



**THE COURT OF APPEAL**

**[249CJA/13]**

The President  
Mahon J.  
Edwards J.

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

**APPLICANT**

**V.  
JOHN RYAN**

**RESPONDENT**

**JUDGMENT of the Court delivered by the President on the 19th day of January 2015**

1. This is an application by the Director of Public Prosecutions under s. 2 of the Criminal Justice Act 1993, for a review of the concurrent sentences of five years imprisonment imposed on the respondent at Limerick Circuit Criminal Court on the 24th of October, 2013 for one offence under s. 15A of the Misuse of Drugs Act 1977, as amended and three charges under s. 27(A)(1) of the Firearms Act, 1964 as amended.

2. On the 14th of May, 2011, the Gardaí went to an apartment complex in Limerick with a search warrant and they found the respondent in a van outside the premises. On searching the van, they found 1 kg of cannabis and a small quantity of cocaine in a sock. The respondent had the keys of an apartment in the complex in which the Gardaí discovered heroin with a market value of €625,000 and other drugs including cocaine, cannabis resin and MDMA with a total value of €918,000. They found drug dealing paraphernalia including a press, plastic bags to contain the drugs, a mixing area and a cat litter for use in disguising the odours that would be produced in the mixing. The gardaí also found two guns, ammunition, a balaclava and gloves.

3. The respondent got involved in dealing with drugs because of a gambling debt that mounted up to €10,000. His connection with drugs involved picking them up from particular points and dropping them off elsewhere. He initially had the stock of drugs at another address, but because of concerns about that location, he was told to find another place. He was given money to set himself up in the apartment and had been there for about eight months. Part of this task involved mixing operations and from time to time he bought bags for storing the drugs.

4. He accounted for the presence of the guns by describing to the gardaí how he was asked to pick up a package, but he did not know what was in it until he brought it back to the apartment. On discovering the contents, he phoned his contact and said he wanted nothing to do with it, but he was told that the guns were unable to work and he would get a phone call when someone else would pick them up.

5. In the course of his garda interviews, the respondent described his role as follows:-

"I'd say in the scheme of things, they couldn't have worked without me, not just me, a person in the role I'm in. It's probably the most dangerous part of the whole operation. But when it came to the finances, I was definitely the bottom end of the ladder."

6. The investigating garda officer confirmed in response to a question from the learned trial judge that she accepted the respondent's explanations as to being a store man, a mule and a courier and that he was at the lowest rung of the ladder.

7. The sentence hearing took place on the 9th October, 2013, and the learned sentencing judge put the matter for consideration until the 24th October, 2013, when he delivered judgment. The judge summarised the facts of the case. He noted that the respondent was born on the 21st November 1967 and had two children. Before his arrest, he had had a job which he had lost because of the offences. He had no previous convictions. He had a significant gambling problem and told the gardaí that he owed €10,000 and that at the relevant time, he needed to get his hands immediately on €5,000. The respondent had said that he had been trapped into being involved in a situation from which he could not escape. The judge took note of the other evidence including testimonials in support of the respondent.

8. The judge assessed the issues that were relevant to sentence. He noted that the prosecution had a strong case independent of the admissions made by the respondent. He took into account the respondent's gambling addiction. He found mitigating factors in the accused's plea of guilty, that he had been of material assistance, that he was not the owner of the contraband and merely its store man and courier. On that question, the judge noted the use of the word quartermaster by the prosecution, but he accepted that the accused was at the lowest rung on the ladder of the drug dealing business. Far from having the trappings of wealth, he was burdened by significant debt. He felt that the accused was trapped into being involved in the affair and it was a situation from which he could not escape. The respondent had no previous convictions and was remorseful for what he had done.

9. As against the mitigating elements, there were aggravating factors which were the amount of drugs involved, which was almost €1 million worth of illegal drugs. There was a variety of different drugs and more than half of them were heroin and there was also a large quantity of cocaine. Then there were the firearms. The judge found that the situation therefore was very serious either in respect of the drugs or the firearms and obviously it was even more serious that both were present. The respondent is not a drug user and his involvement therefore was considered to be more serious in the sense that he was not driven by addiction to a drug.

