



**THE COURT OF APPEAL**

**Record Number: 141CJA/23**

**The President.  
Kennedy J.  
Burns J.**

**IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**- AND -**

**JOHN LINDSAY**

**RESPONDENT**

**JUDGMENT of the Court delivered (*ex tempore*) on the 22<sup>nd</sup> day of March 2024 by Ms. Justice Isobel 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.
2. On the 8<sup>th</sup> May 2023, the respondent was sentenced to 4 years and a half years imprisonment with the final two years suspended in respect of one count of possession of drugs with a value of €13,000 or more for the purposes of sale or supply contrary to s. 15A of the Misuse of Drugs Act, 1977.

**Background**

3. On the 15<sup>th</sup> March 2022, the respondent was under surveillance and was observed by gardaí in a Hyundai Kona, collecting another individual. This person had with him an empty green holdall bag. The respondent drove this individual to another location where he got out of the respondent's vehicle and into the third person's vehicle.
4. The second person was searched after exiting the third person's vehicle and nothing was found. However, on searching the third person's vehicle, the green holdall bag was found containing a supermarket bag which in turn contained 12 sealed packages of diamorphine with a value of €831,00.00. Gardaí later retrieved dash cam footage from the respondent's vehicle which showed the respondent passing a supermarket bag to the second co-accused which was found later inside the green holdall bag.
5. Gardaí searched the respondent's home and found a further six packages of diamorphine with a value of €420,000.00
6. The respondent made admissions in respect of the drugs found in his home and stated that he had built up a drugs debt. He pleaded guilty to an amalgamed count concerning both locations with a total value of €1,251,000.

### **Personal Circumstances of the Respondent**

**7.** The respondent was employed at the relevant time. The court heard evidence that after the breakdown of his marriage, the respondent developed addiction issues to the point that he was spending up to €1,000 a week on cocaine.

**8.** Documentation before the sentencing court included a certificate from the Coolmine Project indicating the respondent's completion of their Cocaine Programme in August 2022 and a letter written by the respondent indicating his remorse for the offending.

**9.** The respondent has one previous conviction in 2001 for assault causing serious harm, 1997 for which five years' imprisonment with one year and eight months suspended was imposed.

### **Sentencing Remarks**

**10.** The sentencing judge considered the large quantity of drugs, the deleterious effect on society and that heroin is a particularly insidious and dangerous drug.

**11.** In terms of mitigation, the sentencing judge took account inter alia of the early guilty plea, admissions, remorse and the significant steps taken by him in rehabilitation.

**12.** In respect of the respondent's previous conviction, the sentencing judge accepted that same was a conviction of some antiquity.

**13.** A headline sentence of six and a half years' imprisonment was nominated which was reduced to four and a half years' imprisonment and the final two years were suspended.

**14.** The judge was satisfied that there were exceptional circumstances in the case to allow the court to depart from the presumptive minimum sentence applicable in respect of s. 15A offending. In the course of this review, counsel for the Director expressly indicated that this is not challenged.

### **Grounds of Application**

**15.** The Director relies on the following grounds of application:-

- a) *Failing to impose a sentence which reflected the severity of the offending in question, both in general and having regard to the sentencing regime attaching to same, the correct approach to the application of that regime and the value of the drugs in question (€1.25 million worth of heroin);*
  - b) *Nominating a headline sentence which was too low;*
  - c) *Failing to have appropriate regard to the significant aggravating factor of the accused's previous conviction for a very serious offence involving a relatively substantial custodial sentence;*
  - d) *Failing to impose a sentence which provided for either specific or general deterrence.*
- 2.** *The learned sentencing judge erred in law and in fact in placing undue emphasis on certain mitigating factors, in:-*
- a) *Overstating the value of the accused's plea of guilty in circumstances where the accused was caught red-handed'*
  - b) *Overstating the value of the accused's very limited admissions in circumstances where he was caught red handed;*
  - c) *Placing undue emphasis on the fact that 20 years had elapsed since the accused's conviction for a previous very serious offence;*

*d) Failing to note that while the accused had a drug issue he was able to nonetheless hold down significant employment"*

### **Submissions of the Applicant**

**16.** The essence of the Director's case is that a two-and-a-half-year effective sentence for possession of drugs in this quantity, imposed on a person who had previously served a significant sentence for another very serious offence is unduly lenient.

**17.** The Director identifies the primary aggravating factors in the case as the value of the drugs and the fact of the two separate quantities of drugs. While it is acknowledged that the respondent is lower down the ladder in terms of involvement in the offence, it is submitted that the high value of drugs is indicative of a high value of trust placed in him by persons at a higher standing in the enterprise.

**18.** In respect of the headline sentence, the Director relies on the following dicta from this Court in *People (DPP) v Sarsfield* [2019] IECA 260:-

*"Where the offence involves significant involvement in a very high-level drug offence, the headline for pre-mitigation sentence is likely to 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."*

**19.** The Director emphasises the need to impose a sentence which provides for general deterrence and it is submitted that the value of both the respondent's plea and his admissions were overstated in circumstances where he was caught red handed having regard in particular to the high quality dash cam footage showing him transferring the drugs.

