



THE COURT OF APPEAL

Record Number: 145CJA/18

Birmingham P.
Kennedy J.
Donnelly J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT/

- AND -

DARREN DELACEY.

RESPONDENT

JUDGMENT of the Court delivered on the 18th day of October 2019 by Ms. Justice Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent on the 24th April 2018. The respondent pleaded guilty to a count of unlawful possession of controlled drugs with an aggregate market value of €108,087 contrary to s. 15A of the Misuse of Drugs Act 1977, as amended and two counts of possession of cannabis and cannabis resin contrary to s. 3 of the Misuse of Drugs Act 1977, as amended ("the 1977 Act"). A sentence of four years' imprisonment was imposed in respect of the offence contrary to s. 15A. The remaining counts were taken into consideration.

Background

2. On the 22nd May 2017, an Garda Síochána received confidential information in relation to the movement of controlled substances. On the basis of this information, members of an Garda Síochána drove towards Inchicore where they followed a car in which the respondent was a passenger. The car was then stopped, and a plastic bag was removed from between the respondent's feet. This bag was found to contain 744 grams of heroin and 55 grams of cocaine with a combined street value of €108,087. Following this, a search warrant was executed in respect of the respondent's home and a small amount of cannabis herb and cannabis resin was found on the premises.
3. The respondent was then arrested and interviewed. During the course of his interviews, the respondent accepted that he was carrying drugs, but he initially maintained that he did not know the particular type of drugs he was carrying. The respondent maintained that he was to receive the sum of €500.00 for the drop-off and that he needed the money to discharge a drug debt.

The Sentence

4. At the sentence hearing, and prior to evidence, counsel for the prosecution addressed the Court. It transpired that the respondent had, on the 27th October 2017, been convicted of two offences contrary to s. 15A. These offences occurred on the same date; 11th May 2016. The offence which is the subject of this appeal was committed on the 22nd May

2017. The sentencing judge was informed that, although this was the respondent's third s. 15A conviction, albeit committed on the same date, the respondent had not been convicted of the first two offences at the time of the commission of the present offence and therefore the sentencing judge was not bound by the mandatory minimum sentence under s. 27(3F) of the 1977 Act and retained a discretion to depart from the presumptive minimum 10 year sentence in terms of s. 27(3D) of the 1977 Act.

5. The sentencing judge acknowledged in terms, that as the offence in question was committed on bail, the sentence was required to be consecutive and therefore the Court would have regard to the totality principle in imposing sentence.
6. The judge in imposing sentence said as follows: -

"Now, obviously in dealing with this man Mr DeLacey, I must take into account what he did. I must also take into account that he has a conviction -- or two convictions, but essentially really one conviction for section 15A. It seems he was sentenced to seven years with the last three suspended. Now, obviously if the -- let's say if matters had, let's say, occurred in a different juxtaposition, my hands would have been tied. I would have had to impose a 10-year custodial sentence consecutive to the sentence he's currently serving; obviously I could have put in a review date in relation to Mr de Lacy and obviously that date couldn't be below five years. I'm going to take it, I suppose, a little bit, I'm going to do it a simpler way, in my own eyes at least, I am going to try to sentence him globally for his misbehaviour in relation to all of the counts that I have knowledge of.

Now, he has a history of offending, he has had his difficulty in his background. It seems that he's an intelligent enough man, he's capable of work. He has his personal responsibilities. It seems that he's an agreeable man and it seems that he can reform himself, but the question will be, I'm not sure. Nobody knows that, but obviously he must be given some hope. Now, I can depart from the mandatory minimum of 10-years for the co-operation and his plea, the question is how far should I depart? Obviously, in departing I have to take into account the nature of his crime, the facts of his crime, but I'm also to take into account that he's serving a reasonably substantial sentence at this current time"

7. The judge concluded by imposing a sentence of four years' imprisonment to run consecutively to the sentence of seven years with three years suspended currently being served by the respondent, giving an effective sentence of eight years' imprisonment. When asked about the headline sentence, the sentencing judge stated, "I would say the headline sentence would have been probably seven."

