



THE COURT OF APPEAL

58/13

The President
Mahon J.
Edwards J.

D.P.P.

APPLICANT

V.
CONOR FANNING

RESPONDENT

JUDGMENT of the Court delivered by the President on the 19th day of January 2015

1. This is an application by the Director of Public Prosecutions under s. 2 of the Criminal Justice Act 1993 for an order reviewing the sentence imposed on the respondent on the 11th of February, 2013 at Carlow Circuit Criminal Court. The respondent was charged with possession of approximately 19.6 kg of cannabis with an estimated street value of €235,000. In December 2011 he was arraigned and pleaded guilty and the sentence hearing took place on the 16th of March, 2012 when the matter was adjourned for a period of one year during which the respondent was on bail and required to co-operate with the probation service.

2. The evidence established that on the 29th of March 2011, Gardai stopped the respondent's car on the M9 motorway and found 20 packages of cannabis herb weighing 9.6 kg in the boot and they also found two mobile phones. The value of the drugs was €235,000.

3. Mr. Fanning admitted possession of the drugs, "knowledge of what he had done to a certain extent" according to the investigating officer, Detective Sergeant Egan. He said that he was short of money and he hoped to get between €5,000 and €10,000 for this run. He cooperated to the extent of admitting his own involvement but did not provide further information.

4. Detective Sgt. Egan classed Mr Fanning as being mid-table in regard to his involvement in the group dealing in the drugs. "He, throughout his interviews, outlined that he wasn't in fear of these persons and I would believe that to be true. He would know them and I believe that's why he didn't fear them. I would also say on his behalf the drugs that were brought in on the day, I don't believe Mr. Fanning was going to -- while he says he owns them, it's not my belief he did own them, it is my belief he couriered them in for these other persons. I don't believe he would have sold them. I believe he was used as a courier, with full co-operation on his behalf and under no threat, but just primarily for financial gain." Mr. Fanning would have been well rewarded for his work but would not have shared in the profits from the sale of the drugs. The Sergeant did not believe that Mr. Fanning was always truthful during the interviews; he knew that some of the accounts that he gave were untrue.

5. Mr. Fanning had no previous convictions--apart from a road traffic matter. He has a child who lives in Spain with a former partner. He has worked most of his life but was unemployed at the time. He was working as a barman in a well-established bar in Dublin at the date of trial. He gave as a reason for committing the crime that he wanted to go to Spain to see his daughter and to pay arrears of maintenance. He is a cannabis user. In general, the Sergeant said that Mr Fanning "just barely gave answers to what he knew we knew." He accepted defence counsel's suggestion that Mr Fanning had said on one occasion: "I'm in fear for others around me". The Sergeant also agreed that Mr Fanning believed he was collecting a significantly lesser amount of drugs than was actually the case because the original intention was for half of that quantity to be collected but the plan changed on the morning. He agreed that it was a gamble he took that didn't pay off.

6. Mr. Fanning gave evidence to the sentencing court. He was working as a barman in Dublin and had in his career worked in bars and in construction. He was aged 31 at the time of the sentence hearing on 16 March 2012. He has a daughter aged eight years. She lives in Spain with her mother. He said that his involvement in this offence was related to a desire to provide for his daughter:

"It was. I cannot condone what I've done, my part that I've played in this, but it was a means to try and get some money for the arrears of my maintenance that I owe her and to go and see her."

7. He said that he could not have spoken about the people above him in the business or give names because of fear of repercussions. If you disclose any information in the interviews or in court his life would be at risk.

8. The court had a probation report and counsel submitted a number of testimonials. Defence counsel cited the probation report as indicating that the respondent had acquired insight into the offences, had remorse and an understanding of the effect of drugs on the community, had referred himself for counselling in respect of addiction difficulties, that he was at low to moderate risk of reoffending and could be subjected to the standard supervision by the probation services. He also referred to the significant family support available to him and the testimonials including the reference and testimonial from Mr Fanning's employer.

