



## THE COURT OF APPEAL

**Sheehan J.  
Edwards J.  
Butler J.**

**136CJA/15**

**135CJA/15**

**The People at the Suit of the Director of Public Prosecutions**

**V**

**Warren Bale and Kaide Fowler**

**Applicant**

**Respondents**

### **JUDGMENT of the Court delivered on the 5th day of July 2016 by Mr. Justice Sheehan**

1. This is an application by the Director of Public Prosecutions for a review, on grounds of undue leniency, of the sentences imposed on Kaide Fowler and Warren Bale at the Dublin Circuit Criminal Court on the 7th May, 2015.

2. Each of the respondents had pleaded guilty on an earlier date to committing an offence contrary to s. 15A of the Misuse of Drugs Act 1977 on the 21st June, 2014, and they were each sentenced to five years imprisonment, which was wholly suspended on the usual terms, namely, that they keep the peace and be of good behaviour for a period of five years.

3. The applicant based her application in respect of each respondent on eight separate grounds of appeal, seven of which were common to each case. The seven grounds are as follows:-

1. The learned sentencing judge did not have sufficient regard to the fact that this was a significant professional operation run for purely commercial benefit.
2. The learned sentencing judge erred in law by overstating the significance between cannabis and other drugs and by attaching too much weight to the fact that the drug in question was cannabis.
3. The learned sentencing judge erred in law and in fact by failing to attach any weight to the aggravating factors in the case.
4. The learned sentencing judge erred in law and in fact in attaching undue weight to the mitigating factors in the case.
5. The learned sentencing judge erred in principle in the imposition of a lenient sentence and as such it was not in the public interest in all the circumstances.
6. The sentence imposed will not act as a deterrent to other persons or assist in the prevention of other crimes.
7. The learned trial judge erred in law and fact in failing to have appropriate regard to the presumptive mandatory minimum sentencing regimes applying to the offence

4. The additional ground of appeal in respect of Kaide Fowler was that the learned sentencing judge erred in law by failing to give sufficient weight to his 103 previous convictions.

5. Regarding Warren Bale, the additional ground of appeal stated that the learned sentencing judge erred in law and in fact by failing to differentiate between the co-accused when determining the appropriate sentence.

6. In order to consider these grounds, it is necessary to set out the background to the case, the personal circumstances of each respondent and the sentencing judge's remarks.

### **Background**

7. On the 21st June, 2014, Garda Christopher Sweeney, the investigating officer who was accompanied by other members of An Garda Síochána, searched premises at Meekstown Close, St. Margaret's Road, Finglas, Dublin 11. This premises was located in a residential estate set aside for members of the travelling community. The doors and windows of the property were boarded up with the only access to the property being by way of the rear door, which was padlocked. When Garda Sweeney entered the property, he observed four males in the process of cutting cannabis branches from a number of cannabis plants. Two of these men were the respondents: Warren Bale, who had a key to the premises, and Kaide Fowler, his nephew. Garda Sweeney told the court that three rooms in this property were being used to cultivate cannabis plants. He said that there were approximately 179 mature cannabis plants as well as 65 cannabis plants in the early stages of growth. Items associated with the production of cannabis, such as high intensity lighting, electric fans, water hoses, compost and soil, were also found during the search. Garda Sweeney told the court that the value of the mature plants was €143,200.

8. The other plants had a potential value of over €50,000 when fully matured.

9. At the time of his arrest, Warren Bale told the gardaí he was there to cut down the plants and that he was to receive 3 ozs. of cannabis in return. He was doing this for another person, whom he did not name. Kaide Fowler made a number of admissions to the

gardaí when arrested, but he said that he did not know who the owner of the cannabis was. He expected to receive between €200 and €300 for his work.

#### **The personal circumstances of the respondents**

10. Warren Bale was 43 years old at the time of sentence and originally from London. His family had moved to Dublin when he was 17, and he worked at attic conversions with his father. He is a married man with three children and has no previous convictions. In 2003 he was involved in a serious road accident, which resulted in a lot of back pain. He tried various treatments to relieve this pain, but these were unsuccessful, and he started to use cannabis as a painkiller, to which he subsequently became addicted. There was evidence before the court that, since his arrest, he had made significant efforts to overcome his addiction. There was also evidence that he was an active member of his community, had helped to train one of the youth football teams and was also involved in other community work. The court also received a number of testimonials from former employers which confirmed his excellent work record and his trustworthiness as an employee.