Personal Circumstances

8. The respondent was 35 years old at the time of sentencing. He has a long-term partner and a 13-year-old son. The Court heard that the respondent has tragic personal circumstances and addiction issues which had a bearing on the commission of the offence in question as he owed a significant debt due in part to his addiction.

9. The respondent has 65 previous convictions including 50 convictions for road traffic offences, ten convictions for public order offences, one conviction for a theft offence and one conviction for the unauthorised taking of a motor vehicle. The respondent's most recent conviction at the time of sentencing related to the aforementioned s. 15A convictions before Mullingar Circuit Court.

Grounds of Appeal

10. The appellant puts forward the following grounds of appeal:-

1. The learned Sentencing Judge erred in principle in departing from his obligation under Section 27(3C) of the Misuse of Drugs Act 1977 to specify a term of not less than 10 years as the minimum term of imprisonment to be served by the Respondent in the circumstances.
2. The learned Sentencing Judge erred in principle in imposing a sentence which was lesser in terms of its severity than the sentence imposed on the 27th October 2017 by Mullingar Circuit Court in respect of the Respondent's first two convictions under Section 15A.
3. The learned Sentencing Judge erred in law and in fact in failing to attach sufficient weight to the 64 previous convictions of the Respondent, which included convictions for offences contrary to Section 15A.
4. The learned Sentencing Judge erred in law and in fact in failing to attach sufficient weight to the fact that this was the Respondent's second conviction under Section 15A and that his first two Section 15A offences had been committed only a year prior to the offence before the court.
5. The learned Sentencing Judge erred in law and in fact in failing to attach sufficient weight to the fact that the offence before it had been committed by the Respondent whilst he was on bail and/or in failing to treat the commission of the offence whilst on bail as an aggravating factor.
6. The learned Sentencing Judge erred in law and in fact in failing to have appropriate regard to the nature of the offence and/or the harm caused to society by drug trafficking and in failing to impose a sentence which reflected the inherent gravity of the offence.
7. The learned Sentencing Judge erred in law and in fact by attaching excessive weight to the Respondent's role in the distribution of the controlled drugs in question and to the fact that he did not own the drugs but was merely transporting them for another individual.
8. The learned Sentencing Judge erred in law and in fact in attaching undue weight to the mitigating factors in the case.

9. The learned Sentencing Judge erred in law and in fact in his application of the proportionality and totality principles.
10. The learned Sentencing Judge erred in law and in fact in the imposition of such a lenient sentence as such was not in the public interest in all the circumstances and the sentence imposed would not act as a deterrent to other persons and would not prevent further crimes.
11. The learned Sentencing Judge erred in principle in imposing an unduly lenient sentence in all the circumstances

Submissions of the DPP

11. In her oral submissions, Ms Coonan BL on behalf of the appellant places considerable emphasis on her submission that the judge erred in departing from the presumptive minimum sentence of 10 years as prescribed by s. 27(3C) and she submits that the judges' reasoning for so departing was not readily apparent. Moreover, she says that the judge erred in failing to consider the respondent's previous drug trafficking convictions, pursuant to s. 27(3D)(c)(i) and the provisions of s. 27(3D)(c)(ii) which concern the public interest in preventing drug trafficking.
12. She also submits that the judge erred in taking account of the possibility that the respondent would rehabilitate himself in circumstances where she says there was no evidence of any effort made by the respondent in this regard.
13. The appellant argues that the judge erred in imposing a sentence which was less severe than that imposed for the Mullingar offences when there was little to distinguish the offences and where the offence in the instant case was committed one year later and whilst the respondent was on bail.
14. Several aggravating factors are identified, to which, it is submitted, the judge did not attach sufficient weight. These include the respondent's previous convictions; the fact that this was the respondent's second s. 15A conviction; that this offence was committed whilst on bail, and the nature and gravity of the offence.
15. Ms Coonan further argues that the judge attached undue weight to the mitigating factors and submits that excessive credit should not be afforded to a plea of guilty where an accused is caught red-handed, as in the instant case.
16. She says that the judge erred in applying sentencing principles with particular reference to proportionality and totality in reviewing the overall sentence.
17. Finally, it is submitted that the sentence imposed was not in the public interest and would not operate as a deterrent to other persons.

