



**THE COURT OF APPEAL**

**Birmingham J.  
Mahon J.  
Edwards J.**

**Appeal No.: 124/2015**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT, 1993**

**Between**

**The People at the Suit of the Director of Public Prosecutions**

**Applicant**

**- and -**

**Alan Wallace**

**Respondent**

**Judgment of the Court delivered by Mr. Justice Mahon on 22nd day of February 2016**

1. This is an application for a review of sentence pursuant to s. 2 of the Criminal Justice Act 1993 on the grounds of undue leniency.
2. On 7th November 2014, at the Circuit Criminal Court in Dublin, the respondent pleaded guilty to the unlawful possession of a controlled drug, cannabis, for the purpose of supply in contravention of Misuse of Drugs Regulations 1988 and 1993, made under s. 5 of the Misuse of Drugs Act 1997, and 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.
3. On 5th May 2015, the respondent was sentenced to five years imprisonment. The sentence was suspended in its entirety on condition that the respondent enter into a bond in the amount of €100 and keep the peace and be of good behaviour for a period of five years. The said bond was duly entered into by the respondent.

**Section 2 of the Criminal Justice Act 1993**

4. Section 2 of the Criminal Justice Act 1993 reads as follows:-

2.(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

(2) An application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed.

(3) On such an application, the Court may either:-

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application.

**The background facts**

5. On 17th April 2014 a motor vehicle being driven by the respondent was stopped and searched by gardaí at Ballyowen Road, Lucan, in Co. Dublin. The search revealed a quantity of cannabis with a street value of €180,000. The gardaí were involved in a surveillance operation, and had followed a number of vehicles. The respondent was observed meeting with other persons at a car park in Liffey Valley when the drugs were transferred from another vehicle to the respondent's vehicle for onward transportation.

6. The respondent made admissions immediately following his arrest. He said he was aware that the consignment being transported by him was cannabis. He was to be paid €500 for transporting the drugs. It was accepted by the gardaí that this was the height of the respondent's involvement in the operation.

**The Director's grounds of appeal**

7. The Director in her written submissions to this court maintains that the sentence imposed on the respondent was unduly lenient for the following reasons:-

- (i) Placing the s. 15A offence at the lower end of the scale, notwithstanding that the value of the cannabis was approximately €180,000, and the fact that the respondent was actively engaged in transporting it, as opposed to merely storing it.
- (ii) Failing to initially place the offences on the spectrum of seriousness of offences of this kind and in failing to have appropriate regard to the range of sentences appropriate to such offences in the approach to sentencing.
- (iii) Failing to have appropriate regard to the presumptive mandatory minimum sentencing regime applying to the offence.
- (iv) Attaching undue weight to the mitigating factors in the case.
- (v) Imposing a lenient sentence which was not in the public interest in all the circumstances and that would not act as a deterrent to other persons.

## The sentencing judgment

8. Section 27(3B) of the Misuse of Drugs Act 1977, as amended, provides that

*"Where a person .. is convicted of an offence under s. 15A, the Court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than ten years imprisonment."*

9. Subsection 3C goes on to provide that:-

*"Subsection (3B) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the persons convicted of the offence, which would make a sentence of not less than ten years imprisonment unjust in all the circumstances and for this purpose the court may have regard to any of the matters it considered 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."*

10. In his sentencing judgment, the learned sentencing judge considered the issue relating to the proscribed minimum sentence as follows:-

*"There is a mandatory minimum sentence for ten years for this type of offence. Within the same legislative framework I have been given discretion to depart where I find there are suitable circumstances. I find there is in this case. His plea of guilty and his co-operation allow me to depart from the mandatory minimum sentence."*

11. The learned sentencing judge referred to a number of mitigating factors, including the pleas of guilty, his admissions, and his co-operation with the gardaí. He identified as an "over-riding factor" the respondent's medical condition. He stated:-

*"Mr. Wallace has a serious diabetes problem. It has put him in a wheelchair. I have looked at the reports as given to me and I can take from these medical reports that his condition is permanent and probably progressive. It seems that Mr. Wallace will not improve from his current situation."*

12. The learned sentencing judge then went on to pose the question:-

*"Would imprisoning the respondent be unduly punitive, and would it be too severe a sanction upon him taking into account his particular personal circumstances, particularly obviously, the most over-riding is his medical condition?"*

13. The learned sentencing judge observed that if the case was what he described as a *normal* s. 15A case, the respondent would receive a sentence of in or about five years.

