



THE COURT OF APPEAL

[C.A. No.167 of 2018]

**Edwards J.
McCarthy J.
Ni Raifeartaigh J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

MARK O'DWYER

RESPONDENT

JUDGMENT of the Court delivered on the 10th day of December 2020 by Ms. Justice Ní Raifeartaigh

1. This is an application by the Director of Public Prosecutions who seeks to have the sentence of the respondent increased on the basis that it was unduly lenient. The respondent pleaded guilty to an offence contrary to s.15A of the Misuse of Drugs Act 1977 as amended, that is to say, possession of drugs for sale or supply in circumstances where the drugs exceeded the value of €13,000. The value of the drugs in question was €4.17 million. The sentencing judge imposed a sentence of 5 years.
2. The sentence imposed in respect of another man involved in the same incident relating to possession for supply of the drugs, Mr. Stephen Sarsfield, was the subject of an undue leniency application by the DPP and the Court delivered judgment in that case on the 15 October 2019 (judgment delivered by Birmingham P.), increasing his sentence from 7 years (imposed by the same trial judge) to 10 years imprisonment on appeal.

The Sentence Hearing in respect of the Respondent

3. The sentence hearing in respect of the respondent took place before Judge Martin Nolan of the Dublin Circuit Criminal Court on the 8 May 2018. The evidence given was as follows. On foot of confidential information, a number of Detective Gardaí carried out a surveillance operation at Ballyfermot Drive. A large heavy goods vehicle was parked across the road from No. 10 Ballyfermot Drive. There was a large garage attached to No. 10 Ballyfermot Drive and a large white Mercedes van was parked in the driveway. At 1:50 pm, Stephen Sarsfield was observed moving the truck into position on the footpath

immediately opposite the entrance to No. 10 and entering the garage on foot. There were various movements of vehicles and people until, at 2:08 pm, the respondent Mark O'Dwyer arrived on the scene in his own car, a blue Ford Focus. The Gardaí observed three men, two of whom were Mr. Sarsfield and the respondent, entering and exiting the garage. They were observed removing green and white flat pack boxes from the rear of the truck and bringing them into the garage.

4. At 4:05 pm Gardaí entered the garage on foot of a search warrant. Mr. Sarsfield was standing at the side of the truck and the respondent was standing at the rear of the truck, both having been observed exiting the garage a few seconds prior to that. A large amount of controlled drugs were scattered throughout the garage in plain sight. There were packages of cannabis herb stacked against the left-hand wall and more on the floor and others were placed inside some of the flat packed storage boxes that had now been made up. A total of 378 packages of cannabis herb were seized by the Gardaí. In a smaller room they found a weighing scales and there were three packages with approximately 1kg of diamorphine on the table in open view. There was also a money counter on the table. In another small room there were three stun guns and they were also in open view. There were other items such as plastic bags and mobile phones.
5. The respondent was arrested and brought to Ballyfermot Garda Station where he was detained. At one point he was asked how it felt seeing what was at the scene and he answered: "*I just wanted to get out of it*". He also made a comment at one point that he "*felt like shit about all of that*" and added that he had no knowledge of guns or drugs.
6. The total weight of the plant material was estimated to be 188 kilogrammes and upon analysis from twelve of the packages it was found to be cannabis. The valuation of the cannabis seized was €3.76m. The blocks of white powder were found to contain 2.9 kilogrammes of diamorphine and the value of that was put at €410,312. The combined total value of the drugs was put by the Gardaí at €4.17m.
7. A detective from the ballistics section gave evidence that the stun guns were in poor condition and did not work.
8. It was established in cross-examination of the Garda Officer that Mr. O'Dwyer did not make any attempt to flee and did not resist arrest, and that the extent of his involvement in the operation was that he was brought in to assist with the packaging of the drugs. He was one of the last to arrive on the scene and he had driven his own car, the Ford Focus, which had a 2003 registration. His house was searched and nothing of evidential value was found nor were there any signs of wealth. The garda accepted that he was in poor health and was HIV positive.
9. Mr. O'Dwyer was 44 years of age and had 41 previous convictions, most of which were for road traffic matters. There were four previous convictions for s.3 of the Misuse of Drugs Act, one for obstruction under the Misuse of Drugs Act, and two for robbery under the old Larceny Act. All of them were District Court matters. The last conviction date was the 19

January 2010, therefore leaving a gap of seven years between that offence and the present offence. The offences under the Larceny Act dated back to the 1990s.

