



THE COURT OF APPEAL

Record Number: 292/23

**Edwards J.
Kennedy J.
Burns 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 -

PEARL KENNA

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 14th day of May 2024 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent on the 28th November 2023 in the Circuit Criminal Court.
2. On the 4th May 2023, the respondent pleaded guilty to count 1 on the indictment, an offence contrary to s. 15A of the Misuse of Drugs Act, 1977, as amended. On the 28th November 2023, the respondent was sentenced to three years' imprisonment which was wholly suspended.

Background

3. On the 21st April 2021, Gardaí executed a search warrant on the respondent's home and the respondent immediately pointed to a black bag in the sitting room containing 344.3 grams of cocaine, with a value of €24,101, 620.6 grams of creatine which was used as a mixing agent and drugs paraphernalia.

4. In interview, the respondent admitted that she was being paid to mix, weigh and bag the drugs, explaining that she was being paid approximately €500 and that she had been doing it for six or seven months, every month or every six weeks. She said that she was not under duress and did not have a drug addiction. The respondent answered all questions asked of her with the exception of identifying the person by whom she was paid.

Personal Circumstances of the Respondent

5. The respondent was 51 years of age at the time of sentence. She has no previous convictions. She had not been in employment in the years preceding this offence however, she had been acting as a carer for her mother. She has four children.

6. Having initially stated that she did not have a drug addiction, it was accepted during the sentence hearing that this was not actually the case, and that the respondent was a heavier drug user than she had first admitted.

Sentencing Remarks

7. The sentencing judge noted the value of the drugs at €24,000, that the respondent was cutting up the drugs for a third party for reward and that the third party was going to sell them on to customers and make a profit.

8. He identified the mitigating factors as the respondent's early plea of guilty, her co-operation, her lack of previous convictions, her work history and familial responsibilities. The judge expressed the view that it was unlikely that the respondent would reengage in serious crime, that her culpability was on the lower end and that she was at the very lowest in relation to the drug dealing operation.

9. The judge concluded that the respondent's early plea of guilty, her full cooperation and previous good character allowed him to depart from the mandatory minimum.

Grounds of Application

10. The Director relies on the following grounds in seeking a review of this sentence on grounds of undue leniency:-

"1. On the evidence, the sentencing judge erred in principle by departing from the presumptive mandatory minimum sentence prescribed by law and imposing a fully suspended sentence;

2. The sentencing judge erred in principle by failing to identify the headline sentence;

3. The sentencing judge erred in principle by failing to have proper regard to all of the aggravating factors which included inter alia:

a. The offending was motivated by financial gain and that she was paid €500 per cut and bagging;

b. Admissions that she had been bagging drugs every 4 to 6 weeks for 6 to 7 months;

c. Admissions to the Gardaí and the Probation and Welfare Officer that she did not have a drug habit, was not under duress and did not have a drug debt;

d. The drug was cocaine (3.443 grams valued at €24,101);

e. There was a significant quantity of mixing agent (620.6 grams of creatine); and

f. She was at a moderate risk of reoffending."

Submissions of the Director

11. The Director acknowledges the principles applicable in an application of this kind as established in *People (DPP) v Byrne* [1995] 1 ILRM 279 and *People (DPP) v McCormack* [2000] 4 IR 356.

12. Reliance is placed on the guideline judgment of *People (DPP) v Sarsfield* [2019] IECA 260. The Director identifies several comparator cases: in *People (DPP) v Farrell* [2020] IECA 163, the accused pleaded guilty to offending involving diamorphine with a value of approx. €2,000, the sentence after appeal was 2 ½ years' imprisonment with the final six months suspended; in *People (DPP) v Thornton* [2020] IECA 245, the accused pleaded guilty to offending involving €5,654 worth of cannabis, the sentence after appeal was 2 ½ years with the final six months suspended. In

People (DPP) v Tran [2021] IECA 227, involved an early plea where the accused transported €480,000 worth of cannabis, the sentence after appeal was 5 years and 4 months' imprisonment.

13. In *People (DPP) v Lawlor* [2021] IECA 281, the accused pleaded guilty to offending of approx. €23,000 of cannabis and alprazolam tablets, the sentence after appeal remained at 5 years' imprisonment with the final year suspended.

14. In *People (DPP) v Rakovac* [2022] IECA 233, the accused pleaded guilty to s. 15A and money laundering charges, the sentence after appeal was 3 years' imprisonment with the final 6 months suspended. The drugs concerned were cannabis and cocaine with a value of approx. €36,000. In *People (DPP) v Konar* [2023] IECA 145, the sentence after appeal remained at 2 ½ years' imprisonment involving approx. €17,000 of cannabis.