#### **The personal circumstances Kaide Fowler**

11. Kaide Fowler was 26 years of age at the time of sentence, and the court was told that he had 103 previous convictions. The last time he had committed an offence was the 22nd April, 2008, and he had not come to the attention of the gardaí since that time. In the meantime, he had married and was now living with his wife and three children in Finglas. At the time of the offence, he had a serious drug addiction problem. Between that time and the time of sentence, he had undertaken and committed to a drug treatment rehabilitation programme with Coolmine Therapeutic Community. There was evidence before the court that he had successfully completed phase 1 of that programme and further evidence that he was due to complete the second phase the following August. The court also received urine analysis reports showing that he was no longer using drugs as well as progress reports from his project worker. In addition, he had commenced work in a supportive environment. The court was also told about significant difficulties in his own background, which were a factor in his offending as a youth.

12. Garda Sweeney confirmed that all of Kaide Fowler's previous convictions had been dealt with in the Children Court and the District Court. These were broken down as follows: 73 road traffic offences, 14 public order offences, 6 for failing to appear in court, 3 matters under the Theft Act, 4 for criminal damage, 3 for theft and 2 relating to the possession of knives. A Ms. Cahill from the Coolmine Therapeutic Community gave evidence about Kaide Fowler's commitment to his rehabilitation and his successful completion of the first phase of the treatment programme.

#### **Sentencing remarks**

13. The following remarks were made by the sentencing judge prior to sentence:-

"On the date in question the gardaí arrived at the house in question and found four men picking cannabis. Two of the men were Warren Bale and Kaide Fowler. Now their involvement it seems was that of pickers. They are going to receive some consideration. It appears Warren Bale was going to get some cannabis to feed his habit and it seems Kaide Fowler was going to receive some monetary remuneration also to deal with his drug situation. Now the amount of drugs involved or the estimated amount to drugs involved were in the region of mature plants €143,000 and the immature plants were valued at €52,000. There were 65 of those and a 179 mature plants. Now obviously, it is obvious that the drug we are dealing with here is cannabis. It is probably the lesser of the three major type of drugs that are dealt with in this Court, namely heroin, coke, cannabis is usually the order of seriousness. Now the amount is serious enough, but it is probably, unfortunately for everybody, not the most serious of amounts that this Court deals with. Now they have pleaded guilty at a very early stage. They made useful admission even though I have to accept they were caught red-handed and they cooperated fully with the guards. Both have their own histories.

Warren Bale has a very good history. He is a hardworking man. He seems to be a gifted man with his hands full. It seems that all of his employers have thought well of him. There are very glowing references particularly by Mr. Tuffy who, I think, works for the Porterhouse Companies in Bray.

Now Kaide Fowler had a drugs habit. He has some record of conviction. I note that the last conviction is some time ago. I think about six or seven years ago. It seems that he has taken significant steps to deal with his drug habit. I am satisfied from the evidence of the witness that gave evidence on his behalf that he has more or less I think conquered that situation at this stage.

Now they both have significant mitigation in their favour. Warren Bale has excellent mitigation and Kaide Fowler has very good mitigation in that he has taken significant steps to reform and rehabilitate himself. I am satisfied that he has been largely successful. Now this is a s. 15A offence, there is a mandatory minimum sentence of ten years, I should say for this type of offence. Within the same legislation the Oireachtas has given this Court discretion to depart where I find there are suitable circumstances. I do find their early pleas and their cooperation and admissions allow me to depart from the mandatory minimum sentence of ten years. But how far should I depart in this case? Both are mature men that should have known better. They committed a serious misjudgement. I think their involvement is at the very lowest level, they were picking. . . . At this stage all the evidence I have is they were picking and harvesting the cannabis. They were useful to the people who own this cannabis and obviously there were some parties who were going to make a lot more than these two gentlemen out of this enterprise. I have to accept the jurisprudence that I am at large in dealing with this type of crime. Obviously I am aware of the jurisprudence. There are numerous cases that have support from the higher courts that have supported the right of this Court to impose a suspended sentence if it feels it is the appropriate case. Now I think to bring it within the appropriate case there has to be exceptional type cases. The question is do Warren Bale and Kaide Fowler fall into this category. Obviously cannabis is the less serious drug and I must take that into account. The amount involved is pretty serious but not the most serious. Warren Bale has very good mitigation in that he has led a very very good life and Kaide Fowler has taken very concrete steps to deal with his situation. I think I can accede to the applications of both counsel in this case. I think probably in this case a suspended sentence is the appropriate sentence taking into account all of the factors obviously particularly the mitigating factors and the nature of the drug involved.

I am going to impose on both gentlemen a sentence of five years imprisonment. I am going to suspend it on the following basis that both will be of good behaviour for a period of five years and secondly, they will enter into a bond in the sum of €100. Obviously I am very much aware that they are at the very lowest rung of the ladder and that certainly that has influenced me in the way I have dealt with this. It is an unusual thing for the court to do. I don't do it too often and probably will not do it again for a good while, but in this case I think it is the appropriate sentence."