10. In mitigation, counsel on behalf of the respondent submitted that he had been a chronic drug addict from a young age who was successfully maintained for almost twenty years on maintenance programmes. He had not been involved in offending of any kind in 7 years. Furthermore, he had been released from a prison sentence in 1999 and between that time and 2017 the only offences of which he was convicted were matters under the Road Traffic Act. He contracted HIV in 2003 from sharing a needle. Originally, he came from the Liberties in Dublin, being born in 1973. His mother had a very serious drug problem herself and she died when she was 25 years old. He was raised by his grandmother and completed a Junior Certificate. He worked as a labourer occasionally and worked with horses for years, but unfortunately developed a major drug problem in his early teens. He had been a good athlete, playing hurling and football, but opted out during his teens when he succumbed to addiction.
11. Placed before the court were the following reports and letters:
 - (1) A letter of Dr. Dominick Rowley, Consultant Physician of St. James's Hospital dealing with his HIV status and medication;
 - (2) A letter dated 3rd May 2018 from Dr. Caulfield of the Addiction Services in Dr. Stevens' Hospital who confirmed that Mr. O'Dwyer was attending the Drug Treatment Service there almost continuously from May 2000 until July 2017 and gave the history of his drug addiction and maintenance medications and said that he was also polite and cooperative with the staff in the clinic;
 - (3) A letter dated 26th March 2018 from Ms. Moira O'Neill of the Rialto Community Drug Team, who referred to his addiction issues which he wished to address and refers to the possibility of residential treatment as part of or at the end of his sentence;
 - (4) A letter from Mr. Anthony Kiely, addiction support worker, who referred to the fact that the accused has been dealing not only with addiction but a number of personal issues within his family, and the loss of some key people in his life, as well as his relationship with his partner and child;
 - (5) A number of person letters testifying as to his personal character;
 - (6) A letter indicating that the respondent had work with a funeral service (in his capacity of dealing with horses, presumably in connection with horse-drawn hearses).
12. A forensic psychologist report was also put before the Court. This indicated that the respondent falls within an extremely low range of cognitive functioning, and that this would affect his ability to think logically and make judgments and decisions in his own best interests. He has a limited ability to read and write, to understand language or

control his impulses. His psychologist described him as very vulnerable and recommended that he needed supports of various kinds.

13. The psychological report also provided the respondent's account of how the offending had come about. It records that the accused said that an acquaintance contacted him by phone in the days prior to the offence and asked him if he wanted to assist moving boxes at a house in Ballyfermot for several hours for €1,500. He thought it would be cannabis and he agreed because he thought it would be an easy way to earn money. He said that he regretted the offences and expressed a desire to live a crime-free life in the future. He said that when he agreed to his acquaintance's proposition, he did not think of the potential legal consequences and focused on the short-term monetary gain. He did not have an awareness of how he was contributing to the drug industry or how associating with those in criminality could potentially lead to a return to crime on his part. He described his plans to attend his GP and commence a process of ultimately ceasing his methadone treatment and to cease his intermittent use of heroin, cannabis and prescription medication.
14. Counsel characterised the case as one in which a man of limited intelligence and a long history of drug addiction had succumbed, after a very long interval of managing his addiction and staying away from offending, to involvement in a once-off serious offence because he was offered money to do it. He was recruited on the day as unskilled labour for the job for which he had been promised payment of a sum of €1,500. He had pleaded guilty and cooperated as best he could and he was at a very low level within the criminal enterprise in question.

The imposition of sentence by the sentencing judge

15. In delivering sentence, the judge said that the respondent's involvement was to package and move along the drugs and that he was promised a certain amount of money for his services. He had committed a serious misjudgement in involving himself in this drug-dealing operation but the judge accepted that the respondent had no proprietary interest in the drugs and that his sole reward was a small amount of money. He described his previous convictions and noted the letters and the various good things that had been said about his character in those letters. He referred to the lifelong drug problem and the long-term treatment by way of methadone maintenance programme.
16. The judge referred to the mandatory presumptive minimum sentence of ten years and said that he could depart from that mandatory minimum in this case by reason of the respondent's cooperation and his plea of guilty. He observed that it would have been evident to the respondent that this was a serious drug dealing operation once he entered the premises, and that would obviously have to be taken into account. The judge imposed a sentence of 5 years, backdated to when he first went into custody, which was the 17 July 2018.

