



THE COURT OF APPEAL

Record No. 150CJA/2017

Birmingham J.  
Mahon J.  
Edwards J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

PATRICK FARRELLY

RESPONDENT

**JUDGMENT (ex tempore) of the Court delivered on the 9th day of March 2018 by Mr. Justice Mahon**

1. The respondent pleaded guilty and was convicted at Cork Circuit Criminal Court in February 2017 of one count of the unlawful possession of controlled drugs with a value of €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 as amended by s. 81 of the Criminal Justice Act 2006) and s. 27 of the Misuse of Drugs Act 1977 (as amended by s. 5 of the Criminal Justice Act 1999 and by s. 33 of the Criminal Justice Act 2007). The value of the drugs amounted to €59,496 in respect of cannabis, and €7,024.50 in respect of amphetamines. The total value was €66,700.00. The respondent was sentenced on the 17th May 2017 to three and a half years imprisonment (to date from the 25th November 2016) with the final eighteen months suspended on certain conditions for a period of two years post release.

2. The appellant seeks a review of that sentence pursuant to s. 2 of the Criminal Justice Act 1993 on the ground that it was unduly lenient.

3. The respondent also pleaded guilty and was convicted at the same court on one count of possession of a controlled drug contrary to s. 3 of the Misuse of Drugs Act 1977 (as amended), one count of possession of a controlled drug with intent to unlawfully supply to another contrary to s. 15 of the Misuse of Drugs Act 1977 (as amended). These offences pre-dated the s. 15A offence (detailed in paragraph 1) by approximately five months. The value of the drugs was €3,692. In respect of these offences, the respondent was sentenced to twelve months imprisonment, to be served concurrently with the net two year prison sentence imposed in respect of the s. 15A offence. The imposition of this twelve months sentence is not the subject of this application, nor has it been appealed on the grounds of severity by the respondent.

4. The instant offence occurred on the 26th November 2016. Gardaí conducted a search at 8, Market Place, Stag Park, Mitchelstown, County Cork being the home of the respondent. The respondent was not in the premises at the time. They located the drugs in question, and the respondent was arrested the following morning in Fermoy whereupon he made full admissions in relation to the sale and supply of the drugs. The respondent told the gardaí he owed a large drugs debt in the region of €120,000, and that he was holding the drugs for another party.

5. The respondent has fifty seven previous convictions for a wide range of offences, including burglary, theft, public order and road traffic matters. He has nine previous drugs convictions including one for an offence committed on the 11th May 2016 in respect of which he received a three month term of imprisonment on the 14th March 2017. All these drugs offences were dealt with at District Court level. The respondent was well known to gardaí in the Fermoy area in relation to drugs issues. He himself was a drug and alcohol addict and was unemployed on the date of these offences. He has a supportive partner and they have one child. He is twenty six years of age.

6. Section 2 of the Criminal Justice Act 1993 provides as follows:

*"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 Appeal to review the sentence.*

*(2) An application under this section shall be made, on notice given to the convicted person within 28 days from the day on which the sentence was imposed.*

*(3) On such an application, the Court may either:-*

*(a) 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*

*(b) refuse the application."*

7. The grounds on which this application is brought are that the learned sentencing judge failed to have appropriate regard to the following factors when sentencing the respondent:-

(i) The gravity and circumstances of the offences for which the respondent pleaded guilty;

(ii) the value and nature of the drugs;

(iii) the fact that the s. 15A offence was committed a few short months after the s. 15 offences and therefore represents a serious escalation in offending behaviour;

(iv) the fact that the respondent had approximately fifty seven previous convictions nine of which were for s. 3 Misuse of Drugs Act offences;

(v) the fact that the Probation and Welfare Service report noted that the respondent was at a high risk of re-offending;

(vi) attaching undue weight to the mitigating factors in the case;

(vii) imposing a sentence of such leniency which was in all the circumstances of the case in the public interest and the sentence imposed was such as would not act as a deterrent to other persons and the prevention of further crimes.

8. In oral submissions made to this court, counsel for the Director indicated that the primary focus of her application related, firstly, the contention that the choice by the learned sentencing judge of three and a half years imprisonment as the headline sentence was unduly lenient. No particular issue was taken with the decision to suspend the final eighteen months from an appropriate headline sentence. Secondly, the Director is critical of the decision not to make the s. 15A sentence consecutive to the s. 15 sentence imposed in relation to the offence committed five months previously. It is, however, accepted that the learned sentencing judge did have a discretion whether or not to direct the sentencing to be consecutive.