9. At the sentence hearing on the 16th March 2012, the trial judge said that the case was a serious one as was evident from the quantity of drugs involved and that the respondent when questioned was cooperative only to a degree that was essentially necessitated by what the Gardai had found in their search and he had given some information that was untrue. The judge acknowledged that a section 15A case was a serious one for that reason alone. He noted that the respondent had points against him but there was also a considerable body of mitigating factors that counsel had put before the court. He said that the case warranted a 10 year sentence. However, the judge put his decision back for one year and said that how much if any of the sentence was to be suspended would depend to a very considerable degree on how the respondent conducted himself in the meantime. In addition to his bail terms, he was required to continue to cooperate with the probation service.

10. When the matter came back before the learned sentencing judge on the 11th of February, 2013 he imposed the wholly suspended sentence that is the subject of the application by the Director. On this occasion, the judge referred to the mandatory minimum sentence stipulated for this offence. He noted the value of the drugs and took that as a significantly aggravating factor. He regarded the case as being in the middle range of such offences. Then he turned to the mitigating factors, noting the early plea of guilty and the admissions that the respondent made to the Gardai, which made the investigation of the case and prosecution very much easier. The judge referred to a disagreement between the investigating Garda officer and the respondent as to the reason for lack of more extensive cooperation and was sympathetic of the position of the accused in being fearful of the consequences of giving information about the hierarchy of the organisation in which he was involved. The respondent had no previous convictions and had indicated a high level of remorse as well as having gained a real insight into the misery caused by drugs. He changed his life to a very considerable extent and the probation report indicated that the respondent had moved further away from its previous criminal ways and into a more stable environment. He had risk factors from alcohol and gambling but changed employment to move away from the

risk factors and was now not working in the bar trade. The judge also referred to the impressive testimonials that had been put before him and his involvement with sport.

11. In the circumstances, the judge imposed a sentence of 10 years but he suspended it for a period of five years on condition that the respondent keep the peace and be of good behaviour for that period and that he remain entirely drug-free and alcohol free and not engage in any gambling activities and in addition to engage fully with the probation service for the period that they considered appropriate.

12. The DPP contends that the sentence was unduly lenient having regard to all the circumstances of the case. The sentence did not adequately reflect the grave nature of the charge and the trial judge erred in principle in failing to attach sufficient weight to the aggravating features, namely, the nature, quantity and value of the drugs involved; the respondent's limited cooperation with the Gardai; the absence of material assistance; his degree of involvement in the planning and commission of the offence; the evidence that he was a trusted member of the criminal gang that planned and directed the enterprise; and the absence of any evidence that he was acting in fear or under duress. It is submitted that the trial judge gave undue weight to the personal circumstances of the respondent and the other mitigating factors that were advanced on his behalf.

13. The respondent submits that departure from the presumptive mandatory sentence and the imposition of a wholly suspended sentence were not unduly lenient in exceptional and specific circumstances. There was no error of principle in this case because the circumstances were indeed exceptional in specific. The learned sentencing judge located the offence in the middle range and applied the mitigating factors. The original sentence hearing was on the 16th of March, 2012 and between that time and the hearing of the Director's application in December 2014 the respondent had not come to any adverse Garda attention and had used the time constructively to his advantage. The time from sentence to hearing of the appeal is relevant in considering the application. The respondent cited the case of *DPP v Robert Eustace* – Court of Criminal Appeal 16th of December, 2013 in which it was held that it would not be just to substitute a custodial sentence for a non-custodial one. The sentence that was imposed here was significant and real although wholly suspended. This sentence may be considered lenient but not unduly so and it was within the discretion of the trial judge to impose it. The applicant has failed to discharge the onus of proof of establishing that the sentence was unduly lenient.

14. Each party cited decided cases of the Court of Criminal Appeal to demonstrate examples of sentences that were offered as precedents in support of the arguments for and against undue leniency.

Jurisdiction to Review: Section 2 of the Criminal Justice Act 1993

15. Section 2 of the Criminal Justice Act 1993, in so far as relevant provides:-

"(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 -

(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."