Submissions of the DPP on appeal

17. Understandably, a key focus of the submissions on behalf of the appellant was the decision of this Court in *DPP v. Stephen Sarsfield* 15th October 2019 (judgment delivered by Birmingham P), where the sentence of a co-accused of the respondent was increased from 7 years to 10 years on appeal. The Court said that the appropriate headline sentence would have been 15 years in view of the quantity and value of the drugs involved, having regard to information provided to the Court with regard to sentences in many other s.15A cases.
18. The DPP submits that the appellant was a willing participant, for financial reward, in an operation which was of a large-scale and serious nature, a fact which must have been entirely obvious to him once he entered the garage on the day in question.
19. The DPP refers *inter alia* to the case of *DPP v. O'Mahony and Brennan* [2014] IECA 57 where the appellants entered an early plea to s.15A charges in respect of cocaine and heroin worth €3.5m; had no previous convictions, had chronic addiction issues, and had taken very positive steps for dealing with them. They were sentenced to thirteen years with the final three years suspended. The Court of Appeal upheld this sentence.
20. The DPP also emphasises that the respondent's involvement was for financial reward even though he had limited authority and no proprietary interest in the drugs. The issue of financial reward was one which the court identified in *Sarsfield* as increasing culpability. Even lower ranking operatives could be very important because without them, major drug dealing and trafficking could not occur. The evidence in the present case was that the respondent was a willing participant and there was no question of duress in the case.
21. The DPP submits that while the sentencing judge did have regard to the mandatory presumptive minimum sentence, he determined that the co-operation and guilty plea allowed him to depart from that presumptive minimum without further discussion. The sentencing judge had treated the plea as one of the exceptional circumstances, but the reality was that the circumstances of the plea were that the defendant was caught red-handed. There was little in terms of co-operation beyond beyond the entry of a plea, in circumstances where the respondent maintained he was unaware of the drugs and the stun guns and did not put anything forward by way of material assistance.
22. Further, the DPP said, the sentencing judge had failed to place sufficient weight on the social policy considerations underlying the presumptive minimum sentence with regard to s.15A offences. No headline sentence was indicated, nor was there any reference to the range of seriousness in which the judge determined the offence to lie. That in itself, the DPP submits, was an error of principle.
23. The DPP submits that even if the judge was correct in concluding that exceptional and specific circumstances were present that enabled him to depart from the presumptive sentence, the sentence arrived at was an excessive departure from what would be the appropriate sentence.

The submissions on behalf of the respondent on appeal

24. Counsel for the respondent refers to the great experience of the sentencing judge who is well-known for the conciseness of his sentencing remarks. The Court accepts that this particular trial judge has a vast experience in imposing criminal sentences and indeed this fact was alluded by the Court in its judgment in the *Sarsfield* case.
25. With regard to the headline sentence, counsel submits that this should be fixed with reference not only to the objective aspects of the crime, such as the quantity and value of the drugs, but also with reference to the precise relationship of the particular accused to the drugs. For example, he submits, there is a considerable difference between the person who owns the drugs and has arranged for their packaging and who stands at the apex of the profit-making aspect of the drug pyramid, on the one hand, and the person at the bottom of the pyramid who has been brought in for one day as a manual labourer, to pack the boxes.
26. Counsel submits that this does not undermine the proposition set out in the judgment in *Sarsfield*, namely that the quantity and value of the drugs bear a relationship to the harm caused in society by the distribution of drugs, and therefore should be reflected strongly in determining the culpability of the accused and the headline sentence. However, he submits, another important factor is the relationship to the particular accused to the drugs in question; the further away a particular accused is from ownership and profit-making from the drugs, the less is his culpability and therefore the lower should be the appropriate headline sentence. He submits that not all persons connected with a particular consignment of drugs should necessarily start out with the same headline sentence, even if the value of the drugs remains a constant.
27. The Garda officer giving evidence had accepted that the respondent had been brought in for the packaging on the day, that he was one of the last to arrive, that he drove there in his own car, that he did not have keys (to the truck). He was, counsel submits, clearly at the level of the 'drudge work' in the operation. He had no proprietary interest in the boxes; and no input in the wider aspects of the operation such as where they would be sold, the price at which they would be sold and other such matters.
28. Counsel refers to the respondent's background, marred by personal tragedy including the death of his mother at the age of 25 in connection with her own addiction to drugs, together with his own addiction to drugs; his offence-free history (if one leaves aside the road traffic matters) for 17 years despite having developed a severe addiction at a young age; the various character references which emphasised the good qualities in his character; his limited intellectual abilities; and the positive relationships in his life with his partner and child coupled with his desire to continue dealing with his addiction in a crime-free environment and having a normal life involving work with horses.
29. Counsel submits there was therefore a "cornucopia of reasons" which might have led the sentencing judge either to depart from the presumptive minimum sentence and to pick a

