



THE COURT OF APPEAL

**Peart J.
Birmingham J.
Sheehan J.**

196CJA/15

IN THE MATTER SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

RORY KILKENNY

APPELLANT

RESPONDENT

JUDGMENT of the Court delivered on the 22nd day of February 2016 by

Mr. Justice Birmingham

1. This is an application brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993 seeking review of a sentence on grounds of undue leniency. The sentence sought to be reviewed was one of ten years imprisonment with the final six years suspended, subject to conditions, imposed on the respondent at Kilkenny Circuit Court on the 2nd July, 2015, in respect of an offence contrary to s. 15A of the Misuse of Drugs Act 1977, as amended. On that day, the respondent also received a concurrent sentence of four years imprisonment in respect of another s. 15A offence.

2. The background facts relating to the offending may be briefly stated as follows. On the 2nd May, 2012, gardaí searched two industrial units at Piltown, Co. Kilkenny. There, they found 2,504 cannabis plants and 43.54 kgs. of cannabis herb. The court was told that the total value of the drugs was €2,874,174. It is accepted that the figure given to the court was a notional figure of what the cannabis was expected to be worth on maturity and did not represent the actual value of the items on the day of the search. The industrial units had been converted in order to provide for the large scale cultivation of cannabis plants from growth through to vacuum packing of the finished product. The Court has been shown photographs of the scene, and there is no doubt whatever that this was not just a huge operation but a very sophisticated one too. At the scene were three Asians who were tending to the plants. They were arrested and brought before the courts. In their case, sentences of seven years imprisonment were imposed, but the final six years thereof were suspended on condition that they each leave the State immediately. The individuals involved spent something over a year in custody before they were dealt with by the courts and required to leave the State.

3. On the 11th November, 2013, Mr. Kilkenny was arrested and, during the course of the subsequent detention, he admitted signing a lease for the two industrial units using a false name and a false company name. The court was told that other evidence relating to his involvement included the purchase of a vacuum packer; the placing of an order for 500 vacuum bags signed for under a false name; and mobile phone top up slips found at the industrial units, which were traced and found to have been purchased at a particular location in Wexford, where CCTV showed that those buying the top up credit did so using a van registered to a non-existent owner but used by the respondent. Of particular significance is that a wrapped kilo of cannabis herb, which was found inside the unit, bore the respondent's fingerprints.

4. Of note is the fact that on the 4th June, 2014, another property linked to Mr. Kilkenny at Foulksmills, Wexford was searched, and there gardaí found cannabis and cocaine having a total value of €40,782. On this occasion the respondent was at the scene, and he made admissions.

5. While the Director made clear to the Court that the application for a review on grounds of undue leniency concerned only the Piltown, Co. Kilkenny matter, counsel for the respondent stated that the notice of application referred to both offences and that this was invalid. Further, counsel stated that because the notice of application was invalid, this Court had no jurisdiction to entertain the review application. He said that the reference to the Foulksmills matter was to draw attention to it because of its relevance to the question of whether there was genuine remorse and a desire to rehabilitate on the part of Mr. Kilkenny. While the Court accepts that the notice of application might have been drawn up differently so as to make clear exactly what was sought to be achieved, the Court is satisfied that the application for a review is properly before the Court and is one to be considered on its merits.

6. In terms of the accused's background and circumstances, he was 32 years of age at the time of sentence. He had in the past run a scaffolding business, but that failed. He was very involved in the care of his elderly and frail mother who is in very poor health, and who is heavily dependent on him. The Court was told that there was a history of depression, and indeed an earlier sentencing hearing had not proceeded because Mr. Kilkenny had taken an overdose of medication which necessitated a brief period of hospitalisation. He did not have any relevant previous convictions. Though, there were a number of road traffic matters, including one for no insurance, but these were not regarded as significant in the context of the grave matters before the court.

7. In terms of the extent to which Mr. Kilkenny cooperated, it is true that when detained following his arrest in relation to the Piltown matter, he did not seek to exercise his right to silence, but rather answered questions; though, his responses were not altogether complete or accurate. Indeed, at the sentence hearing his counsel stated that he gave explanations that were implausible to the point of absurdity. To give one example, he told the gardaí that he thought it was a tobacco smuggling operation.

