THE COURT OF APPEAL

9CJA 2016]

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND -

VIDAS PETRAUSKAS

RESPONDENT

JUDGMENT of the Court (ex tempore) delivered on the 18th day of December 2018 by Ms. Justice Kennedy

1. This is an application brought by the Director of Public Prosecutions pursuant to s.2 of the Criminal Justice Act 1993 seeking review of a sentence on grounds of undue leniency. The sentence sought to be reviewed is one of five years' imprisonment suspended almost in its entirety with the exception of a period of some five and a half months spent in custody by the respondent prior to the imposition of sentence on the condition that he leave Ireland and not return for a period of at least twenty years. The sentence was imposed on the 8th December 2015 at Wexford Circuit Criminal Court and concerned an offence contrary to s.15(b) of the Misuse of Drugs Act 1977 as amended.

The background facts
2. On the 1st July 2015 a Lithuanian registered Opel Vivaro was stopped by customs officials at Rosslare Harbour, having disembarked the ferry which had arrived from Cherbourg. Following a search of the vehicle at Rosslare Europort a substantial quantity of drugs was discovered concealed in the vehicle. There were four persons travelling in the car and all were subsequently detained at Wexford Garda Station pursuant to s.2 of the Criminal Justice Drug Trafficking Act 1996. Panels were removed from the flooring of the vehicle and cannabis herb and cannabis resin to a total value of €144,272.00 was discovered. In the course of this detention, the respondent was interviewed by members of an Garda Síochána on five occasions. He was co-operative to the extent that while he initially denied any knowledge of the content of the vehicle or the route travelled in the course of the four interviews, in the final interview he made admissions in relation to the journey and the collection of the drugs in question.

3. The court heard that the respondent was at the time of sentence 47 years of age and resided with his mother, was a married man and had been in gainful employment in Lithuania. The respondent has one previous conviction which appears to be that of criminal damage and was not considered to be a relevant conviction for the purpose of sentence.

4. In cross examination it was accepted by the guard that the respondent decided from the outset of the fifth interview to take responsibility for the substance in question and stated that he suspected that there was something illegal and that while he was unsure of the amount, he accepted that he had a level of knowledge in respect of what was being carried. The prosecution guard also accepted that the respondent was more in the nature of a "cog" in the wheel and had been induced to make the trip by another named individual.

5. It was accepted by the prosecuting guard that the respondent had a good work history in Lithuania, and a letter from Cloverhill Prison indicated that he had been working whilst incarcerated and was in effect a model prisoner.

6. The above was emphasised in the course of a plea in mitigation, as was the respondent limited English and the fact that he had not received any visits whilst incarcerated and pending sentence.

The judges sentencing remarks
7. The judge referred to the respondent's plea of guilty and acknowledged that the offence was a very serious offence, for which the legislature has provided for a mandatory minimum sentence. He then proceeded to say that the respondent's co-operation entitled the sentencing judge not to impose the mandatory minimum sentence and further that he regarded his cooperation as a special circumstance pursuant to the provisions of the legislation. While the judge was advised, in error, that a presumptive mandatory minimum sentence did not apply, we are satisfied that he did in fact consider the correct legal position.

8. It was confirmed that the respondent was the driver of the vehicle in question. The judge then enquired should he decide to partially suspend the sentence, whether the respondent would in those circumstances undertake to leave the jurisdiction and not return. A positive response was received to this query. The judge then referred to the what he termed as, the respondent's impressive CV and the efforts for charity he had made whilst a prisoner in Cloverhill Prison. He further referred to a letter received from the prison authorities and concluded that those who had come into contact with the respondent realised that he had something to offer and that he had in fact rehabilitated himself. The judge went on to observe as follows: –

> "Nevertheless this is a serious offence. What I intend to do is as follows: I am going to impose a sentence of five years imprisonment on the single count of which he has pleaded guilty which is before the court and as and from next Monday, I will suspend the balance of that sentence from whatever date next Monday is, upon him undertaking to return to Lithuania and not to return to this country for a period of twenty years. If he fails to comply with that order he will serve the balance of the five years imprisonment. I require him to give that undertaking to the court."

The respondent then proceeded to give the required undertaking under oath.

