



**THE COURT OF APPEAL**

**[90CJA/17]**

Birmingham P.

Edwards J.

McCarthy J.

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPELLANT**

**AND**

**BRIAN O'GRADY**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 19th day of July 2018 by Birmingham P.**

1. In this case, the DPP, pursuant to s. 2(1) of the Criminal Justice Act 1993, seeks to review, on grounds of undue leniency, a sentence of 5 years imprisonment suspended in its entirety imposed on the respondent on 21st March 2017 in the Circuit Criminal Court in Dublin in respect of an offence contrary to s. 15A of the Misuse of Drugs Act.

2. Counsel on behalf of the DPP has made it clear that the Director accepts that there was a basis for departing from the statutory presumptive minimum. The Director does not take issue with the identification of five years as an appropriate sentence, and indeed, is prepared to accept that it would not have been inappropriate to suspend that sentence in part, but explains that she takes issues strongly with the decision to suspend the sentence in its entirety. Accordingly, this application brings into sharp focus the question of when it might be permissible to entirely suspend a sentence in respect of a s. 15A offence.

3. The background to the sentence hearing in the Circuit Court is to be found in events that occurred on 12th February 2016. Gardaí were in possession of information in relation to the activities of two individuals from Cork. This resulted in a surveillance operation being put in place. As part of that operation, it was noted that two vehicles, a silver BMW and a blue Ford Focus, were travelling in convoy between Cork and Dublin. The vehicles made their way to the car park of the Aldi store in St. Margaret's, Dublin, where they rendezvoused with a Volkswagen Passat which was seen performing a number of laps of the car park. A transaction involving a man who got out of the BMW and the respondent, Mr. O'Grady, who had come from the Passat, was observed. Two large bags were taken from the Passat and placed in the boot of the Ford Focus. Mr. O'Grady was also seen to hand one of the men from Cork an object which appeared to be a mobile phone. All three vehicles left the car park at the same time. The Gardaí kept the vehicles under surveillance. The Ford Focus was stopped; the boot was examined and found to contain a quantity of cannabis resin. The cannabis weighed just over 20kg and was valued by Gardaí in excess of €122,000. Mr. O'Grady, the driver of the Passat, was stopped, arrested and detained.

4. In the course of detention, he was interviewed and made immediate admissions. In the course of one interview, when asked where he had collected the drugs, he responded that he could not say; that it was more trouble than it was worth, indicating that he was afraid to go further. In the course of these interviews, he told Gardaí that he "had to do stuff to pay off a debt". The debt was not his, but that of his brother. In cross-examination by defence counsel, Detective Garda Sean Smith confirmed that Mr. O'Grady had not been on the Garda radar and was not the subject of the surveillance operation. The Detective Garda agreed that it was a feature of the drug trade that when a debt was incurred by a family member, it was rolled over and followed family members around. There followed this exchange:

"Q. [defence counsel] And the particular circumstances here appear to be that his stepbrother had a relatively modest debt of €2,000, but because of the family dynamic, his father had assisted previously a family member in terms of a significant debt of €10,000 which they had to borrow, and that caused very significant conflict within the family unit: isn't that correct?

A. I believe that to be the case, yes.

Q. And what happened here was when his younger brother came to him for help, they both realised they couldn't go to their father because they were financially compromised – they were broke, effectively – and the disharmony in the family almost led to the breakup of his father's relationship and that boy's mother – between the boy's mother and father, isn't that correct?

A. That would be correct, Judge, yes.

Q. So, a disastrous error of judgment led Brian O'Grady to act out of loyalty to his younger brother and puts himself in a

position he finds himself in before the Court.

A. Yes, by his brother's actions, put the rest of the family in danger and jeopardy."

Defence counsel concluded his cross-examination by asking:

"Q. And in terms of his place on the ladder, insofar as it can be assessed, I think you're satisfied that he operates at the lowest end of the ladder, merely – and it's acknowledged that this, unfortunately, is an important part of the system, but literally handing over from A to B the product in question.

