



THE COURT OF APPEAL

[Record Number 58CJA/2022]

**Edwards J.
Kennedy J.
Ní Raifeártaigh J.**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL
JUSTICE ACT, 1993**

BETWEEN/

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

APPLICANT

AND

MIREN RAKOVAC

RESPONDENT

**JUDGMENT of the Court (*ex tempore*) delivered on the 10th of October, 2022 by Mr
Justice Edwards.**

Introduction

1. The respondent appeared for sentencing before the Circuit Criminal Court in Cork on the 25th of February 2022 having previously signed and affirmed guilty pleas to both an offence contrary to section 15A of the Misuse of Drugs Act 1977 and an offence contrary to section 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2005.
2. The respondent was sentenced to two and a half years imprisonment in respect of the s.15A offence, the last 18 months of which were suspended on condition that he enter a bond to keep the peace, be of good behaviour and that he submits to probation supervision, to include urinalysis, for a period of 12 months. The offence in respect of the s.7 Criminal Justice (Money Laundering and Terrorist Financing) Act 2005 was taken into consideration by the trial court.
3. The applicant now seeks a review of the sentence imposed, pursuant to s.2 of the Criminal Justice Act 1993, on the basis that it was unduly lenient.

Factual Background

4. The sentencing court heard evidence from Detective Garda Robert Kennedy who outlined the circumstances of the offences the subject of this appeal and stated that following the signing and affirming of guilty pleas, the respondent was granted bail.

5. He continued by explaining that the charges in respect of the s.15A offence related to two categories of drugs, those being cannabis and cocaine.
6. The Detective Garda then proceeded to outline the details of the offences stating that on the 25th of October 2020 he had obtained a search warrant from peace commissioner Michael Murphy, following the swearing of an information on oath, pursuant to s.26 of the Misuse of Drugs Act 1977-84. The gardaí then proceeded to the respondent's address at 76 St. Kevins Square, off Barrack Street in Cork, where the search warrant was shown and explained to him.
7. During the search of the respondent's residence a number of controlled drugs were seized which included 256 grams of cocaine with an estimated street value of €17,943, and 155 grams of cannabis with an estimated street value of €3,102, the combined value of both being €21,045. Drug paraphernalia such as baggies and an electronic weighing scales were also seized.
8. During the search of the respondent's bedroom a safe was discovered which was opened by the respondent and from which a quantity of cash was recovered to the value €35,000. A search of the respondent's wallet was conducted from which €685 was recovered by gardaí.
9. Two mobile phones were also recovered from the respondent both of which were PIN locked and both of which were opened by the respondent on request.
10. The respondent was arrested and conveyed to Togher Garda Station where he was detained under s.2 of the Criminal Justice (Drug Trafficking) Act and where he made admissions in relation to the sale and supply of drugs and that the cash seized at his residence was the proceeds of his drug dealing. Following his admissions, the respondent was released from detention.
11. An application was made to the court in relation to the €35,685 seized, that it be declared forfeit to the State, and this was acceded to.

Personal circumstances of the respondent

12. The respondent is a 30-year-old Croatian national who has lived in Ireland for some time and who, prior to the onset of the COVID pandemic, had been employed as a chef.
13. He has a partner with whom he lives and who was present in court during sentencing. During cross-examination Detective Garda Kennedy acknowledged that the taking of responsibility for the drugs by the respondent was of evidential value in circumstances where, at the time of his arrest his partner was in the process of moving into his apartment.
14. Evidence was also given under cross-examination that during the pandemic the respondent had lost his employment due to the closure of the food establishment he had worked for, and that although in receipt of the COVID pandemic payment he had come under financial pressure in relation to his rent.

15. Three references were handed into the sentencing court, two from previous landlords and one from his employer at the time of his sentence hearing, who testified as to his character and work record.
16. A probation report was also prepared which noted that the respondent had a good insight into his offending and that he took full responsibility for the drugs and money seized. It was also noted in the report that he had taken steps to rehabilitate himself in relation to his drug use and had not taken any illegal substances or traded in them since his arrest in 2020.
17. The respondent had no previous convictions in Ireland and following a check with Interpol by the gardaí it was established that he had no convictions abroad.

