



THE COURT OF APPEAL

[Appeal No. 10/2013]

**Finlay Geoghegan J.
Peart J.
Mahon J.**

Between/

The People at the Suit of the Director of Public Prosecutions

Respondent

**V
Malachy Boyle**

Appellant

Judgment of the Court (ex tempore) delivered on the 13th day of November, 2014 by Finlay Geoghegan J.

1. This is an appeal by the appellant against the severity of a sentence of ten years with three years suspended imposed on him on the 20th July, 2010, in respect of an offence contrary to s. 15A of the Misuse of Drugs Act 1977, in which he had pleaded guilty on the 13th May, 2010, which was the first arraignment date.

2. The facts giving rise to the offence were that on the 17th October, 2009, the appellant had transported from England to Ireland, two boxes containing 10.7 kg of cannabis herb and 47.3 kg of cannabis resin with an estimated value of approximately €413,600. When arrested he made admissions and cooperated with the interview process. This was his first offence under s.15A of the Misuse of Drugs Act 1977.

3. The primary ground of appeal relates to the approach taken by the trial judge to sentencing under s. 27(3B), (3C) and (3D) of the Misuse of Drugs Act 1977, as amended. Those sections are complex. The statutory scheme which applies is that under subs. 3C where a person, other than somebody under the age of eighteen years is convicted of an offence under s.15A or s.15B of the Act, the court in imposing sentence shall specify a term of not less than ten years as a minimum sentence of imprisonment to be served by the person unless permitted by the Statute to depart from same. The appellant was in excess of eighteen years.

4. However, the mandatory ten year term imposed by s. 3C is tempered by subs. 3D and subpara. 3D (b) is of particular relevance to this appeal and that provides:-

"Subsection (3C) of this section shall not apply 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 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this section, have regard to any matters it considers appropriate... ."

and there are certain specified matters to which the court may have regard which are not directly relevant to the first ground of appeal.

5. It is accepted by the Director that the trial judge, who is a very experienced criminal trial judge, did properly have regard to matters to which he is permitted to have regard under the subsection and must have reached a conclusion (albeit not expressly stated) that he was satisfied that there were exceptional and specific circumstances in relation to the offence or the appellant which would have made a sentence of not less than ten years imprisonment unjust in all the circumstances. There is no appeal by the Director in relation to that conclusion on grounds of undue leniency and the appellant submits that having reached that conclusion that the trial judge then erred in principle in his approach. What he said at the time having effectively reached that conclusion was as follows:-

"Am I prepared to exercise my discretion and to impose a lesser sentence than the prescriptive minimum sentence of ten years? I am not, but I am prepared to cushion him against such a sentence in this way."

He then went on to deal with the mitigation:

"Having regard to the mitigating factors which I have outlined and his previous good character et cetera, I am going to impose a sentence of ten years' imprisonment, but I am going to suspend the last three years of the sentence on the following conditions. . ."

6. Later on in his sentencing judgment, he said that he accepted "for the purpose of completeness of my sentence" that the appellant was in a position of a courier or mule and that he was at the lowest rung of the ladder in the commission of this type of offence.

7. The error of principle submitted is that the judge having concluded for the purposes of subs. 3D(b) of s. 27 of the 1977 Act, as amended, that there were exceptional and specific circumstances which would have made a sentence of not less than ten years imprisonment unjust in all the circumstances, he then failed to properly approach the sentencing of the appellant. In submission, it is contended that the proper approach then was to apply what would be termed the normal sentencing approach of looking at the gravity of the offence and the aggravating and mitigating circumstances, but it is accepted, having regard to the statutory provisions in s. 27 and in particular subs. 3D(a) in which the Oireachtas has indicated the purpose of the sentence and that in view of the harm caused to society by drug trafficking, a court in imposing sentence on a person for an offence under s. 15A or 15B shall specify a term of not less than ten years unless there are exceptional and specific circumstances

8. This Court is of the view that the trial judge did err in his approach to sentencing herein in that having reached the conclusion that there were exceptional and specific circumstances which meant that a sentence of not less than ten years would be unjust in all the circumstances he then imposed a sentence of ten years albeit with three years suspended. He erred in starting and using as a benchmark, the ten year minimum sentence. It also appears that there was an internal inconsistency in making a finding under subs. 3B(d) that he had a discretion by reason of the fact that it would be unjust in all the circumstances to impose a sentence of ten years, but then going on to exercise his discretion not to impose a lesser sentence than the prescriptive minimum sentence of ten years.

9. The court has considered whether notwithstanding that error of principle, this Court should not interfere and the court is of the view that the imposition of a sentence of ten years with three years suspended is on the facts before it excessive and not proportionate. Accordingly the Court will set aside the sentence and will now hear any submissions or additional material that the appellant wishes to put before the court in relation to the sentencing of the appellant now today.

[Following the further hearing and deliberation the Court imposed sentence as follows.]

10. By reason of the prior decision of the Court, it is now sentencing Mr. Boyle as of today's date. It follows from that decision there are exceptional and specific circumstances which would make a sentence of ten years unjust in all the circumstances. The Court has concluded, that by reason of the inherent gravity of the offence and having regard to the statutory criteria set out in s. 27 of the 1977 Act; the value of the drugs in question; the low level role of Mr. Boyle in the transport of the drugs in question; his personal circumstances and the other mitigating factors, all of which have been set out in the sentencing decision of the trial judge which we do not propose repeating, the appropriate sentence which is to date from the date of the original sentence is seven years with two years suspended on condition that Mr. Boyle enter into a bond in the sum of €500 as was prescribed below and that he enters into that bond today to keep the peace and to be of good behaviour for a period of four years from today's date.