



**THE COURT OF APPEAL**

**Record No: 267/2018**

**Edwards J.  
Baker J.  
Kennedy J**

**HE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**CILLIAN BARRY**

**APPLICANT**

**JUDGMENT of the Court (ex tempore) delivered on the 5th February 2019 by Mr. Justice Edwards**

1. This is again an application for an enlargement of time within which to appeal.

2. In Mr. Barry's case he was convicted before Cork Circuit Criminal Court on the 31st October 2017 of the offence of possession of heroin for sale or supply contrary to s. 15A of the Misuse of Drugs Act 1977. We are told that the value of the heroin was around €22,000. He was sentenced on the 22nd November 2017 and received a sentence of eight years' imprisonment with the final three years of that sentence suspended on him entering into a bond to keep the peace and be of good behaviour for a period of three years.

3. Now, in this case we have received a number of affidavits in support of the application. There is an initial affidavit sworn by Mr. Barry and it is stamped the 30th October 2018. It was in fact sworn on the 14th September 2018 and we have received a supplemental affidavit sworn on today's date which has been filed in court. To this supplemental affidavit is exhibited a psychologist's report. It is based on an assessment carried out quite some time ago. But that is really irrelevant in terms of the basis on which the report is being put forward, which is to the effect that Mr. Barry has a specific learning disability which causes him to process information more slowly than a person who does not suffer from the particular difficulty that he has, and that he needs more time to process information than persons who do not suffer from his difficulty.

4. Now it requires to be stated that this case is unique amongst all of those that have been put forward this morning in terms of the affidavit material that has been put before the court. The court is satisfied that there is real engagement with the reasons for the delay in the supplemental affidavit that has been filed this morning, and in terms of an effort at trying to put forward an explanation for the delay.

5. There are lengthy and detailed averments as to the circumstances in which the delay occurred, as to the steps that were taken by Mr. Barry once he had formed his intention to apply for an enlargement of time in late January 2018, and concerning the circumstances in which the application for an enlargement of time was filed.

6. Mr. Barry was out of time both in forming the intention to appeal and in putting forward his paperwork but we are satisfied on the basis of what is contained in the affidavit evidence that a proper and reasonable explanation for that has been put forward.

7. The problem partly rests with Mr. Barry's learning disability, the information processing deficit that he has and the need that he has for more time than a person who does not have his particular learning disability and difficulty in processing information. He needs more time and we accept that. We are satisfied that he did form the intention to appeal by late January 2018 and the description that follows thereafter of the various efforts that he made to progress matters, and concerning the events that occurred to frustrate that, are also accepted by the court.

8. So, in terms of the first requirement, namely that he should have formed the intention within time, we are satisfied that the court should not refuse to allow him to appeal solely on that basis.

9. The issue which has caused us more difficulty is whether he has managed to persuade us that the interests of justice require that he should be allowed to appeal. It is the case that the grounds of appeal that he has put forward are to a great extent generic. But in circumstances where he has put forward very strong grounds to explain the delay and in circumstances where it is not the case that he puts forward grounds that are utterly unarguable, we are satisfied that we should on balance extend the time in this case.

10. Mr. Burns, who is to be congratulated for tenaciously standing up to our perhaps testing, and even robust exchanges with him, was probed in some depth with a view to this Court getting some sense as to whether what he was putting forward appeared to be substantial grounds, or less substantial but nonetheless cogent arguable grounds, or merely arguable grounds in the sense of being stateable but no more than that. This was potentially relevant in terms of weighing where the interests of justice lie. It appears to us that the grounds being advanced are more in the nature of arguable grounds than substantial grounds but, we are satisfied, they are cogent arguable grounds.

11. He makes two points. He says that the gravity of the offence was assessed at an excessively high level and he also makes the case that insufficient weight was given to the mitigating circumstances of the case. With respect to the former he was confronted with the proposition that this court deals with very many s.15A cases and that in a case of this sort the sentence of eight years' imprisonment, if that is the headline sentence as it appears to be, would not, at least a first glance, appear to be out of kilter with sentences typically applied in such cases, albeit that it must be acknowledged that every case will depend on its own facts. However, we readily conceded that it was entirely possible that he might successfully persuade this Court that the circumstances of this particular case, which we do not yet know the full details of, are distinguishable from other cases that might be put forward by

the respondent as comparators. In the circumstances we will not shut the door on him in that regard.

12. Similarly, with respect to the mitigating circumstances, he did plead guilty and he pleaded guilty at an early stage and that obviously is the factor that would have carried most weight. He would also have been entitled to some mitigation for the admissions that he made. There were other matters, his physical and mental health, and his other personal circumstances (which are not particularised). However, it does not seem that either of those matters would have been likely to carry as much weight as the plea and the admissions. Nevertheless, he was entitled to have everything taken into account and synthesised in arriving at an appropriate discount for mitigation; and, again, a cogent arguable case might be advanced that the three-year discount, which was effected in this case by means of the suspension of the final three years of the eight-year headline sentence, was insufficient in the circumstances of the particular case.

13. It remains to be seen whether such a case is successfully made out or not at the appeal hearing. It is not a matter for today, and again, it must be emphasised that we simply do not know the full circumstances of the case. Be that as it may, it is clear that the justice of the case requires that the applicant be allowed to at least ventilate the matter on appeal.

14. One final matter merits commenting upon. Several times already this morning we have deprecated the absence of even basic information about the circumstances of the case in respect of which an enlargement of time within which to appeal is being sought. That criticism, I think, also applies to an extent here; certainly with respect to the failure by either side, although the responsibility is primarily that of the moving party, to set out in any detail the circumstances in which the offence occurred. Although there has been nothing about it deposed to upon affidavit, we were told by counsel for the prosecution that a garda dog discovered heroin on waste ground, that gardaí kept the heroin under discrete surveillance, and that the accused was effectively caught red-handed in attempting to retrieve the heroin, and that he made some admissions after that. But that is all we know about the case. This is again a case where it would have been helpful if we had been told a good deal more in terms of a general outline as to what it was all about. Moreover, such information should be on affidavit.

15. Anyway, at the end of the day, we have concluded that on balance this is a case in which we ought to exercise our discretion to grant the extension sought and we will do so.