10. In the circumstances, the judge proceeded to impose a sentence of five years imprisonment on all counts to run from the 25th July, 2013. He held that it would be unjust to apply the minimum of ten years because of the plea of guilty, material assistance, absence of other convictions and because he was not the owner of the drugs, but only a store man or courier.

**The Director's Application**

11. The Director contended that the learned sentencing judge erred in principle and the sentences were unduly lenient having regard to the nature, circumstances and gravity thereof and in particular failed to identify an appropriate starting point at a sufficiently high level to reflect the nature of the offences including the accumulation of crimes and the aggravating factors; misdirected himself in law in treating the mandatory sentence of ten years as the maximum sentence or the starting point; failed to reflect the policy of the legislature and the principle of deterrents. In addition, the Director points to specific features of the case which it is contended

represent serious aggravating features that were not reflected in the sentences imposed. The Director submits that the respondent's role was that of a very active quartermaster for the organisation and points to the evidence given in the sentencing court that the apartment had been let to the respondent in August 2010. The landlord collected only from the respondent, and from no other person. Although the refusal by the respondent to name persons directing the operations is understandable, there was no suggestion that he was acting under duress from those persons in his initial involvement in the offending.

### **Submissions of the Respondent**

12. The respondent submits that the Director has to reach a high standard in order to demonstrate undue leniency and has failed to do so in that the Director has not demonstrated a clear error of principle and a substantial departure from the wide range of appropriate sentence option available. The sentence imposed is in accordance with the relevant mandatory minimum sentence for firearms offences. The sentences imposed were reasonably and rationally determined by the trial judge in the exercise of his proper discretion and they were just in all the circumstances. The judge carefully considered all the relevant evidence and issues, the circumstances of the case, the aggravating and mitigating features. He submits that the term "quartermaster" is not appropriate in circumstances where the garda evidence was that he was on the lowest rung of the ladder and was a store man and a mule.

13. The respondent cites the various mitigating factors in the case that he says amply justified the approach that was adopted by the trial judge.

### **Legal Submissions**

14. Each of the parties drew attention to relevant jurisprudence in relation to applications for review of sentence by the Director and on the statutory penalty regime for offences under s. 15A, the latter now comprising the subsections that were inserted by s. 33 of the Criminal Justice Act 2007. Some of the relevant jurisprudence is set out below. The parties found cases that they cited in favour of the argument for undue leniency and that for appropriateness of the sentence or permissible leniency.

### **Jurisdiction to Review: Section 2 of the Criminal Justice Act 1993**

15. Section 2 of the Criminal Justice Act 1993, in so far as relevant provides:-

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the 'sentencing court') on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

(3) On such an application, the Court may either –

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

16. In *Director of Public Prosecutions v. Byrne* [1995] 1 I.L.R.M. 279 at p. 287, the Court of Criminal Appeal stated four principles to be applied when a review of sentence under s. 2 of the Act of 1993 is brought:-

1. The onus of proof to show that the sentence was 'unduly lenient' rests on the Director of Public Prosecutions

2. Great weight should be afforded to the trial judge's reasons for imposing the sentence at issue. In particular, if the trial judge has kept a balance between the circumstances of the case and the relevant circumstances of the offender the decision should not be disturbed.

3. The test is not the converse of that when there is an appeal by an appellant; it is not a query as to whether a more severe sentence could have been imposed and upheld as being right in principle. Rather, it is an inquiry as to whether the sentence was 'unduly lenient'.

4. Nothing but a substantial departure from what would be regarded as the appropriate sentence would justify intervention.

17. The term 'undue leniency' was further explored in that court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356. Delivering the judgment of the court Barron J. said at p. 359:-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

.... The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependant upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

18. In *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390, Hardiman J set out the role of the appellate court in a matter of this nature. In considering the cases set out above, and reviewing similar statutory provisions in Australia and England, he held that an error of principle was required for an appellate court to interfere with a sentence given by a sentencing judge. It was not enough that the members of court might impose a different sentence, whether more lenient or severe, to that given at first instance. The sentencing judge must have been found to have made an error of principle.