14. The principles governing this Court's approach to undue leniency applications is now well settled.

15. This Court is cognisant of the decision in *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279, which is the recognised authority in relation to appeals pursuant to s. 2 (1) of the Criminal Justice Act 1993, and which states at p. 287 that:-

"Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

16. In its subsequent judgment in *The People (Director of Public Prosecutions) v. Derrick Stronge* [2011] IECCA 79, the Court of Criminal Appeal further identified the applicable principles in undue leniency appeals pursuant to s. 2 of the Criminal Justice Act 1993. The Court stated the following:-

"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are:-

(i) the onus of proving undue leniency is on the D.P.P.:

(ii) 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:

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate:

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal:

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise:

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.

The relevant cases are *The People (D.P.P.) v. Byrne* [1995] 1 ILRM 279, *The People (D.P.P.) v. McCormack* [2000] 4 I.R. 356 and *The People (D.P.P.) v. Redmond* [2001] 3 I.R. 390."

17. In applying these principles, we note from the sentencing remarks of the trial judge that he was fully aware of the seriousness of the offences he was dealing with, and equally aware of the jurisprudence in this area. No complaint is made by the applicant that he was not entitled to depart from the statutory minimum ten year sentence, and no complaint is made that the learned sentencing judge was wrong in measuring the seriousness of these offences by imposing a sentence of five years imprisonment. In the course of the oral hearing, it emerged that the primary complaint of the applicant was the fact that the sentences in each case had been wholly suspended.

18. At the end of the day, there is not a great deal between the parties. Counsel for the Director of Public Prosecutions, while acknowledging that each respondent had demonstrated significant mitigation, nevertheless maintained that the principle of public deterrence allied to public policy required that both respondents should spend time in prison. It should also be noted that counsel for the Director of Public Prosecutions was not saying that this was one of those cases where the fact of imprisonment was more important than its duration. The essential question then for us to ask ourselves is whether the sentences imposed represented a clear divergence from the norm. As this court has said in numerous cases including the *People (DPP) v. Sharon Flanagan* [2015] IECA 94, absent special reasons of a substantial nature and particularly exceptional circumstances that might justify the imposition of a wholly suspended and immediate and frequently substantial custodial sentence will be the norm for an offender who has committed an offence under s. 15A of the Misuse of Drugs Act 1977. Our inquiry must therefore be focused on whether special reasons of a substantial nature and particularly exceptional circumstances in fact existed so as to have justified the trial judge in not requiring either respondent to have to serve an immediate custodial sentence.

19. This is another example of what is known as a cannabis-grow-house case. The estimated street value of the cannabis was €143,000, and the court accepted that both offenders were at the lowest level of the operation, being described as harvesters or pickers, one of whom was due to receive 3 ozs. of cannabis, and the other at most €300, for his participation. While it is fair to categorise this as a serious commercial operation, the trial judge correctly described the amounts of cannabis as, unfortunately for everybody, "not the most serious amounts that this Court deals with".

20. The sentencing judge measured the seriousness of the offences as requiring a five year sentence. There is no dispute between the parties as to whether or not this was an appropriate starting point. It also, in our view, demonstrates clearly not only that the sentencing judge regarded the matter as serious but also that he was fully aware of the damage done to society by drug abuse, and that he was aware as well of the views of the Oireachtas regarding same as expressed in the relevant statutory provisions.

21. Furthermore, a five year suspended sentence is a serious sanction. At para. 22-08 in *Sentencing Law and Practice*, 2nd Ed., (2006, Dublin), Prof. O'Malley states that "[a]lthough a suspended sentence is commonly perceived as a light punishment or, indeed, as none at all, it is a genuinely punitive measure". He goes on to state that a suspended sentence can serve a number of penal goals including just deserts, rehabilitation and individual deterrence. In *R. v. Peterson* [1994] 2 N.Z.L.R. 533, the New Zealand Court of Appeal referred in particular to the rehabilitative capacity of the suspended sentence, in the sense that it encouraged reform while holding out the threat of imprisonment, and went on to point out that it was suitable for use in cases of moderately serious offending where a sufficient opportunity for reform was considered to exist and the need to deter others was not paramount.

22. When considering the imposition of a prison sentence, especially in the case of married men with families, we need to remind

ourselves of the inevitable adverse impact that imprisonment normally has on family life and the interest of children. Frequently, this is an unavoidable consequence of imprisonment, but it is important to remember nevertheless that the deprivation of liberty can have unintended additional adverse consequences.

23. In the case of Warren Bale, he is a married man with three children who has no previous convictions, and who pleaded guilty promptly. While his early plea of guilty and the fact that he has no previous convictions are key mitigating elements, they would not normally be sufficient on their own to justify a wholly suspended sentence in a s. 15A case. There are, however, other factors which distinguish Warren Bale's case. He became dependent on cannabis following a serious road traffic accident which resulted in frequent serious back pain. Various medications did not provide the relief he required, and he resorted to this type of illegal self-medication. In addition, it was clear from the documentary evidence before the court that Warren Bale had an excellent work history and had also made an exceptional contribution to his own community through his work with local groups and as a football coach. It could therefore be said that this offence was entirely out of character, and furthermore the sentencing judge found Warren Bale to have engaged in this offence at the lowest level for a minimal return. The court was also told that he had made significant efforts to deal with his addiction.

