the presumptive mandatory minimum sentence, and we find no error that she did in fact so depart.

24. The judge then proceeded to impose the sentence set out above, which we have found was unduly lenient, and consequently we now quash the sentence imposed and proceed to re-sentence as of today's date.

Re-sentence

25. We do not take issue with the headline sentence, nor do we quibble to any great degree with the reduction afforded for mitigation. We have considered the material furnished to us which shows that the respondent is doing well whilst in custody and has employment prospects. We have also considered the material furnished to the court below.

26. As we are re-sentencing, we believe the appropriate reduction for mitigation should have been to reduce the sentence to one of eight years. We are persuaded that the judge erred in suspending three and a half years of the seven and a half year sentence, but we believe it is appropriate to suspend some of the eight-year sentence, to enable him to address his gambling addiction. So, we will suspend eighteen months of the eight-year sentence.

27. Accordingly, we will quash the sentence imposed in the court below and substitute for that sentence one of eight years' imprisonment, with the final eighteen months suspended on the same terms and conditions as imposed in the Circuit Court.