15. In *People (DPP) v Graham* [2023] IECA 168 the accused pleaded guilty to offending related to €34,000 worth of diamorphine, the initial sentence was one of three years' imprisonment, fully suspended and the sentence after appeal was 4½ years' imprisonment with the final 2½ years suspended. In *People (DPP) v McInerney* [2023] IECA 221, the accused pleaded guilty to offending involving €50,000 of cocaine, the initial sentence was one of 14 years' imprisonment with the final two years' suspended and the sentence after appeal was 10 years' imprisonment.

16. While it is accepted that the failure to identify a headline sentence is not an error in principle, it is submitted that this failure makes it very difficult to identify where the offending was placed and what credit was given for mitigation.

17. The Director highlights the following:-

- a. The drug was cocaine;
- b. The value was well in excess of the statutory requirement for a section 15A charge;
- c. The quantity of mixing agent that was found;
- d. The fact that the Respondent had been actively mixing, weighing and bagging drugs for a number of months;
- e. She was motivated by monetary gain;
- f. She was placed at a moderate risk of reoffending;
- g. She misled the Gardaí, probation officer and/or the court as to her drugs status and threat level; and
- h. If she did have a drug addiction (which was first instructed on the morning of the sentence hearing), there was no evidence that she had taken any steps to deal with it.

18. It is submitted that to reduce the three-year sentence to a fully suspended sentence was not justified on the evidence and amounted to an error of principle.

19. Reliance is also placed on the sentencing principles of punishment and prevention or deterrence. *People (DPP) v O'Brien* [2018] IECA 2 is cited in this regard.

20. It is submitted that it appears that the sentencing judge did not think there was any requirement for rehabilitation as he did not follow any of the recommendations of the Probation Service.

21. The Director emphasises the respondent's "*late declaration of a drug addiction*", that there was no evidence of any steps towards rehabilitation having been taken and that her claim of having been drug-free for two years is unreliable given what transpired at the sentencing hearing.

22. It is submitted that the sentence imposed is unlikely to be deterrent to others in the

respondent's situation who play a pivotal role in the drugs trade; mixing, weighing and bagging drugs.

23. Reference is made to the legislative motivation for the sentencing regime applicable to s. 15A offending as specified under s. 27(3D) as follows.

Submissions of the Respondent

24. In respect of the sentencing judge's failure to nominate a headline sentence, the respondent asserts that this decision does not render the sentence incorrect.

25. Reliance is placed on para 18 of the *Sarsfield* judgment.

26. It is asserted that a sentencing judge is not constrained by a particular formula and reliance is placed on *People (DPP) v Molloy* [2018] IECA 37.

27. Further reliance is placed on *People (DPP) v Joyce* [2021] IECA 124 as follows where no headline sentence was nominated and no indication given as to where on the spectrum the offending fell in general terms.

28. It is submitted that all that is required is cognisance on the part of the sentencing judge of the mandatory presumptive minimum, clarity of rationale behind the departure and appropriate weight to be given to the factors in s. 27(3D) and general sentencing principles. The respondent asserts that this was done by the sentencing judge.

29. In respect of the aggravating factors, it is submitted that the sentencing judge explicitly stated factors prior to addressing mitigation.

30. It is emphasised that the sentencing judge in the present case is an extremely experienced sentencing judge and that he received evidence from a member of An Garda Síochána who had experience of the respondent and knowledge of her reasons for getting involved in the offending. It is submitted that it was legitimate for him to conclude that the respondent was not involved in the manner which had initially been indicated but in a less culpable role and that nuance in the oral evidence informed the approach taken by the sentencing judge.

31. The respondent further emphasises the mitigating factors in the case including the guilty plea, the cooperation, the lack of previous convictions, work history, family responsibilities and efforts towards rehabilitation.

32. The respondent distinguishes the present case from *Kenny* wherein the accused was followed at speed by a garda car while travelling at speeds of 133km/h through red lights and eventually fled on foot. It is submitted that the degree to which the respondent in the present case was caught red-handed is vastly different in that there was no attempt at fleeing or avoiding culpability.

33. In respect of rehabilitation, it is submitted that this was addressed by the sentencing judge as follows:-

"I've thought about involving the probation service, but I note the defendant before me is 51 years of age, and at this point in her life, it seems to me she knows the difference between right and wrong and she knows that if she reoffends within that suspended period, the likelihood she'll go to -- go to prison for three years. So, I don't want to waste the resources of the probation service on somebody such as Ms Kenna. It's up to her now. She's received a chance and hopefully she won't abuse it."

