



THE COURT OF APPEAL

Record No: 181/2018

Edwards J.
Baker J.
Kennedy J

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

MARK DEWEY

APPLICANT

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

1. The court has arrived with a view in this matter. This is an application for an extension of time within which to appeal against the severity of a sentence. The applicant, Mr Dewey, was before Cork Circuit Court pursuant to a signed plea of guilty to an offence contrary to s.15A of the Misuse of Drugs Act 1977. The matter was initially before that court on the 24th October 2017, and he was subsequently sentenced on the 23rd November 2017. The offence involved being in possession of drugs for sale or supply with a value in excess of €13,000, and we were told that the evidence had been that he was found in possession of three different categories of drugs, namely cocaine, cannabis herb, and methylenedioxymethamphetamine, commonly referred to as MDMA or "ecstasy". The prosecution's case was that the value of these drugs in aggregate amounted to €13,000 or more.

2. On the date of his sentencing, which as I have said occurred on the 23rd November 2017, Mr Dewey received a sentence of seven years imprisonment with the final two years of the said sentence suspended. It requires to be recorded that an offence under s. 15A of the Misuse of Drugs Act 1977 carries with it a potential penalty of up to life imprisonment and a presumptive mandatory minimum sentence of ten years' imprisonment, but which presumptive minimum can be departed from if the judge is of the view that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances. It is to be presumed, although we don't have a transcript, that the Circuit Court Judge in this instance must have been so satisfied because he imposed a sentence that was considerably below the presumptive minimum.

3. Mr Dewey did not appeal within twenty-eight days. He was out of time and concedes in his affidavit that he was out of time but it has to be said that he was not enormously out of time. I think he was one month and twenty-three days out of time in as much as he completed an application seeking an enlargement of time on the 13th February 2018. Due to an error on the part of somebody else, which was not his fault, that application was not in fact lodged for a number of months subsequently. However, the court is prepared to treat the 13th February 2018 as the relevant date for the purposes of the time issue, and while he was out of time, the court would, in circumstances where it was relatively close to the limit, have been prepared to stretch a point if time was the only problem in this case.

4. However, we are not prepared to stretch a point in Mr Dewey's case and we are not prepared to grant him the extension of time within which to appeal that he seeks, for the following reason: It is necessary for the purposes of considering an application such as this for this court to consider where the interests of justice lie. It is clear since the decision of the Supreme Court in *the People v Eamonn O'Kelly* [1980] 2 I.R. 90 that the *Eire Continental Trading Company Ltd v Clonmel Foods Ltd* jurisprudence, which applies on the civil side, does not apply to applications for an enlargement of time on the criminal side. The test is somewhat more flexible on the criminal side, the court should not make its decision based on pre-determined criteria but by a consideration of what the justice of the case, in the light of all the circumstances, requires.

5. We have addressed our minds to that, and the difficulty we have from Mr Dewey's point of view is that there has been no engagement by him in his affidavit, or indeed through the submissions made on his behalf, with the merits of the case and with the concrete circumstances of the case. We have been told nothing about the circumstances in which Mr Dewey came to be caught by the Gardaí. We have been told nothing about the circumstances in which he came to be prosecuted; or about the nature of his involvement (ie, was he a minor player, a middle manager, or the principal organiser in this drugs enterprise). While we have been told the type of drugs involved, we don't know the quantity (other than they are said to have been worth more than €13,000 in aggregate). We have not been told anything about his previous record, i.e., whether or not he has previous convictions. We don't know whether he had received chances from the courts before, or whether he is a first time offender even.

6. We know virtually nothing about the circumstances in which the sentencing hearing took place. Despite this, criticisms are made by Mr Dewey of the manner in which the Circuit Court Judge conducted the sentencing hearing. However, these are entirely vague. It appears to be suggested that there may have been medical evidence put forward in mitigation and that a complaint is now being made either that this evidence was not taken into account at all or alternatively not adequately taken into account. However, it is not stated which it is. Moreover, we are not told the nature of the medical evidence, nor what is said to be wrong with Mr Dewey. The affidavit simply refers non-specifically to "a number of medical issues" but not a single one of them is identified. We were not told whether these were matters in respect of which there was, or had been, active treatment. It is not stated if the medical evidence alluded to involved medical reports being handed into court, or expert testimony given viva voce. We are told in a letter from Mr Dewey's solicitors that was handed in to the court that a psychologist's report was sought but refused by the sentencing judge. However, this is not alluded to in the affidavit evidence. Moreover, we have not been told the basis on which a psychologist's report was sought and how it is contended that it might have been potentially mitigating in circumstances where the man was before the court facing sentencing for a s.15A drugs offence. It is nowhere asserted in the affidavit evidence that the applicant suffers from a specific psychological problem, that was drawn to the attention of the sentencing judge, of which account should have been taken, but of which account was not taken.

7. Now of course it is the case that where a person is suffering from a medical condition, whether it be mental or whether it be physical, that fact may make prison harder for them to bear, and that that ought to be taken into account as part of an accused's personal circumstances, providing there is concrete evidence of it. However, in an application like this, there must be engagement in the grounding affidavits with what is said to have been put forward and not taken into account. There is no such engagement in this case. What we have is a bald assertion that information concerning "a number of medical issues", none of which are identified, was not taken into account. That, in this court's view, is insufficient to persuade us that the interests of justice require the granting of an extension of time in this case. The court is fully alive to the problem, which always arises in these matters, that the transcript is not available. However, Mr Dewey was present in Court during his sentencing. Mr Dewey was in a position to tell his present solicitors and counsel what were the circumstances of the crime in respect of which he pleaded guilty, whether he had previous convictions, what medical conditions (if any) he was suffering from at the time of his sentencing, what treatment (if any) he was receiving at the time, what was said about all of that to the court at the time of his sentencing, whether he has continued to receive treatment in prison, and whether he continues to suffer from problems at this point in time. None of that, as I say, is engaged with. So, due to the singular lack of engagement with the facts of the case, and with the evidence that was put forward at the sentencing hearing, this Court has not been persuaded that the interests of justice require the extending of time in this case for the purposes of an appeal against the severity of the sentence imposed. We hasten to add that it is not required that an applicant should have to persuade us on the hearing of an application such as this that an appeal, if time was extended, would succeed, or even have a strong prospect of succeeding. However, a basis for appealing that has at least some degree of cogency, and referable to what actually occurred at the sentencing hearing, needs to be advanced. The application before us does meet that requirement.

8. We therefore refuse the application.