THE COURT OF APPEAL

232CJA/2017

Birmingham P.
Whelan J.
McCarthy J.

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLICPROSECUTIONS

APPLICANT

- AND -

CHRISTOPHER GERAGHTY

RESPONDENT

JUDGMENT of the Court delivered on the 15th day of October 2018 by

Mr. Justice McCarthy

1. This matter comes before us on an application by the Director of Public Prosecutions to review a sentence of 4 years' imprisonment imposed (with two years suspended) by Dublin Circuit Criminal Court on the 4th October 2017 for an offence of possession of a controlled drug to a value in excess of €13,000 for supply contrary to s. 15A of the Misuse of Drugs Act 1977 as inserted by s. 4 of the Criminal Justice Act 1999 and as amended by s. 81 of the Criminal Justice Act 2006, on the 15th October 2014 and in particular the controlled drug Pyrrolidinovalerophenone (PVP). The market value of that drug was given at €242,984.

2. The proceedings had what one might describe as a somewhat chequered history. We are not told of the date upon which the accused was charged but we infer that since he was released from custody in March 2015 after some five months (having been granted bail but being apparently unable to take it up) this must have occurred in or about the time of the offence or perhaps the following month. His release took place because of the decision of the High Court in *Bederev v. Ireland* whereby it was held that the statutory instrument making that substance a controlled drug for the purposes of the Misuse of Drugs Acts was void as ultra vires the Minister for Justice. Its consequence was that possession of the substance was not an offence. A number of persons in custody obtained *habeas corpus*; the accused here did not take that route but rather requested his release in writing, which occurred immediately. A *nolle prosequi* was entered on behalf of the Director of Public Prosecutions. The decision of the High Court was subsequently reversed by the Supreme Court and the accused was accordingly recharged on the 5th September 2016 and entered a plea of guilty on the first occasion upon which he appeared before the Circuit Criminal Court on the 16th February 2017. He was thereafter remanded on bail and ultimately the sentence was imposed as aforesaid.

3. The accused's flat in the rear garden of 22 Oldtown Avenue, Santry, was searched pursuant to warrant on the date of the offence. The accused was found to be there and the Gardaí seized a number of items suspected to be controlled drugs and in the present context, most significantly, twenty-seven nine-ounce bars found in a bag in a wardrobe being the drug to which I have referred above but then suspected to be cocaine. The weight was 6.942 kg. A number of items, similarly suspected to be the latter substance, were found on a bedside locker and in a compartment under a bed and when these were found, after caution, the accused told Gardaí about items in the bag, when asked whether or not there were any other drugs in the house. He admitted that he knew they were "cocaine" and of the number. He was arrested and when subsequently interviewed he admitted "holding" the substance as a "favour" as he was receiving cocaine in return. He told the Gardaí that he would deliver the drugs when he was contacted on his mobile phone and given a time and location for delivery. Whilst it seems from the transcript that he told the Gardaí in his first interview that he had not been under threat and did not have a drug debt, it appears from the evidence that he told them that he was under threat and was going to "get a little bit of cocaine for himself". However, the evidence is also to the effect that the accused stated on a number of occasions throughout the second interview that he was holding the drugs as a favour for a friend. Counsel says that we should take what one might call the most benign view of the evidence so far as the accused is concerned and proceed upon the footing that in fact he had been under threat. We adopt this view accordingly, having regard to the ambiguity of the evidence. There is no mention in the evidence of the fact that the accused had a debt in the amount of €10,000 as recounted by him to Ms Lisa Anderson of the Probation Service and we accordingly cannot reach any view as to the amount of the debt of which evidence was actually given.

4. One of his previous convictions was for manslaughter. On the 1st June 2006 a sentence of ten years with the last two years suspended was imposed upon him and there is no reason to suppose that he did not receive the usual remission of one quarter whereby we infer that he was released from custody in or about 2012. His release date from the current sentence is 5th November next.

