



THE COURT OF APPEAL

[Appeal No: 87/2019]

**Clarke C.J.
Edwards J.
Donnelly J.**

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DAVID O'DRISCOLL

APPELLANT

Judgment (ex tempore) of the Court delivered by Mr. Justice Frank Clarke, Chief Justice on 3rd December, 2019.

1. On 4 February of this year the accused, Mr. O'Driscoll, pleaded guilty on arraignment to charges relating to the possession of cocaine for sale or supply contrary to s.15 of the Misuse of Drugs Act, 1977, obstruction of a peace officer and also dangerous driving contrary to s.53 of the Road Traffic Act, 1961. A co-defendant, Wayne Moynihan, had pleaded guilty to a similar offence of possession of cocaine for sale or supply on a so-called full facts basis. Both accused appeared for sentencing on 13 May this year. The offences occurred on 26 April of last year.
2. A car driven by Mr. O'Driscoll and in which Mr. Moynihan was a passenger was intercepted by members of An Garda Síochána and the Garda Armed Response Unit on an exit junction off the main Dublin – Cork motorway near Cork City. The car attempted to escape by reversing back down the ramp but ultimately crashed into a tree. Mr. Moynihan was seen attempting to throw white powder from the side passenger window. Mr. Moynihan attempted to escape but was apprehended. Mr. O'Driscoll tried again to drive the car away but was also apprehended.
3. Cocaine residue to the value of €2,716 was found inside the car. However, the evidence strongly suggested that a greater quantity was present before some was thrown out the window of the car.
4. At the sentencing hearing evidence was given that Mr. O'Driscoll had 54 previous convictions. The two most serious of those convictions involved first dangerous driving and endangerment from 2001 when he was 16 years of age for which he was sentenced to four years imprisonment with two and a half years suspended. Second there was a 2009 conviction for possession of a firearm. A sentence of five years with 12 months suspended was imposed for that later offence but that sentence was reduced by a period of 12 months by the Court of Criminal Appeal. The remainder of Mr. O'Driscoll's previous convictions were for summary offences, 34 of which were road traffic offences.
5. Mr. Moynihan had eleven previous convictions the most serious of which was conviction on indictment for assault giving rise to a sentence of three years imprisonment.

6. It should also be noted that a probation and welfare service report indicated that Mr. O'Driscoll had been uncooperative with that service. It would appear that, while Mr. O'Driscoll had requested such a report, he failed significantly to engage with the Probation Officer.
7. In mitigation counsel for Mr. O'Driscoll indicated that, notwithstanding the content of that report, his client was remorseful. Counsel drew attention to a challenging family background and an education which had been hindered by a learning difficulty.
8. On the other hand, the plea of mitigation on behalf of Mr. Moynihan placed emphasis on what might be described as a significantly more positive report from the probation and welfare service.
9. In his sentencing remarks the trial judge described the offences as serious including the sourcing of drugs, the attempt to escape and the attempt to dispose of the drugs at the scene. Insofar as distinguishing between the two co-accused was concerned, the trial judge described the previous record of Mr. O'Driscoll as being more serious and also noted his significantly less than satisfactory engagement with the probation and welfare service which the sentencing judge considered increased his risk of reoffending.
10. Ultimately, the sentencing judge took the view that it was appropriate to consider a term of six years imprisonment in Mr. O'Driscoll's case as a proper headline sentence but reduced this term by one year to reflect his guilty plea and certain steps which he had taken while incarcerated to undergo education courses. On the driving charge a concurrent sentence of six months was imposed with a ten year disqualification. Mr. Moynihan, the co-accused, was sentenced to five years imprisonment but with 18 months suspended on condition that he remain under the care of the probation and welfare service.
11. In essence, the principal grounds of appeal put forward on behalf of Mr. O'Driscoll centre on what is said to be an impermissible differentiation in the sentences imposed on, respectively, himself and Mr. Moynihan. Coupled with this is a suggestion that, in purporting to distinguish between both co-accused, the sentencing judge placed excessive emphasis on what was seen as a negative probation report.
12. On the other hand, it is argued on behalf of the Director of Public Prosecutions that the distinction between the sentences imposed was appropriate having regard to the respective histories of offending, levels of culpability and attitudes towards the probation services.
13. There does not seem to be any significant difference between counsel as to the broad principles to be applied. It is accepted that, generally speaking, the principles applicable to parity of sentencing for co-defendants are well settled going back to *the People (D.P.P.) v. Poyning* [1972] I.R. 402. Those principles suggest that, all things being equal, co-offenders should, in general, receive comparable sentences as noted by Edwards J. in *the People (D.P.P.) v. Norton* [2015] IECA 276.

14. Equally, there did not seem to be any dispute that, at the level of principle, it can be appropriate to impose different sentences given the obligation, noted in *O'Malley on Sentencing Law and Practice* (3rd Ed., Round Hall, 2016), to consider each offender individually and to ensure that each sentence reflects the level of involvement in the crime, the personal circumstances of each accused and the respective previous records.
15. It thus seems clear that a sentencing court will require an appropriate reason to differentiate between co-accused but that such reasons can often be found in the kind of factors identified in *O'Malley*. It follows that the issues in this case really turn on whether the factors identified by the sentencing judge in this case justify the distinction between the two sentences imposed.
16. Insofar as it was also suggested that a reduction of one year from the headline sentence was insufficient to reflect the plea of guilty, it should be noted that both accused were caught red handed so that any reduction to reflect that plea of guilty must be at the bottom end of the scale. Likewise, Mr. O'Driscoll's undoubtedly difficult early years and the fact that he made some progress in prison must be seen in the light of the negative probation report which reasonably led the sentencing judge to the view that the prospect of rehabilitation is limited. In the Court's view a reduction of slightly over 15% was, in those circumstances, within the range available to the sentencing judge so that no error of principle has been demonstrated.
17. So far as the central point concerning an alleged breach of the parity principle is concerned, the Court is of the view that the trial judge was entitled to regard Mr. O'Driscoll's previous record as being the more serious and to have therefore justified some difference in the approach between the two co-accused.
18. In addition, it is clear that the sentencing judge was entitled to and did take the view that the significantly more positive probation report on Mr. Moynihan justified mitigating Mr. Moynihan's sentence in a manner not available to Mr. O'Driscoll.
19. In the Court's view those factors were such that the sentencing judge was entitled to regard them as sufficient to justify the distinction in sentence in the form of the partial suspension which was applied in Mr. Moynihan's case but not in that of Mr. O'Driscoll.
20. It follows that no error of principle has been shown to exist in relation to the sentence in this case and that the appeal must, therefore, be dismissed.