Sentencing judge's remarks

18. In sentencing the judge outlined the details of the offence and acknowledged that the respondent was a man with no prior convictions who had made admissions promptly and had entered an "*extremely early plea*", had been fully cooperative with the investigation including providing the gardaí with assistance in unlocking the two seized mobile phones and had provided the combination to the safe during the search of his residence. The judge held that these "*exceptional and specific circumstances*" allowed him to depart from the 10-year presumptive minimum sentence for a s.15A offence as mandated by the Oireachtas.
19. In commenting on the "*deleterious effect of drugs on society and communities*" and in assessing the gravity of the offences, the judge noted that the majority of the drugs seized were cocaine and stated that he saw "*that as more serious offending than had the total been cannabis.*"
20. The judge continued;

"It is at the lower end of a section 15A valuation and is at a valuation that at times possibly just at the outer limit of that, or maybe just beyond it, that one would on occasion see being dealt with by way of 15 rather than section 15A. In assessing the gravity of the offence, I would identify a headline sentence of five years."
21. The judge then held that "*obviously significant mitigation is required for the signed guilty plea, which is a positive indication of the remorse*" and noted that the Detective Garda had found it particularly valuable in respect of the ownership of the drugs which could potentially have been contested in circumstances where the respondent's partner was moving into his apartment. He noted that the plea had saved An Garda Síochána and the courts, both time and resources. He also found it commendable that the respondent had not used substances or traded in them since his arrest in 2020 as was set out in the positive probation report. In relation to the absence of previous convictions he stated, "*it is a serious first offence, and it's a matter that – to allow for mitigation, I would impose a sentence – adjust the headline sentence downwards significantly, to two and a half years.*"

22. In response to defence counsel's request that he consider a fully suspended sentence in reliance of the authority of *Bale v. Fowler* [2016] IECA 209 the judge stated;

"...and I note that in [Bale v. Fowler], while there was a significant mitigation, albeit with a significantly greater amount of drugs, it was a case for example in which the accused was working, tending plants for small reward. The reward in this case was clearly significant and — there was clearly dealing on a significant basis. In excess of €35,000 in cash was on the premises at the time, and in those circumstances, given that the extent of dealing with drugs, together with the paraphernalia, I do not think this is a case in which I can accede to an application to impose a fully suspended sentence."

23. The judge then imposed a sentence of two and a half years imprisonment, suspending the final 18 months as an incentive to *"encourage the respondent along the path that he is on of keeping away from trouble"* on condition that he *"submit to a period of ... probation supervision for a period of 12 months from the time of his release and that he follow all directions and instructions given to him by the probation service, including in relation to urinalysis."*

24. In respect of the s.7 charge relating to the proceeds of criminal conduct the sentencing judge remarked;

"I'll mark that as having been taken into consideration."

25. The court then proceeded to make an order for forfeiture of the cash in the amount of €35,000 and destruction of the drugs.

Grounds of appeal

26. The applicant now seeks a review of the sentence imposed at first instance, contending that it was unduly lenient on the following grounds:

- (i) That the sentencing judge erred in placing too much weight on the mitigating factors and the personal circumstances of the respondent, thereby imposing an ultimate sentence which was substantially outside the norm given all the facts of the case.
- (ii) The sentencing judge erred in failing to nominate and impose a separate sentence in respect of the charge of possessing the proceeds of criminal conduct.

Submissions on behalf of the applicant

27. Counsel for the applicant makes no criticism of the headline sentence identified regarding the s.15A offence, nor the fact that the sentencing judge departed from the presumptive statutory minimum and accepts that same was within his discretion. It is also accepted that there existed personal circumstances and mitigating factors such as the early plea, the co-operation of the respondent with the investigation, the absence of previous convictions and the positive working history and probation report which all fell to be considered by the sentencing judge. However, it is submitted that there existed little, if

any offence-based mitigation that warranted the imposition of a sentence of two and a half years with the final 18 months suspended.

