



THE COURT OF APPEAL

[213CJA/21]

The President

McCarthy J.

Kennedy 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

APPLICANT

AND

JAMES CURTIS

RESPONDENT

JUDGMENT of the Court delivered on the 29th day of July 2022 by Birmingham P.

1. Before the Court is an application brought by the Director of Public Prosecutions seeking to review a sentence on grounds of undue leniency, pursuant to s. 2 of the Criminal Justice Act 1993. At the outset, it may be said that there was no dispute between the parties about the legal principles to be applied to applications for review on grounds of undue leniency, and indeed, those principles have not really been in dispute since the first such case of its kind, that of *DPP v. Byrne* [1995] 1 ILRM 279. The sentence sought to be reviewed is one of five and a half years' imprisonment, imposed in the Circuit Criminal Court in Nenagh, on 22nd October 2021, in respect of an offence contrary to s. 15A of the Misuse of Drugs Act 1977, as amended. He was given a concurrent sentence on that day in respect of an offence contrary to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

2. The background to the sentence hearing and to this review application is to be found in events that occurred on 30th October 2020 at Reiska, Kilcommon, Thurles. On that occasion, Gardaí attached to the Tipperary Divisional Drugs Unit and Detective Unit had mounted a surveillance operation at what is a rural location. At the location, it was noted that there was a barrel buried in the ground. In the barrel was a sum of €37,000 in cash and approximately 4.25kg of cocaine. Next to the barrel was a plastic bag containing cash in the sum of €339,550, meaning that the total cash found at the location was €376,550. While the location was kept under surveillance, shortly before 10pm on 30th October 2020, a male was observed approaching the site, noted to be carrying a large bag. The male left the roadway and climbed an embankment to the location where the drugs and cash were hidden. At the time, he was wearing latex gloves. Gardaí intervened and detained the man. The bag that he had been carrying was found to contain 5kg of cocaine. The individual is the respondent to the present application. It is to be noted that his home was located approximately 500m further up the road.

3. The respondent was arrested and detained and nothing of probative value emerged from the detention. However, the respondent was cooperative, in the limited sense that he gave the Gardaí no difficulties when dealing with him. As to the drugs of which the Gardaí took possession, on analysis, what was seized was found to contain 9,229.9g of cocaine, with a total street value of €646,093. Also relevant to the question of cooperation is the fact that, when detained, the respondent indicated to Gardaí that he had Covid-19. This resulted in the respondent being brought to Portlaoise Hospital for a Covid test, a test which proved negative. However, it is understood that respondent had Covid the previous week but had cleared it.

Personal Circumstances of the Respondent

4. In terms of the respondent's background and personal circumstances, at the time of the commission of the offence, he was just short of his 50th birthday and had 42 previous convictions recorded. The bulk of these fell into the category of offences under the Road Traffic Acts as well as offences relating to public order. However, of greater relevance is the fact that on 5th February 2020, at Nenagh Circuit Court, a sentence of two years' imprisonment, fully suspended, was imposed in respect of offences contrary to s. 15 and s. 3 of the Misuse of Drugs Act 1977, as amended. The significance of this conviction is that it meant that the instant offence was committed during the currency of a suspended sentence. The sentencing Court was told that this offence from February 2020 related to controlled drugs in tablet form, which are normally prescribed. Also of note is the fact that in May 2016, at Limerick District Court, there was a community service order made as against the respondent in respect of offences contrary to s. 15 and s. 3 of the 1977 Act. The other conviction of note went back to November 2014 and related to an offence of a threat to kill or cause serious harm, which was dealt with at Limerick District Court and saw the respondent entering a bond to keep the peace for a period of two years.

The Sentence Imposed

5. In the course of the sentence hearing, an issue arose about the fact that certain horses owned by the respondent had been shot some ten days prior to the sentence hearing. When the judge heard about this, he decided not to proceed to finalise sentence, but allowed this issue be explored to see whether it provided support for the suggestion that the respondent might have been acting under duress or might have been subject to threat or intimidation. At the resumed hearing, the Court was told that Garda investigations suggested that the perpetrator of the attacks on the horses was acting under the mistaken belief that the horses

belonged to someone else entirely. At the resumed hearing on 22nd October 2021, the Court dealt with the matters on Bill No. TNDP0010/2021, *i.e.* the Reiska Kilcommon matter, and also dealt with the question of s. 99 (of the Criminal Justice Act 2006, as amended) hearing in relation to the suspended sentence. The judge made specific reference to the *DPP v. Sarsfield* [2019] IECA 260 decision of this Court and to recent decisions of the Court in the area of money laundering.