Submissions of the respondent

18. Mr O'Higgins SC on behalf of the respondent submits that there were a number of factors present which could allow the trial judge to conclude that there were exceptional and specific circumstances enabling him to determine that it would be unjust to impose the

presumptive minimum sentence. These include, he argues, material assistance, an early plea of guilty, the role of the respondent and his personal circumstances.

19. He submits that the remarks of the trial judge in relation to the rehabilitation of the respondent cannot be construed as a basis for concluding that it was appropriate to depart from the minimum sentence but rather a remark on leaving the respondent some incentive to reform himself, which is a legitimate consideration in sentencing, particularly given the addiction problems of the respondent.
20. Moreover, he submits that the factors referred to by the appellant were given due weight by the trial judge and this is reflected in the sentence ultimately imposed. None of the factors identified by the appellant precluded the trial judge from concluding that he ought to depart from the ten-year minimum sentence.
21. The respondent accepts that the trial judge did not follow the sentencing process advocated by this Court but the absence of such does not mean that the sentence imposed is undermined. The respondent points to the fact that the trial judge stated that the headline sentence "would have been probably seven" and it is submitted that this makes clear that the trial judge did not arrive at the final sentence by applying mitigation directly to ten years, as suggested by the appellant.
22. In relation to the appellant's arguments concerning the weight given to the various mitigating and aggravating factors, the respondent submits that this can be considered by first looking at the headline sentence imposed and then considering whether the discount afforded to the respondent was a substantial departure from what was appropriate in light of the mitigating factors and the totality principle. In respect of the seven-year headline sentence, the respondent refers to *The People (DPP) v. Samuillis* [2018] IECA 316 where Edwards J. stated the following: -

"In s. 15 and in s.15A cases the range of available penalties (ignoring at this stage any presumptive mandatory minimum) ranges from zero (i.e., non – custodial options) up to life imprisonment. However, in the great majority of cases the effective maximum usually tops out at around fifteen years. There will, of course, always be truly egregious cases where even higher sentences might be justified. If one divides the effective range that operates in most cases by three, that allows for a low range from zero to five years, a mid-range from five to ten years, and an upper range from ten to fifteen years."

The respondent submits that this places the instant offence in the middle of the medium range of sentence, which is accurate. While there are various factors that clearly heightened the gravity of the offences committed by the respondent, these were tempered to some extent by matters impacting the respondent's overall culpability.

23. By reducing the sentence by three years, the respondent submits that the early plea of guilty, the personal circumstances of the respondent and the co-operation with the Gardaí were such to allow the sentencing judge to apply a significant discount. The respondent

submits that a further crucial consideration was the fact that the sentence was to run consecutively, thus requiring the trial judge to apply the totality principle when considering the final sentence to be imposed. The respondent submits that this justified further discounts from the headline sentence beyond those merited by the mitigating factors alone.

24. Furthermore, Mr O'Higgins argues that there can be no error in imposing a different sentence for the Dublin offence as opposed to the Mullingar offences as the trial judge had to abide by the totality principle in sentencing the respondent.
25. Finally, it is submitted that the sentence in the instant case must be seen as part of a whole and not merely a four-year sentence but rather an eight-year sentence. Viewed in this light, it is clear that this sentence is an adequate deterrent.

The Principles

26. The jurisprudence in this area is well settled. Over 24 years ago in *The People (DPP) v Byrne* [1995] 1 ILRM 279, it was established that nothing save a substantial departure from what would be regarded as the appropriate sentence would justify the intervention by a reviewing court. A sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender. In the instant case there were significant aggravating features and mitigating features, many of which were specifically identified by the sentencing judge.