28. In his submission to the sentencing judge when making an application that a fully suspended sentence be considered, counsel for the respondent placed reliance on the judgment in *DPP v. Bale and Fowler* [2016] IECA 209 which referenced *DPP v. McGinty* [2007] 1 I.R. 633, where Sheehan J. outlined that successful rehabilitation of drug addiction dramatically reduces the risk of repeat offending. The judge in that case continued by stating that; *"such rehabilitation was more likely to ensure that the accused would be a law-abiding citizen in the future than if his rehabilitation programme was terminated by a prison sentence."*
29. During sentencing, counsel for the respondent stated that the respondent was a recreational drug user and not an addict. Counsel for the applicant therefore contends that the respondent was not labouring under an addiction or drug debt and that the motivation for the offences was purely financial. While it is submitted that the sentencing judge was correct in his analysis of the respondent's motivation, it is submitted that the judge fell into error in imposing a sentence which departed substantially from one that might have been expected in such circumstances.
30. In respect of the charge of possessing the proceeds of criminal conduct the applicant places reliance on O'Malley 'Sentencing Law and Practice' in submitting that the gravity of the offence, which was taken into consideration during sentencing, in and of itself warranted the imposition of a separate sentence, albeit that the sentence imposed may have been expressed as concurrent with the other offence for which sentence was imposed.
31. Further reliance was placed on *DPP v. Sinnott & Ors* [2021] IECA 42 at paragraphs 33 and 34, as to the court's determination of what might be viewed as an appropriate sentence for a money laundering offence. In the present case it is submitted that there was an error of principle in not identifying a headline sentence for the particular offence, in circumstances where the proceeds of the respondent's drug dealing amounted to a significant amount of cash and where he was an active drug dealer and was clearly assisting the activities of a criminal organisation.

Submissions on behalf of the respondent

32. The respondent places reliance on the comprehensive survey of sentencing in respect of s.15A offences as set out in *DPP v. Sarsfield* [2019] IECA 260 as being of assistance to the within appeal. In delivering judgment in that appeal Birmingham P. stated;

"In assessing the gravity of a particular offence, the value and quantity of drugs seized have long been regarded as critical factors to be taken into account in evaluating where on the scale of seriousness the offence falls."

33. The respondent points to the fact that the lowest valuation of drugs considered in *Sarsfield* was €34,386 which is of greater valuation than the valuation of €21,045 in the

present case and, whilst it is not submitted that a lower valuation constitutes a mitigating factor, it is submitted that in circumstances where it fell towards the lowest end of the valuation spectrum, the sentencing judge had proper and appropriate regard to the valuation of the drugs at issue in his determination of an appropriate penalty.

34. The respondent also places reliance on the judgment of McCarthy J. in *DPP v. Cambridge* [2019] IECA 133 in submitting that a plea of guilty constitutes the most significant of mitigating factors. A plea of guilty will always attract a discount of sentence, especially one signed in the District Court which attracts particular consideration. In *Cambridge McCarthy J.* stated;

"We again ... emphasise the special weight which should be attached to signed pleas whatever the state of the evidence. ...the appropriate reduction from the headline sentence, because of the signed plea, should be in or about a third..."

It is submitted that the plea of guilty in the present case was of inherent value in circumstances where the drugs at issue were located in the apartment into which the respondent's girlfriend was in the process of moving and thus removed any contestation as to ownership of the drugs.