lower headline sentence or to give greater mitigation to this respondent than to Mr. Sarsfield.

30. Finally counsel submits (although he accepts it is slightly premature) that his client has been on temporary release and is doing well, and that it would be unfair to extend his sentence at this stage, given that it is now two and a half years since the sentence was imposed; he says that priority was given to the Sarsfield appeal, which has left his client in the unfortunate situation of facing a potential increase some considerable period of time after the sentence was imposed.

Decision of the Court

Parameters of sentencing in a s.15A case

31. The devastating impact of the illegal drug industry on individuals and communities in Ireland as well as Irish society as a whole is so notorious that it need not be described here. One of the responses of the Oireachtas to this major ill which has afflicted Irish society for decades has been to enact the presumptive minimum sentence of 10 years for the offence of sale or supply of drugs where the value exceeds €13,000. The imposition of a mandatory presumptive minimum sentence as a starting point for the sentencing judge reflects the dreadful harm that the illegal drugs trade has caused in this country and the need to provide a substantial deterrent to those involved in the trade.
32. However, the Oireachtas has also recognised that room must be left to the sentencing courts to factor in personal circumstances relating to a particular accused person. As the facts of the present case well demonstrate, when illegal drugs ravage a community, some people can become both a victim of the problem and a part of the problem. In this case, the respondent's mother died at the age of 25 by reason of drug addiction. The respondent himself became an addict at a young age and also became HIV positive. Since his early twenties, and for 20 years, he has apparently managed to deal with his drug addiction by engaging with medical and support agencies and maintaining himself on methadone prescribed for him. For 7 years he has been entirely crime-free, although prior to that he had amassed 41 previous convictions, mostly for road traffic offences. On this particular occasion, however, he crossed the line into criminality of a different order of gravity; possession of drugs with a value of more than €4 million. He knew (or assumed) before he arrived at the garage that the job he was asked to do involved handling illegal drugs; he also must have known as soon as he walked into the garage and started packing the goods that this operation involved a significant quantity of drugs. He may not have known that the drugs had a value of €4.17 million, but in light of the description of the scene as presented by the evidence of the Garda officer, the respondent was highly reckless in this regard and/or indifferent to the large quantity of drugs being packaged. The case is a good example of many ways in which the illegal drugs trade can impact upon a person's life and how the sentencing of an offender under s.15A presents a complex problem of justice.
33. Although s.15A allows the courts to depart from the presumptive sentence, the circumstances in which the court may do so are circumscribed. The sentencing judge may

deviate from the presumptive sentence only 'where there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make [the presumptive sentence] unjust in all of the circumstances...'. The section goes on to reference specific factors such as material assistance and guilty plea, but even as regards the latter, directs the court to have regard to the stage at which the plea was entered and the circumstances in which it was entered.

