THE COURT OF APPEAL

Record No. 145/2016

Birmingham J.
Mahon J.
Edwards J.

Between/

The Director of Public Prosecutions

Appellant

- and–

Craig McManus

Respondent

JUDGMENT (ex tempore) of the Court delivered on the 26th day of January 2017 by Mr. Justice Mahon

1. This is an application pursuant to s. 2 of the Criminal Justice Act 1993 for a review of sentences imposed on the respondent at Dublin Circuit Criminal Court on the ground that they were unduly lenient.

2. On 2nd February 2016 the respondent pleaded guilty and was convicted of the unlawful possession of a controlled drug for the purpose of selling or otherwise supplying the drug to another, the market value of which drug amounted to €13,000 or more, contrary to s. 15A of the Misuse of Drugs Act 1977 (as inserted by s. 4 of the Criminal Justice Act 1999 and amended by s. 81 of the Criminal Justice Act 2006 and s. 33 of the Criminal Justice Act 2007) and contrary to the Misuse of Drugs Regulations 1988/1993 made under s. 5 of the Misuse of Drugs Act 1977. The respondent was sentenced on 10th May 2016 to a term of four years imprisonment with the final eighteen months of that term suspended for a period of eighteen months post release on certain conditions.

3. On 4th March 2016 the respondent pleaded guilty and was convicted of unlawful possession of a controlled drug for the purpose of selling or otherwise supplying the drug to another contrary to s. 15(1) and s. 27 of the Misuse of Drugs Act 1977 (as amended by s. 6 of the Misuse of Drugs Act 1984 and s. 33 of the Criminal Justice Act 2007) and the Misuse of Drugs Regulations 1988/1993 made under s. 5 of the Misuse of Drugs Act 1977. In respect of this offence, the respondent was sentenced on 10th May 2016 to a term of imprisonment of one year. That sentence was directed to be served concurrently with the sentence for the aforesaid s. 15A offence.

4. The s. 15A offence concerned the possession of a controlled drug, Diamorphine, with a market value of €101,537. The s. 15(1) offence also concerned the possession of Diamorphine, with a market value of €8,225.40.

5. The Diamorphine in the s. 15A offence was discovered hidden amongst the respondent's four year old sister's toys and in an air vent at his residence. The respondent signed a garda notebook admitting possession of the drugs at the time explaining that he had a drugs debt of €1,300. He pleaded guilty to the offence at an early stage in the proceedings. The second s. 15(1) offence was committed on 26th October 2014, some five months after the commission of the first offence. Whilst on patrol an unmarked garda vehicle observed the respondent walking close to his residence. On observing the gardaí the respondent ran into a driveway and threw a bag containing a weighing scales and a quantity of Diamorphine into a nearby skip. He also threw some plastic bags into a house hereby. All of the discarded material was recovered by the gardaí. The respondent made full admissions in relation thereto. He also pleaded guilty to this offence at an early stage in the proceedings.

6. The respondent had eighty one previous convictions, most of which related to road traffic matters. Two of the offences were for theft, and three related to drugs.

7. In respect of the s. 15A offence, the learned sentencing judge expressed her satisfaction that there existed exceptional and specific circumstances which permitted her to depart from the presumptive mandatory minimum sentencing regime, including, in particular, the plea of guilty and the material assistance offered to the gardai by the respondent. The respondent takes no issue in relation to this aspect of the sentence.

8. The learned sentencing judge referred to the various aggravating and mitigating factors. She particularly mentioned the admissions made at the scene of both crimes and the early pleas of guilty. She referred also to the respondent's young age and his drug addiction problem, and also to his drug debts and the fact that threats had been made in relation thereto, including threatening phone calls to the respondent's mother. The learned sentencing judge also specifically referred to the respondent's co-operation with the gardaí, a number of impressive testimonials and his efforts to rehabilitate himself since the commission of the offences.

9. Having decided, in relation to the s. 15A offence, that it was appropriate to impose a sentence of less than ten years, the learned sentencing judge considered six years to be the appropriate headline sentence. She then proceeded to discount that headline sentence to provide for mitigation, arriving at a four year prison term. She then further decided to suspend the final eighteen months of that term, giving as her main reasons for doing so the respondent's young age, the impressive testimonials received by the Court, and his attempt to rehabilitate himself. She also took account of the fact that the probation service had indicated that his risk of re-offending was moderate. In relation to the s. 15 offence the learned sentencing judge halved what she considered the appropriate headline sentence, two years. She exercised her discretion not to direct the one year sentence be served consecutively to the s. 15A sentence in spite of the fact that this second offence was committed some five months after the commission of that more serious offence.

