



**THE COURT OF APPEAL**

**Birmingham J.  
Sheehan J.  
Mahon J.**

**Record No.: 247/2016**

**Between/**

**The Director of Public Prosecutions**

**Respondent**

**- and -**

**Alison Cleary**

**Appellant**

**JUDGMENT (ex tempore) of the Court delivered by Mr. Justice Mahon on the 5th day of December 2016**

1. The appellant pleaded guilty at Dublin Circuit Criminal Court on the 1st June 2016 to one count of unlawful possession of a controlled drug for the purposes of supply contrary to s. 15A (as inserted by s. 4 of the Criminal Justice Act 1999) and s. 27 (as amended by s. 5 of the Criminal Justice Act 1999) of the Misuse of Drugs Act 1977. The appellant was sentenced on the 29th July 2016 to three years imprisonment, from that date. The appellant has appealed against her sentence.

2. The appellant's family home at 15 Bewley Lawns, Lucan in Co. Dublin was searched by gardai under a search warrant on the 4th February 2015. Nothing was found in that search, but on a further search carried out later on the same day a quantity of cocaine weighing 1.48 kilograms was found in an upstairs bedroom. The street value of the drugs was €128,891. The appellant was arrested and interviewed on two occasions at Ronanstown garda station, in the course of which she admitted responsibility for the possession of the drugs.

3. The appeal is grounded on the following:-

- (i) The learned trial judge did not accord sufficient weight and balance to the evidence advanced in mitigation and in particular failed to take into consideration the report of Dr. Mulrooney. And furthermore the learned trial judge erred in law and in fact in finding that there were no exceptional circumstances in the case;
- (ii) the learned trial judge did not facilitate an adjournment to consider implementation of the recommendations of the Probation Officers report before the Court;
- (iii) the appellant should have been afforded the benefit of a lesser sentence, such sentence imposed been unduly severe, and
- (iv) the learned trial judge did not afford sufficient weight to the plea of guilty .

4. It is contended on behalf of the appellant that the mitigating factors present in the case included the early plea of guilty, the youth of the appellant at the time of the commission of the offence (she was twenty years old), the lack of previous convictions and that the appellant was a minor player in relation to the drugs.

5. Section 15A(1) of the Misuse of Drugs Act 1977 (as amended) provides that a person guilty of an offence under this section receive a sentence of imprisonment of not less than ten years unless a court is satisfied that there are exceptional and specific circumstances relating to the offence, which would make a sentence of not less than ten years imprisonment unjust in all the circumstances. It is provided that the court may have regard to any matter 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."

6. The learned sentencing judge, in considering the statutory requirement to impose a sentence of at least ten years imprisonment save in exceptional and specific circumstances stated the following:-

"The Court is obliged to consider such a sentence where it would be appropriate and indicates that in some circumstances it ought not to be imposed, and if it is and would be unjust and disproportionate. Despite the fact that this is a very significant amount, in excess of €120,000 worth of cocaine, and though the accused ought to have known and possibly did know the value and quantity of what she was dealing with, describing it herself as having a difficulty to carry and been a user of cocaine must have know that it was significant. Nonetheless the fact that she had pleaded guilty, and no previous convictions, and her youth makes it clearly and abundantly clear that it would be entirely unjust to impose such a sentence. What I also say, nonetheless, is that this, although a ten years sentence ought not to be the minimum is an offence that carried potentially as a maximum sentence life imprisonment and so it is open to the Court to impose a sentence, having regards to the facts, anything up to and including life imprisonment. It is extremely serious because of the scale of the problems caused within our community by the traffic in illegal drugs."

7. The learned sentencing judge also referred to the appellant as being the storer of the drugs and that she was availing of an

opportunity to earn money to clear a drugs debt.

8. Prior to passing sentence, the learned sentencing judge heard evidence from Mr. Tim Cleary, the appellant's father. Mr. Cleary told the Court how his daughter underwent neurosurgery for an abyss on her brain when she was fourteen years old. Subsequently there were behavioural issues including excessive drinking, drug taking, poor school performance, in contrast with her siblings who did not exhibit these problems. He emphasised that he and his family were prepared to give the appellant all the support she required in the future. A letter from a senior clinical neuropsychologist at Beaumont Hospital, Mr. Mark Mulrooney, was also handed into the court. The appellant had been referred to his department in Beaumont Hospital in November 2010 because of ongoing behavioural problems and personality changes. She remained under the care of his department from that time. His letter also referred to the appellant's suitability for participation in addiction treatment programmes and probationary supervision. A letter from Dr. Tony Bates, clinical psychologist, was also handed into the court, as was a report from the probation service of 29th July 2016.