35. The respondent submits that his co-operation with the investigation was near total as demonstrated by the fact that he made full admissions as to ownership of the drugs, the source of the monies at issue, the purpose for which he had the drugs and the unlocking of the phones which were in his possession.
36. Further reliance was placed by the respondent on O'Malley on 'Sentencing Law and Practice' 3rd edition and on the case of *Sarsfield* in submitting that in light of his good work record both prior and post offence, the absence of previous convictions, the positive probation report and the laudatory references put before the court, the sentencing judge had identified the appropriate sentence in respect of the respondent who he had had the opportunity of observing as he awaited sentence.
37. It is submitted that in circumstances where an offender has pleaded guilty to multiple offences, the requirement that a discrete sentence be imposed in respect of each offence is less pressing as the pleas of guilty are likely to prove a bar to successful conviction appeals in all but the most unusual of circumstances.
38. The respondent highlights that the provision governing the practice of taking offences into consideration is permissive rather than mandatory where s.8 of the Criminal Justice Act 1951 provides;
- "8(1) Where a person, on being convicted of an offence, admits himself guilty of any other offence and asks to have it taken into consideration in awarding punishment, the Court may take it into consideration accordingly.

- (2) If the Court takes an offence into consideration, a note of that fact shall be made and filed with the record of the sentence, and the accused shall not be prosecuted for that offence, unless his conviction is reversed on appeal.”
39. Further reliance is placed on O’Malley in submitting that in circumstances where both convictions recorded by the respondent were recorded on foot of guilty pleas the sentencing judge’s exercise of his discretion to take an offence into consideration was proper. O’Malley states;
- “Strictly speaking, a sentence should be imposed for each offence of conviction, though the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive, applying the totality principle or mitigating fines.”
- O’Malley further notes that “[c]ourts certainly tend to apply the section most generously.”
40. It was submitted that should the Court hold that a discrete sentence ought to have been imposed in respect of both offences of conviction, it was submitted that the money laundering offence which was taken into consideration was of lesser gravity than the s.15A offence for which a discrete sentence was imposed, and that any sentence imposed ought to be of equal or lesser magnitude than that imposed in respect of the s.15A offence. It is also submitted that the sentences should be expressed as concurrent.

Analysis and Decision

41. The jurisprudence in respect of undue leniency reviews is at this stage well known and the applicable principles are well established. In approaching its task, the reviewing court is entitled to attach significant weight to the stated reasons of the sentencing judge for the sentence that he or she imposed. Whether or not the reviewing court would have imposed the same sentence is not the test. A reviewing court should not intervene unless it is satisfied that the sentence is manifestly unduly lenient in the sense of representing a clear departure from the norm. Moreover, such an incorrect sentence will usually be the result of a clear error of principle.
42. In this case the applicant maintains that the overall sentencing package, comprising a single sentence of two years and six months imprisonment, with the final eighteen months thereof suspended for the s.15A offence, with the other offence being merely taken into consideration, was unduly lenient. No issue is taken with the headline sentence of five years imprisonment on the s.15A charge, nor is any issue taken with the sentencing judge’s decision to depart from the presumptive mandatory minimum sentence in respect of the s.15A charge. However, the applicant levels two net criticisms at the overall sentencing package. It is said in substance that there was too much discount allowed for mitigation, involving not just a straight discount of 50% from the headline sentence of five years imprisonment to two years and six months imprisonment, but a further amelioration of the period of hard treatment in terms of actual deprivation of liberty to be endured by the respondent by the suspension of the final 18 months of that two years and six months term. Further, it is contended that it was an error not to have

imposed a discrete sentence in respect of the charge relating to the possession of the proceeds of crime and to have taken it into consideration.