6. The judge indicated that, as far as aggravating factors, in the case of the s. 15A count, he had regard to the amount and type of drugs – 9,229g of cocaine with a street value of €646,093. He took into account the harm to society from drugs such as cocaine, and in relation to money laundering, the amount of cash found – €376,550 – was a substantial amount of cash which it was said was obviously related to drug dealing. In relation to s. 15A, he referred to the fact that the accused had a previous conviction from February 2020, by reference to which he was subject to a suspended sentence.

7. As to mitigating factors, the judge took into account the respondent's age, 50 years, and personal circumstances. He referred to the fact that there was an early plea of guilty and that it was an early plea of guilty in the Covid era, noting that in Nenagh the trial list was quite long. Assessing the value of the plea of guilty, he referred to the fact that the evidence would have been that the then accused had a bag containing cocaine in his hands, and that therefore possession was not such an issue in the case, but that the value of the plea was essentially that it saved the prosecution time and it freed up the court in order to deal with other matters. A contested trial would probably have taken one to two weeks. So far as the money laundering aspect is concerned, the prosecution would have had to prove possession, so, for that reason, the plea in relation to money laundering was probably of greater value.

8. The judge made reference to a report from a psychologist, Dr. Mark Fitzpatrick, that had been put before the Court. The judge indicated that he had read the report on a number of

occasions and was taking it into consideration. He was also taking into account a number of letters that were written and the fact that the accused did not have an elaborate or flamboyant lifestyle. In relation to the drugs offence, the judge referred to evidence that had been given from a Detective Sergeant, which indicated that the accused's role was a logistical one, involving storing and controlling the drugs, and referred to the fact that he had been described as a trusted member of the drugs organisation. He was not under duress. The judge said he was satisfied the accused was not at the top of the ladder, in that he was not, quoting from *Sarsfield*, "in a supervisory role" or "managing and directing the operations". However, the judge said, equally, the accused was not at the bottom of the ladder, he was not a gardener, or a courier transporting drugs from A to B, or a person merely holding the drugs for a short period of time.

9. The judge then indicated that, so far as the money laundering offence was concerned, he identified a headline sentence as one of eight years and imposed a sentence of four and a half years. In relation to the s. 15A offence, he identified a headline sentence of eight and a half years and imposed a sentence of five and a half years. Having reached that stage in the sentencing process, the judge then turned his attention to the question of the presumptive ten-year minimum. As the question of whether there was a basis for the judge deciding to depart from the mandatory presumptive minimum is central to this application to review, his observations in relation to the presumptive minimum merit quotation.

"Now I then have to go on to decide whether this sentence of the presumptive 10-year sentence applies. And I have regard to section 33 of the Act and section 19 of the Act, the penalty for section 15A, I have regard to the maximum sentence, which is imprisonment for life. I have regard to section 3(c), 'That the presumptive sentence is 10 years.' I have regard to section 3(d) (a), 'The purpose of the section is in view of the harm caused to society by drug trafficking, a court shall specify a term of 10 years

as the minimum term, unless the court determines by reason of exceptional and specific circumstances relating to the offence or the offender, it would be unjust in all the circumstances to do so.' Paragraph (b) then provides that, 'Subsection (c) shall not apply where the court is satisfied that there are exceptional and specific circumstances which would make it relating to the offence and the offender which would [make] the sentence of 10 years -- not less than [10] years, unjust in all the circumstances. And the court may have regard to any matters it considers appropriate, including (1) is whether the person pleaded guilty to the offence.' He did plead guilty to the offence and in relation to that, the stage at which he pleaded, I'm satisfied that it was an early plea. The circumstances in which it was given, it was an unequivocal plea. The next subsection (2) is, 'Whether the person materially assisted in the investigation of the offence.' I take into account *DPP v. Davis*, the judgment of Ms Justice Denham of the Court of [Criminal] Appeal of the 19th of February 2008 [[2008] IECCA 58] at page 5, the reference to materially assistance there. And in relation to the facts of this case, the material assistance is admitting to the offence, he was co-operative in relation to dealing with the gardaí, as I have set out. The circumstances in which the indication was given, I've referred to that. And the Court has to consider whether he was previously convicted of a drug trafficking offence. The answer to that is, yes, I've already referred to the suspended sentence that he's under, and I do have to bear that in mind. I also have to bear in mind that the suspended sentence, if activated or partly activated, has to be consecutive to the section 15A. I take into account whether the public interest would be best served by imposing the presumptive sentence.

Other matters [that] I take into account are his drug and alcohol addictions, his vulnerabilities, as set out in the psychological report and I'm satisfied therefore that

the presumptive sentence does not apply. Now, I'm not going to suspend any part of the sentence and I am presuming that he will rehabilitate in the prison. So I'm satisfied that the presumptive sentence does not apply, so the sentences that I have set out do not need to be amended or altered in relation to the section 15A matter."

