

THE HIGH COURT

[2013 No. 320 JR]

BETWEEN

DAVID KAVANAGH

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered the 5th September, 2013.

1. This is an application for judicial review seeking an order of certiorari quashing the decision of the respondent made in or around April, 2013, not to consider the applicant for temporary release from the training unit of Mountjoy Prison.
2. Leave was granted on the 29th April, 2013. The matter was deemed urgent and was heard on the 22nd May, 2013.
3. It transpired at the hearing that the applicant was due for release imminently, but despite this it was agreed by both parties that the issue was not moot. The Court was not in a position to immediately deliver judgment and judgment was reserved.
4. The issue in the case is one of statutory interpretation of s. 27 of the Misuse of Drugs Act 1977 ("the Act of 1977") as amended.
5. Section 27 of the Act of 1977 was amended by s. 5 of the Criminal Justice Act 1999 and subsequently by s. 33 of the Criminal Justice Act 2007.
6. The amendment inserted by the Criminal Justice Act 2007 allocated different subsection numbers to similar provisions.
7. For the purposes of this application the court will designate the sections in accordance with the amendment inserted by s. 5 of the Criminal Justice Act 1999.

Facts relied upon to support the application

8. The applicant was found guilty by a jury in the Circuit Criminal Court on the 29th February, 2008, on three counts of possession of cannabis contrary to the Act of 1977; one count contrary to s. 15, one count contrary to s. 3 and one count contrary to s. 15 (a). The value of the cannabis was alleged to have been €676,825. The applicant was sentenced by the Court on the 4th April, 2008.
9. The sentencing remarks of the learned trial judge were as follows:-

"The Court in this matter is dealing with three counts. Count No.1, Section 15. Section, count No.2, Section 3 and count No.3, under Section 15A.

And the amount of, in monetary terms of the drug, was €676,825 and the type of drug was cannabis resin.

And Mr. Kavanagh was found guilty in this court after a trial on counts 1, 2 and 3. And the court has heard of the family background and the educational and employment record of Mr. Kavanagh. The Court has also been advised that Mr. Kavanagh was in fear of certain persons who requested him to provide transportation for what he thought were runners, and not a controlled drug.

The aggravating factors, it seems to the Court, are the very serious nature of these charges, and the Court intends to deal with the charges by way of dealing with the count of Section 15A, and taking the Section 15 and Section 3 into consideration. And the aggravating matters, it seems to the Court, are the serious nature of these charges, and secondly, the amount of the drugs involved.

The mitigating factors, it seems to the Court, are the fact that Mr. Kavanagh has no previous convictions. Secondly, he hadn't come to Garda attention before this. Thirdly, he didn't seek to prolong the trial, and he agreed to dispense with witnesses during the course of the trial. And fourthly, the Court is taking into account his previous good character.

A person guilty of an offence under Section 15A is liable, on indictment, to a maximum sentence of imprisonment for life, or such shorter period, as the Court may, subject to Section 3B and Section 3C, determine, and a fine. And Section 3B provides that where a person is convicted of an offence under Section 15A, the Court shall, in imposing sentence, specify as the minimum term of imprisonment to be served by that person, a period of not less than 10 years imprisonment. This shall not apply where the Court is satisfied that there are exceptional and specific circumstances relating to the offence, or to the person convicted of the offence, which would make a sentence of not less than 10 years unjust, in all the circumstances. And the legislation particularly provides in regard to matters that the Court may take into account, and these include whether a person pleaded guilty at the stage at which he intended to plead guilty, and the circumstances in which the indication was given; and whether the person materially assisted in the investigation of the offence. The Court also has discretion to take other matters into consideration.

And the Court, in dealing with this matter, has to mark the seriousness of the offence, and also take into account the personal circumstances of the accused. And the Court in so doing will impose a prison sentence of 10 years imprisonment, with three years suspended for three years. And the reason why the Court is suspending three years of the sentence is because he has no previous convictions, and was of previous good character. And that sentence should be backdated to the time that he went into custody following his conviction, after trial, in this court".

10. The Committal Order signed by the learned trial judge ordered:-

"That the applicant be imprisoned for the period of 10 years backdated to the 29th day of February, 2008 on count 1 with the final three years of said sentence suspended on the accused's own bond to be entered before the Prison Governor in the sum of €150 the conditions being that he will keep the peace and be of good behaviour towards all the people of Ireland for a period of three years from the date of his release and further that he will come up if called on to do so at any time within the said period of three years to serve the balance of the sentence imposed."