Section 15A

27. Section 15A of the 1977 Act, has been the subject of many decisions of the Superior Courts. The maximum sentence for an offence under this section is one of life imprisonment. The harm caused to society is expressly recognised by s. 27 (3D) (a) of the 1977 Act and in providing for a presumptive minimum sentence of 10 years, the Act does so in light of the harm caused to society by drug trafficking. This is the rationale for the presumptive mandatory minimum sentence, but of course a court may depart from that in certain circumstances, some of which are prescribed by statute. There can be no doubt therefore that this is a very serious offence and one which the Oireachtas has recognised and acknowledged as such.
28. We consider the optimum approach for a court, in sentencing an offender for an offence contrary to s.15A, is to approach sentencing in the usual manner, that is by assessing the gravity of the offence, with regard to the offender's culpability and with reference to the harm done, or perhaps more accurately, in this instance, the potential for harm, should the drugs have reached the intended destination.
29. In order to assess gravity, the moral culpability of an offender must be assessed. This may include aggravating and extenuating factors. In assessing the moral culpability of an offender, a judge is assessing the blameworthiness of the person whom he or she is about to sentence. Having nominated a notional or pre-mitigation sentence, the judge may then proceed to justify the sentence downwards, if appropriate, by virtue of any mitigating factors present.

30. If the sentence is above the presumptive minimum, then, that is the sentence to be imposed. If, however, the sentence is below 10 years, the judge must assess whether by reason of exceptional and specific circumstances concerning the offence and/or the offender, it would be unjust to impose the presumptive minimum sentence of 10 years.
31. The 1977 Act was amended by virtue of the Criminal Justice Acts 2006 and 2007. In considering whether to depart from the presumptive minimum, a court may have regard to any matters it considers appropriate which include, but obviously are not limited to, the matters specifically provided for by statute. These are well-known and include whether the person has pleaded guilty to the offence and the stage at which and the circumstances in which such indication was given, and whether material assistance was provided regarding the investigation of the offence.
32. Moreover, a court when deciding whether it would be unjust to impose the presumptive minimum sentence may have regard to whether the offender has a previous conviction for a drug trafficking offence (s. 27 (3D) (c)(i)) and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence (s .27 (3D)(c)(ii)).

The Present Case

33. The respondent has two previous convictions for offences contrary to section 15A, although as both convictions arose from the same investigation, the appellant relies on this offence as being a second, rather than a third conviction under section 15A. This previous conviction therefore was a matter which the sentencing court could take into consideration pursuant to the 1977 Act. In any event, even excluding the provisions of s.27 (3D)(c)(i), and in accordance with sentencing principles, a conviction for a similar offence can aggravate an offence.

The Aggravating Factors

34. Encapsulated in the assessment of the gravity of the offence will be the assessment of the role of the particular offender. Obviously the more significant role the greater the moral culpability or blameworthiness of the offender. In the instant case, the respondent admitted that he was transporting the drugs from Dublin to Limerick. It appears from the evidence that the respondent was aware that he was transporting drugs, albeit he indicated he did not know the nature of the drugs in question. It is apparent that he had a lesser role than those managing the operation; he was not directing proceedings, rather he was acting under instruction to deliver the drugs. His role was therefore a lesser one, that of a transporter.
35. The evidence disclosed that the respondent was a drug addict at the time of the offence, with an addiction to cocaine and that he was to get €500 for the drop-off. Moreover, he had a significant drug debt. In his interview with the gardaí when asked about his drug debt; and specifically, as to whether it was as a result of his own drug use, he gave what Mr O'Higgins properly describes as a rather curious response by saying "half and half". He was asked to clarify, and he told the gardaí that this meant that he acquired half the debt as a result of his drug habit and the other half from drugs that 'went missing'. In

assessing his moral culpability, the fact of his drug habit and the fact of his drug debt serve to mitigate his moral culpability due to the coercive nature of those factors.

36. In summary, the aggravating factors in the instant case include the value of the drugs, the nature of the drugs; the fact that the respondent was on bail at the time he committed this offence, his previous conviction for an offence contrary to section 15A and also the fact that there was some, albeit limited, financial gain although this latter factor is mitigated by virtue of his drug addiction and his drug debt. His role was that of a conduit, which whilst a lesser role, was nonetheless a position of some trust.
37. The appellant takes issue with the trial judge's assessment of the pre-mitigation figure of 7 years and asserts that this is simply too low.

