



**THE COURT OF APPEAL**

[2024] IECA 257

**Court of Appeal Record No. 268/CJA/23**

**Edwards J  
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-**

**MARK HARRIS**

**RESPONDENT**

**JUDGMENT (*ex tempore*) of the Court delivered on the 24th day of October 2024 by  
McCarthy J**

1. This is an application pursuant to section 2 of the Criminal Justice Act, 1993 for a review of sentence on grounds of undue leniency in respect of a sentence imposed in Kildare Circuit Court on Bill No: KEDP0086/2022. Mark Harris, the respondent herein, was arraigned on the 18th of October 2022 and pleaded guilty to one count of possession of a controlled drug for the purpose of sale or supply, where the market value of the controlled drug amounted to €13,000 or more contrary to section 15A of the Misuse of Drugs Act, 1977, as inserted by section 4 of the Criminal Justice Act, 1999, and section 27 of the Misuse of Drugs Act, 1977, as amended by section 5 of the Criminal Justice Act, 1999. The matter was adjourned for sentence to the 23rd of March 2023 when the respondent pleaded guilty to a count of possession of property being the proceeds of criminal conduct contrary to section

7(1)(a)(ii), 7(1)(b), and 7(3) of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010. Following the initial sentencing hearing, the sentencing judge sought a report from the Probation Service and adjourned the hearing to the 23rd of October 2023. On that date, the sentencing judge imposed a sentence of four and a half years' imprisonment for the possession of drugs offence, and a concurrent sentence of two and a half years' imprisonment for the money laundering offence. In sentencing the respondent, the judge took into consideration six further counts relating to unlawful possession of a controlled drug and possession of a controlled drug for the purpose of sale or supply contrary to the Misuse of Drugs Act, 1977 (as amended). Each sentence was suspended in its entirety on terms.

2. We will now outline the facts of this matter. One Detective Garda Séamus Doyle gave evidence that, on the 23rd of June 2021, he conducted a search of a temporary dwelling belonging to the respondent with other Gardaí. The respondent was present when the Gardaí arrived to conduct the search and, in response to a question put by Detective Garda Doyle, informed him that there were drugs in a caravan on the property. That caravan was found to contain several bags and a box containing bars of cannabis resin, a quantity of cocaine in brick form, and weighing scales. A Toyota Avensis car, which was parked near the caravan, was searched and a quantity of cannabis herb was found inside. A separate mobile home belonging to the respondent was subsequently searched, during which a sum of cash in the amount of €22,450 was located. The evidence was that the approximate street value of the drugs located during the search was as follows: the quantity of cocaine was valued at €57,197, the cannabis resin at €211,974, and the cannabis herb at €218,220 giving a combined street value of €478,391.
3. The respondent was arrested and conveyed to Newbridge Garda Station and was interviewed twice during his detention. In the first interview he made full admissions to 'holding' the drugs and told Gardaí that he was paid to 'hold' these by unknown persons. During cross-examination, Detective Garda Doyle accepted that the respondent had said that he had accrued a debt of in or around €10,000 relating to drug use and that the 'payment' received by the respondent was the discharge of that debt. In interview, the respondent admitted that the money found in his mobile home was money that he had received for drugs and that he was to provide this to persons unknown (who had, he contended, instructed him to mind the money). A weighing scales and other paraphernalia for the preparation of drugs for sale was found and the fact that the respondent was left in charge (to put it no further) of what was undoubtedly a commercial enterprise indicates that he was far more than a mere 'storekeeper'.
4. The respondent also made what were described as "*extensive*" admissions in his second interview with Gardaí. In cross-examination Detective Garda Doyle accepted that, whilst on bail, the respondent had abided by all the conditions of his bail and had not been in trouble with Gardaí. He also acknowledged that he was aware that Gardaí had been involved in a search for the respondent in September/October of 2021 and there were "*significant worries about his well-being*". The respondent has four previous convictions relating to offences

under the Road Traffic Acts, which were not considered to be relevant to the offending in this case.