16. In *Director of Public Prosecutions v. Byrne* [1995] 1 I.L.R.M. 279 at p. 287, the Court of Criminal Appeal stated four principles to be applied when a review of sentence under s. 2 of the Act of 1993 is brought:-

1. The onus of proof to show that the sentence was 'unduly lenient' rests on the Director of Public Prosecutions

2. Great weight should be afforded to the trial judge's reasons for imposing the sentence at issue. In particular, if the trial judge has kept a balance between the circumstances of the case and the relevant circumstances of the offender the decision should not be disturbed.

3. The test is not the converse of that when there is an appeal by an appellant; it is not a query as to whether a more severe sentence could have been imposed and upheld as being right in principle. Rather, it is an inquiry as to whether the sentence was 'unduly lenient'.

Nothing but a substantial departure from what would be regarded as the appropriate sentence would justify intervention.

17. The term 'undue leniency' was further explored in that court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356. Delivering the judgment of the court Barron J. said 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.

.... 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 dependant 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."

18. In *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390, Hardiman J set out the role of the appellate court in a matter of this nature. In considering the cases set out above, and reviewing similar statutory provisions in Australia and England, he held that an error of principle was required for an appellate court to interfere with a sentence given by a sentencing judge. It was not enough that the members of court might impose a different sentence, whether more lenient or severe, to that given at first instance. The sentencing judge must have been found to have made an error of principle.

Penalty for section 15A offence: Section 27 of the 1977 Act as amended

19. Section 33 of the Criminal Justice Act, 2007 inserted new subsections (3A) to (3K) in Section 27 of the 1977 Act as follows:

"(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment—

(a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and

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

(3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.

(3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(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 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.

(b) Subsection (3C) 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 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 not 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.

(3E) Subsections (3C) and (3D) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3F) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this Act are to be construed as references to a first such offence.

(3F) Where a person (other than a person under the age of 18 years)—

(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or

(b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections,

the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3G) 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 term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section less any reduction of that term under subsection (3H) of this section.

(3H) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct shall apply in the case of a person serving a sentence imposed under subsection (3A) of this section and the minimum term specified by the court under subsection (3C) of this section shall be reduced by the amount of any remission so earned by the person.

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

(3J) In imposing a sentence on a person convicted of an offence under section 15A or 15B of this Act, a court—

(a) may inquire whether at the time of the commission of the offence the person was addicted to one or more controlled drugs, and

(b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the term

specified by the court under subsection (3C) or (3F), as may be appropriate, of this section.

(3K) On reviewing a sentence listed under subsection (3J)(b) of this section, the court—

(a) may suspend the remainder of the sentence on any conditions it considers fit, and

(b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate.

20. Some relevant elements of the provisions may be summarised. The maximum penalty for an offence under section 15A or 15B is imprisonment for life. The subsection as inserted also provides for a minimum sentence, for which it expresses a policy justification that was not part of the provisions that these subsections replace. "In view of the harm caused to society by drug trafficking," where a person over 18 years is convicted of an offence under section 15A, the court must specify a minimum term of imprisonment of not less than 10 years. However, this is not absolute. If it is a first such offence and there are exceptional and specific circumstances relating to the offence or the convicted person which would make the minimum sentence unjust, the court may impose a lesser punishment. For this purpose the court may have regard to anything it considers appropriate, including—(i) whether the person pleaded guilty and if so the stage and circumstances in which the indication to do so was given; (ii) whether the person materially assisted in the investigation of the offence; (iii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence; (iv) the court can also take into account whether the convicted person has a previous conviction for drug trafficking but a section 15A offence on the person's record outrules the discretion to depart from the 10 year minimum—see subsection 3(H). The power to commute or remit a punishment cannot be exercised before the expiry of the minimum term less any remission. Neither can temporary release be granted except for a grave humanitarian reason and then only for such time as is justified by the reason. If the person was addicted to drugs at the time and that was a substantial factor leading to the offence, the court may review the sentence after the expiration of half the specified term.

