THE COURT OF APPEAL

Record Number: 320CJA/2018

Birmingham P.
Irvine J.
Donnelly J.

BETWEEN/

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

MARK PARKES

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 15th day of July 2019 by Ms. Justice Irvine

1. This is an application brought by the DPP pursuant to Section 2 of the Criminal Justice Act 1993 seeking a review of a sentence on the grounds of undue leniency.

2. The sentence in respect of which the review is sought is one of three years' imprisonment with the last twelve months suspended on terms that the respondent keep the peace and be of good behaviour during the period of imprisonment and for a period of twelve months thereafter and that he would, inter alia, engage in offence and victim focused work, engage in an anger management programme and desist from engaging with anti-social peers. The sentence was imposed on the 29th November, 2018 at Trim Circuit Court, the respondent having pleaded guilty on the 1st May, 2018 to an offence contrary to Section 15A of the Misuse of Drugs Act 1977, as amended.

Background
3. In July 2017 the Garda National Drugs Unit, as a result of an investigation, detected an inward bound consignment of cannabis. An arrangement was made to conduct a controlled delivery and this was carried out by Detective Garda Barber at Marywell Business Park, Drumree, County Meath. There, Detective Garda Barber met with the respondent who admitted that he was the consignee and he assisted him in unloading the delivery. Shortly after the respondent left the Business Park he was intercepted, then later arrested and taken to Finglas Garda Station. A search was then carried out at Marywell Business Park where 29.9 kilograms of cannabis, then concealed in air filters, with an estimated market value of €598,000, was uncovered.

4. The respondent was interviewed on multiple occasions and was co-operative to the extent that he admitted that he knew that the consignment which he had taken possession of was illegal or to use his own word, "bogey". It was also not contested that he had rented the premises concerned, which was a commercial premises, for the purposes of housing the consignment which was delivered on a number of pallets.

5. In cross-examination it was accepted that the respondent had never previously come to the attention of An Garda Síochána and that he was not somebody who they would have expected to have been involved in this type of operation but for the fact that he had been put under some pressure to take possession of the drugs.

6. The Court heard that the respondent, at the time of his sentence, was thirty-two years of age. He had no relevant previous convictions. He was of good character. He was one of eleven children who had had a difficult upbringing due to the fact that his parents had issues with alcohol. He had been in a committed relationship for fourteen years and was the father of three children aged thirteen, nine and five months. He left school early and had been employed on a relatively constant basis in different types of manual employment and/or in driving until 2016 when he became unemployed.

7. The respondent had co-operated with the Probation Service and was assessed as being at a moderate risk of re-offending.

The sentence imposed
8. Prior to the imposition of sentence, the sentencing judge was advised that the mandatory minimum ten-year sentence provided for in s. 27(3C) of the Misuse of Drugs Act 1977, as amended, was not obligatory if the court was satisfied that there were exceptional and specific circumstances relating to the offence or to the person convicted of the offence that would make a sentence of not less than ten years' imprisonment unjust in all of the circumstances. Ms Murphy, SC for the respondent maintained that this was one such case. She emphasised the respondent's guilty plea, his co-operation, his remorse, the minor level of his involvement which had been at the level of a mule and the implicit threats to the safety of his family. Furthermore, whilst he knew what he was storing was illegal and would have suspected the delivery was a consignment of drugs, he had admitted that he knew that what he was receiving was illegal and had taken responsibility for his conduct.

9. Relying on those factors the sentencing judge concluded that the minimum mandatory sentence of ten years' imprisonment should not be imposed as to do so would be unjust.

10. In coming to his conclusion concerning the gravity of the offence, and whilst stating that these were not exhaustive factors, the sentencing judge stated that he would pay particular regard to four factors. First, the quantity and value of the drugs which in this case constituted just under 30 kilograms of cannabis with a value of close to €600,000. Second, the type of drug involved which in this case was cannabis which he stated was deemed to be a less harmful drug than drugs such as cocaine or heroin. Third, the role of the respondent which in this case was stated to be at a low level as he was not a "prime mover". Finally, he would have regard to the condition of the respondent, and in this regard he referred to the fact that it had been accepted in evidence that he had become involved due to coercion involving threats against himself and his extended family rather than due to the promise of outright profit.

11. The sentencing judge went on to conclude that:

> "Having regard to the quality, type and value of the drugs in this case, I believe that the offence falls in the lower end of the mid-range of offences under this section, and I believe that a headline sentence of five years' imprisonment would be appropriate."

12. Accordingly, having nominated a headline sentence of five years' imprisonment, he reduced that sentence downwards to three years' and further suspended the final twelve months by reason of the prevailing mitigating factors, most of which he had identified when considering whether or not he should depart from the minimum mandatory sentence of ten years' imprisonment.

Submissions
13. As to the submissions, whilst the DPP does not maintain that the sentencing judge erred on the facts of the present case in failing to impose the presumptive mandatory minimum sentence of ten years, counsel for the DPP makes three principal complaints.