## **Penalty for section 15A offence: Section 27 of the 1977 Act as amended**

19. Section 33 of the Criminal Justice Act, 2007 inserted new subsections (3A) to (3K) in Section 27 of the 1977 Act as follows:

“(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment—

(a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and

(b) at the court’s discretion, to a fine of such amount as the court considers appropriate.

(3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.

(3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3D)(a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.

(b) 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 that 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 that 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 concerned was previously convicted of a drug trafficking offence, and

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

(3E) Subsections (3C) and (3D) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3F) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this Act are to be construed as references to a first such offence.

(3F) Where a person (other than a person under the age of 18 years)—

(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or

(b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections,

the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3G) The power conferred by section 23 of the Criminal Justice Act 1951 to commute or remit a punishment shall not, in the case of a person serving a sentence imposed under subsection (3A) of this section, be exercised before the expiry of the minimum term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section less any reduction of that term under subsection (3H) of this section.

(3H) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct shall apply in the case of a person serving a sentence imposed under subsection (3A) of this section and the minimum term specified by the court under subsection (3C) of this section shall be reduced by the amount of any remission so earned by the person.

(3I) Any powers conferred by rules made under section 2 of the Criminal Justice Act 1960 to release temporarily a person serving a sentence of imprisonment shall not, in the case of a person serving a sentence imposed under subsection (3A) of this section, be exercised during the term for which the commutation or remission of his or her punishment is prohibited by subsection (3G) of this section unless for a grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by such reason.

(3J) In imposing a sentence on a person convicted of an offence under section 15A or 15B of this Act, a court—

(a) may inquire whether at the time of the commission of the offence the person was addicted to one or more controlled drugs, and

(b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section.

(3K) On reviewing a sentence listed under subsection (3J)(b) of this section, the court—

(a) may suspend the remainder of the sentence on any conditions it considers fit, and

(b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate.

20. Some relevant elements of the provisions may be summarised. The maximum penalty for an offence under section 15A or 15B is imprisonment for life. The subsection as inserted also provides for a minimum sentence, for which it expresses a policy justification that was not part of the provisions that these subsections replace. "In view of the harm caused to society by drug trafficking," where a person over 18 years is convicted of an offence under section 15A, the court must specify a minimum term of imprisonment of not less than 10 years. However, this is not absolute. If it is a first such offence and there are exceptional and specific circumstances relating to the offence or the convicted person which would make the minimum sentence unjust, the court may impose a lesser punishment. For this purpose the court may have regard to anything it considers appropriate, including—(i) whether the person pleaded guilty and if so the stage and circumstances in which the indication to do so was given; (ii) whether the person materially assisted in the investigation of the offence; (iii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence; (iv) the court can also take into account whether the convicted person has a previous conviction for drug trafficking but a section 15A offence on the person's record outrules the discretion to depart from the 10 year minimum—see subsection 3(H). The statutory power to commute or remit a punishment cannot be exercised before the expiry of the minimum term less any remission. Neither can temporary release be granted except for a grave humanitarian reason and then only for such time as is justified by the reason. If the person was addicted to drugs at the time and that was a substantial factor leading to the offence, the court may review the sentence after the expiration of half the specified term.

21. The subsection envisages that among the exceptional and specific circumstances are an early plea of guilty and material assistance in the investigation of the offence. The court is entitled but not obliged to take a plea of guilty into account, particularly if it is signalled early and if it has extra value. As to co-operation, that applies to material assistance in the investigation of the offence, that is, the crime of possession by the person of controlled drugs having excess value. Information that the person provided about others, for example, would arguably be considered to go outside the specific and instant offence and to refer to other crimes; for such assistance the court can if it wishes allow additional mitigation or invoke the clause on the public interest in preventing drug trafficking. The terms of the section imply that an early indication of guilt and relevant admissions as to the person's own role cannot be discounted as being unexceptional. The court may take them into account. It has to be a first such offence to give rise to the discretion to depart from the minimum sentence but it would be relevant that a convicted person did not have previous convictions of any kind. It is not sufficient that there are exceptional and specific circumstances in the case, whether relating to the crime or the guilty person, because the subsection requires that these features make it unjust to apply the minimum.