21. The subsection envisages that among the exceptional and specific circumstances are an early plea of guilty and material assistance in the investigation of the offence. The court is entitled but not obliged to take a plea of guilty into account, particularly if it is signalled early and if it has extra value. As to co-operation, that applies to material assistance in the investigation of the offence, that is, the crime of possession by the person of controlled drugs having excess value. Information that the person provided about others, for example, would arguably be considered to go outside the specific and instant offence and to refer to other crimes; for such assistance the court can if it wishes allow additional mitigation or invoke the clause on the public interest in preventing drug trafficking. The terms of the section imply that an early indication of guilt and relevant admissions as to the person's own role cannot be discounted as being unexceptional. The court may take them into account. It has to be a first such offence to give rise to the discretion to depart from the minimum sentence but it would be relevant that a convicted person did not have previous convictions of any kind. It is not sufficient that there are exceptional and specific circumstances in the case, whether relating to the crime or the guilty person, because the subsection requires that these features make it unjust to apply the minimum.

22. The penalty provisions cited above that are applicable in these cases are similar in all material respects to those that were considered in a series of appeals to the Court of Criminal Appeal so that jurisprudence is valuable as authoritative precedent. The present contents of s.27 (3A) and following subsections are replacements of provisions inserted by s.5 of the Criminal Justice Act, 1999. There is however one significant difference: now, the statutory purpose behind the mandatory sentence is expressly stated. The previous court's authoritative analyses of the earlier provisions make clear that the legislative purpose was indeed understood although it was then to be inferred. It may be therefore presumed that the explicit iteration of purpose in the present section was intended to reinforce the authority of the court's interpretation and to leave no room for uncertainty.

The Authorities

23. Section 15A requires both exceptional and specific circumstances about the offence or the perpetrator that make it unjust to impose the 10 year minimum sentence before the court is able to depart from that regime: *DPP v. Botha* [2004] 2 IR 375. Even if it would be unjust to impose the 10-year minimum sentence, an offence under s.15A is a very serious one and the court must have regard to the minimum and maximum punishment –the latter is life imprisonment—when determining the appropriate sentence. The fact that there is a severe minimum albeit subject to some exceptions is an important guide to gravity: *Renald CCA* 23/11/2001. The quantity and value of the drugs are critically important in assessing gravity: *DPP v. Long* [2009] 3 I.R. 486. This also follows from the specification of €13,000 in the section. People who enter into the trade for reward must expect severe treatment from the courts, in enforcing the statutory policy clearly laid down by the Oireachtas. *DPP v. Duffy CCA* 21/12/2001; *DPP v. Lernihán CCA* 2007 IECCA 21. Couriers play an essential role in the illegal drugs trade and if they willingly go into it for financial reward can't expect less than severe treatment from the courts in accordance with the clear and unambiguous policy of the legislation: *DPP v. Hogarty* – 21/12/2001 per Keane CJ. Nevertheless, there have been cases under s.15A where wholly suspended sentences were upheld by the CCA; it is clearly not wrong in principle to do so but that will only arise in rare cases. One such was *People v. McGinty* [2007] 1 IR 633, in which Murray CJ said that a term of imprisonment is normally what should be imposed. "However, where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interests of justice."

24. This approach has been endorsed in many subsequent cases and the test for a suspended sentence may be stated thus: Are there special reasons of a substantial nature and wholly exceptional circumstances such that the imposition of a suspended sentence is correct and appropriate in the interests of justice? In *Jervis and Doyle* [2014] IECCA 14, the Court of Criminal Appeal said that the test laid down in *McGinty* "goes well beyond the ordinary requirement that there be exceptional and specific circumstances, as ordinarily understood. There must, in addition be "special reasons of a substantial nature" which must be, not only exceptional, but "wholly exceptional" something quite out of the ordinary. A totality of factors where the court combines all the mitigating factors is not sufficient."