A. Yes, Judge."

5. In terms of the background and personal circumstances of the respondent, he was born on 21st January 1986 and was thirty-one years old at the time of the sentence hearing. The Court heard that he had eleven previous convictions, none of direct relevance to the offence before the Court. Six had been dealt with under the Probation Act. Of the remainder, two were for road traffic related; one was for criminal damage; one for violent disorder and one for possession of a knife and articles. There was an indication that the defence had some concerns about the accuracy of at least one of the convictions, but the judge indicated it was not a significant issue.

6. Further information about the background and circumstances of the respondent emerged from a probation report and from what was stated, without objection, by defence counsel in the course of his plea in mitigation.

7. The information put before the Court was that Mr. O'Grady hailed from Finglas; that he continued to reside in that area with his father, stepmother and two stepbrothers. He was the eldest of a family with four stepsiblings arising from his father's long-term relationship with his mother. His background was a particularly difficult one. His mother experienced alcohol and drug difficulties, leading to family members being placed in voluntary care. In his submissions, counsel described the appellant and his siblings being physically abandoned on the doorsteps of Dublin Corporation; of the family then being broken up and separated and taken into care and then being reunited only some years later as a result of the efforts of the respondent's father and an uncle.

8. The Court heard that he had a very good employment record, culminating in employment with UPC which, unfortunately, had come to an end some months before the incident. It was the case that a number of siblings and members of the extended family experienced substance abuse difficulties and had an involvement with the criminal justice system. One family member had amassed a drug debt of €10,000 which required the family to borrow that sum to come to his aid. The Court heard that the background to the instant offence was that a younger stepbrother incurred a debt of €2,000. Had Mr. O'Grady not lost his rewarding employment, he would have been in a position to help with a debt of that amount, but being unemployed that was not an option, and so he made the decision to become involved in this criminal activity. The plea in mitigation stressed that the offence was not committed for personal gain or, indeed, to clear a personal debt, but out of a misplaced sense of loyalty to his stepbrother. It was submitted on his behalf that the fact that a young man was effectively abandoned by his mother on the steps of Dublin Corporation as an infant, and that thereafter, the family unit was broken up and distributed among foster families, was a specific and exceptional circumstance.

9. In the course of his submissions, counsel urged the Court to consider an entirely suspended sentence. It is clear that he was very conscious of the fact that it would be a very unusual course of action, referring to the fact that on a number of occasions, the judge had commented that individuals before him had "perfect mitigation", but had still felt compelled to impose a custodial sentence. However, he urged that this was a truly exceptional case and one where the imposition of a non-custodial penalty was warranted.

### **The Judge's Sentencing Remarks**

10. In the course of his sentencing remarks, the judge commented that it was obvious that they were dealing with a serious criminal enterprise in the form of drug dealing, and that profits, and big profits, were being made by certain parties. He described the Garda evidence in the case as very revealing. He referred to the fact that it was accepted by everyone in Court that Mr. O'Grady had become involved as a result of misguided loyalty to his stepbrother. The judge first addressed the mandatory presumptive minimum and found that the circumstances existed justifying a departure. As already indicated, that is not the subject of any controversy between the parties. The judge said the question, therefore, was how far could he depart from the mandatory minimum sentence, going on to observe that he was at large, obviously, if he decided to depart. Therefore, he had to consider the crime in this case and what had been described by defence counsel as "moral culpability". In that regard, the judge said that Mr. O'Grady had involved himself in a serious crime, but that his estimate of the situation was that the respondent's level of moral culpability was quite low. What he had wanted to do was to help his stepbrother: how he did it was misguided and a huge error of judgment.