43. We agree with the applicant's submissions. There was undoubtedly a good deal of mitigation in the respondent's case but it was not so great as to have justified the level of discount actually afforded. The point is made by counsel for the respondent that a suspended sentence is still a sentence and that the actual sentence imposed on his client was a sentence of two years and six months, with 18 months thereof suspended. That is true but the suspension of a portion of a sentence does represent an amelioration of punishment. But for the suspended portion the offender would suffer a greater level of deprivation of liberty. The punishment for a crime has to be proportionate. We do not consider that the actual level of hard treatment, in the form of deprivation of liberty, required of this offender was proportionate to the gravity of the offending conduct, even taking into account his mitigating circumstances and personal situation. Moreover, there was little justification for the suspension of 18 months over and above the discount that had already been afforded for mitigating circumstances. The stated reason was "*to encourage Mr Rakovac along the path he is on of keeping away from trouble*", but we consider that the level of incentive provided was excessive. The ultimate sentence imposed here was significantly outside of the norm in our view, particularly having regard to the sentencing policy statements by the Oireachtas in regard to s.15A type of offending and the guidance of this court in *The People (DPP) v. Sarsfield* [2019] IECA 260. In our assessment there was excessive discounting for mitigation and incentivisation, and that represented an error of principle leading to an unduly lenient sentence.
44. Addressing the second point raised by the applicant, namely that there ought to have been a discrete sentence for the money laundering offence, we again agree with the submission that has been made on behalf of the applicant. While there was some degree of relatedness between the s.15A offence and the offence relating to the possession of the proceeds of crime, in that they were both committed in the context of the sale and supply of illicit drugs, it cannot be gainsaid that there was only an indirect relatedness between them. The possession of the proceeds of crime offence arose from criminal conduct committed at an earlier time and it was not directly related to the s.15A offence which was also on the indictment. The possession of the proceeds of crime offence should therefore, we believe, have received a separate and discrete sentence. It is no answer to this to say that the fact that there had been previous offending which had generated the monies which are the subject of the s.7 offence was something that was taken into account by the sentencing judge as an aggravating factor in assessing the gravity of the s.15A offence. That may be so but his possession of the proceeds of crime was still a stand-alone offence in its own right. Moreover, this was not a situation where the respondent could seek to avail of the statutory provision contained in section 8 of the Criminal Justice Act 1951. The respondent's possession of the proceeds of crime was not uncharged criminal conduct which he wished to have taken into account having been convicted of the s.15A offence. On the contrary, it was a charged offence. It represented a count on the indictment in its own right. Absent direct relatedness to the s.15A count, there should properly have been a discrete sentence imposed for it. We consider that it

was an error to have taken it into consideration in the way that was done, and accordingly how this offence was treated for sentencing purposes was also outside the norm and unduly lenient on that account.

45. We must therefore quash the sentences imposed by the court below and proceed to a resentencing.

Re-sentencing

46. In resentencing the respondent, we will again nominate a headline sentence of five years imprisonment for the s.15A offence. Further, we will discount from that by two years to reflect mitigating circumstances. In circumstances where we note that the respondent has asserted a determination to abstain from illegal substances in the future, and where he is said to be doing well in prison (we note that a Probation report and a Governor's report submitted to us are both positive) we will also suspend the final six months of the resultant three-year sentence.

47. Insofar as the count relating to the possession of the proceeds of crime is concerned we will similarly nominate a headline sentence of five years imprisonment. Once again, we will discount from that by two years to reflect the mitigating circumstances in the case and then suspend the final six months of the resultant three-year sentence.

48. We agree with the submission made to us on behalf of the respondent that it is appropriate in the circumstances of this case that the sentences be made concurrent rather than consecutive. However, in nominating headline sentences for these offences we have sought to have regard to the totality of the offending conduct and have taken account of the fact that the respondent faces sentencing for two offences which only bear the degree of indirect relationship to which we have previously alluded. If the second offence had been a stand-alone offence, we would have nominated a somewhat lower headline sentence for that offence than we have done. However, we opted to nominate a higher headline sentence because we consider that it would have been inappropriate that, by virtue of the sentences being made concurrent, the respondent should in effect receive a "free ride" in respect of the second offence. The sentences as we have structured them ensures that that will not be the case. Both sentences are to date from the 25th of February 2022.

49. The conditions attaching to the part suspended sentences in each case are the same as those attaching to the part suspended sentence that was imposed in the court below, save for the duration of the suspension which is now six months rather than 18 months.

50. We confirm the forfeiture order made in respect of the cash seized.