14. The learned sentencing judge proceeded to impose the five year sentence, but suspended it in its entirety, on certain conditions, for a period of five years, and expressed his view that, but for the appellant's medical condition he would have imposed an immediate custodial sentence. His decision to suspend the entire five year term was attributed to the respondent's medical condition, and more particularly his view that any custodial sentence would be "unduly punitive" in his particular circumstances.

## The respondent's personal circumstances

15. The sentencing court was presented with a number of reports, including two reports from the respondent's general practitioner, a report from a consultant psychiatrist, a supportive letter from the principal of a school in Clondalkin attended by his children and a supportive letter from a nun, Sr. Catherine Sweeney, associated with another school in Clondalkin. The respondent's general practitioner, Dr. Olinger, has provided a comprehensive insight into the respondent's serious medical condition. He describes the respondent as "suffering from insulin dependant diabetes, mellitus with advanced vascular disease including peripheral vascular disease and gangrene requiring amputations of his toes, and a stroke". Dr. Olinger describes the respondent's mobility as extremely limited, and emphasises the fact that the respondent remains in severe pain, and has become "markedly depressed with suicidal ideation and intent". Problems with depression, suicidal ideation and insomnia are described in detail in the report of Dr. Finian Kelly, Consultant Psychiatrist with the HSE. These conditions are, in general terms, secondary to his chronic pain. The reports from the teachers speak highly of the respondent and his wife pointing to their positive and supporting involvement with the schools in which their children attend.

## 16. The respondent's previous convictions

17. The learned sentencing judge referred to the respondent's prior record as being good" and remarked that the respondent had "no real conviction record".

18. The respondent did however have previous convictions. In 1997 the respondent was convicted of a s. 27 Firearms Act offence and a s. 20 Offences Against the Person Act offence at Limerick Circuit Court, in respect of which he received a three year prison sentence. In the following year, 1998, the respondent was convicted of possession of an offensive weapon in respect of which he received a three month prison sentence at Dublin District Court. In addition he had four other road traffic type offences. However, he had no convictions in the period of approximately fifteen years prior to the commission of this offence.

19. In the view of this Court the learned sentencing judge properly exercised his discretion in his decision to depart from the requirement to impose a sentence of at least ten years imprisonment notwithstanding the significant value of the drugs in question, in that there were exceptional circumstances which enabled him to do so, including, in particular, the plea of guilty and the respondent's co-operation with the gardaí. In the particular circumstances of this case, a headline sentence of five years was within the range of sentence appropriate for the commission of this offence by this offender, albeit at the lower end of that range having regard, in particular, to the considerable street value of the drugs consignment.

20. Essentially, the basis for the respondent's contention that the sentence as actually imposed was unduly lenient is the decision to entirely suspend the sentence. It is quite clear from the sentencing judgment that the decision to sentence the respondent on this basis related almost entirely to the fact that the appellant has a very serious medical condition which requires the use of a wheelchair and has chronic pain, and that any period spent in custody would consequently be extremely harsh for him. It was not suggested to the court below, or indeed to this court, that the prison service (including its medical facilities) would be unable to cater for the appellant's disability and provide him with the necessary medical care. That said, it is of course the case that a serious degree of disability, and particularly a disability which significantly limits mobility will, of its very nature, render prison life more difficult and uncomfortable than it might otherwise be

21. Reliance on behalf of the respondent is placed on the judgment in DPP v. Creighton [Unreported, Court of Criminal Appeal, 15th April 2002] in which an application by the Director under s. 2 of the Act of 1993 was premised on, *inter alia*, a submission that a trial judge had erred in affording mitigation on the grounds of disability. The judgment of the court stated:-