Submissions
9. While in written submissions, the appellant submitted that the sentence imposed was a substantial departure from the appropriate sentence in all the circumstances and that cooperation of itself was not sufficient to enable the sentencing judge to depart from the presumptive mandatory minimum sentence. In the hearing before this court, the appellant only advances the argument that the judge failed to identify such wholly exceptional circumstances so as to justify suspending the sentence in the manner he did.

10. In response, the respondent submits that the trial judge identified the aggravating and mitigating factors and then proceeded to identify the respondent's cooperation with the gardai as being a factor which justified him in departing from the presumptive mandatory minimum sentence provided for pursuant to the legislation. The respondent submits the appellant has failed to demonstrate that the sentencing judge erred in law or in fact in imposing the sentence and that the judge carefully analysed the facts of the case before coming to his determination.

The application to review sentence
11. The principles concerning the review of sentences are well settled and in order to establish undue leniency it must be proven that the sentence imposed and which is under review constitutes a substantial departure from what would have been the appropriate sentence in the circumstances. As stated by McKechnie J. In *The People (Director of Public Prosecutions) v. Stronge [2011] IE CCA 279*;

> "There must be a clear divergence and discernible difference between the latter and the former".

12. The court agrees with the appellant that the real issue for consideration is whether the sentencing judge erred in principle in suspending the sentence as he did. It is clear that an almost wholly suspended sentence, such as was imposed in this case, constitutes a significant departure from the presumptive mandatory minimum sentence of ten years. It is the position that wholly suspended sentences in the instance of sentences imposed in respect of offences contrary to sections'15A and 15B of the Act, as amended are rare. As Murray J stated as he then was, in *The People (Director of Public Prosecutions) v. Alexiou [2003] 3 I.R. 513*;

> "Even where there are exceptional and specific circumstances which would make a sentence of not less than Ten years' imprisonment on just, a substantial term of imprisonment, although less than Ten years, will generally be the appropriate sentence. That does not, however, exclude wholly exceptional and specific circumstances where a suspended sentence may be considered appropriate in order to do justice in the particular case".

Therefore, in order that a sentence be wholly suspended there must exist circumstances which are wholly exceptional in the instance of offences under s. 15A or s.15B.

Findings of the Court
13. The gravamen of the director's appeal concerns the suspension of almost the entirety of the sentence imposed. It is undoubtedly the position that the offence before the court was a very serious one, involving a quantity of drugs to a value in excess of €144,000. Whilst it was accepted that the respondent was a cog in the wheel, nonetheless he was an important one as he was the driver of the vehicle and had knowledge of the operation in question. As has been previously stated by this court, the Oireachtas has provided for mandatory levels of sentencing in respect of certain offences pursuant to the Misuse of Drugs Act. It is true that the sentencing judge did not identify a pre mitigation sentence; he proceeded to identify a post mitigation sentence of five years' imprisonment. The judge decided that there were factors justifying a departure from the presumptive mandatory minimum sentence. It appears to this court that there were factors present which justified a departure, including the respondent's plea of guilty, which was of particular value where there were three other occupants of the vehicle and his co-operation with án Garda Síochána.

14. It is clear from the judges sentencing remarks that he attached significance to the respondent's behaviour whilst incarcerated in Cloverhill Prison pending sentence, to the extent that he commented that the respondent had been rehabilitated. It is of course important to recognise the efforts of rehabilitation on the part of any offender and to leave some light at the end of the tunnel if that is appropriate. However, we do not consider that there was before the sentencing court sufficient material and in particular exceptional circumstances so as to justify a sentence which was in reality wholly suspended. In particular, the question of deterrents which must be to the fore front in importation cases was not considered by the sentencing judge. We consider also that the court attached excessive weight to the mitigating factors and we are satisfied that the sentencing judge was in error in imposing the sentence as he did. We are of the view ultimately that the sentence imposed and suspended almost in its entirety was unduly lenient.

15. To that extent therefore, an error in principle has been established by the Director of Public Prosecutions and the court must accede to this application. We are therefore required to consider the question of sentence and in accordance with the jurisprudence of the court, to impose the sentence which is, at this point in time, appropriate. We will therefore address the issue of sentence at the appropriate time and consider the appropriate headline sentence and a reduction, if appropriate, of that sentence for mitigating factors.