



**THE COURT OF APPEAL**

**Record No. 65/2016**

**Birmingham J.  
Mahon J.  
Edwards J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**FERGAL BERKERY**

**APPELLANT**

**JUDGMENT (ex tempore) of the Court delivered on the 12th day of May 2017 by Mr. Justice Mahon**

1. This is the appellant's appeal against the severity of a sentence imposed on him on the 15th February 2016 at Dublin Circuit Criminal Court following his plea of guilty and conviction on the 21st December 2015 to two counts, namely:-

Count No. 4:

Unlawful possession of a controlled drug for the purpose of sale or supply contrary to s. 15 and s. 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs 1977, and

Count No. 5:

Unlawful possession of a controlled drug for the purpose of sale or supply contrary to s. 15 and s. 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs 1977

2. The sentences imposed were of five years imprisonment in respect each count, with the final eighteen months of each sentence suspended on terms for a period of two years post release.

3. Following information received by gardaí, and surveillance undertaken by them, a warrant to search the appellant's address was obtained and was executed on the 12th April 2016. On entering the premises, a strong scent of cannabis was noted and a search revealed bars of cannabis and suspected cannabis resin from underneath a bed in the appellant's bedroom. A weighing scales was found in the kitchen. Three cannabis grinders were found on a sitting room table along with a jar containing empty plastic bags. In another jar was found €505 in cash.

4. The appellant was arrested and interviewed. He accepted responsibility for all the drugs detected. He claimed that he stored the drugs under duress following an incident in which he was kidnapped and beaten.

5. The value of the cannabis herb was €1,728, and the value of the cannabis resin was €18,774.

6. The appellant has four previous convictions. Of particular relevance is the fact that in May 2008 he was convicted in Belgium for possession of drugs and was sentenced to fourteen months imprisonment, of which he served three months before being released on licence. His other convictions go back to 2003 and they relate to drink driving, dangerous driving and a hit and run incident in 2001.

7. The appellant is aged fifty eight years and is the separated father of two children. At the time of the offences he was caring for his teenage son. He suffers from asthma and a heart condition.

8. The appellant's grounds of appeal are as follows:-

(i) The learned sentencing judge erred in passing a sentence which gave insufficient weight to the attempts made by the appellant to rehabilitate himself;

(ii) the learned sentencing judge erred in law in failing to give sufficient weight to the fact that the appellant had remained out of trouble for a substantial period of time post the offence date, or to the fact that this was an early plea of guilty in all the circumstances of the case;

(iii) the learned sentencing judge erred in law in failing to give adequate weight to the personal circumstances of the appellant especially, and including, the care that he provided for his young son. In opening the appeal today, counsel for the appellant indicated that this ground formed the focus of the appeal.

9. Mr. Michael Dempsey, consultant clinical psychologist, prepared a detailed report on the appellant on the 11th February 2016, and this was considered by the learned sentencing judge. That report refers to a historical addiction problem with alcohol and drugs and that considerable rehabilitation had already taken place in respect of both. The psychological report did not reveal anything of particular note.

10. In the course of her sentencing judgment, the learned sentencing judge stated, *inter alia*:-

*"... I've had an opportunity to read the references and testimonials which have been submitted on behalf of the accused. He is somebody who has an educational background and has a long and impressive career in the computer software industry. And he was in gainful employment for much of his adult life until recent years when it appears that his addiction to alcohol overcame him and he has not been gainfully employed in the recent past. He is the father of two*

*children who are now adults, who have written letters pleading for leniency of his behalf and he clearly maintains a good relationship with his family and they are supportive of him. There are also testimonials and references from previous employers which suggest that he was somebody who was an asset to the various companies that he worked for and he was held in high regards by the various employers. I also note that he is now somebody who is suffering from anxiety, some of which, undoubtedly, is related to the existence of these particular proceedings."*

11. The learned sentencing judge also referred to the significance of the appellant's four previous convictions, and in particular the Belgian conviction in respect of which he received a prison sentence.

12. The learned sentencing judge expressed her view that the appropriate headline sentence was one of five years imprisonment and proceeded to suspend the final eighteen months.

13. In her sentencing judgment the learned sentencing judge very specially referred to the appellant's personal circumstances and background. She clearly considered this factor very carefully. She also referred to letters from both the appellant's children pleading clemency for their father. The content of these letters was again highlighted by Ms. Burns in her oral submissions to this court. These letters are moving and undoubtedly establish the children's love and concern for their father, and their firm belief that his offending days are over.

14. This case presents a great difficulty for the court. On the one hand, the appellant has been convicted of very serious drugs offences and has a particularly relevant previous conviction from another jurisdiction. On the other hand, the court is faced, as was the court below, with a number of compelling factors relating to the appellant's personal circumstances, not least his relationship with his children and a particularly strong bond with his teenage son who remains at least partly dependant on him. Additionally, the appellant has impressive computer skills which he generously shares with others from disadvantaged backgrounds and who would not otherwise have the benefit of such assistance. By all account, the appellant appears to be a very caring individual dedicated to helping others and an unlikely candidate to engage in serious criminality.

15. Ultimately, however, and in general, and subject to corrective oral or jurisdictional errors, for this court to interfere and reduce a sentence imposed by a court of first instance, it must satisfy itself that a sentence was imposed on the basis of an identifiable error or principle. It will not ordinarily interfere with a sentence simply because it, or any of its members, might have been inclined to impose a different sentence. Neither can it, save in exceptional circumstances, interfere solely on the basis that an appellant's personal circumstances have altered, and more specifically, have become more difficult in the intervening period [between the date of sentence and the date of appeal]. In this respect, particular emphasis was placed on the fact that the appellant's health has deteriorated over the past year or so.

16. In the court's view, the sentence imposed by the learned sentencing judge was not unduly harsh. The offences are serious, and there exists a significant and relatively recent and particularly relevant previous conviction. Save in circumstances where the appellant had been a first time offender, a sentence significantly less than a net three and a half years in custody could hardly have been justified, nor would it have been in the public interest. Had that occurred it is likely that the case would have, in any event, found its way into this court, but as an undue leniency application.

17. In these circumstances the court must dismiss the appeal.