*The decision in DPP v. Sarsfield*¹

34. The presumptive minimum sentence in s.15A cases is not a new arrival into the Irish landscape of sentencing law; on the contrary, there are numerous authorities on the proper approach to such cases. The relatively recent decision of the Court in *Sarsfield* is a useful up-to-date judicial exposition of how such sentences must be approached by a sentencing judge as well as a record of the actual sentences (and re-sentences on appeal) which have been previously imposed.
35. In conjunction with the statutory parameters, the usual approach of selecting a headline sentence and then adjusting for mitigation continues to apply.
36. On the selection of an appropriate headline sentence, the Court referred, including by way of example, to a number of factors which may be relevant in such cases before selecting a headline pre-mitigation sentence ² :
 - a) The value and quantity of the drugs seized, being a critical factor while not determinative of sentence;
 - b) The level of knowledge of the person as to the quantity of value of the drugs ³;
 - c) The role played by the person, as an indicator of their level of ownership or control in the operation ⁴ (with the comment: "*In general, the greater the authority exercised, the greater the culpability.*")
 - d) Whether a decision was taken to engage in the operation to make a financial gain and level of financial gain that was to be made, if any ⁵;
 - e) Whether the person was acting under duress or not.
37. The court in *Sarsfield* was provided with information concerning a large number of Misuse of Drugs cases (104 in total) which had been dealt with on appeal (either by way of appeal against severity or appeal against undue leniency), most of which had been dealt

¹ [2019] IECA 260

² Para. 12-14 of judgment.

³ The example was given of a drugs mule who is handed a suitcase at an airport and asked to import it into Ireland for a reward, to illustrate that a person may have little knowledge of the value and quantity of the drugs.

⁴ The example was given of a person who was playing a totally subservient role and living in poverty and deprivation such as the 'gardener' in cultivation cases.

⁵ Reference was made to cases where the offender was being provided with nothing more than a small quantity of drugs for immediate personal use, which would reduce culpability.

with on a guilty plea. Additional information was also presented of a review of 67 sentences under s.15A dealt with on appeal in the period 2014-19.

38. The court noted various difficulties with comparators in this area (at paragraph 17), and then (at paragraph 18) set out *'tentative'* observations. This included the observation that *'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 to be of the order of 14 or 15 years and in some exceptional cases, significantly higher...'*
39. The Court went on to say that a plea of guilty without more would be unlikely to justify a reduction below the presumptive minimum sentence, particularly if entered against *'a backdrop of very strong or overwhelming evidence...'* which was *'not an unusual situation in the context of s.15A cases'*.
40. Applying these principles to the accused man before the Court in *Sarsfield*, the Court decided that the sentence of 7 years imposed by the sentencing judge was unduly lenient. It indicated that a headline sentence of 15 years would have been appropriate and that, even allowing for mitigating factors, a post-mitigation sentence greater than 10 years would have been justified. However, because it was intervening to re-sentence, the Court confined itself to imposing a new sentence of 10 years.
41. Mr. Sarsfield had pleaded guilty, had no relevant previous convictions, had a gambling debt and was addicted to cocaine. His role at the scene appears to have been similar to the role of the respondent, with the only difference being that Mr. Sarsfield had keys for the HGV as well as a mobile phone. He was described by Gardaí as *'a small cog but undoubtedly important cog in the bigger machine'*.

Decision of the Court on whether the sentence imposed was unduly lenient

42. The Court has reached the conclusion that, having regard to the principles set out in the *Sarsfield* decision as to how to approach the presumptive 10-year sentence, the sentence imposed in the present case was unduly lenient. Taking into account the quantity and value of the drugs and the fact that the appellant made a free and conscious decision to involve himself with the enterprise purely for easy financial gain and without any pressure or duress operating upon him, the sentence arrived at was unduly lenient notwithstanding the mitigating factors. By reason of the fact that the sentencing judge did not set out his thoughts explicitly, it is not possible to say whether the error came in at the stage of fixing the headline sentence or in applying an excessive discount for mitigating factors, or some combination thereof. However, the Court has reached the conclusion that the sentence of 5 years imposed at first instance was unduly lenient.