9. The probation service report noted that the appellant had recently engaged with the Matt Talbot Trust and was undergoing urinalysis screening in relation thereto. The court suggested an adjournment of the case to facilitate the appellant continuing to attend for urinalysis. The learned sentencing judge however felt that an immediate custodial term was required.

10. It is undoubtedly the case that the appellant has had significant health issues with difficult consequences for her and that these have occurred during her teenage years, a problematical time well known to parents of teenagers. The issue is the extent to which these problems can be said to explain or excuse, entirely or partly, the appellant's decision to hide illicit drugs with a six figure value in her family home, thereby assisting serious criminality with obvious potentially appalling consequences for society, and more particularly young people, including those of her own age. There was however no compelling evidence to suggest that her past medical history contributed to any inability on the appellant's part to distinguish between right and wrong, or that she did not fully comprehend the fact that she was engaging in serious criminality and which carried a great risk to her, and indeed to her family.

11. Crimes involving the possession of illicit drugs valued in excess of €13,000 for sale or supply to others are very serious offenses and are treated as such. In providing for a statutory presumptive minimum sentence of ten years in the absence of exceptional circumstances the Oireachtas has clearly indicated its requirement that such offences be treated as being very serious and that in general, a significant custodial sentence should be imposed in respect of them.

12. In *DPP v. Renald*, a decision of The Court of Criminal Appeal in 2001, this aspect of these offences was addressed by Murray J. (as he then was) in the following terms:-

*"Clearly subsection (3C) requires the sentencing Court to examine circumstances relating to the offence or the person convicted of the offence which, it is alleged, are exceptional and specific and which in the opinion of the Court would render a sentence of not less than ten years imprisonment unjust. To perform that task the sentencing Court must form some view of what an appropriate sentence would be having taken into account the matters which the Court considers appropriate including the matters expressly specified in subsection (3C) aforesaid, if the Court is satisfied that factors exist which would render the mandatory minimum sentence unjust then the Court is not required to impose it but the existence of such matters or circumstances does not reduce the inherent seriousness of the offence. It remains the task of the Court to impose a sentence which is appropriate having regard to the relevant circumstances and also the fundamental gravity of the offence as determined by the Oireachtas and reflected in the sentences which it has prescribed.*

*The statute does not expressly authorise the use of the minimum sentence as a "benchmark" in the sense of providing a figure by reference to which particular reductions or discounts should be afforded having regard to material circumstances existing in the particular case. On the other hand, the sentencing limitations imposed by the Oireachtas are, as has been pointed out, of the utmost importance in recognising the gravity of the offence and determining the appropriate punishment."*

13. In this case, the learned sentencing judge correctly identified the exceptional circumstances which properly permitted him to approach sentencing on the basis that the ten year minimum sentence provision would not apply. While in so doing it was nevertheless necessary that an appropriate sentence be imposed albeit one less than ten years.

14. In *DPP v. McCormack* [2000] 4 I.R. 36, Barron J. stated:-

*"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. 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 dependent upon those two factors."*

15. Notwithstanding that a sentence of less than ten years was appropriate the facts of the case including the fact that the drugs had a six figure value, required the imposition of a custodial sentence. It was necessary to treat the offence, albeit a first offence, as being very serious and to reflect in the sentence imposed the requirement as expressed by the Oireachtas in the amending provisions of s. 27 of the Misuse of Drugs Act 1977, that the courts take a tough sentencing approach to these types of offences.

16. A custodial sentence of three years for an offence involving over €120,000 worth of drugs is not a harsh sentence by any means. While it could have been structured as a longer headline term, say four or five years, before discounting for the relevant mitigating factors, bringing the custodial element of the sentence down to less than three years might well have triggered a different type of appeal to this Court. It is likely that in arriving at the three year custodial term, the learned sentencing judge took into account the fact that he had already adequately and generously provided for mitigation in that he had decided that a sentence of less than ten years was justified.

17. In any event, the Court is satisfied that the three year custodial sentence was appropriate and it has not identified any error of principle such as would permit it to interfere to further reduce that term.

18. The appeal is therefore dismissed.