5. In her plea in mitigation, counsel for the respondent, by reference to the evidence, referred to the respondent's difficult early life which included some parental mistreatment and eventually led him to become alienated from his parents at a young age. She referred to the fact that at the age of 12 or 13, he moved in with his now-partner and her family. She told the Court that the respondent is in a stable relationship with his partner, who is very supportive of him, and they have four daughters who were then aged from nine to six months old. Counsel for the respondent told the judge that the respondent had some previous work history in the construction sector, but that the respondent's significant addiction problem had previously led him to become unemployed, though we cannot find anything in the evidence supporting the latter proposition. The main thrust of counsel for the respondent's plea in mitigation was that the respondent had completely turned his life around since his arrest for the offending behaviour in the present case. She told the court that the respondent had self-referred himself to a counselling service, provided clean urine samples, and had become drug free (as he remains). She further told the Court that the respondent had gained full-time employment and was training to become a professional truck driver (he has since qualified). She also referred the judge to various testimonials written in respect of the respondent's good character as well as to the contents of a letter from a consultant psychiatrist. Counsel submitted that this case belonged to a truly exceptional category of cases where the offender is deserving of a chance and ought not be placed into immediate custody. This also was the thrust of her submissions on this re-sentencing where she also referred to major successful efforts at rehabilitation by the respondent.
6. The sentencing judge (as do we) had the benefit of a detailed probation report dated the 3rd of October 2023 as well as a psychiatric report from Dr. Deirdre Jackson dated the 30th of June 2022. We cannot set out the contents of either report *in extenso*. The probation report provides detail on the difficult early life of the respondent, including the fact that his childhood was affected by problems of alcohol addiction and domestic abuse within the home, and further notes that he was expelled from school in second year for behavioural issues. Dr. Jackson's report further substantiates this and describes harsh and neglectful behaviour which the respondent experienced from his parents during his childhood. The Probation Report describes the respondent as having a limited understanding of the impact of his offending upon his community. He has however since that report completed an "Offending Behaviour Programme" which would tend to indicate that his approach may be different. The sentencing judge noted *inter alia* that: -

*"His primary risk factors relate to his offending behaviour, his decision making, his consequential thinking deficits, poor self regulation, negative influences, a lack of victim awareness, and his mental health issues."*

Apart from those reports the Court had the benefit of testimonials from the respondent's employer and partner and reports indicative of the fact that he had ceased to use controlled

drugs and pertaining to a head injury which he suffered in childhood and from which there are residual, albeit minor, symptoms.

7. The mental health issues referred to in the probation report are described in more detail in Dr. Jackson's report. In her report of the 30th of June 2022, Dr. Jackson describes a very significant psychiatric incident which occurred in October 2021 (which counsel for the respondent alluded to in the cross-examination of Detective Garda Doyle) which involved suicidal ideation. Dr. Jackson also provided a short, updated report dated the 19th of October 2023 wherein she noted that the respondent's depressive symptoms continued and stated that it remained a risk that his mental state would deteriorate.
8. The sentencing judge identified the mitigating factors in the following terms: -

*"By way of mitigation, I take account of his early pleas, his co operation with gardaí from the outset, in particular when questioned about stolen property, he directed gardaí to the location of the drugs and also what was described as his full co operation in the course of his -- of the garda investigation, which include his -- the admissions and the full admissions that he made in relation to his involvement.*

*I take account of his lack of previous convictions. I take account of the fact that he has come to no subsequent garda attention. I take account of the substantial steps that he has taken in rehabilitation, and I take account of his remorse and that is demonstrated, it seems, by what is indicated by his wife or by his partner, rather, in her letter as his intention to donate his bail monies to two services who have helped him overcome his addictions."*