9. Section 27(3D) of the 1977 Act (as amended) permits a sentencing judge to impose a sentence less than the presumptive minimum of ten years imprisonment in respect of a s. 15A (or s. 15B) offence. The provision states as follows:-

*"(3D)(a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or section 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so."*

10. Section 27(3D)(b) and (c) provides as follows:-

*"(b) Subsection (3C) of this section (requiring the imposition of a minimum 10 year sentence) 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 that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including:-*

*(i) whether that person pleaded guilty to the offence and, if so:-*

*(I) the stage at which he or she indicated the intention to plead guilty, and*

*(II) the circumstances in which the indication was given,*

*and*

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

*(c) The court, in considering for the purposes of paragraph (b) of this subsection whether a sentence of less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to:-*

*(i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and*

*(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence."*

11. In her written submissions to this court the appellant contends as follows:-

"The appellant submits that when selecting a sentence for s. 15A offence, a judge should begin by considering the gravity of the offence in order to locate it properly on the overall scale, bearing in mind that the maximum sentence is life imprisonment. Appropriate adjustments should then be made for mitigating and aggravating factors. If the resulting sentence is ten years imprisonment or more it should be imposed. If, however, the resulting sentence is less than ten years, the judge must take account of the presumptive minimum requirement in s. 27(3)(c) and impose a ten year prison sentence, unless he or she is satisfied that there are exceptional and specific circumstances that would render such penalty unjust".

12. The Court is in agreement with this submission. It correctly sets out the approach that ought to be taken by a sentencing judge in a s. 15A (or s. 15B) case.

13. The learned sentencing judge addressed the issue of the presumptive mandatory sentence of ten years as follows:-

*"Undoubtedly the more serious of the two offences is the s. 15A offence, which empowers the court to impose what was envisaged by the legislature as a mandatory sentence of ten years. The sentence must be proportionate to the crime within the context of the maximum sentence prescribed by statute, and in that regard, I am satisfied that Mr. Farrelly falls within the category of offender that can be viewed as an exception to the mandatory rule, due to his co-operation and the fact that he turned himself into the gardaí, the fact that he pleaded guilty at the earliest opportunity. I accept that his addiction difficulties are a factor which the court must take into consideration. I believe that the headline sentence should be one of three and a half years."*

14. The court is satisfied that the learned sentencing judge properly exercised his discretion to impose a sentence below the

presumptive mandatory minimum term. While the learned sentencing judge did not identify where in his view the offence ought to be ranked on the gravity scale, it is nevertheless apparent from his sentencing remarks that in setting a headline sentence of three and half years imprisonment he believed it ranked in the lower category of that scale.

15. The Director has drawn the court's attention to the decision of this court in *DPP v. McManus* [2017] IECA 13 on the basis that its facts were broadly similar to those of the instant case. That case, also an undue leniency application, concerned the issue of sentencing and more particularly consecutive sentencing for separate s. 15 and s. 15A offences committed approximately twelve months apart. A difference between *McManus* and the instant case, arguably one of great substance, is that in *McManus* the s. 15A offence pre-dated the s. 15 offence, whereas in the instant case the opposite is the position. In *McManus* the concurrent sentences under review were, in respect of the s. 15A offence, four years imprisonment with the final eighteen months suspended, and in respect of the S. 15, twelve months imprisonment. In *McManus* this court, having found the sentences imposed at first instance to have been unduly lenient, increased the s. 15A to six years with the final two years suspended and it left the s. 15 sentence at twelve months. However, it directed that the latter be consecutive to the former.

16. There are however at least two strongly distinguishing features as between *McManus* and the instant case. The category of drugs in *McManus* was heroin, wherein in the instant case they were largely cocaine, amphetamines and cannabis. Furthermore, the value of the drugs haul in *McManus* was significantly higher than in the instant case - indeed not far off double the value.

17. The principles which govern this court's review of an application pursuant to s. 2 of the 1993 Act are well settled at this point in time. They are usually set out in the judgment of McKechnie J. in *DPP v. Stronge* [2011] IECCA 79 and are as follows:-

*"(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 such 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 the sentence 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."*

18. Applying those principles in this case, the court is satisfied that the sentence sought to be reviewed, that is the s. 15A sentence and including the consecutivity issue, was not just very lenient but was unduly lenient. The learned sentencing judge exercised his discretion not to impose consecutive sentences and was entitled in the circumstances to so decide. He could have decided differently and in so doing structure the sentences accordingly with due consideration for the principles of totality and proportionality.

19. In the circumstances of this case the setting of an appropriate sentence for the s. 15A offence on the basis that it is to be served concurrently to the s. 15 sentence (a sentence which is not being challenged) undoubtedly requires a more severe sentence than that imposed by the court below.

20. Having due regard to the mitigating factors undoubtedly present in this case, and also the impressive array of the respondent's certificates and achievements during his time in custody to date, the court will replace the s. 15A sentence with one of five years imprisonment with the final eighteen months suspended on similar terms to those directed in the court below. This sentence will also date from the 25th November 2016 and will also be concurrent with the s. 15 sentence which, in any event, has probably been fully served at this point in time.