10. The appellant's criticisms of the sentences are based on the following:-

(i) undue weight was attached to the mitigating factors;

(ii) inadequate consideration was given to the aggravating factors;

(iii) there was a failure to reflect the principles of specific and / or general deterrence;

(iv) the sentences were individually and commutatively unduly lenient

11. In particular it is contended on behalf of the appellant that a four year imprisonment sentence with the final eighteen months for an offence involving in excess of a €100,000 consignment of Diamorphine amounts to a significant divergence from the norm, even though the respondent was a person without previous convictions, but particularly so because of those previous convictions, their number and their relevance. A particular focus of the appellant's criticism of the sentence under review is the cumulative sentence for two offences concerning approximately €110,000 worth of heroin having regard to his significant level of previous offending. It is contended that the effective net custodial term of two and a half years for both offences is unduly lenient.

12. It is also contended that the decision not to impose the mandatory minimum sentence was, while not challenged by the appellant, itself an act of leniency and that there was no justification, having done so, to set a headline sentence so significantly below the mandatory minimum term, and furthermore, having done so then to discount that figure by approximately over 55%.

13. The jurisdiction invoked by the respondent in this case is that conferred by s. 2 of the Criminal Justice Act 1993. Insofar as relevant, the section provides:-

> *"2(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:-*
>
> > *(c) 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*
> >
> > *(d) refuse the application."*

14. In *DPP v. Byrne* [1995] 1 ILRM 279 it is clearly stated that the onus of proof rests on the respondent to show that the sentence called into question was *"unduly lenient"*.

15. In *DPP v. McCormack* [2000] 4 I.R. 356, Barron J. stated, 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.*
>
> *Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. 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 dependent 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."*

16. In this case the learned sentencing judge acknowledged that her decision to suspend the final eighteen months of the four year term was 'a large discount'. She stated:-

> *"Now, I have given a large discount in respect of the custodial sentence because of his young age, because of the impressive testimonials which has been presented to this court, because he has attempted to rehabilitate himself and the probation service's found that because of the support he has from his family, they have regarded him as being at moderate risk of re-offending".*

17. Certainly the testimonials were impressive, particularly the lengthy letter written by the respondent's mother. Equally certainly, they warranted some discounting of the appropriate headline sentence as indeed did the other mitigating factors, not least the guilty plea and co-operation with the gardaí.

18. The leniency of the sentences imposed including the exercise of judicial discretion not to impose consecutive sentencing for essentially repeat offending within a relatively short time period is without doubt. What the Court must decide however is, as was emphasised in *McCormack*, is the leniency so great a divergence from the norm as to amount to an error of principle?

19. In the Court's view a six year headline sentence for the s. 15A offence was lenient, particularly having regard to the previous convictions, but not unduly so. It was within the discretion available to the learned sentencing judge. However, having chosen six years as the correct headline sentence the decision to further discount that figure by over 50% to arrive at a net custodial term of two and a half years is unduly lenient.

20. The s. 15 offence, while itself less serious than the first offence, must be considered in the particular circumstances in which it was committed and especially the fact that it was committed just five months after the first offence. Both offences involved large quantities of heroin and demonstrated a dedicated and persistent effort to engage in drug dealing on a commercial basis. In that situation, and in the absence of exceptional circumstances none of which are present here, the imposition of a consecutive sentence for the s. 15 offence is required. The sentence of one year imposed in respect of the s. 15 offence was also lenient, but nevertheless one within the discretion of the learned sentencing judge but, as indicated, the decision not to direct that it be served consecutively to the s. 15A sentence does constitute an error of principle.

21. The Court will now quash the sentence imposed in the Circuit Criminal Court, and sentence the respondent afresh as of today. In so doing the Court has considered the documentation available to the learned sentencing judge in addition to that submitted this morning.

22. The sentence for the s. 15A offence (being the first offence) will be six years with the final two years suspended for eighteen months post release on the same conditions as those imposed by the Circuit Criminal Court. The sentence for the s. 15 offence (being the second offence) remains at one of twelve months imprisonment. That sentence is consecutive to the sentence for the first offence and will commence on the lawful termination of same.

23. The Court is conscious of the fact that, the in effect, doubling of the respondent's custodial term will come as a bitter

disappointment to him some eight months after being initially sentenced and for this reason it has imposed lower sentences than it would have considered appropriate if sentencing at first instance.