



THE COURT OF APPEAL

Record Number: 101/20

**Birmingham P.
McCarthy J.
Kennedy J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DUNG TRAN

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 1st day of February 2021 by Ms. Justice Kennedy.

1. This is an appeal against sentence. The appellant pleaded guilty to a count of unlawful possession of a controlled drug with a market value in excess of €13,000 for the purpose of sale or supply contrary to section 15A of the Misuse of Drugs Act 1977, as amended. On the 11th July 2019 a sentence of twelve years' imprisonment was imposed with the final two years suspended on terms.

Background

2. On the 6th February 2019, members of An Garda Síochána were travelling through Kilkenny on the M9 motorway in an unmarked garda car when they observed a vehicle overtake them travelling at an estimated speed of 160 kmph. The gardaí signalled for the vehicle to pull over, which it did. Garda Conroy alighted from his vehicle to speak with the driver, Mr Tran, and noticed a strong smell of cannabis emanating from the vehicle. Garda Conroy informed the appellant that he and his vehicle were going to be searched under the provision of the Misuse of Drugs Act. Whilst searching the appellant Garda Conroy found a bag containing six deals of cannabis. The vehicle was searched and five refuse sacks were discovered in the boot. Upon inspection, it was noticed that each sack contained a number of tinfoil type packages which had been vacuum packed . When one of these packages was opened it was found to contain a green plant material suspected to be cannabis herb. The estimated value of the drugs seized was €480,000.
3. The appellant was arrested and conveyed to Kilkenny garda station where he was detained and interviewed. During interview the appellant cooperated with gardaí and explained his role in transporting drugs from one location to another. The appellant outlined that he received his instructions from a Chinese man and was instructed to drive

to a particular location where his car would be loaded with the material and then he would be given his destination. The appellant was to receive €1000.

Personal circumstances of the appellant

4. At the time of sentencing the appellant was 39 years old. He is from Vietnam and he moved to Ireland when he was 18 years old and has since become an Irish citizen. The appellant has a wife and three children and he has no previous convictions.

The sentence imposed

5. In sentencing the judge identified the primary aggravating factor to be the quantity of cannabis involved, amounting to almost €500,000 worth of cannabis.
6. In terms of mitigation the following factors were identified: the absence of previous convictions, the plea of guilty, the cooperation with the gardaí at an early stage and the effect on the appellant's family, particularly his wife and children.
7. Given the gravity of the offence the judge identified a headline sentence of sixteen years. The judge noted that if the case had involved a drug other than cannabis, the headline sentence would be higher. Allowing for the significant mitigation, the judge reduced the sentence to twelve years. Taking into account that it was the appellant's first offence and the need for rehabilitation to be included in the sentence the judge suspended the final two years of the sentence for a period of five years.
8. The judge concluded that this was not a case in which the circumstances would have justified departing from the presumptive minimum mandatory sentence.

Grounds of appeal

9. The appellant puts forward the following grounds of appeal:-
 - (1) The learned sentencing judge erred in law and in principle by failing to depart from the presumptive minimum mandatory sentence where there were exceptional and specific circumstances relating to the offence; namely the appellant's plea of guilty, cooperation with the investigation and lack of previous convictions which justified such a departure;
 - (2) The learned sentencing judge erred in law and in principle by failing to give adequate weight to the lack of previous convictions of the appellant;
 - (3) The learned sentencing judge erred in law and in principle by failing to give adequate weight to the nature of the drug;
 - (4) The learned sentencing judge erred in law and in principle by creating a headline sentence of sixteen years which was excessive and disproportionate in all the circumstances of the case;
 - (5) The sentence of twelve years with the final two years suspended imposed on the appellant was excessive in all the circumstances;

Submissions of the appellant

10. In oral submission, Mr Clarke SC for the appellant focused on the headline or pre-mitigation sentence and contended that the judge erred in failing to depart from the presumptive mandatory minimum sentence. It is said that the judgment of the Court in *The People (DPP) v. Ryan & Rooney* [2015] IECA 2 is instructive in relation to the relevant statutory provisions and the circumstances in which a sentencing judge may disapply the presumptive minimum mandatory sentence. In *Ryan & Rooney* the DPP sought to review the sentences imposed in respect of the accused who each received sentences of ten years' imprisonment suspended in their entirety for seven years. The case involved the transfer of a consignment of heroin and cocaine with an aggregate market value of over €1.3 million. On appeal, the Court allowed the application and the offenders were resentenced to five years which was then reduced to three years.
11. The appellant notes that in *Ryan & Rooney*, the Court, while allowing the Director's application, nonetheless found that the sentencing judge was entitled to depart from the mandatory minimum sentence. The appellant argues that there were several mitigating factors, also present in this case, which led the Court to that conclusion: the plea of guilty and no previous convictions in respect of Mr Rooney.
12. The appellant submits that it was an error in principle not to deviate from the mandatory minimum sentence. The appellant refers to O'Malley, *Sentencing Law and Practice*, (3rd Ed. 2016) where he states at para 16-20:-