11. The judge then referenced the mitigating factors, mentioning the plea of guilty; cooperation with Gardaí; extensive admissions in relation to his own involvement; the fact that he was terrified of third parties who were on the Dublin side of the operation; the fact that he did it by reason of a misguided loyalty to his brother; the absence of relevant previous convictions and the fact that he had not received the best start in life, but that thankfully, for him, his father had found him and reunited the family. The judge said that his assessment of the evidence was that it was unlikely that Mr. O'Grady would reoffend to any level of seriousness in the future. He referred to his work record and his ambitions to work. The judge said that he was being asked by defence counsel to take the ultimate step of giving Mr. O'Grady a suspended sentence. Normally, he said it was unusual for the Court to give a suspended sentence, but he had done so on occasions in the past for particular reasons. He felt that the most pertinent circumstance in the case before him was the reason why the offence was committed. It was not the case that Mr. O'Grady had got himself into trouble or difficulties, it was not Mr. O'Grady who owed the drug debt, it was his brother. He then said that, basically, by reason of that factor, he had decided, unusually and somewhat reluctantly, to accede to the principal submission of defence counsel and impose a non-custodial sentence.

12. The legal principles applicable to undue leniency reviews are at this stage very well known, and in truth, have not been seriously in dispute ever since the first such case, that of DPP v. Byrne. Accordingly, there is no dispute about the fact that the onus of proof clearly rests on the DPP to show that the sentence is unduly lenient. It is also accepted that the review Court should afford great weight to the trial judge's reasons for imposing the challenged sentence. This is particularly relevant in the present case where the judge called onto sentence is perhaps the most experienced sentencing judge in the country and has imposed sentences in a great number of s. 15A Misuse of Drugs Act cases. Again, it is not in dispute that nothing but a substantial departure from what would be regarded as the appropriate sentence justifies intervention by the Court.

13. A considerable number of cases involving sentences in respect of s. 15A offences have come before this Court and its predecessor, the Court of Criminal Appeal. These have involved, as one would expect, both appeals against severity of sentence and applications by the Director to review on grounds of undue leniency. What emerges from the cases that have come before the courts, as well as from the great number of decisions at first instance, is that it is not at all unusual for courts of first instance to conclude that there is a basis for departing from the mandatory presumptive minimum. However, the courts have made clear that even where circumstances exist which would render the statutory minimum term unjust, there is no question of the minimum sentence being ignored. The matter was addressed by the Court of Criminal Appeal in *DPP v. Renald*. There, the Court (per Murphy J.) said:

"[e]ven where exceptional circumstances existed which would render the statutory minimum term of imprisonment unjust, there was no question of the minimum sentence being ignored. Perhaps the most important single factor in determining an appropriate sentence is the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the seriousness of the offence may be obtained from the maximum penalty imposed for its commission. This is particularly true in the case of modern legislation. What is even more instructive is legislation which, as in the present case, fixes a mandatory minimum sentence. Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provision, that is to say, the maximum sentence. It would be wrong to assume that the offence of importing controlled drugs in excess of the prescribed amount or value will attract only the mandatory minimum sentence, long though it may be."

14. While cases where sentences less than the mandatory presumptive minimum are imposed are not unusual, cases where non-custodial sentences i.e. sentences that are wholly suspended are imposed or upheld are rare indeed, but are not wholly unknown.

15. The issue of a wholly suspended sentence was considered in some detail by the Court of Criminal Appeal, Murray CJ presiding, in the case of *DPP v. Ingram McGinty*, a decision of 3rd April 2006. In that case, the Court of Criminal Appeal was clear that even in cases where a trial judge properly concluded that subsection 3(b), as regards the minimum term of imprisonment, did not apply to the particular case, the appropriate sentence should normally involve a term of imprisonment, including, depending on the circumstances, a very substantial term of imprisonment. At p. 5 of the judgment, the Court of Criminal Appeal commented as follows:

"[i]t cannot be said that there could never be circumstances in which, having regard to the interests of society as a whole, the facts of the particular case and the circumstances of the accused, where a suspended sentence would be appropriate. Undoubtedly a trial judge sentencing a convicted person for an offence such as that in question here is constrained by the considerations already referred to above to consider 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 interest of justice. This is a combination of factors which could only arise in a relatively rare number of cases. This Court has previously upheld a sentence of such a nature in the case of *D.P.P.-v-Alexiou* [2003] 3 I.R. because there were such exceptional circumstances and special reasons."