14. First, the sentencing judge erred in principle when he fixed the pre-mitigation headline sentence at five years and stated that the offence fell within the lower end of the mid-range of offences under the section. Counsel submits that the critical factor in terms of establishing the gravity of the offence was the value of the drugs seized which was nearly €600,000, a significant multiple of the threshold provided for in s.15A. He contends that the headline sentence fixed was substantially out of line with sentences in other cases where the value of the drugs was a great deal less than that which was involved in the present case. He submits that in all of the prevailing circumstances the offence should have been placed at the low end of the higher range of offences of this nature. I should also say that in his written submissions counsel has set out in some detail a number of what I would call comparative sentencing decisions upon which he relies to show that the sentence imposed amounted to a substantial departure from those imposed in other cases of this nature. The cases cited included *DPP v. Donovan* [2018] IECA 60, *DPP v. Hanley* [2018] IECA 184, *DPP v. Muszak* [2018] IECA 327, *DPP v. Ryan* [2016] IECA 258, *DPP v. Ulrich* [2010] IECCA 13 and *DPP v. Drozzin* [2008] IECCA 29.

15. Second, the DPP submits that the trial judge erred in law when he determined that, having departed from the mandatory minimum sentence, he was at large as to the sentence he might impose. According to counsel the sentencing judge was nonetheless obliged to have regard to the maximum and mandatory minimum sentence applicable to s. 15A offences as these play an important role in guiding the court when making its sentencing decision, particularly as they indicate the gravity of the offence as determined by the Oireachtas. Reliance in this regard was placed upon the decision of Murphy J. in *People (DPP) v. Renald* (Unreported, CCA, 23rd November, 2001).

16. Thirdly, counsel submits that the trial judge placed undue weight on the type of drug involved in the offence, namely cannabis. He was not entitled to treat the nature of the drugs as one of the four principal factors guiding his view as to the gravity of the offence. At best he was entitled to treat the nature of the drugs as being of marginal importance. This was not a s.3 possession offence where such a distinction might be warranted. Section 15A does not permit as such a distinction. And, in this regard he relied upon the decision of Denham J. in *The People (DPP) v. Gilligan (No. 3)* [2006] 3 I.R. 273 where she observed that the Oireachtas had, for what were clearly political reasons, not placed cannabis resin in a less serious category than other drugs. Counsel further relied upon the decision of Murphy J. in *The People (DPP) v. Renald* wherein it was stated that s. 15A did not distinguish between the nature of the controlled drugs and instead concentrated on the value of those drugs even if it be the case that the sentencing judge might in their discretion attach some limited importance to the distinction.

17. Also, whilst not mentioned in the DPP's oral submissions, in the written submissions it was asserted that in sentencing the trial judge did not give appropriate weight to the circumstances in which the respondent's guilty plea was given. The respondent had been, in effect, caught red-handed and in such circumstances lesser weight should have been attached to such a plea.

Respondent's submissions
18. Ms Murphy SC on behalf of the respondent submits that having regard to the circumstances of the case the sentencing judge was not to be faulted for departing from the mandatory minimum sentence particularly having regard to the guilty plea and the duress which was pivotal to that decision. She further submits that the sentencing judge did not err in principle in determining the gravity of the offence. In particular, she emphasises that there were other relevant factors, and by other relevant factors she was referring to factors other than the guilty plea and duress, that the sentencing judge was entitled to take into account when it came to determining the gravity of the offence. She emphasised the fact that the respondent was not involved in the transaction for commercial gain and there was simply no evidence that he had benefited in any way from his involvement in the crime. Furthermore, there was no evidence that he had actual knowledge that the consignment he was receiving was a consignment of drugs even if he knew that the goods concerned were illegal. Likewise, she stated that the respondent had no way of knowing the value of the goods which he had agreed to take possession of.

19. On behalf of the respondent counsel further submitted that the sentencing judge had paid due and proper regard to the circumstances in which the guilty plea was offered. It had been forthcoming at the earliest stage of the investigation and within a very short period of time after his arrest. Counsel rebutted the submission made on behalf of the DPP to the effect that there was perhaps some element of double discount afforded to the respondent in that having departed from the mandatory minimum sentence the sentencing judge had then further reduced the sentence in a significant manner to allow for mitigating factors.

20. Finally, counsel for the respondent maintains that the authorities relied upon by the DPP for the purposes of seeking to demonstrate that the sentencing judge erred in principle when identifying the headline sentence were of little assistance and did no more than highlight the differing sentences imposed in a number of cases where the accused was charged with the same offence. It was, she emphasised, for the sentencing judge to have regard to the circumstances of the particular offence under consideration and to the respondent's own personal circumstances. The fact that a higher sentence was imposed in other cases where the drugs were of lower value did not establish that the sentencing judge had erred in principle in imposing the sentence.

The application to review sentence
21. The principles to be applied by the Court when asked to review a sentence are well established. They are conveniently

summarised by McKechnie J. in his decision in *DPP v. Derrick Stronge* [2011] IECCA 79. The onus is on the DPP to prove that the sentence imposed constituted a substantial or gross departure from what would be an appropriate sentence in all of the circumstances. There must be a clear divergence and discernible difference between the latter and the former such that it can be stated that the divergence amounts to an error of principle. And, of course, deference must be afforded to the trial judge's reasons for the imposition of sentence given that they received, evaluated and considered at first hand the evidence and submissions made by the parties. The fact that the appellate court might have imposed a more severe sentence, had it been the trial court, is not sufficient to justify intervention.