Re-sentencing of the Respondent

43. The Court will therefore proceed to re-sentence the respondent.

44. The first question is what the headline sentence should have been and whether there is any reason to select a different headline sentence from Mr. Sarsfield, where the headline was identified as being one of the order of 15 years.
45. Although they were engaged in the same crime and the evidence of their involvement was rather similar, the sentencing judge distinguished between Mr. Sarsfield and the respondent by giving the former a sentence of 7 years and the latter a sentence of 5 years. He appeared therefore to view them slightly differently, although whether this was due to a view that the respondent had a slightly lesser role in the operation or because he considered that his mitigating circumstances were of a different order (or both) is difficult to say because the judge himself did not explain his reasoning in this regard.
46. The Court notes that the evidence was that Mr. Sarsfield had keys and a mobile phone at the scene, and that the respondent was the last to arrive and did so in his own car. Otherwise the evidence as to their level of involvement and/or relationship to the illegal drugs was the same, and of course the quantity and value of the drugs was the same, a point so obvious that it hardly needs stating. The Court is of the view that there is little room for differentiating between the two offenders other than in a marginal way and therefore would designate 14 or 15 years as the appropriate headline sentence in respect of the respondent. The next issue then is the question of mitigation.
47. As regards mitigating circumstances, these included his guilty plea. This is one of the factors referred to in s.27(3D) (b)-(c); however, the sub-section also refers to the stage at which the intention to plead guilty was indicated and the circumstances in which the indication was given. The respondent was caught red-handed; this is a highly relevant circumstance in terms of the guilty plea and naturally reduces the amount of mitigation that can be afforded because of the plea.
48. There was no material assistance given to the Gardaí (another of the factors explicitly referred to in the section).
49. The respondent's personal circumstances did, however, provide further mitigating factors, as described earlier in the summary of the evidence presented on behalf of the respondent, including the various reports described above. The Court also notes that he had 41 previous convictions, mostly involving road traffic offences, but also that he has been conviction-free for 7 years.
50. In ordinary circumstances, these mitigating factors would reduce the headline sentence of, say, 14 years, to 12 years; certainly, these mitigating factors would not have warranted a sentence below the 10-year presumptive minimum as they were not sufficiently exceptional to warrant such a course of action.
51. However, the Court is of the view that the matter does not end there in this particular case, on appeal.

52. The Court on re-sentencing following a successful s.15A appeal must sentence in light of the provisions of s.15A as a whole. This means that the Court should have regard not only to the presumptive minimum but also the circumstances in which a court is entitled to depart from it. For example, if an accused person had been diagnosed with a terminal illness between the time of original sentence and the re-sentence on appeal, the Court would be entitled to take that into account when re-sentencing, even though it was a factor not before the original sentencing judge. The relevant sentencing sub-section provides that the Court may depart from the presumptive sentence where there are "*exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make [the presumptive sentence] unjust in all of the circumstances*". On a re-sentence, the circumstances of the person convicted of the offence *at the time of re-sentence* are also relevant, and not merely the circumstances as they presented at the time of the original sentence.
53. Are there any exceptional circumstances in the present case which justify or require a further reduction in the interests of justice? The Court is of the view that there is one such circumstance. This is the fact that two and a half years have now elapsed since the imposition of sentence and the respondent has been released from prison under the temporary release scheme. He appears to have resumed normal life with his partner and child and has resumed working. There would be a particular harshness, in the Court's view, if he were not only returned to prison at this stage (as he will be) but also to serve the balance of the full sentence which the Court considers would have been appropriate to impose at first instance. The Court will therefore reduce the sentence further to 9 years by reason of what it considers an exceptional circumstance. The position would be different if the appeal had been brought to hearing earlier and this is a point of which the DPP might well take note for the future.
54. The Court also observes that this small distinction between this 9-year sentence and that of Mr. Sarsfield maintains in some small degree the differentiation between them which the very experienced trial judge had sought to put in place.
55. By way of clarification to the previous point, the Court is not thereby suggesting that it would necessarily and always be appropriate to maintain the same or any differentiation between offenders on a re-sentence in an undue leniency appeal. All will depend on the facts of each case. The principle of equality in sentencing, which in turn leads to the principle of appropriate differentiation between offenders where appropriate, must be held in balance with the sentencing regime imposed under s.15A. In some cases, this might lead to a sentence of 10 years being imposed on appeal on two offenders who were treated differently at first instance. The Court also takes the opportunity to emphasise again that the 10-year sentence is a presumptive *minimum* sentence and that sentences greatly in excess of that will sometimes be warranted, as discussed in *Sarsfield*.