16. The issue in the case really boils down to this. It is accepted that there were factors present justifying a departure from the statutory presumptive minimum. However, were there special reasons of a substantial nature and wholly exceptional circumstances present to justify the suspension of the sentence in its entirety?

17. In seeking a wholly suspended sentence, counsel had placed the emphasis on the motives for the offence, the motive being to assist a family member who had got himself into trouble and the particular dynamic that existed in a family which had such a particularly troubled experience.

18. It is undoubtedly the case that the respondent had significant factors present by way of mitigation. They were helpfully listed by the sentencing judge and have been referred to earlier in the course of this judgment and it is not necessary to set them out again. Undoubtedly, those factors justified a departure from the statutory presumptive minimum, and indeed, justified a substantial departure, both in determining the sentence to be imposed and at the further stage of considering whether to suspend any part of it. There remains for consideration, though, and this is essentially the key argument of the DPP, whether the decision to suspend the sentence identified in its entirety, and so opt for a non-custodial disposal, was simply a step too far. This Court has decided that it was indeed that. This was serious criminal activity. This is reflected in the fact that the two Cork participants in the incident received sentences of eight years imprisonment with one suspended, and 5 years imprisonment with three suspended, respectively. Again, while the respondent's involvement was categorised as being at the lowest level on the ladder, moving drugs from A to B, this Court is not convinced that it is proper to so categorise the nature of Mr. O'Grady's involvement. Mr. O'Grady brought a significant quantity of drugs to the rendezvous and he it was who handed them over to those who had travelled from Cork. It seems to the Court that his involvement can be differentiated from that of a mule importing drugs concealed in the stomach. Arguments could be made that at least some individuals in the category of pure couriers are also operating at a lower level. Again, there may be cases where similar arguments could be made in respect of individuals who have been coerced into allowing drugs be stored in their dwelling. While comparisons are perhaps invidious, Mr. O'Grady made a conscious decision to engage in serious criminality, and so his situation is to be contrasted with those who may have been driven to participate by the ravages of addiction.

19. The Court does accept that the fact that Mr. O'Grady's motivation was to assist his brother who had got himself into an extremely difficult situation was a relevant consideration. A difficult family background was also a relevant consideration, though, sadly, such difficult backgrounds are not unusual. However, its particular relevance may be that it would have caused Mr. O'Grady to have a particularly acute sense of family responsibility and family loyalty. However, notwithstanding that there were significant factors present in favour of Mr. O'Grady, we are quite unable to conclude that they could ever have justified suspending the sentence in its entirety.

20. The Court must, therefore, conclude that the sentence was unduly lenient and so is obliged to engage in the task of resentencing. In a situation where the DPP has accepted that the sentence of 5 years was an appropriate one, the Court will begin by imposing that sentence. The Court then addresses the question of to what extent is it possible or appropriate to suspend part of that sentence.

21. The Court has concluded that, having regard to the undoubtedly powerful factors present in favour of Mr. O'Grady, it would have been possible for the trial judge to suspend two years or 40% of that sentence.

22. In resentencing, the Court resentsences as of today's date. In that regard, the Court has to have regard to the fact that it is now

incarcerating someone who must have believed that he had avoided custody. We have also been told that since the sentence hearing, he has moved to Britain and made a new life for himself there, working in the construction industry.

23. Having regard to these factors, the Court will go further and will suspend not two, but two and a half years of the five year sentence. The sentence will run from the date when Mr. O'Grady first enters custody.