9. In terms of aggravating factors, the judge noted the significant quantity of drugs and money involved and rightly stated *inter alia* that the "*presence of a variety of drugs in such quantities and the presence of such an amount of cash is suggestive of involvement above the lowest levels of culpability*". He also took into consideration the fact that the respondent was receiving a financial benefit through the forgiveness of a sizable debt and also what he described as the "*deleterious impact that the trade in illegal drugs has on communities and on society in general*".
10. Considering all of those factors, the sentencing judge was of the view that the appropriate headline sentence in respect of the offence of possession of a controlled drug for the purpose of sale or supply, where the market value of the controlled drug amounted to €13,000 or more was one of seven years. In relation to the money laundering offence, the judge was satisfied that the appropriate headline sentence was one of three and a half years. Considering what he described as the "*substantial*" mitigating factors, the sentencing judge reduced the sentences to four and a half years in respect of the possession of drugs offence, and two and a half years for the money laundering offence.
11. The sentencing judge then had regard to the presumptive minimum sentence of 10 years' imprisonment in respect of offences contrary to section 15A of the Misuse of Drugs Act, 1977 (as amended). He stated that: -

*"I am satisfied that there are exceptional and specific circumstances through his early plea, his immediate co operation and the admissions that he made, together with, it seems to me, the immediate steps on rehabilitation, which combined, allow the Court to depart from the presumptive minimum sentence."*

In particular, the judge noted that the respondent's arrest for the offending in this case appeared to have acted *"as a wake-up call to him"* and that he took immediate, and successful, steps to rehabilitate himself which had continued to the date of sentence.

12. In concluding that he was justified in departing from the presumptive minimum sentence in this case, the sentencing judge had regard to the authorities of the Court of Appeal, and former Court of Criminal Appeal, regarding this issue. The judge noted that those authorities establish that a custodial sentence is required in most cases of this kind. He considered the *dicta* of the late former Chief Justice, Mr. Justice Murray in *DPP v. McGinty* [2007] 1 I.R. 633 which he considered established that a custodial sentence is not required in every circumstance (notwithstanding the fact that an immediate custodial sentence is normally required), and further correctly considered it as an authority for the proposition that where special reasons of a substantial nature and wholly exceptional circumstances exist, the imposition of a suspended sentence may be correct and appropriate in the interests of justice. In concluding that the present case fell within the threshold of exceptional cases considered in *McGinty* the judge stated: -

*"It is clear that the accused has, as I have said, substantial and excellent mitigation, most particularly where his rehabilitation and lack of subsequent garda attention are concerned. That he appears to have a limited understanding of the impact of his offending is of some concern. But that on its own would not lead the Court to the imposition of a custodial sentence. As I have acknowledged, there is substantial mitigation. The accused very shortly after his arrest sought treatment for his addiction issues. That treatment has to date been successful. He has no other convictions of any note, he has come to no other adverse garda attention in the two years and some months since this offending.*

*In my view, he has displayed genuine remorse, although it is clear that he does require to work on his understanding of the impact of the offending. He is now in good employment, and he is providing for his family in a lawful and proper way. His personal circumstances, including his particularly difficult childhood, including familial alienation when he was 13, taken with the extensive mitigation, in my view do bring this case into the wholly exceptional category."*

13. The sentencing judge also had regard to the decision of this Court in *DPP v. Flanagan* [2015] IECA 94, in which the Court did not interfere with a wholly suspended sentence in circumstances which he felt were not dissimilar to those in the present case.
14. The sentencing judge was satisfied that this was a case where it was appropriate to take the wholly exceptional step of fully suspending the sentences imposed in respect of each offence for a period of four and a half years.

