



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.**

122CJA /15

123CJA/15

In the matter of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

V

Edward Collins and James Mallon

Appellant

Respondents

Judgment of the Court delivered on the 15th day of March 2016, by

Mr. Justice Sheehan

1. This is an application by the Director of Public Prosecutions for a review of the suspended sentences of imprisonment imposed on both respondents Edward Collins and James Mallon pursuant to s. 2 of the Criminal Justice Act 1993.

2. The sentences were imposed at Cork Circuit Criminal Court on the 23rd April, 2015, for offences contrary to s. 15A of the Misuse of Drugs Act 1977, as amended, which had been committed by the respondents on the 5th June, 2014, at Blackpool Shopping Centre, Cork. Each of the respondents had pleaded guilty to possession of cocaine with an estimated value of €35,000 contrary to s. 15A and were sentenced to five and a half years imprisonment suspended for that period of time, provided that each of them remain under the supervision of the Probation Service for a period of two years.

3. In the course of written submissions counsel for the applicant advanced the following grounds in support of the Director's application in respect of both respondents:-

1. The learned sentencing judge placed the s. 15A offence at the lower end of the scale notwithstanding that the value of the cocaine was approximately €35,000 and that each respondent was actively engaged in transporting it as opposed to storing it.

2. The learned sentencing judge erred in law and in fact in failing initially to place the offences on the spectrum of seriousness of offences of this kind and in failing to have appropriate regard to the range of sentences appropriate to such offences in his approach to sentencing.

3. The learned sentencing judge erred in law by failing to give sufficient weight to the previous convictions of the respondent.

4. The learned sentencing judge erred in law and in fact in failing to have appropriate regard to the presumptive mandatory minimum sentencing regime applying to the offence.

5. The learned sentencing judge erred in law and in fact in attaching undue weight to the mitigating factors in the case.

6. The learned trial judge erred in principle in the imposition of such a lenient sentence as such was not in the public interest in all the circumstances and the sentence imposed would clearly not act as a deterrent to other persons and the prevention of further crimes.

7. The learned sentencing judge erred in principle in imposing an unduly lenient sentence in all the circumstances.

4. The background to these offences is that both respondents were arrested following a garda surveillance operation which observed James Mallon handing over a package of cocaine to Edward Collins at Blackpool Shopping Centre, Cork. James Mallon had brought the package from Limerick to Cork in his own car and the evidence was that he was to have a €450 drug debt cancelled for doing this. The garda evidence was that neither of the respondents knew each other prior to the commission of this offence and that they had both cooperated and been of material assistance. Mr. Collins was described as a pawn of a criminal organisation who was due to receive very little money for his involvement. He was also described as being a vulnerable person.

5. The personal circumstances of James Mallon are that he was 25 years old at the time of the offence and in stable employment notwithstanding the fact that he had developed in his early teenage years a serious addiction to cannabis which resulted in his own family requiring him to leave the family home. Since being arrested for the present offence he has undergone a rehabilitation programme with the Saoirse Drug Treatment Programme in Limerick. He engaged positively with this programme. He also received significant assistance from his employer who had assisted in his recovery. This recovery was so significant that at the time of sentence he had been allowed to return to his family home. The Probation Service considered him to be at low risk of re-offending. He has a small number of previous convictions for possession of drugs for his own use contrary to s. 3 of the Misuse of Drugs Act 1977, as well as two convictions for public order offences. He was deemed suitable for probation. Edward Collins at the time of sentence was a 21 year old single man living at home who had a serious alcohol problem. He has a number of previous convictions under the

Road Traffic Acts, as well as a conviction under the Theft Act, one conviction under the Firearms and Offensive Weapons Act and another for a public order offence. He was described by the gardaí as a not being well known to them. Since his arrest in respect of the present offence he has undergone a residential treatment programme at Bruree, Co. Limerick. He had previously referred himself to another treatment centre as a result of a drug addiction that he had when he was younger.

6. In opposing the application by the Director of Public Prosecutions counsel on behalf of Edward Collins submitted that the sentence imposed by the learned judge reflected both the gravity of the offence and the circumstances of the offender. The judgement delivered was carefully considered and the sentence imposed was fair, measured and in accordance with the principles of sentencing. The sentence remains in place for five and a half years with the respondent under the supervision of the Probation Service for two years. He has been given every incentive to rehabilitate and is continuing to do so. The learned judge was mindful of all the circumstances and counsel submitted that because of them the sentence while lenient was not unduly lenient. Counsel for Mr. Collins also emphasised the garda evidence to the effect that his client was a vulnerable young man.