The Mitigating Factors

38. It is undoubtedly so that there were many mitigating factors in the present case, the most significant of which was the respondent's early plea of guilty. Whilst the appellant argues that less weight should be given to this factor as the respondent was caught red-handed, nonetheless it is a significant mitigating factor. Further mitigating factors include his co-operation with the gardaí, his immediate admissions in interview, his tragic personal circumstances; including the death of his two sisters, his now stable family relationships and the fact that he has a good work record and that he completed various courses in order to improve his prospects. It seems his circumstances deteriorated after the death of his sister in 2006; he began abusing cannabis and, from 2015, cocaine. He has 65 previous convictions, notwithstanding that some 50 of those were for road traffic matters, the result is a progressive loss mitigation.
39. Mr O'Higgins requested the court below and this court to consider that the sentence to be imposed had to be consecutive given the provisions of the Criminal Justice Act 1984. The judge therefore had to have regard to the totality principle to ensure that the sentence which was imposed was proportionate in terms of the gravity of the offence and the personal circumstances of the respondent. In this respect the judge took the view that he was going to sentence the respondent in a global manner for his misconduct in relation to all matters of which he had knowledge. In imposing sentence, the judge specifically indicated that he was taking into consideration the fact that the respondent was serving a sentence. He clearly had regard to the totality principle. Ultimately having identified and considered the relevant factors the judge imposed a sentence of four years on this count consecutive to the unsuspended portion of the sentence of seven years, previously imposed on the respondent, giving a total actual sentence of eight years imprisonment.
40. In so imposing, the trial judge adjusted downwards the notional, pre-mitigation sentence from seven years, having taken into account the mitigating present and the requirement that the sentence be imposed on a consecutive basis.

Departure from the Presumptive Minimum

41. Ms. Coonan argues that it was unclear from the judge's sentencing remarks as to the reason why he departed from the presumptive minimum sentence. We disagree with this suggestion. In fact, whilst the judge's sentencing remarks may be succinct, this does not

have the effect of an absence of clarity. Indeed, quite the opposite is the case. The judge in deciding that the respondent fell within s. 27(3D)(a), noted the respondent's plea of guilty and his co-operation and posed the question as to how far he should depart. The fact that he briefly stated his reasons for departing from the presumptive minimum does not make his reasoning unclear.

42. Ms Coonan further argues that there was no basis to depart from s. 27(3C) of the Act and says that so doing constituted an error in principle and resulted in a substantial departure from the appropriate sentence. Moreover, she contends in this regard that the judge failed to give sufficient weight to the provisions of s. 27(3D)(c)(i) and (ii) of the 1977 Act.
43. It is clear that the judge did have regard to the fact that the respondent had, as he termed it "essentially really one conviction" for s. 15A. The criticism is that he failed to give sufficient weight to this factor in taking his decision to depart from the presumptive minimum of 10 years. Moreover, he made no reference to the public interest in preventing drug trafficking in so deciding.
44. On behalf of the respondent, it was argued in the court below that there were factors present, which would permit a derogation from the presumptive minimum. His plea of guilty, admissions, co-operation, the underlying drug addiction and his personal circumstances were highlighted.
45. The judge decided to impose a global sentence on the respondent. Whilst this court has indicated on previous occasions, the optimum manner of sentence; a failure to do so does not necessarily amount to an error in principle.
46. The issue for us is whether having decided to depart from the presumptive minimum sentence, the judge was in error. The key issue in this determination is whether the fact of the respondent's previous conviction for the same type of offence should have caused the sentencing judge not to depart from the presumptive minimum. Taken in isolation; that is excluding the previous conviction, there were factors present which would enable a judge to depart from the presumptive minimum. These factors were not limited to the plea of guilty or the early admissions and co-operation but included the respondent's drug addiction and tragic circumstances. S. 27(3C) provides that a court may have regard any matters it considers appropriate in deciding whether it would be unjust to impose the presumptive minimum. It is apparent from the judge's sentencing remarks, that he first identified the aggravating factors, he considered the role played by the respondent and then moved on to consider specifically, the respondent's previous conviction. While the judge did not identify features other than the plea of guilty and co-operation and did not specifically mention the previous conviction in the context of departing from the presumptive minimum, he had immediately prior to taking his decision not to impose the presumptive minimum, referred to the previous conviction. We are satisfied in the present case that he did not err in deciding in all the circumstances that it would be unjust to impose the presumptive minimum sentence.