### **Grounds of Appeal**

15. The applicant submits that the sentences imposed by the judge were unduly lenient on the following grounds: -

- 1) *The Learned Sentencing Judge erred in principle in failing to take any or any adequate or sufficient account of the particular aggravating circumstances surrounding the commission of the offence in question which included the manner in which the drugs were possessed by the Respondent, the quantity and value of the controlled drugs concerned, and further the manner in which the Respondent further held large quantities of cash which represented the proceeds of drug trafficking.*
- 2) *Further, or in the alternative, the said sentence did not adequately reflect the nature of the charges and the consequences of the acts of the Respondent.*
- 3) *The Learned Sentencing Judge erred in principle in the manner in which he structured the sentence imposed by applying undue weight to the mitigating factors present which resulted in him failing to adequately reflect the seriousness of the offending behaviour before him.*
- 4) *The Learned Sentencing Judge placed excessive weight on the mitigating factors in the case for the purposes of not only deviating from the presumed mandatory minimum sentence but also in suspending the totality of the sentence.*
- 5) *The Learned Sentencing Judge erred in principle in holding that the particular facts of the case were sufficiently exceptional so as to justify the imposition of an entirely suspended sentence for a section 15A offence.*
- 6) *Further, or in the alternative, the Learned Sentencing Judge erred in principle in circumstances where the sentence imposed failed to adequately reflect the principles of specific and/or general deterrence.*

Ultimately, the case proceeded on the basis that the facts were not sufficiently exceptional as to justify the imposition of an entirely suspended sentence.

### **Submissions of the Parties**

16. In his written submissions, counsel for the applicant accepts that the onus rests with the applicant to establish that the sentence imposed is unduly lenient when applying for a review of sentence pursuant to section 2 of the Criminal Justice Act, 1993. The applicant submits that the sentence imposed in this case was unduly lenient on the basis that the sentencing judge erred in imposing a fully suspended sentence of imprisonment. Counsel submitted that this decision amounted to an error in principle on the part of the trial judge because, he contended, the facts in this case were not sufficiently exceptional so as to justify the imposition of an entirely suspended sentence in respect of the section 15A offence. Counsel for the applicant refers this court to a number of authorities (which we

refer to in detail below) which, in his submission, indicate that custodial sentences are generally unavoidable in the case of offences under section 15A, and submits that those authorities establish that fully suspended sentences are only warranted in the context of such offences where there exist “*special reasons of a substantial nature combined with wholly exceptional circumstances*”. The applicant submits that although there were substantial mitigating factors in this case which entitled the judge to depart from the statutory presumptive minimum sentence, they were not ‘wholly exceptional’ within the meaning of the authorities cited and did not therefore meet the threshold required for the imposition of a fully suspended sentence. Counsel for the applicant concludes his submissions by stating that because, in his submission, the respondent’s circumstances were not ‘wholly exceptional’ within the meaning of the authorities, the decision to impose a fully suspended sentence in respect of the section 15A offence in this case was a substantial departure from what could be regarded as an appropriate sentence and was, on that basis, unduly lenient.

17. In her written submissions on behalf of the respondent, counsel refers to several of the authorities cited in the applicant’s written submissions and submits that the circumstances of this case can meet the high threshold established by those authorities for the imposition of a fully suspended sentence to be justified. The respondent submits that the authorities of this Court have drawn a distinction between offenders involved in the large-scale sale or supply of drugs due to the burden of their own addiction and pressure from the serious criminal organisations with whom they associate on the one hand, and those offenders who are purely motivated by financial reward on the other. Counsel for the respondent submits that the circumstances of the respondent are analogous, or similar, to other cases where this Court has found the imposition of a fully suspended sentence to be justified in the context of a section 15A offence. On this basis, she submits that although the step taken by the sentencing judge to impose a fully suspended sentence in this case was “*exceptional*”, it was neither beyond the norm for cases involving such exceptional circumstances nor a gross departure from what would be an appropriate sentence in such a case. The respondent accordingly submitted that the sentencing trial judge acted within his discretion in fully suspending the custodial sentence in respect of the section 15A offence in this case and that the applicant has failed to establish that the sentence was unduly lenient or a departure from the norm given the exceptional circumstances of the respondent.

