



THE COURT OF APPEAL

[53/17]

Birmingham P.

Edwards J.

Hedigan J.

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

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

DECLAN HARRIS

RESPONDENT

EX TEMPORE JUDGMENT of the Court delivered on the 9th day of July 2018 by Birmingham P.

1. This is an appeal against severity of sentence.
2. The sentence under appeal is one of 5 years imprisonment in respect of an offence contrary to s. 15 of the Misuse of Drugs Act that was imposed in the Circuit Criminal Court in Cork on 23rd February 2017.
3. The background to the case is that on 2nd February 2016, Gardaí were in possession of information which led them to stop a vehicle at the Dunkettle Interchange. The passenger was Declan Harris. He was in possession of heroin valued by Gardaí at €2,830. When questioned, following arrest and detention, he admitted possession of the heroin and said it was for personal use.
4. In terms of the appellant's background and personal circumstances, he was 58 years of age at the time of sentence. He was described by the defence lawyers as a heroin addict for 20 years, though Gardaí described him as a heroin user. He was single and unemployed and had a number of previous convictions under the Misuse of Drugs Act:
 - On 24th January 2008, he was sentenced to 9 months imprisonment on a s. 3 charge.
 - On 19th February 2009, he received a sentence of 7 years imprisonment on a s. 15 charge.
 - On 23rd April 2009, he was sentenced in Cork Circuit Court to 9 years imprisonment, but that was reduced on appeal by the Court of Criminal Appeal to 8 years.

Some exchanges that took place between the sentencing judge and prosecution counsel would suggest that the trial judge may not have adverted to the fact that it was the Court of Criminal Appeal, which was the body that was in existence at that time, which dealt with that appeal and reduced the sentence, as distinct from this Court.

5. The grounds of appeal criticised the judge's approach to the sentence hearing. It was pointed out that no headline sentence was identified, no indication was given of what mitigation was being given for the plea of guilty and no effort was made to place the offence on the spectrum of gravity. It was said there was an undue emphasis on the absence of rehabilitation. Certainly, it is the case that the judge's sentencing remarks were unusually brief. It is convenient to quote them in full:

"This 58-year old man has pleaded guilty to being in possession of approximately €2,800 worth of heroin for sale or supply in circumstances as outlined by Garda Sheehan. There is no doubt that this was a well-thought out operation and it was not done for personal use, it was done for trading in the drugs by a man who was a recidivist offender who shows no sign of rehabilitation even at this late stage in his life. There is nothing before me to indicate that he has ever taken treatment, that he ever has any intention of taking treatment, and that even efforts by the Court of Appeal to incentivise his rehabilitation by lessening a previous sentence have come to naught. The Guard says he is a calculated individual and that he is a user rather than an addict, that he does not do this in payment of a debt, but, I mean the previous history of convictions, going back to 2008, the significant conviction in 2009 and the repeat offence that I am now dealing with, you know, what am I supposed to do? He did plead guilty; he did cooperate insofar as he pleaded guilty. I understand from the Guard's evidence that the drugs were actually found on him and he says he wants to be educated in prison. At this stage, I will accept what he says.

I think the appropriate sentence, in view of his plea and giving him a reduction for that, and some level of cooperation, but acknowledging that he has never had treatment up to date, that he is a calculated individual, his previous history, I think the appropriate sentence is 5 years backdated to 5th February 2017.”

5. The structure of the sentence is somewhat disappointing. There is, as the appellant points out, a failure to identify a headline or pre-mitigation sentence and a failure to place the offence on the scale of gravity. However, as the appellant, through his lawyers himself acknowledges, a failure to follow best practice, and here, there has been a failure to follow good practice, will not necessarily see a sentence quashed and the Court proceeding to re-sentencing.

6. This court regards the offence in issue as serious and would place it well into the mid-range of seriousness for s. 15 Misuse of Drugs Act offences. In making that observation, the Court is conscious that the quantity of drugs involved is relatively modest. However, it is the case that the drug in issue is heroin. It is also the case that as the trial judge pointed out, that this was as well-thought out operation for the profit of the individual. It was professional drug dealing and it was activity that was engaged in by someone with a significant and highly relevant prior record.

7. In those circumstances, the Court has no doubt that the sentence imposed has to be regarded as a lenient one and says that notwithstanding the observation about certain comparators made by counsel on behalf of the appellant. The Court has no doubt the sentence cannot be regarded as excessively severe. Indeed, had the judge decided to impose a somewhat more severe sentence and then reasoned his approach, it is very possible that a more severe sentence would have been upheld.

8. The Court is clear that there can be no question of reducing the sentence. The only real question is whether the Court should regard the sentence as so lenient as to be unduly lenient and requiring an intervention.

9. The Court has given some consideration to that, but has eventually decided not to intervene. In deciding not to intervene, one factor to which we have regard is that if we were intervening, it would be incumbent on us, in accordance with the established jurisprudence of this Court, to sentence as of today's date as distinct from February 2017 when the sentence hearing took place in the Circuit Court. It is also the case that when the Court feels it necessary to increase a sentence, that we often impose a sentence somewhat less than we would have been minded to impose if sentencing at first instance, reflecting the difficulty there is for an individual having a sentence increased at a time when the sentence was being served.

10. In this case, we have been made aware that there is a very positive report, one might almost say a glowing report, from the Governor of Loughan House, about how Mr. Harris is conducting himself while in custody and about the progress that he has been making there. The report confirms the information that was put before the Circuit Court about the determination of Mr. Harris to use his time in custody productively. If we had felt that an intervention could not have been avoided, we would have had to have regard to the Governor's report and that would have militated against a substantial increase.

11. Overall, we are satisfied that in the circumstances of the case, the appropriate course of action is to simply dismiss the appeal and leave the sentence of the Circuit Court in place.