"A guilty plea can scarcely be treated as exceptional in itself; the statistical evidence consistently shows that it is anything but exceptional.⁷⁰ However, an early and frank admission followed by a plea which is maintained throughout the proceedings may qualify for this purpose..."
13. Furthermore, the appellant provided full assistance and cooperation. The appellant refers to *The People (DPP) v. Murtagh* [2015] IECA 3 where quantities of cannabis and MDMA with a total market value of €3, 582,778 were seized from a storage unit and van. Although the Court of Appeal found that the sentence imposed was unduly lenient, the Court accepted the sentencing judge's decision to depart from the presumptive minimum mandatory sentence as follows:-

"This court considers that the sentence imposed by the Circuit Court was unduly lenient. In view of the presence in the case of the guilty plea and co-operation, which are specified in the section as matters that can be taken into account by the sentencing court, this Court will not disturb the judge's conclusion in that regard, although we consider that the starting point for this offence as committed by this respondent could easily have been found higher on the scale of penalties. Having said that, allowing that there was enough in the case to justify departure and giving maximum value to mitigation, the quantity and value of the drugs and the circumstances of the case generally demanded that a higher sentence was required to comply with the legitimate statutory purpose."

14. It is said that the absence of previous convictions is another factor which is capable of amounting to "exceptional and specific circumstances" for the purposes of departing from the presumptive minimum mandatory sentence. The appellant refers to *The People (DPP) v. Galligan* (Unreported, Court of Criminal Appeal, 23rd July, 2003) where Fennelly J. stated as follows:-

"Whether or not the court is dealing with a first offence is not one of the two named "exceptional and specific circumstances" mentioned in sub-section 3C, but it is clearly capable of being one. It is a matter relating to the person rather than the offence. It is closely linked also with the evidence of some genuine remorse and purpose of amendment."

Submissions of the respondent

15. It is submitted that the culpability of the appellant was high, in that he was fully aware that he was transporting a significant quantity of drugs, at the time he was not addicted to drugs, he was not under the dominion of others or acting under duress. It was accepted that the appellant knew that he was engaged in the sale and supply of controlled drugs and engaged in the activity for purely financial purposes. The value of the drugs, although not determinative, was high and noted as being on an industrial scale.
16. The respondent accepts that the appellant did plead guilty at an early stage and he did cooperate with the investigation. However, it is submitted that there was strong evidence of the appellant's guilt and his plea and cooperation should be viewed in this light
17. The respondent submits that the role of the appellant as a drug courier should not be underestimated, with reference to the remarks of Edwards J. in *The People (DPP) v. Ryan* [2015] IECA 10:-

"There are some couriers who do no more than take a package that they know contains drugs from one place to another having no further involvement in the matter. That in itself is a significant role, because couriers are an essential part of the drug trafficking organisational structure. The courts have commented on the position of couriers and their importance and the fact that notwithstanding their relatively lowly or humble role, they are nevertheless deserving of severe punishment."

18. The respondent submits that the Oireachtas, in providing a mandatory minimum sentence of ten years' imprisonment for possession for sale and supply of drugs in excess of the threshold of €13,000, considers that such offences must be treated as very grave indeed, and that is a factor to which the sentencing judge was obliged to have significant regard. The comments of the sentencing judge demonstrate that he had sufficient regard to matters set out in the legislation and all circumstances relating to the offence, the appellant and the legislative policy. The respondent emphasises the primacy of the view of the sentencing judge in the sentencing process

19. The respondent refers to *The People (DPP) v. Donovan* [2018] IECA 60 where the appellant was stopped by gardaí and his car searched. Cocaine with a market value of €70,000 was found in his possession. The appellant was 26 years old with no previous convictions and he received a sentence of eleven years' imprisonment. On appeal this was reduced to eight years. The Court placed the offence in the mid-range of offending due to the value of the drugs. The respondent submits that the value of the drugs in the instant appeal is significantly more than that in *Donovan* and therefore the offending should be classed as falling within the higher range.

Discussion

20. It must be recalled that the maximum penalty for an offence contrary to s.15(A) of the 1977 Act is life imprisonment. The sentencing provisions are as provided by s.27 of the Act as amended, which provide for a presumptive mandatory minimum sentence of ten years' imprisonment which may be departed from where the Court is satisfied that there are exceptional and specific circumstances which would render the imposition of ten years unjust in all the circumstances. The appropriate approach to sentence involves the assessment of the gravity of the offence, arriving at the headline sentence and adjusting the notional sentence downwards to take account of mitigating factors. If this sentence is over ten years, that is the sentence to be imposed, if not, then the Court must consider whether there are exceptional and specific circumstances justifying a departure from the presumptive mandatory minimum sentence.
21. In the present case, it is said that the judge erred in his nomination of sixteen years as the notional sentence, that he further erred in the reduction permitted for mitigation and that he erred in failing to find the presence of exceptional and specific circumstances which would render the imposition of the minimum sentence unjust.
22. The sentencing court may have regard to the non-exhaustive factors as set out in subsection (3C) of the Act which states:-
- "Subsection 3C of 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 the 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 the 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, and

(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.”