For completeness, it should be noted that the judge then turned his attention to the s. 99 matter and decided to activate one year of the sentence which was made consecutive to the five and a half years effective sentence on the Reiska Kilcommon matter, providing a total sentence of six and a half years.

Undue Leniency Application

10. In contending that the sentence imposed was unduly lenient, the Director takes as her starting point the statutory regime which provides for a presumptive minimum. The Director says what has to be considered is whether there were exceptional and specific circumstances which would make a sentence of ten years' imprisonment unjust in all the circumstances. She points out that subsection (3D)(b) provides that "a court may...have regard to any matters it considers appropriate", including a guilty plea and material assistance, but she says it is important to note that a Court is not required to treat either of these matters as exceptional and specific circumstances. They are matters to which a Court may have regard, but there may be countervailing factors. The Director draws attention to the fact that there is specific statutory provision to the effect that a Court, in considering whether a sentence of ten years or more would be unjust, may have regard to whether a person was previously convicted of a drug trafficking offence, and also may address the question of whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence. The Director says that, in the present case, the judge was in error in taking the view that a basis for departing from the presumptive minimum had been established. She says that the headline

or pre-mitigation sentence identified of eight and a half years was unduly lenient and unduly lenient to a significant extent. She draws attention to the evidence that was before the Court about the respondent's role, he was stated to be a trusted member with a drugs gang with a logistical role in storing drugs and the cash proceeds from drug dealing.

11. In resisting the application, the respondent says, correctly, in our view, that this was a case where the judge approached the task of sentencing with conspicuous care. It is acknowledged that the sentence was undoubtedly a lenient one, but it is said that it is not so lenient as to warrant intervention from this Court. It is said that this is a case where there was a plea, an early plea, while it is accepted that it was a plea in circumstances where there was a strong case against him, it is said, nonetheless, that it was a valuable plea. It is said that the nature of the accused's interaction with Gardaí – being polite, not causing any trouble, and then coming forward with a plea – amounted to material cooperation. The respondent takes issue with an assertion on behalf of the Director that the mitigation in the case was “meagre”.

Discussion and Decision

12. In our view, this was, even by the standards of s. 15A cases, serious offending indeed. There was evidence that the offences were committed in the context of logistical support of a drugs gang, to the extent that the judge differentiated the accused from those at the bottom of the drugs trade, such as so-called gardeners, or those storing drugs for another for a short time; we think he was undoubtedly correct to draw that distinction. The factors that seem to us to put the offence very well up the scale, even in terms of s. 15As, are, firstly, the very significant quantity of drugs and the nature thereof (cocaine). We think the fact that there was a significant quantity of cocaine at the location, and that the accused was involved, and indeed, caught red-handed bringing a further significant quantity of the same drug, is significant. Also significant, in our view, is the presence of a large amount in cash in close

proximity to the drugs. Being responsible for such a large sum of cash is only consistent with being a trusted figure within the criminal organisation involved. Also significant is the fact that two prior convictions for s. 15A are recorded. It is true that the way in which the two s. 15 matters were dealt with, in one instance, by a community service order, and in the other, by way of a fully suspended sentence, would indicate that the offending was in a different league to the matter now before the Court. However, the fact of the two s. 15 convictions, some four years apart, is a matter of real significance. Particularly striking also is the fact that this offence was committed while subject to a suspended sentence.

13. In our view, notwithstanding the obvious care with which the judge approached the question of sentencing, the headline of eight and a half years for the s. 15A offence is not an appropriate one, and a significantly more severe sentence was required. This was a case where the judge was dealing with a s. 15A Misuse of Drugs case and a money laundering case. Each of these were offences of real seriousness in their own right. The judge might well have considered the question of consecutive sentences. However, we can well see how he might have taken the view that this was, in a sense, a single transaction, in that it concerned possession of a single consignment made up of drugs and cash. If the view was taken that consecutive sentences could be avoided, it remained necessary to have regard to the large sum of cash, the proceeds of drug dealing, which was found and which added a further dimension of seriousness to the s. 15A offence. In our view, the appropriate headline sentence for the s. 15A would have had to have been in the range of 12 to 12 and a half years. There was scope for some reduction from that headline sentence, but apart from the plea, which, while not without any value, it must be remembered was offered in circumstances where the accused had been caught red-handed, we think there was little else present by way of mitigation. Giving the maximum benefit for such factors as were present, including the plea, we feel that it is not possible to conclude that the imposition of a sentence of at least ten

years would have been unjust. Neither do we believe it can be said that the public interest would have been served by the imposition of a sentence less than the presumptive minimum.

14. In the circumstances, we are compelled to quash the sentence imposed in the Circuit Court and to substitute therefor a sentence of ten years' imprisonment, which will date from 30th October 2020, as did the sentence in the Circuit Court. It is to that sentence that the s. 99 reactivated sentence will now be consecutive.