7. Counsel on behalf of James Mallon submitted that the learned sentencing judge had acted correctly, appropriately and in accordance with the established principles of sentencing in his approach to structuring the sentence imposed and also in imposing a sentence which marked both the gravity of the offence and the circumstances of the offender. Counsel submitted that the sentence imposed was proportionate and should not be displaced adding that while the sentence imposed might be seen as lenient it was not unduly so.

8. This Court is cognisant of the decision in *People at the Suit of the Director of Public Prosecutions v. Byrne* [1995] 1 ILRM, which is the recognised authority in relation to appeals pursuant to s. 2 of the Criminal Justice Act 1993. The court stated at p. 287 of its judgment:-

"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."

9. In the *People at the Suit of the Director of Public Prosecutions v. Derek Stronge* [2011] 5 JIC 2301, 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:

"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."

10. In considering how these principles apply in the present case, this Court has considered the transcript of the sentence hearing and concludes that it is clear that the trial judge approached a difficult balancing exercise in a careful manner.

11. In the course of his sentencing remarks, the learned judge acknowledged the seriousness of the offending behaviour and also the legislative intent in light of the presumptive minimum ten year sentence. However we are of the view in light of the serious adverse consequences of cocaine abuse for society that the personal circumstances of both respondents in this case were not of such an exceptional nature as to justify a wholly suspended sentence. We are of the view that the learned trial judge erred by not requiring a period of imprisonment to be served by both respondents and in our view the minimum sentence to be imposed bearing in mind the particular circumstances of this case would have been a sentence of two years imprisonment. The sentence imposed represents a substantial departure from the appropriate sentence in this case and accordingly we find that it is unduly lenient.

12. As a result of this finding the court is obliged to proceed to a fresh sentence hearing.

13. The court has received up to date probation reports on each of the respondents. The court notes that James Mallon has become a father since the matter was last before us and further that he is taking seriously his responsibilities as a parent. He has continued to make great progress, performs his work well and more importantly all his urine samples are clean. He has cooperated with the

Probation Service.

14. Mr. Collins who is now a 23 year old single man has also continued to make progress. The probation report in respect of him concludes as follows:-

"As highlighted in this report, Mr. Collins overall response to the suspended sentence has been positive and it is considered that he is making efforts to address the fact which ultimately brought him to the court's attention. Following the commission of the offence Mr. Collins entered a residential drug treatment programme to address his drug and alcohol abuse. He reports that he has distanced himself from all criminal associations. He is also trying to address his training and employment needs but his ability to do this has been compromised by a deterioration in his mental health. During interviews with the Probation Service Mr. Collins impresses as a young man who is keen to avoid any return to offending behaviour. As highlighted he has not come to the negative attention of the gardaí since the offence was committed.

Use of a risk assessment tool indicates that there is a moderate risk of re-offending in the coming twelve months. Should Mr. Collins continue with his current efforts this risk can be reduced.

In consideration of the above and in particular his overall compliance with supervision to date, I respectfully propose that Mr. Collins be afforded the opportunity to remain under probation supervision."

15. Although we have already indicated that this was a case which in our view merited a sentence which incorporated a custodial element it is now almost two years since both respondents commenced life changing rehabilitation programmes. It is to their great credit that they have continued to make progress and Mr. Mallon not only continues at work but remains drug free and has also become a responsible father. In the case of Mr. Collins he has not come under any unfavourable notice by the gardaí and he too continues to make progress. In view of these very special circumstances the court considers that there is little to be gained at this stage by requiring either of the respondents to serve a period in prison. However, the court does require both respondents to perform 240 hours of community service by way of reparation for their wrongdoing. The court notes that each of them are deemed suitable for community service and that each of them now gives an undertaking to this Court to perform 240 hours of community service within a period of eighteen months from today's date. Accordingly the court will now re-impose the original suspended sentence of five and a half years imprisonment with the additional term namely that each respondent undertake to complete 240 hours of community service.