22. The penalty provisions cited above that are applicable in these cases are similar in all material respects to those that were considered in a series of appeals to the Court of Criminal Appeal so that jurisprudence is valuable as authoritative precedent. The present contents of s.27 (3A) and following subsections are replacements of provisions inserted by s.5 of the Criminal Justice Act, 1999. There is, however, one significant difference: now, the statutory purpose behind the mandatory sentence is expressly stated. The previous court's authoritative analyses of the earlier provisions make clear that the legislative purpose was indeed understood although it was then to be inferred. It may be therefore presumed that the explicit iteration of purpose in the present section was intended to reinforce the authority of the court's interpretation and to leave no room for uncertainty.

## The Authorities

23. S.15A requires both exceptional and specific circumstances about the offence or the perpetrator that make it unjust to impose the 10 year minimum sentence before the court is able to depart from that regime: *DPP v Botha* [2004] 2 IR 375. Even if it would be unjust to impose the 10-year minimum sentence, an offence under s.15A is a very serious one and the court must have regard to the minimum and maximum punishment – the latter is life imprisonment – when determining the appropriate sentence. The fact that there is a severe minimum albeit subject to some exceptions is an important guide to gravity: *Renald CCA* 23/11/2001. The quantity and value of the drugs are critically important in assessing gravity: *DPP v Long* [2009] 3 IR 486. This also follows from the specification of €13,000 in the section. People who enter into the trade for reward must expect severe treatment from the courts, in enforcing the statutory policy clearly laid down by the Oireachtas. *DPP v Duffy CCA* 21/12/2001; *DPP v Lernihán CCA* 2007 IECCA 21. Couriers play an essential role in the illegal drugs trade and if they willingly go into it for financial reward cannot expect less than severe treatment from the courts in accordance with the clear and unambiguous policy of the legislation: *DPP v Hogarty* – 21/12/2001 per Keane CJ. Nevertheless, there have been cases under s.15A where wholly suspended sentences were upheld by the CCA; it is clearly not wrong in principle to do so but that will only arise in rare cases. One such was *People v McGinty* [2007] 1 IR 633 in which Murray CJ said that a term of imprisonment is normally what should be imposed. "However, where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interests of justice".

24. This approach has been endorsed in many subsequent cases and the test may be stated thus: Are there special reasons of a substantial nature and wholly exceptional circumstances such that the imposition of a suspended sentence is correct and appropriate in the interests of justice? In *Jervis and Doyle* [2014] IECCA 14 the Court of Criminal Appeal said that the test laid down in *McGinty* "goes well beyond the ordinary requirement that there be exceptional and specific circumstances, as ordinarily understood. There must, in addition be "special reasons of a substantial nature" which must be, not only exceptional, but "wholly exceptional" something quite out of the ordinary. A totality of factors where the court combines all the mitigating factors is not sufficient."

25. In *Alexiou* [2003] 3 I.R. 513, the Court said that when the court held that the statutory proposed minimum would be unjust there should normally be a substantial term of imprisonment. It also said that considerations of vulnerability on the part of the guilty person were relevant matters to be taken into account but those "considerations by no means automatically override others, such as the impact on victims and the gravity of the offence. More often than not any alleged vulnerability will have little or only marginal effect on the sentence having regard to the gravity of the offence and the fact that the accused knowingly and freely committed an offence which entailed the prospect of a serious custodial sentence. They are factors which can arise in any case and the weight to be given them will vary."

26. *DPP v Botha* [2004] 2 IR 375 is an early and authoritative analysis of the previous form of the penalty provision which is similar to the present version. The application for leave to appeal a sentence of five years imprisonment imposed following a plea of guilty to a charge under s.15 (A) of the Misuse of Drugs Act, 1997 was rejected. The court commented thus on the policy of the legislature:

"The Oireachtas, as it is entitled to do, has indicated that this offence is to be considered a very grave one capable of attracting a sentence which might be regarded as harsh in certain circumstances and on certain individuals. It is important that sentencing courts should bear this in mind. Furthermore, consistency of sentencing is desirable in this as in other areas. It is true that the desideratum of consistency cannot be carried to the point of imposing a sentence which is actually unjust. We would however say that the circumstances in which a sentence less than the one imposed for this offence could be imposed must be indeed very exceptional."

