



THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Record No.: 104CJA/2016

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

Between/

The Director of Public Prosecutions

Appellant

- and -

Ronan Clohessy

Respondent

Judgment (ex tempore) of the Court delivered on the 24th day of November 2016 by Mr. Justice Mahon

1. The respondent pleaded guilty and was convicted on 3rd November 2015 at Ennis Circuit Criminal Court to one count of possession of a controlled drug for the purpose of selling or otherwise supplying it to another contrary to s. 15A Misuse of Drugs Act 1977, as inserted by s. 4 of the Criminal Justice Act 1999, and s. 27 of the Misuse of Drugs Act 1977, (as amended by s. 6 of the Misuse of Drugs Act 1984), and in contravention of the Misuse of Drugs Regulations 1988 and 1993 made under s. 5 of the Misuse of Drugs Act 1977. On the 7th April 2016 the appellant was sentenced to five years imprisonment, but with the final three years of that term suspended for a period of four years post release on certain conditions. This is the appellant's application pursuant to s. 2 of the Criminal Justice Act 1993 to review the said sentence on the grounds that it was unduly lenient.

2. On 19th December 2014, gardaí on foot of a search warrant searched the respondent's parents' home at Querrin, Kilkee in Co. Clare. At the time of the search, the sole occupant of the property was the respondent's mother. A Volkswagen Golf motorcar was parked at the rear of the property, and when searched, six green refuse sacks of cannabis were found. The market value of the drugs amounted to €632,000 approximately. On being contacted by the gardaí the respondent came to the property. He was arrested and interviewed. He immediately admitted responsibility for the drugs haul, explaining that he had been requested to store the drugs in return for a payment of €2,000. The drugs had originally been delivered to the respondent's own house in Cree, Co. Clare and then moved to his parent's property approximately twenty miles away. The gardaí accepted that the respondent had been acting as a warehouse man in relation to the drugs.

3. Section 2(1) of the Criminal Justice Act 1993 provides as follows:-

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

4. Section 15A of the Misuse of Drugs Act 1977, as amended, requires a court when sentencing a person convicted of being in possession of controlled drugs for the purpose of selling or otherwise supplying the drug or drugs to another, where the value of same amounts to €13,000 or more, to impose a prison sentence of not less than ten years, unless:-

"...where the court is satisfied 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 ten years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this sub section, have regard to any matters it considers appropriate including:-

Section (3D)

(b) (i) Whether that person pleaded guilty to the offence, and if so:-

(I) the stage at which he or she indicated the intention to plead guilty, and

(II) the circumstances in which the indication was given,

and

(ii) whether that person materially assisted in the investigation of the offence.

(c) the court in considering for the purposes of para. (b) of this sub section whether a sentence of not less than ten years imprisonment is unjust in all the circumstances, may have regard to, in particular:-

(i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and

(ii) whether the public interest in preventing drug trafficking would be served by an imposition of a lesser sentence.

5. In his carefully considered and lengthy sentencing judgment, the learned sentencing judge reviewed the evidence in relation to the offence. He noted that the respondent had co-operated with the gardaí in their investigation, and he had no previous convictions. He also noted that the respondent was storing the drugs in return for a payment of €2,000, and that the drugs had been in his possession for approximately six or seven days. In particular, he noted that the respondent *"could not have been more co-operative with the garda investigation"* and that he had shown genuine remorse for his offending. He considered as an aggravating factor the large quantity of drugs involved, and the respondent's knowledge that they were intended for sale or supply.

6. The learned sentencing judge decided that there were circumstances present in the case which would render a sentence of not less than ten years imprisonment unjust. He stated:-

"I am of the view that there exists exceptional circumstances in this case, which would, in all the circumstances, render the statutory minimum term of ten years imprisonment unjust. Furthermore, I do not believe that the imposition of a lesser sentence would affect the public's interest in preventing drug trafficking."