47. The respondent made immediate admissions, co-operated with the gardaí and continued in that vein by pleading guilty at the earliest opportunity. The statute enables a court to consider the circumstances relating to the offence or the offender in this assessment. The fact of a previous conviction and the public interest are factors to which a court may have regard in determining whether a sentence of not less than 10 years would be unjust. The presence of a previous conviction does not, as long as s. 27(3F) is not engaged, in and of itself mean that a court may not depart from the presumptive minimum. They simply are factors which may be considered and weighed in the balance.
48. We are satisfied that whilst there was limited scope for the judge to conclude it would be unjust to impose the presumptive minimum, we are satisfied that there was nonetheless a basis to enable him to do so.
49. Having said that, in our view, when we consider the totality of the aggravating factors and in particular the fact that this was a second offence for s. 15A within a period of one year, together with the fact that the respondent was on bail for s. 15A offences, the pre-mitigation or notional figure is a low figure. Moreover, in terms of mitigation, this was a case where the respondent was caught red-handed and therefore less weight is to be afforded to the plea of guilty. Furthermore, while his previous convictions (apart from the s. 15A conviction) may not be said to be significant, nonetheless they detract from the level of mitigation to be afforded to him.

Conclusion

50. In our view, the sentence imposed was a lenient sentence. The question is whether the lenient sentence imposed is so unduly lenient, so as to require intervention by this Court. On an assessment of the aggravating factors, we are satisfied that the judge erred in identifying a pre-mitigation sentence of seven years. Whilst we have indicated that we do not find that the judge erred in departing from the presumptive minimum sentence, notwithstanding the existence of a previous conviction for a s. 15A offence; in identifying a headline figure of seven years, the judge fell into error, particularly where this offence was committed within a year of the previous conviction. S. 27(3B) makes specific reference to the consideration of the existence of a previous s. 15A conviction in imposing sentence for a s. 15A offence, but even if this were not the case, sentencing principles permit that a similar previous conviction may aggravate an offence. The fact that this offence was committed while the respondent was on bail further aggravates the offence. We have concluded therefore, that the ultimate sentence imposed was a substantial departure from the appropriate sentence in the particular circumstances.
51. Therefore, we propose to quash the sentence and in accordance with sentencing principles we will re-sentence the respondent.

Re-Sentence

52. In sentencing the respondent for the offence, we have assessed the aggravating factors already identified in order to determine the gravity of the offence. We have in this assessment considered the respondent's role in the offence, his drug addiction and debt

and the impact of those factors on his moral culpability and conclude that the appropriate pre-mitigation sentence is one of ten years imprisonment.

53. We have had regard to the respondent's efforts while in custody to rehabilitate himself and have noted the content of the material furnished to us. In giving the appropriate weight to the mitigating factors, we will reduce the notional sentence to one of seven years imprisonment. We are cognisant of the disappointment factor for the respondent in receiving a greater sentence and to take that into consideration, we will reduce the sentence to one of six years. As the sentence is below ten years, we have considered whether there are circumstances which allow for a departure from the presumptive minimum and while we believe that there is limited scope, we are satisfied in the circumstances that it would be unjust to impose the presumptive minimum. In the knowledge that the sentence must be consecutive to the Mullingar sentence, being an actual sentence of four years imprisonment, we have had regard to the totality principle and in the circumstances consider the sentence of six years consecutive to the four year sentence to be the appropriate sentence.