27. The court concluded that:

"There was no error in principle in the sentencing and indeed a somewhat harsher sentence would not, in our opinion, have been erroneous in principle either. Every mitigating factor was given all the weight it could possibly bear and the learned trial judge was, if anything, generous to the applicant."

## Discussion

28. The learned sentencing judge was correct in characterising these offences as serious. As he said, the drugs considered on their own in relation to their quantity, nature and value represented a very large quantity of extremely harmful material. The firearms considered on their own also represented serious offences. The guns were capable of being discharged even if one of them would have been dangerous to the user. The accused had collected the package with the guns and then became aware of what he was storing in the apartment.

29. The respondent played an active role in regard to the drugs. He acquired the apartment with money that was given to him. He stored the drugs there and he distributed them. He mixed them in the apartment and he packed them. The paraphernalia of drug dealing were present in the apartment. When he was apprehended he was in a van in which there was a quantity of drugs. It is difficult in those circumstances to see how the respondent's role could be regarded as that of merely a courier or mule, notwithstanding the agreement that the judge's question elicited from the investigating garda. However, the point is not the characterisation by way of a word but what actually was the function discharged by the respondent in regard to the drugs. By comparison with many other cases, the respondent's involvement in this case is at a much more active level and represents an important part of the drug distribution business that was being operated by the organisation that employed the respondent. He was trusted with money, drugs and firearms.

30. The accused got involved in this business for money. Admittedly, he was the sufferer of a gambling addiction but that does not excuse his involvement in this criminality. There were indeed features of mitigation as the learned judge noted. There were first the matters that are expressly recognised as being legitimate considerations for the departure from the ten year minimum if justice permits namely, the plea of guilty and the material cooperation. The fact that the accused cooperated only in regard to his own offence of possession is a sufficient basis for holding that there was material assistance. There were in addition the other features of the case as the trial judge noted.

31. There were thus aggravating features and mitigating elements in the case. The question is whether the learned trial judge made an error in principle in his approach to the sentencing. In the first place, in the view of this Court, the trial judge was in error in assessing the role of the respondent as being on the bottom rung of the ladder. It is actually inconsistent with what the accused man himself said in his evidence as above quoted. He said that he was financially in that position but he did explain what his function was. It is true of course that in response to the trial judge's question, the investigating garda agreed with the suggestion that he was on the bottom rung of the ladder. However, this Court does not consider it decisive or even useful to rely on the nomenclature as to the position of a person who commits an offence under s. 15A. The important thing is what the person actually does in relation to the drugs.

32. 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. But somebody in the position of the respondent is altogether different. He practically established a distribution centre for drugs. He rented the apartment and stored a valuable and large quantity of drugs in it. He prepared the drugs for distribution and bought containers to put them in. He paid the rent on the apartment and was a regular visitor to it. He distributed drugs. He collected the package and brought it to the apartment and discovered that it had firearms in it. However, that set of functions is described, it represents serious involvement in drug trafficking. It is a serious error to consider that that is at the level of a mule or a courier only.

33. This Court is of the view that the learned sentencing judge made a serious error accordingly in his assessment of the gravity of the case and of the accused's role in the business of drug trafficking. There was undoubtedly room for sympathy in respect of the mitigating features. In view of the seriousness of the features mentioned above, it is arguable that the minimum sentence of ten years ought not to have been departed from and that a sentence above the minimum specified could have been considered. Nevertheless, this court, with some hesitation, will not interfere with the decision of the trial judge in that regard. However, the court is of the view that the sentences imposed in this case were unduly lenient to a significant degree and will now propose to consider appropriate sentences. For that purpose, the court will in accordance with the jurisprudence on this matter afford the parties the opportunity of putting forward relevant material for the purposes of sentencing at the present time.

Approved: Ryan P.