34. In respect of s. 27(3D) and the considerations of the Court in that regard in *Graham*, it is submitted that the reasoning in *Graham* does not apply to the within application. It is submitted that the harm caused by drug trafficking was at the forefront of the sentencing judge's mind.

Discussion

35. Issue is taken with the failure of the judge to nominate a headline sentence; thus, it is not possible to determine the reduction for mitigation or to assess whether the assessment of culpability was correct in the circumstances. It is fair to say that while these matters are in issue, the real focus, appears to us, to rest with the suspension of the entire sentence.

36. The background is set out above. The appellant was engaged in mixing, weighing and bagging cocaine for which she received the sum of the sum of €500.00. It seems she did this perhaps every month to six weeks.

37. On foot of a search, the respondent pointed out a black bag to the gardaí containing cocaine, creatine, weighing scales and bags, all designed for the above purpose. The drug in question was cocaine and the value placed on it was circa €24,000.00.

38. When interviewed, the respondent admitted to her role, and said she did not have a drug addiction, did not have a drug debt and was not under duress. However, an unusual feature of this case is that following a conversation with the garda before the hearing, questions were put to the garda by counsel for the respondent where the garda accepted that she was a "heavier drug user" than that to which she had indicated to the gardaí or the Probation Service.

39. In addition, the garda agreed that she would know the "context and the pressures" leading to her involvement.

40. It is somewhat difficult to understand the respondent's attitude, but what is clear is that the judge accepted her role and that she had a drug problem and through that was obligated to other parties, leading to a degree of pressure.

41. The judge placed her culpability on the lower end of the scale and while no specific figure was nominated, this was the range identified by him. As we have stated time and again the failure to nominate a headline sentence will not necessarily amount to an error in principle. In this case, the judge identified a particular range which is of assistance, however, we cannot assess the level afforded for mitigation with specificity.

42. Ultimately, what we look to in this case is the sentence imposed by the judge, that being a wholly suspended sentence of 3 years' imprisonment.

43. The jurisprudence in respect of undue leniency reviews is well established, this Court will not intervene unless the sentence imposed represents a clear divergence from the norm. In every undue leniency review, we attach significant weight to the reasoning of the sentencing judge in imposing sentence and the judge in the present case is one of the most experienced judges in the criminal courts.

44. With that in mind, it is apparent that the judge took a particularly lenient view of the respondent in this case. In agreement with the judge, we consider that where the respondent was involved in the offending for financial gain, notwithstanding that the value is not at high level, her role impacts on her culpability. Again, we would not disagree with the sentencing judge that her culpability falls on the lower end, but would diverge in that we do not believe it falls at the "very lowest ..in relation to this drug dealing operation" However, the judge at a later stage referred to

her level of culpability as quite low with which we agree, and his ultimate sentence prior to suspension would place her culpability at this level.

45. We would not disagree with the sentence imposed following a reduction for mitigation, being that of 3 years' imprisonment. There was certainly mitigation present, the plea of guilty, her immediate admissions, her co-operation, the absence of previous convictions, her background and personal circumstances. However, we do believe that the judge fell into error in wholly suspending the 3-year sentence.

46. We do not see the kind of exceptional circumstances present which would justify suspending the entirety of the sentence. The judge came to the view that a non-custodial sentence was appropriate and said in this regard:-

"[i]n this case I have to take into account the general points raised in mitigation. I think I can infer there was some pressure on this woman to behave in the way she did, and it seems the amount and her level of culpability is quite low."

47. The judge was very much aware that he was imposing a very lenient sentence in that he later cautioned counsel that this may not be the end of the road for his client.

48. We do not believe however, that the circumstances merited a wholly suspended sentence over and above the discount allowed for mitigation. The custody threshold was passed, and the sentence imposed was significantly outside the norm for this type of offending and amounts to an error in principle.

Consequently, we will quash the sentence imposed and proceed to re-sentence the respondent *de novo*.

Re-Sentence

49. We take account of the aggravating factors to which the judge referred and with which we agree. The role of the respondent is an important factor in determining her culpability. We acknowledge the evidence that her drug problem was greater than she initially said and that she was operating under some pressure. Taking all factors into account including the value and the nature of the drug, we consider the appropriate headline sentence to be 5 years' imprisonment. There was significant mitigation to which we have referred which reduces the headline to 3 years' imprisonment.

50. The issue for suspending a portion of the sentence is a live one in the circumstances, not only to take account of her significant mitigation, but also to incentivise her rehabilitation. We will suspend the final 18 months of the sentence on the same terms and condition as in the court below.