*"Clearly the trial judge placed great weight on the disability of the defendant who had spina bifida and consequential problems including the necessity of using crutches or a wheelchair to move around. Such a disability is correctly heavily weighted as a mitigating factor. Such a disability, and all its consequential difficulties, would be very problematic in the prison. It would cast a heavier burden on the defendant. It was within the discretion of the trial judge to give such a weight to this factor. Consequently, the court would not interfere with the exercise of discretion by the trial judge".*

22. In this appeal, the mobility problems inflicted on the respondent by his medical condition appear greater than those which featured in Creighton. It is undoubtedly the case that the respondent's medical condition, and in particular his dependence on the use of a wheelchair, would subject him to significant additional hardship and discomfort than would be the case for an able bodied man.

23. In DPP v. McCormack [2000] 4I.R. 356, Barron J., when delivering the judgment of the court, stated at p. 359:-

*"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. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."*

24. In this case, and as already indicated, the learned sentencing judge properly exercised his judicial discretion in his decision to impose a sentence of less than ten years because of the presence of certain mitigating factors to which he referred. Indeed, the applicant does not take issue in relation to that particular aspect of the sentencing judgment.

25. The issue in this case is whether or not, in the circumstances, the learned sentencing judge's decision to suspend the entire five year term was correct. Did this decision amount to an error of principle on his part?

26. It goes without saying that the offence of possessing illegal drugs for the purpose of sale or supply, particularly in any significant quantity, is a very serious offence and one which would normally warrant a custodial sentence and a significant custodial sentence, even in circumstances where there existed mitigating factors which justified a departure from the imposition of a minimum sentence of ten years. In DPP v. McGinty [2007] 1 I.R. 633, an undue leniency application, Murphy C.J. stated as follows (at p. 637):-

*"...Even in cases where a trial judge properly concludes that s. 27(3B), as regards the minimum term of imprisonment, does apply to the particular case before him or her, the appropriate sentence should normally involve a term of imprisonment, including, depending on the circumstances, a very substantial term of imprisonment."*

27. The judgment in McGinty went on to state:-

*"However, insofar as the submission of the prosecutor contended that a suspended sentence must always, and in every circumstance, be considered wrong in principle, the court does not accept that this is a correct principle to be applied. First of all there is nothing in the legislation to suggest that the Oireachtas intended to compromise to that extent the judicial function to impose the appropriate sentence in the circumstances of the case. On the contrary, the Oireachtas expressly provided for a trial judge to exercise his or her judicial discretion according to the justice and circumstances of the case when it provided for the non-application of s. 27(3B) in certain circumstances. Generally speaking legislation is incapable of dealing specifically with the vast range of circumstances and factual elements that differentiate one case from another even though they involve an offence under the same section, and this the Oireachtas has recognised in the provisions just referred to. It 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."*

28. While a suspended sentence is undoubtedly less punitive than the imposition of a term in custody, a suspended sentence nevertheless constitutes a punishment, and carries with it the risk of being recalled to serve all or part of the suspended term in prison. It is also a significant lifetime blemish on a person's reputation. On the other hand, it can however produce valuable consequences for society generally in that it requires an offender to remain trouble free for a period of time during which time the risk of being required to serve all or part of his suspended sentence hangs over him. In many instances it aids rehabilitation and promotes the prospect of worthwhile employment and a positive contribution to family, and society generally. In this case the sentence was suspended for a period of five years, a somewhat unusually lengthy period. In the circumstances the suspended five year sentence and the fact that it is to be suspended for a period of five years from 5th May 2015 is not by any means an insignificant penalty.

29. The Court is satisfied that the sentence in this case, and in particular the decision to suspend the entire of the sentence, was a lenient sentence, but was not unduly lenient. In reaching this conclusion, the Court wishes to emphasise the existence of wholly exceptional circumstances in this particular case, being the respondent's serious medical condition and which is not simply limited to his dependence on the use of a wheelchair. It is also noteworthy that the appellant's medical condition has deteriorated since the date of the sentencing in the lower court, in that in the interim the respondent has suffered the amputation of his left lower leg.