8. In the course of her sentencing remarks on the 2nd July, 2015, the evidence having been heard on the 23rd June, 2015, and the matter being put back to allow the judge time to consider the case, the judge commented that the pleas entered were of assistance

and that there were admissions; though, in relation to the Piltown case, the admissions were not as full as they might have been. The sentencing judge referred to a number of testimonials that had been handed in, including ones from Mr. Kilkenny's wife and mother. The judge referred to the provisions of s. 15A and stated her view that there were exceptional and specific circumstances which justified the court imposing a sentence of less than ten years imprisonment. She explained that she regarded the plea of guilty as being of assistance, although it came relatively late in the day, and she was also conscious of the fact that the accused's mother was experiencing serious ill health and that he was very heavily involved in her care. It appears that it was these factors which the judge in the Circuit Court felt permitted a departure from the presumptive statutory minimum. Having done so, the judge referred again to the scale of the operation and its sophistication. She stated that she was accepting that Mr. Kilkenny was remorseful and that the remorse was genuine, and then proceeded to impose the sentence which is now the subject of the review application as well as the concurrent term of four years imprisonment in respect of the Wexford matter.

9. On behalf of the Director, it is said that the judge failed to assess the seriousness of the case in light of the maximum penalty. Counsel on her behalf has criticised the sentencing judge for starting with the presumptive minimum ten year sentence and then applying mitigating factors to reduce it. He says that the sentence of ten years imprisonment was not the appropriate starting point but that even if it was, there was no justification for suspending six years of the sentence. It is contended that the judge clearly attached too much weight to the guilty plea and the personal circumstances of the respondent.

10. In the Court's view, the Piltown matters was a very serious offence indeed. This was commercial cultivation and production on a grand scale. The operation in Piltown was by any standards a very large one, and the respondent's role was a central one. He, it was who had leased the premises, and it was he who was also involved in sourcing machinery. His role was at an entirely different level to the "gardeners", whose task it was to tend to the plants, but his role was also much greater than that of another person who was brought before the courts arising from the Piltown operation; this person was dealt with at a different sitting of the Circuit Court and by a different judge.

11. In terms of the background of Mr. Kilkenny and the extent of his remorse, the fact of his involvement in a further significant offence in June, 2014 is obviously disturbing. This is not a case where there was material cooperation apart from the entry of the plea, which was not made at the first available opportunity but nonetheless was of value.

12. The jurisprudence that applies to applications for a review of sentences on grounds of undue leniency is at this stage well established and can be traced right back to the very first such case, the case of *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279. The court will intervene only if there has been a substantial departure from what would have been the appropriate sentence.

13. While acknowledging the threshold to be met if there is to be an intervention, it is the view of the Court that the sentence was indeed unduly lenient. This was a case where a starting sentence in excess of ten years was required. Accordingly, the Court will impose a sentence of twelve years imprisonment, which it feels is the minimum required to meet the situation. However, there was a plea, and Mr. Kilkenny must have some credit for that as has already been indicated. A judge in the Circuit Court was persuaded that there was genuine remorse. This Court has some hesitation in that regard, particularly taking account of his involvement in the Wexford matter. Nonetheless, the Court will accept the conclusions of the judge in relation to the attitude of Mr. Kilkenny as of the date of the sentencing hearing. There is, therefore, scope for suspending a portion of the sentence.

14. This Court, of course, is required to sentence as of today's date and for that purpose has been provided with information as to how Mr. Kilkenny is faring since he went into custody. He has been a model prisoner and a positive influence within the prison environment, and that is to his credit. The Court is also conscious of the fact that having a sentence increased, and in this case increased substantially, must be particularly burdensome, and the Court will have regard to these matters in imposing a sentence that is less than what would have been the case had the Court been sentencing at first instance. Had the Court been sentencing for the first time, then it is very unlikely that a sentence of less than ten years imprisonment would have been imposed. However, the combination of the factors that now apply permit the court to suspend four years of the sentence it has indicated. In summary then, the Court will quash the sentence imposed in the Circuit Court and will substitute for it a sentence of twelve years imprisonment, but with the final four years suspended.