23. The market value of the cannabis herb was considerable, in the sum of €480,000.00. The appellant’s role was that of courier, which constitutes an important role in the drug trade, he was to be paid the sum of €1000.00 to perform this function. In this regard, he drove to a predetermined location where he met with another vehicle, drove to a remote location where the refuse sacks containing the drug were placed in the boot of his vehicle. This was, therefore, a planned operation wherein the appellant was fully cognisant of his role and for which he was to be remunerated. The prosecuting officer placed the appellant at the lower end of the scale of the drug organisation, and this serves to mitigate his culpability. However, drugs are a scourge in our society and the impact on society as a whole is significant, as stated in *The People (DPP) v. Sarsfield* [2019] IECA 260, which case post-dated the imposition of this sentence:-

“Probably more frequently, however, those brought before the Courts play a lesser role and could be described as lower-ranking operatives in a wider criminal enterprise. These lesser roles, whether they involve storing or transporting drugs, may still be very important and without which major drug dealing and trafficking could hardly occur”

24. On being stopped by Garda Conroy, the guard noticed a strong smell of cannabis coming from the vehicle and on being searched the appellant was found with at least six deals of cannabis in his pocket.

25. The appellant co-operated with the gardaí from the outset by admitting his involvement, although it must be said he was caught red-handed at the scene. Nonetheless, it was accepted that the contents of his memoranda of interview were indicative that the matter would not be contested. His co-operation in the broader sense was not forthcoming and he cannot be said to have assisted the gardaí in combatting the drug trade.

26. A plea of guilty was entered on the date the matter was listed for mention before the court, thus, the plea was entered at the earliest opportunity. Insofar as his personal circumstances are concerned, at the time of sentence he was 39 years old, a man with no previous convictions and has resided in this jurisdiction for in excess of 18 years.

27. Whilst the value of the drug in question is important in assessing gravity, it is not always determinative of the sentence to be imposed. The level of involvement of the individual in question is a critical factor and while the appellant in this case was placed at the lower end of the scale vis-à-vis his role, he nonetheless was aware of what he was doing and was to receive financial benefit. This increases his level of culpability. He is not a person with a drug addiction and could not therefore assert some form of duress in the commission of the offence.

28. The circumstances of each individual vary considerably and all factors must of course be taken into account. Again, we refer to the comments of Birmingham P. in *The People (DPP) v. Sarsfield* [2019] IECA 260 where he stated:-

“Those circumstances will vary widely from the individual with relevant previous convictions making a conscious and unforced decision to become involved, to individuals falling into offending in circumstances of extreme distress and vulnerability.”

Conclusion

29. The appellant’s culpability falls to be assessed in light of the circumstances of the offence; and we have set out the appropriate approach to the sentencing process in offences of this nature. In the present case, the judge identified a notional sentence of sixteen years’ imprisonment, and in determining whether the judge fell into error, *The People (DPP) v. Sarsfield* [2019] IECA 260 is of assistance:-

“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 to be of the order of fourteen or fifteen years, and in some exceptional cases, significantly higher.”

30. In the circumstances of the present case, and on an assessment of the appellant’s culpability, we are persuaded that the nomination of a notional sentence of sixteen years’ imprisonment is excessive. While the value of the drug was considerable, this is not determinative of the sentence to be imposed. His role was that of courier for which he was to receive the sum of €1000.00, he was aware of what he was doing, but he was placed by the Garda at the lower end of the scale in operating as he did in transporting the drugs and did not warrant a headline sentence of the calibre nominated. Such a sentence is appropriate in cases of greater commercial dealing. We consider it appropriate therefore to quash the sentence and re-sentence the appellant as of today’s date.

Re-Sentence

31. In assessing the appellant’s culpability, we take into account the significant value of the drugs at €480,000.00, his role as transporter, the fact that he knew what he was about, that he was to gain financially, and the evidence that he was at the low end of the organisation which operates to mitigate his culpability. We also take account of the impact of the drug trade on society in general. However, this was not high-level commercial dealing, nor was the appellant at the centre of the operation, nonetheless the role of a courier is an essential one in the distribution of drugs. In the circumstances, the appropriate headline sentence is that of eight years’ imprisonment.
32. There are mitigating factors, as outlined above; the co-operation by the appellant, followed by an early plea of guilty, entered on the first date the case was listed before the Circuit Court, his personal circumstances, his employment record, the family support and the absence of previous convictions. The mitigating factors justify a downward reduction

of the sentence by one third and accordingly we reduce the sentence to one of five years and four months.

33. In those circumstances, as the resulting sentence is less than the presumptive mandatory minimum pursuant to s. 27(3)c we must assess whether there are exceptional and specific circumstances which would render the ten-year sentence unjust.
34. We have regard to the appellant's co-operation from the outset, followed by a plea at the earliest opportunity, we note that the plea was entered on the 16th May 2019, approximately three months after the commission of the offence. In those circumstances, whilst a plea of guilty may not be considered as exceptional in and of itself, where it follows admissions, and where the Garda was of the view from the outset that the matter was not going to proceed to trial, we are satisfied that there exist circumstances which would render the imposition of ten years unjust.

Decision

35. The sentence will therefore be one of five years and four months, backdated to the 7th February 2019 being the date the appellant was first lodged in custody.