7. The appellant maintains that the sentence imposed on the respondent was unduly lenient, and that the sentence imposed of five years, with the final three years suspended, does not properly reflect the gravity of the offence. In particular it is contended that the sentence as imposed did not sufficiently take account of the value of the drugs involved and the efforts by the respondent to securely conceal the drugs while in his custody, including moving them from his home, first to a sealed container, and finally concealing them in a motor car at his parents' address. The learned sentencing judge is criticised for failing to identify where on the scale of offending the appropriate sentence ought to be irrespective of a plea of guilty, in other words a headline sentence, prior to discounting for mitigating factors including the respondent's co-operation, his plea of guilty, his lack of any previous convictions.

8. The appellant does not take issue with the decision to impose a sentence of less than ten years, and the Court is satisfied that there were indeed exceptional circumstances such as properly permitted the learned sentencing judge to exercise his discretion to impose a sentence of less than ten years. In particular, the respondent admitted his involvement with the drugs promptly, he pleaded guilty and he co-operated to a high level. It appears that the investigating gardaí accepted fully the respondent's explanation as to the circumstances in which he became involved with the drugs, and the circumstances in which they were stored by him. Additionally, the appellant had no previous convictions (other than for minor road traffic matters).

9. It is contended on behalf of the respondent that the learned sentencing judge did indeed identify a starting point or headline sentence, that of five years imprisonment, before then discounting for the significant mitigating factors. It does however appear to be the case that he did arrive at a sentence of five years as the headline sentence, albeit without specifically stating it to be so, in that he settled on this figure having decided that the appropriate sentence was one of less than ten years.

10. That said, the Court must decide if a five year sentence was within the discretion available to the learned sentencing judge. While it is submitted by Mr. Clarke BL, (on behalf of the appellant), that a five year sentence was 'on the low side', it is not criticised outright.

11. It is the Court's view that five years was a reasonable headline sentence for this offence in the particular circumstances in which it was committed by the respondent.

12. While all s. 15A offences have their own individual facts thus making efforts to create consistency in sentencing problematical, it is nevertheless helpful to consider broadly similar cases. A particularly useful comparator for this case is *DPP v. Ryan and Rooney* [2015] IECA, although the value of the drugs was considerably higher. In that case the drugs were valued at €1.2m., the appellants were transporters, and their remuneration was between €500 and €3k. The sentences imposed in the Circuit Criminal Court were of ten years but the terms were entirely suspended for seven years. The matter came before this Court as an application to review the sentences on the grounds of their undue leniency. This Court deemed both sentences unduly lenient on the basis that no immediate custody was involved, and expressed its view that the appropriate sentence in each case was one of five years. For specific reasons including the fact that both appellants had enjoyed nearly eighteen months of liberty since their original sentencing, the actual sentences imposed were of three years imprisonment.

13. It is now necessary to consider the decision to suspend the final three years of the five year sentence. The learned sentencing judge explained in considerable detail his reasons for suspending what was in effect more than half the five year term. Undoubtedly paramount in his mind in this respect were the strong mitigating factors already referred to. It is also very much the case that a suspended part of any sentence is nevertheless a punishment in that it remains capable of activation, in whole or in part, in the event of a further offence being committed, and in practice applications to activate suspended sentences often arise. In this case the three year suspended element of the sentence will hang over the respondent for four years post release. In effect the respondent will, in a real sense, remain under the watchful eye of the justice system for up to six years, and in a manner which will incentivise rehabilitation, a concept very much in the public interest.

14. In *DPP v. McCormack* [2000] 4 I.R. 356, Barron J., in an often quoted extract from his judgment stated:-

In the view of the court undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

... 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

15. In the Court's view a sentence of five years, to include a suspended element of eighteen months or two years might have been more appropriate but that is not determinative of the issue in circumstances where the sentencing judge acted within the limits of his discretion, albeit at the outer limits of same, by suspending a significantly greater portion. While in the Court's view the sentence imposed was especially lenient, it was not unduly lenient.

16. The application is therefore refused.