#### **Discussion**

18. We proceed by recalling the principles of sentencing in the context of an offence contrary to section 15A of the Misuse of Drugs Act, 1977 (as amended) as discussed in the *People (DPP) v. Sarsfield* [2019] IECA 260. In particular we refer to the dicta of former President Birmingham wherein he stated:

*“17. The difficulty in addressing the issue of sentencing in this area is that comparators are at their most useful when one is comparing headline or pre-mitigation sentences with each other. However, the presumptive minimum sentences identified by the Oireachtas, and indeed, subject to constitutional issues, the actual mandatory*

*sentences stipulated in certain cases relate to actual custodial sentences to be served. Matters are further complicated by the fact that the imposition of sentences less than the mandatory presumptive minimum is not at all unusual, in part because pleas of guilty in s. 15A cases are so widespread.*

18. *Our observations are for that reason, somewhat tentative. It has long been recognised that the proper approach to sentencing is for a judge to identify the appropriate sentence without reference to the presumptive minimum. If the appropriate sentence is at or in excess of the statutory minimum, nothing further is required. If the sentence under contemplation is below the presumptive minimum, the Court will have to address the presumptive minimum and consider whether the imposition of the mandatory presumptive minimum would, in all the circumstances of the case, be unjust. Where the offence involves significant involvement in a very high-level drug offence, the headline or pre-mitigation sentence is likely to be well in excess of the statutory presumptive minimum. In the case of high-level commercial drug dealing involving very large quantities of drugs, we would expect that the headline or pre-mitigation sentence is likely.*
19. *What we have to say about the ultimate sentence is more tentative still, having regard to the very wide variation in the circumstances of offenders coming before the Courts. The Court would, however, observe that in the sort of very high-end commercial drug trafficking cases to which we have been referring, a plea of guilty, of itself, without something more, is unlikely to justify a reduction below the presumptive minimum sentence. Such a situation is particularly likely if the plea was entered against a backdrop of very strong or overwhelming evidence, not an unusual situation in the context of s. 15A cases.*
20. *The non-exhaustive list of factors which a sentencing court may have regard to in determining whether to deviate from the presumptive minimum are set out in s. 27(3D)(b)-(c) as follows:*
  - '(b) ...this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including—*
    - (i) whether that person pleaded guilty to the offence and, if so—*
      - (I) the stage at which he or she indicated the intention to plead guilty, and (II) the circumstances in which the indication was given,*
    - and*
    - (ii) whether that person materially assisted in the investigation of the offence.*



- (c) *The court, in considering for the purposes of paragraph (b) of this subsection whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to—*
  - (i) *whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and*
  - (ii) *whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.”*

19. A number of authorities have been opened to us in relation to the principles which apply to the suspension of the entirety of a sentence—indeed there are many others. The principle involved is now well-settled.
20. The issue of whether a fully suspended sentence would be justified in the context of a section 15A offence received attention in the Court of Criminal Appeal in *The People (DPP) v. Alexiou* [2003] 3 IR 513 wherein it was stated that:

*“Even where there are exceptional and specific circumstances which would make a sentence of not less than ten years imprisonment unjust, a substantial term of imprisonment, although less than ten years, will generally be the appropriate sentence. That does not, however, exclude wholly exceptional and specific circumstances where a suspended sentence may be considered appropriate in order to do justice in the particular case.”*

21. *Alexiou* was cited with favour in *The People (DPP) v. McGinty* [2007] 1 IR 633. In *McGinty* the Court reaffirmed the principle that a custodial sentence will ordinarily be imposed save in limited exceptional circumstances, with Murray C.J. stating *inter alia*:

*“Undoubtedly a trial judge sentencing a convicted person for an offence such as that in question here is constrained by the considerations already referred to above to consider that a term of imprisonment is normally what should be imposed. However, where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interest of justice. This is a combination of factors which could only arise in a relatively rare number of cases.”*

He went on to cite *Alexiou* as an example of a case where a fully suspended sentence was upheld by the Court on appeal.