25. In *Alexiou* [2003] 3 I.R. 513, the Court said that when the court held that the statutory proposed minimum would be unjust there should normally be a substantial term of imprisonment. It also said that considerations of vulnerability on the part of the guilty person were relevant matters to be taken into account but those "considerations by no means automatically override others, such as the impact on victims and the gravity of the offence. More often than not any alleged vulnerability will have little or only marginal effect on the sentence having regard to the gravity of the offence and the fact that the accused knowingly and freely committed an offence which entailed the prospect of a serious custodial sentence. They are factors which can arise in any case and the weight to be given them will vary."

26. *DPP v. Botha* [2004] 2 IR 375 is an early and authoritative analysis of the previous form of the penalty provision which is similar to the present version. The application for leave to appeal a sentence of five years imprisonment imposed following a plea of guilty to a charge under s.15 (A) of the Misuse of Drugs Act, 1997 was rejected. The court commented thus on the policy of the legislature:

"The Oireachtas, as it is entitled to do, has indicated that this offence is to be considered a very grave one capable of attracting a sentence which might be regarded as harsh in certain circumstances and on certain individuals. It is important that sentencing courts should bear this in mind. Furthermore, consistency of sentencing is desirable in this as in other areas. It is true that the desideratum of consistency cannot be carried to the point of imposing a sentence which is actually unjust. We would however say that the circumstances in which a sentence less than the one imposed for this offence could be imposed must be indeed very exceptional."

The court concluded that:

"There was no error in principle in the sentencing and indeed a somewhat harsher sentence would not, in our opinion, have been erroneous in principle either. Every mitigating factor was given all the weight it could possibly bear and the learned trial judge was, if anything, generous to the applicant."

Discussion

27. The sentencing court has to assess the seriousness of the offence with reference to the minimum sentence and to the maximum sentence. It is erroneous to begin with the minimum sentence of 10 years imprisonment and then to consider what mitigating elements that may exist in the case. The legislature has provided severe even harsh punishment for drug trafficking and has specified a minimum sentence for unauthorised possession of drugs that have a value of more than €13,000. The quantity and value of the drugs are extremely important elements and in this case were rightly considered by the trial judge as being aggravating elements. The other features of the case also contained some aggravating elements including the role of the respondent that was not at the lowest level. He engaged in this work for financial reward and not because of any compulsion or duress. Even if he had been no more than a courier, he would still be liable to severe punishment.

28. There were indeed mitigating features and the trial judge was properly conscious of those. The question is whether the mitigating features of the case or some other aspect of it constituted something that was completely out of the ordinary and exceptional in the manner envisaged by Murray CJ and by Fennelly J. in the cases of McGinty and Jervis and Doyle respectively. In the latter case the court said that "A totality of factors where the court combines all the mitigating factors is not sufficient."

29. This Court is satisfied in all the circumstances that the learned trial judge did fall into error of principle in his approach to this case. Having decided that the case warranted a 10-year sentence, the learned judge allowed the mitigating factors that he identified to exert a quite excessive influence. There was a failure to give effect to the legislative policy on sentences for section 15A offences. While it may have been legitimate for the trial judge to have departed from the mandatory 10 year sentence, there was an absence of the rare, special and wholly exceptional specific circumstances that are required in order to justify a non-custodial sentence. The policy of the legislature is clear and it is important as the court said in *Botha* that sentencing courts should bear this in mind. The learned trial judge in this case took into account a totality of factors of mitigation in a case in which there was an absence of any specific sufficiently extraordinary feature to justify the wholly exceptional approach of a non-custodial sentence. The Court will therefore set aside the sentence and proceed to impose the appropriate sentence as of this date.

30. The function of the Court at this stage is to impose the appropriate sentence on the respondent which is of course to be determined as of the present time. For that reason, in accordance with the established jurisprudence of the Court of Criminal Appeal, the Court affords the parties an opportunity of presenting up to date material in regard to sentence.

Approved: Ryan P