22. So, to the present case. Having considered the submissions of the parties this Court agrees that the principal issue for consideration on this appeal is whether the sentencing judge erred in principle when he placed the offence concerned at the lower end of the mid-range of offences under the section with the result that the headline sentence imposed was five years' imprisonment. That is a sentence which is five years less than the mandatory minimum sentence of ten years provided for in respect of an offence under s.15A of the Act. And, whilst no issue is taken with the entitlement of the sentencing judge to dis-apply the section in circumstances where he was satisfied that a sentence of over ten years would be unjust having regard to the factors identified in his judgment, this Court is satisfied that in fixing a sentence of five years as the headline sentence, he did indeed err in principle.

23. The Court accepts the submission made on behalf of the DPP that the sentencing judge was in error to state that he was at large as to the sentence which he might impose having decided it would be unjust to impose a sentence in excess of ten years. He was nonetheless obliged to have regard to the mandatory minimum sentence when he came to consider the headline sentence. Clearly, the Oireachtas, in providing a mandatory minimum sentence of ten years' imprisonment for possession for sale and supply of drugs in excess of what might be described as a relatively low threshold of €13,000, considers that such offences must be treated as very grave indeed, and that is a factor to which the sentencing judge was obliged to have significant regard.

24. Critical, in the context of the present case, was the value of the drugs which was close to €600,000, a value over forty times the €13,000 threshold provided for in the section. Even though the sentencing judge stated in his ruling that the quantity and value of the drugs was one of the four principal factors to which he was intending to have regard, it is the view of this Court, from the sentence he imposed, that he attached wholly insufficient weight to the value of the drugs in the respondent's possession.

25. Notwithstanding the fact that a sentencing judge has a significant discretion in imposing sentence, which should not lightly be interfered with by an appellate court, it is difficult to see how he could have categorised this offence as being at the low end of the mid-range of offences, having regard, as he stated, to the "quantity, type and value of the drugs". The value of the drugs was so far in excess of the mandatory minimum threshold that the offence simply cannot be correctly considered to lie within such a bracket. Accordingly, this Court has no hesitation in concluding that in so categorising the offence the sentencing judge failed to have due regard to the very high value of the drugs. That error led him to nominate a headline sentence of five years' imprisonment which cannot, in the view of this Court, be reconciled with the gravity of a drugs offence of this monetary value. This error of principle marked a substantial departure from the appropriate practice sufficient to justify the Court's intervention.

26. Furthermore, it appears that the sentencing judge attached undue weight to the fact that the drug concerned was cannabis as opposed to cocaine or heroin, a distinction which at best, he was entitled to treat as a marginal factor. It is difficult to otherwise understand how he could have come to locate the offence, in terms of its gravity, at the lower end of the mid-range of the scale. While the sentencing judge was entitled in his discretion to afford some limited consideration to the type of drug in question, it appears to this Court that he went some way further than that, treating the type of drug as a central consideration sufficient to displace the seriousness of the offence brought about by the very high value of the drugs. To this extent the Court is satisfied that the sentencing judge erred in principle. The combination of these two errors in his approach resulted in him placing this offence, quite unjustifiably, in the lower end of the mid-range of offences under this sentence.

27. The Court is satisfied that the offence should have been placed at the lower end of the higher range of offences of this type as submitted on behalf of the DPP. For these reasons the Court is satisfied that the DPP has discharged the burden of proof on the present application and that the sentence imposed by the Circuit Court judge should be quashed.

28. In those circumstances it falls to this Court to impose sentence afresh as of today's date based on the circumstances as they presently exist.

29. The court has been advised that the respondent has been given a release date in May 2020 and that he has been in Loughan House for some time, which is obviously a testament to his good behaviour. The court has also been advised that the respondent has participated in a wide range of physical and educational activities, all of which stand to his credit. He has also volunteered for work that may be described as of a charitable and voluntary nature and he is to be commended for so doing.

30. So coming firstly then to the gravity of the offence, the Court is satisfied that this is an offence which should be placed at the low end of the high range of offences of this nature and that the appropriate headline sentence should be seven years having regard to:-

(1) firstly, the mandatory minimum sentence fixed by the Oireachtas;

(2) secondly, the value of the drugs in the present case which was close to €600,000; and

(3) thirdly, the respondent's personal circumstances which established that he was under duress, that he was not a principal player, and was not involved with a view to amassing wealth.

31. There are significant mitigating factors to be taken into account and these include:-

(1) his guilty plea;

(2) his co-operation with the authorities;

(3) his remorse;

(4) all of what is stated on his behalf in the Probation Service Report of the 23rd October 2018;

(5) the fact that he has no previous convictions; and

(6) all of what the court has been told concerning the respondent's conduct whilst in custody.

32. Taking all of those mitigating factors into account the Court is of the view that the final three years of that seven-year headline sentence should be suspended and the sentence should date from the date upon which the respondent was sentenced in the Circuit Court.