22. As noted by the Court in *The People (DPP) v. Ryan & Rooney* [2015] IECA 2:

*“19. This approach has been endorsed in many subsequent cases and the test may be stated thus: Are there special reasons of a substantial nature combined with wholly exceptional circumstances such that the imposition of a suspended sentence is correct and appropriate in the interests of justice? In The People (Director of Public*

*Prosecutions) v. Jervis and Doyle [2014] IECCA 14 the Court of Criminal Appeal said that the test laid down in McGinty:*

*'goes well beyond the ordinary requirement that there be exceptional and specific circumstances, as ordinarily understood. There must, in addition be "special reasons of a substantial nature" which must be, not only exceptional, but "wholly exceptional" something quite out of the ordinary. A totality of factors where the court combines all the mitigating factors is not sufficient.'*

23. We find *The People (DPP) v. Flanagan* [2015] IECA 94 of some assistance. In that case the total value of the controlled drugs of which Ms. Flanagan had possession was €42,596 and she admitted such possession. Ms. Flanagan's personal circumstances were harrowing. The Court had the benefit of a probation report indicative of serious attempts at rehabilitation in circumstances where her law-breaking activity had been triggered to feed her drug addiction. The Court also had the benefit of a psychologist's report in which the psychologist *inter alia* that he was "*cautiously optimistic about her potential*". At a given stage, as here, the proceedings in the sentencing court had been adjourned and it was clear that in the intervening period she had met with considerable success in seeking to so rehabilitate under the supervision of the Probation Service. *Flanagan* is readily distinguishable from the present case on the facts; it must at all times be borne in mind that comparators, decided on their own facts, are of limited assistance.
24. We consider that in suspending the entirety of the sentences the judge fell into error. The fact of suspension gave rise to a situation where the sentences were outside the norm. On the authorities, the case simply did not fall within the exceptional category which would have permitted suspension. In a case as serious as this, wholly suspending a sentence of imprisonment absent the existence of very exceptional and special circumstances at a level sufficient to justify extraordinary intervention, is likely to deprive the punishment of the offender, including the associated message of censure and of the deprecation of society of his or her conduct, of much of its effectiveness and fail to reflect the objective gravity of the offence. We do not think that these major mitigating factors are sufficient to take the case into that limited category in which a sentence may be wholly suspended – the bar to reach such a conclusion is a high one. Legislative policy and the decisions of this Court are plainly to this effect. We accordingly quash both sentences.
25. We must now proceed to resentence based upon the facts as they are now (including the evidence at trial so far as it remains material). There is no doubt but that since the date of suspension on the 23rd of October 2023 the respondent has engaged *inter alia* with the Probation Service and as indicated above, a drugs addiction clinic and a mental health group. He continues to have an engagement with the health services in relation to his serious mental health issues and drug addiction. He has been highly praised by his employer and it seems that he is a good partner and father. He has made a worthwhile contribution to his community. The hope for rehabilitation which existed at the time of sentencing has proved justified. This is therefore a case where it could not but be in doubt that the judge was entitled to depart from the presumptive mandatory minimum and that mitigating

factors of a high order exist. Thus, the judge was right to identify the headline sentence of seven years (having regard to the quantity of drugs and the nature of the offending) but thereafter imposed a post-mitigation sentence of four and a half years.

26. We take the same view as the trial judge that a post-mitigation sentence of four and a half years is appropriate. We also take the view that the successful efforts at rehabilitation to date and the prospects for the future render it appropriate to suspend the last one and a half years of that sentence on terms that for the period of one year after his release from custody he will place himself under the supervision of the Probation Service and obey all directions thereof and will also keep the peace and be of good behaviour. The suspension will be for a period of two years from his release. In sentencing for the offence under section 15A we take into consideration the money laundering offence and hence no separate sentence will be imposed upon it in this Court.