11. By letter of the 8th April, 2013, the applicant's solicitors wrote to the governor of the training unit and by separate letter of the 9th to the Irish Prison Service, seeking reasons why the applicant had not been considered for temporary release.

12. The service replied on the 12th April, 2013, stating:-

"Under the Criminal Justice Act 1999 Section 5, subsection 3, the Minister for Justice and Equality is prohibited from granting temporary release except in very specific circumstances as outlined in subsection (3F) to those sanctioned under Section 15A legislation serving 10 years imprisonment, including those sanctioned to 10 years imprisonment with a portion suspended. As I understand it David Kavanagh is serving 10 years imprisonment, last 3 years suspended."

13. It would seem the Minister held the view he was restrained by s. 2(3)(b) of the Criminal Justice Act 1960, as inserted by s. 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003, which states that:-

"The Minister shall not give a direction under this section in respect of a person-

(b) where the release of that person from prison is prohibited by or under any enactment whether passed before or after the passing of this Act."

14. The relevant subsections of s. 27 of the Act of 1977 are (3A), (3B), (3C), (3D) and (3F) which are set out hereunder:-

"(3A) Every person guilty of an offence under section 15A shall be liable, on conviction on indictment-

(a) to imprisonment for life or such shorter period as the court may, subject to subsections (3B) and (3C) of this section, determine, and

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

(3B) Where a person (other than a child or young person) is convicted of an offence under section 15A, the court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than 10 years imprisonment.

(3C) Subsection (3B) 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 this purpose the court may have regard to any matters it considers appropriate, including-

(a) whether that person pleaded guilty to the offence and, if so,

(i) the stage at which he indicated the intention to plead guilty, and

(ii) the circumstances in which the indication was given, and

(b) whether that person materially assisted in the investigation of the offence.

(3D) 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 period specified by the court under subsection (3B) of this section less any reduction of that period under subsection (3E) of this section..

(3F) 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 period for which the commutation or remission of his punishment is prohibited by subsection (3D) of this section unless for grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by that reason".

15. As this is a penal statute it must be construed strictly, as set out by Kearns J in *DPP v Moorehouse* [2005] IESC 52, [2006] 1 I.R. 421 at p. 443:-

"It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and the further requirement to interpret strictly words setting out the elements of an offence [Maxwell on *The Interpretation of Statutes*, (12th ed.) at pp. 239 and 240].

If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication".

16. The wording of the relevant sections cannot be given a purposive interpretation, inasmuch as that would assist the court. It must be construed strictly, and if ambiguity arises, it must be resolved in favour of the applicant.

17. Subsection (3F), the section dealing with temporary release, should be construed with subs. (3D), as subs. (3F) states that "any powers...to release...shall not...be exercised during the period for which the commutation or remission of his punishment is prohibited by subsection (3D) of this section".

18. The learned trial judge did not specify whether she was imposing the sentence under (3B) or (3C).

19. The issue is whether the words "the minimum period of imprisonment to be served", include a suspended portion of a sentence.

20. The suspended sentence, although part of criminal sentencing jurisprudence for some time, was not given statutory effect until the enactment of s. 99 of the Criminal Justice Act 2006 ("the Act of 2006"). Section 99(1) states that:-

"Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order."

21. Subsection (10) and (17) of s. 99 of the Act of 2006 provide for the procedure when a person whose sentence has been suspended commits another offence during the period of suspension or where he has breached another of the conditions of his bond.

22. The revocation of the order suspending the sentence is not automatic but rather is subject to the courts consideration of the circumstances of the case. The applicant cannot be required to serve the 3 suspended years of his sentence without a further court order. The original sentence is only required to be served after revocation pursuant to s. 99 of the Act of 2006.

23. The plain and ordinary meaning of a sentence of 10 years imprisonment with the final 3 years suspended is that there are 7 years to be served.

24. In the instant case, where the learned trial judge did not specify whether the sentence was imposed under either subs. (3B) or subs. (3C), a valid interpretation would be that the sentence was imposed pursuant to subs. (3C) and thus the Minister was unfettered in his discretion as to temporary release, subject always to the provisions of the Criminal Justice (Temporary Release of Prisoners) Act 2003.

25. The applicant is thus entitled to an order in his favour.