5. The learned trial judge had the benefit of a probation report. He is described there as being someone who was "living a drug-fuelled lifestyle" at the time he committed the offence: he told Ms Anderson that he was only able to fund his addiction through participation in the activity giving rise to the charge and that he was receiving payment for his actions, in cocaine. He further accepted that he had taken a calculated risk. He accepted that he played a role in the drugs supply chain but viewed himself as a victim in as much as he had been used by others. However, he did possess insight apparently, into the harm which controlled drugs can cause to individuals and communities. He is described as having cooperated fully with Ms Anderson and expressed a positive attitude towards any future involvement. However, he is described as at high risk of offending over the forthcoming 12 months should he fail to address

the risk factors associated with offending characterised as "his criminal history, his limited educational or employment history, his financial histories, his substance misuse issues and [the] absence of pro-social peers." Ms Anderson points out, however, that there are some positive factors which will reduce the risk and in particular positive support from his mother, stable accommodation and engagement with addiction support services. He appears to have had a difficult childhood and ultimately left a residential special school at age 17 without formal qualifications. Whilst apparently he had been a heroin user for in or about 20 years, he resolved this. On his release from prison in 2009 he began to consume cocaine and his use escalated up to 2014 with only short drug-free periods.

6. At the time when interviewed by Ms Anderson on the 2nd October 2017 he described himself as being drug-free for some eight months, although this could not be confirmed as he was not subject to urinalysis. However, he was described as having had an impeccable attendance record and having fully participated in the activities of what is described as the Ballymun Youth Action Project (although he is now 49). He was engaged in this project, we are told, after his release when the *nolle prosequi* was entered. She also states that reports received by her indicate that the accused had, over the preceding year "shown himself as being willing and motivated to engage with services and he expressed a positive attitude towards his continued engagement with those support services in the future." Whilst in respect of certain earlier convictions to which we have not explicitly referred he undertook community service successfully, he has never, apparently, been subject to a period of Probation Service supervision.

7. The accused was considered by Ms Anderson to be someone who was suitable for a period of probation supervision as part of the sentencing process – obviously, and rightly, she contemplated that any sentence would have a custodial element. In respect of any non-custodial elements she suggested a number of conditions which were those imposed in the Circuit Court. In particular, there, two years of the four year sentence were suspended for two years on condition that he enter into a bond to keep the peace and be of good behaviour, place himself under the supervision of the Probation Service for a period of one year from the date of his release from custody and comply with all lawful directions of his probation officer, engage in individual and group-work modules with Ballymun Youth Action Project, attend for urinalysis if deemed necessary by his probation officer and continue to address his vocational and training needs. In this regard he appears to have undertaken a number of educational or training courses whilst in prison. On perusal of the learned Circuit Court judge's judgment she appears to have taken into account all relevant facts and circumstances.

8. However, Counsel for the Director of Public Prosecutions suggests that it is manifest from the conclusion at which she arrived that she gave little or no weight to aggravating factors for the overall gravity of the offence, nor was there a proper reflection of the necessity for a sentence which was generally deterrent. He did not disagree with her starting point, the so-called headline sentence, of five years and six months nor, indeed, the reduction of that sentence to one of four years' imprisonment. His complaint is that the suspension of two years of that four was where she erred. Counsel stressed the fact that the accused was actively involved in distribution and was not merely storing the substance in his home. He described him as an "important cog in the wheel". He submitted that the accused was not on what he described as the lower-level of offending (drawing a distinction between him, and, say, a street dealer). He referred also to his previous offending behaviour.

9. Ms Murphy, on behalf of the accused, submitted that the learned Circuit Court judge had placed the offending at its appropriate place on the scale. She submitted that the offending was not at the highest level and stressed his personal difficulties and especially those with drugs together with his willingness to engage with rehabilitation services. She stressed also the unusual circumstances of his release and recharging.

10. We cannot but take the view that the sentence imposed was lenient and perhaps unduly lenient, on any view. The amount of the controlled drug was very significant and it is true to say that the accused is to be distinguished from someone who, say, dealt in controlled drugs on the street and undoubtedly he was more than a "store man", so to speak, a class of person who also comes before the courts frequently with a drug addiction and possibly acting as a result of indebtedness or threats. The principal exceptional factor in this case which we think should inhibit us from increasing the sentence is, however, the singular, perhaps unique, circumstances arising because of *Bederev*. A *nolle prosequi* was entered on the 13th March 2015 and the accused was not recharged until the 5th September 2016. It is well established that the court if resentencing will have regard in mitigation to the fact of the lengthened sentence alone. The real difficulty here, however, arises because of the long delay which ensued because of *Bederev*. We think it would be wrong to impose a lengthier sentence, primarily because of that delay but also, and this is a modest factor, the imminence of his release. The case must accordingly be considered to be wholly exceptional. We therefore dismiss the appeal.