24. In considering the sentence imposed in Warren Bale's case, we also note that the sentence was imposed by an experienced sentencing judge, who remarked at the time that it would be a long while before he found himself again in a position to depart from immediate imprisonment for the kind of offence to which Warren Bale had pleaded guilty. The combination of mitigating factors relating to this respondent, in our view, provided special reasons of a substantial nature and particularly exceptional circumstances sufficient to have justified a wholly suspended sentence, and accordingly we dismiss the application to review Warren Bale's sentence.

25. The case of Kaide Fowler is somewhat different. An understandable and immediate response to his list of previous convictions is that Kaide Fowler is a person who is not entitled to any leniency. We are obliged, however, to look closely at his record and to situate it in what was clearly a turbulent youth, arising at least partly from serious family problems. We have been told that all of his previous convictions were for minor offences and were dealt with in the Children's Court and the District Court. He has no convictions since he was nineteen years old. In addition, he got married in the intervening period and now has a young family. Unfortunately, he developed an addiction to cannabis, which was a substantial factor in his commission of this offence. However, the most important mitigating factor in this case is undoubtedly his serious engagement with the Coolmine Therapeutic Community. His arrest for this offence led him with the help of others to confront his addiction, seek help and ultimately engage in a meaningful way with the programme offered to him. This has had a profound effect on him and was referred to by the sentencing judge. One of the documents before the sentencing judge indicated that Kaide Fowler was now assisting other people who were endeavouring to overcome their addiction.

26. One of the principle authorities relied upon by counsel on behalf of this respondent, and one which the sentencing judge was no doubt mindful of, is the judgment of the Court of Criminal Appeal delivered by Murray C.J. in *The People (Director of Public Prosecutions) v. Ingram McGinty* [2007] 1 I.R. 633. There are a sufficient number of similarities between this respondent and Ingram McGinty, such that it is relevant to point to the principal ones. Both men suffered from drug addiction at the time of commission of their respective offences, and between the time of arrest and sentence both had successfully engaged with the Coolmine Therapeutic Community. Both men had previous convictions, but neither of them had relevant previous convictions. Both men were fathers whose parenting had improved in the relevant period. Ingram McGinty was 29 years old at the time of sentence, and Kaide Fowler was 26. Both men had suffered as a result of particularly difficult family circumstances.

27. In the course of its judgment in *McGinty*, the Court of Criminal Appeal stated at pp. 642-643:-

"The dilemma faced by the trial judge was that the offence in question was undoubtedly grave enough to normally warrant a custodial sentence, as argued in this appeal by the prosecutor, while on the other hand any meaningful custodial sentence, by removing him from the rehabilitation programme in which he was at an advanced aftercare stage, ran the real risk of seriously damaging his prospects of rehabilitation. This was in the context that the trial judge had concluded, as he was entitled to do on the evidence before him, that there was a high probability that if he continued with the advanced stages of that programme his rehabilitation would be complete and successful. Complete rehabilitation of drug addicts is notoriously difficult while at the same time an important part of penal policy since if successful it reduces dramatically the risk of repeating offences and imprisonment of addicts. In carrying out this difficult balance as to where the public interests best lay, the trial judge clearly decided that its interests were best served by permitting the respondent to see through the rehabilitation to a probably successful conclusion. Such rehabilitation was more likely to ensure that the accused would be a law abiding citizen in the future than if his rehabilitation programme was terminated by a prison sentence."

28. The dilemma faced by the sentencing judge in this case was essentially the same as that faced by the judge in the *McGinty* case.

29. We are satisfied that the sentencing judge in this case correctly observed that the exceptional factors in Kaide Fowler's case were such as to allow him to impose a wholly suspended sentence. It was a finely balanced judgment and one which discloses no error in principle, and in particular no disregard for the views of the Oireachtas as expressed in the relevant statutory provisions. It is also important to note that this sentence was imposed by an experienced trial judge, to whom we are obliged to afford a margin of appreciation. It is not for us to decide what sentence we would have imposed in these circumstances, but rather, in light of the principles outlined above, whether the sentence imposed ought to be set aside on the grounds that it was unduly lenient. The onus in establishing that it should be rests on the Director of Public Prosecutions. We are not satisfied that the Director of Public Prosecutions has discharged the onus in the particular circumstances of this case. On the contrary, we are satisfied that there were special reasons of a substantial nature and particularly exceptional circumstances justifying a wholly suspended sentence. Accordingly, we refuse the application.