### **Submissions of the Respondent**

**20.** The respondent acknowledges the high value of the drugs but emphasises that he was assisting the onward transmission of the drugs. This appears to be accepted by the Garda. Moreover, it is said that the evidence disclosed that the respondent did not benefit from his activities

**21.** The respondent distinguishes *Sarsfield* from the present case on the ground that the respondent in that case was found in possession of drugs to a combined value of €4.1 million and the garage was being used as a large-scale drugs distribution unit.

**22.** The respondent relies on the following portion of the *Sarsfield* judgment:-

*"Additional material and statistical information was put before the Court, including a review of sixty-seven sentence appeals involving offences contrary to s. 15A of the Misuse of Drugs Act 1977, as amended dealt with by this Court between 2014 and 2019. Paragraph 1 of that analysis referred to seventeen sentence appeals involving drugs valued in excess of €1m and it concluded that the average sentence was one of nine years' imprisonment with the average suspended sentence being two and a quarter years. Accordingly, the average time actually served was six and three-quarters years."*

**23.** In respect of the respondent's previous conviction, it is submitted that the sentencing judge placed the correct weight on a previous conviction for an offence which took place twenty-eight years ago when the respondent was some 20 years old.

**24.** In response to the Director's submission regarding specific and general deterrence it is submitted that the sentence does not fail to provide for specific or general deterrence as the respondent is currently serving a custodial sentence. It is submitted that there is specific and general deterrence and the extent of the specific and general deterrence is a matter within the sentencing judge's margin of discretion.

**25.** It is further submitted that there was no overstatement of the early guilty plea or the respondent's admissions and that the correct value was placed on both.

**26.** The respondent cites the well-rehearsed dicta of this Court's predecessor in *People (DPP) v Byrne* [1995] 1 ILRM 279 and submits that the sentencing judge followed the correct methodology in arriving at the sentence imposed by determining in the first instance what would be the appropriate sentence without reference to the presumptive minimum figure.

**27.** It is asserted that the Director has not established an error in principle which would warrant this Court's interference with the sentence imposed.

### **Discussion**

**28.** The principles for determining undue leniency are well established in the case law and neatly summarised in *People (DPP) v Stronge* [2011] IECCA 79:-

*"...to establish undue leniency, it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former.."*

**29.** We commence our consideration in the knowledge that the onus rests on the Director to establish that this sentence was unduly lenient so that the divergence between the sentence imposed and that which ought to have been imposed is an error of principle. It is only if that point is reached that this Court may justifiably intervene.

**30.** The Director emphasises not only the value of the drugs in issue but also the role of the respondent. While counsel on behalf of the respondent seeks to place him toward the bottom rung of the ladder in terms of responsibility, we find that we cannot agree with that assessment.

**31.** The value of the substance was very high indeed, moreover, we acknowledge that the substance itself is significant in that the substance is diamorphine. Added to that, we consider that while the respondent was said not to have any trappings of wealth or to have gained any benefit, the reality is that he did gain a benefit in that his involvement served to reduce a recognised drug debt.

**32.** The value and quantity of drugs seized is a highly significant factor when evaluating the gravity of the offence, although it is well recognised that it is not determinative. Obviously, the role of an offender plays a significant part in this assessment. Therefore, the usefulness of comparator cases is equivocal as while each offender's role may have some similar factors, other factors may well feature in that assessment which may lessen or increase gravity.

**33.** While material and statistical information before the Court in *Sarsfield* made reference to several appeals with drugs valued in excess of €1m where the average custodial portion of a sentence was six and three-quarters years provides some assistance in assessing gravity in terms of value, it is a very individual assessment in each case for the reasons specified above.

**34.** The factors of role, value and benefit obviously all feed into the assessment of gravity. The value is without doubt very high and needs no further elaboration. The role of the respondent was not a subservient one in our view. He has to have been thought of by others higher on the scale as a person of trust, he was moving the substance from place to place with the assistance of others and his debt was to be reduced.

**35.** Bearing in mind that the penalty extends from that of a suspended sentence to one of life imprisonment and the nature of the legislation underlining the serious nature of this type of offending, we find that the sentencing judge fell into error in nominating a headline sentence of 6 ½ years' imprisonment which represents a significant departure from the norm.

**36.** Accordingly, we find that the sentence was unduly lenient and so we will quash the sentence imposed and proceed to re-sentence de novo.

### **Re-Sentence**

**37.** We have already identified the aggravating factors and consider the appropriate pre-mitigation sentence to be that of 10 years' imprisonment. We note that his previous conviction does not serve to aggravate the offence but does lead to a loss in mitigation. However, there is something to be said for the fact that in the intervening period, the respondent has not re-offended but, moreover, he has led a highly productive life where he has cared for others, raised funds for charities, for his family and is held in high regard. There is absolutely no doubt that the respondent has much material in the way of mitigation. In fact, counsel for the respondent is accurate in describing some of that mitigation as unique. In consequence thereof, we will reduce the headline sentence to 6 years' imprisonment.

**38.** His efforts towards rehabilitation are to be commended, he has addressed his drug difficulty, he is doing well in custody and has been transferred to Shelton Abbey. The Prison Governor's report is a very favourable one. There is again little doubt in our minds that this is a man who has every intention of rehabilitating himself and so we will suspend the final two years of that sentence on the same terms and conditions as in the court below.