



THE COURT OF APPEAL

[138CJA/18]

**The President
Whelan J.
McCarthy J.**

SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

STEPHEN SARFIELD

RESPONDENT

JUDGMENT of the Court delivered on the 15th day of October 2019 by Birmingham P.

Background

1. This is an application brought by the Director of Public Prosecutions seeking to review on grounds of undue leniency a sentence that was imposed in the Dublin Circuit Criminal Court. The sentence sought to be reviewed is one of seven years imprisonment that was imposed following the entry of a plea of guilty to an offence contrary to s. 15A of the Misuse of Drugs Act 1977 (as amended) being the possession of drugs with a value of €13,000 or more, with an intention to supply. The respondent was found in possession of diamorphine and cannabis with a combined value of €4.1m. In arriving at the sentence of seven years, the sentencing judge took into account certain other offences relating to the possession of a stun gun.
2. The background facts are that on 17th July 2017, Gardaí were in possession of confidential information suggesting that there was an operation in progress involving a large quantity of drugs in the Ballyfermot area. There was further information that there was a Heavy Goods Vehicle ("HGV") parked outside the house where the activity was said to have been taking place. Members of An Garda Síochána went to Ballyfermot Drive where they engaged in surveillance of the area. Upon their arrival at the scene, they found a large curtain-sided HGV parked outside No. 3 and opposite No. 10. They also observed a large white Mercedes van parked in the driveway of No. 10. Adjoining No. 10 was a large garage, the import of which will soon become apparent.
3. At approximately 1.50pm, the respondent was observed moving the HGV into position on the footpath immediately opposite No. 10. At the same time, a white Peugeot van pulled up and parked in front of the truck. Shortly thereafter, two individuals referred to as Mr. C and Mr. D arrived in separate vehicles. These men were seen removing flat pack boxes

from the HGV and bringing them into the garage. Mr. C left the scene at around 2.38pm. Mr. Sarsfield is said to have remained on the premises for the entirety of the afternoon in question.

4. The Gardaí had, meanwhile, obtained a search warrant in respect of the garage and, at 4.05pm, the decision was taken to enter the premises when it appeared that the respondent and Mr. D were about to bring in more empty boxes. It is worth noting that at this point in time, Mr. Sarsfield was standing on the footpath of the premises and he had on his person the keys for the HGV as well as a mobile phone. Upon entering the garage, Gardaí quickly realised it was the centre of a largescale drugs distribution unit due in part to there being a large amount of controlled substances in plain sight. In particular, there was a significant number of packs of cannabis herbs, some 378 such packages, which, in weight, came to 188 kilos and had an estimated value of €3.760620m. Such was the quantity of cannabis on the premises that Gardaí spoke of people tripping over packs of the substance. The Gardaí also discovered three stun guns on a shelf in the garage during their search. On further examination, it emerged that these guns were not in good condition. In a makeshift office, were three packs of diamorphine which collectively weighed about 2.9 kilos and had an estimated value of €410,312. Other items seized were a weighing scales, a money counting machine, and two plastic bag sealing machines. The evidence of those members who were present indicated that there was an overpowering smell of cannabis herb on the premises.
5. The respondent was arrested and detained and in the course of his detention was interviewed on six occasions. For the most part, he exercised his right to silence, though he did refer to the fact that he had a gambling debt of €60,000 and was addicted to cocaine, using it three or four times a week. Gardaí confirmed that he was “a small cog but undoubtedly important cog in the bigger machine”.

The Sentence

6. In terms of the respondent’s background and personal circumstances, he was thirty-nine years of age at the time his arrest. He had no relevant previous convictions with only minor recorded convictions for road traffic and public order offences. The Central Criminal Court also heard that he had been suffering from depression for some ten years and that there was a history of chronic knee and back pain. A letter from the respondent’s GP suggests that his vulnerabilities, both mental and physical, had been taken advantage of at the time of the offences.
7. A number of very positive testimonials were opened to the Court below which highlighted among other things the efforts made by Mr. Sarsfield to deal with his addictions through the SMART recovery programme, his role as a coach to a youth football team, and his having been a supportive family man. Reference was also made to Mr. Sarsfield assisting others on their own path to recovering from addiction. The approach of the sentencing judge was to identify a headline sentence of twelve years, but he felt that there were factors present which would permit him to impose a sentence less than the mandatory presumptive minimum of ten years. The Judge then proceeded to impose the sentence of seven years imprisonment which the Director has now sought to review.

The Undue Leniency Application

8. When the present application was first listed, counsel for the moving party was asked by members of the Court whether it was the Director's position that this was a case where the mandatory presumptive minimum should not have been deviated from. After a somewhat equivocal initial response, counsel sought an opportunity to take instructions. Having done so, counsel confirmed that the Director's position was that this was not an appropriate case in which to impose a sentence less than the mandatory presumptive minimum. In those circumstances, the Court indicated that it would welcome further submissions directed to identifying the circumstances in which a court would or would not be justified in departing from the mandatory presumptive minimum. The Court further expressed the view that it would welcome being provided with any information that was available in relation to sentencing patterns in this area.
9. In response to these requests, helpful submissions have been provided on behalf of the Director and the respondent. The submissions of the Director address the issues raised by the Court at the initial listing, but also make points in relation to the specific case before us. As one would expect, the submissions on behalf of the respondent are far more case-specific and are directed towards establishing that the sentence imposed in the circumstances of the case did not represent a substantial departure from the norm. Instead, the suggestion is that the sentence was "on the nose" such that Director's application for a review is unstateable.

Section 15A Offences

10. Unusually, s.27(3D) (a) of the 1977 Act contains a specific statement of the rationale behind the sentencing regime by justifying those provisions "in view of the harm caused to society by drug trafficking". The Courts have long been aware of the effects of drug trafficking and are called on to deal with those effects, and the affected, on a daily basis. On very many occasions, the Court has to deal with the fact that those who become addicted to drugs find their lives destroyed. On other occasions, the Court is dealing with victims one step further removed i.e. those victims of crimes committed by individuals in order to feed a habit or to clear a drugs debt.
11. The culpability of those coming before the courts varies considerably. Sometimes, though perhaps not as often as one would wish to see, the Courts are dealing with those in a supervisory role: those managing or directing the operations in question. Probably more frequently, however, those brought before the Courts play a lesser role and could be described as lower-ranking operatives in a wider criminal enterprise. These lesser roles, whether they involve storing or transporting drugs, may still be very important and without which major drug dealing and trafficking could hardly occur.
12. In assessing the gravity of a particular offence, the value and quantity of drugs seized have long been regarded as critical factors to be taken into account in evaluating where on the scale of seriousness the offence falls. See, in that regard, the judgment of the Court of Criminal Appeal in the case of DPP v. Derek Long [2008] IECCA 133. However, as that judgment itself makes clear, that is not of course to say that the value of a drugs haul is, in and of itself, determinative of the sentence to be imposed. As the Court of

Criminal Appeal observed, there may well be cases where the person found in possession of the drugs is left unaware, or could not have known, of the quantity or value of the drugs in question. This can arise in the case of a drugs mule who is handed a suitcase at a foreign airport and asked to import it into Ireland for a reward. As this Court often finds itself emphasising, each case will necessarily turn upon its own particular facts and the individual circumstances of an offender may serve to move the dial considerably in either direction. Even in the case of a very large haul indeed, it is possible to imagine cases where the evidence will indicate that the individual was playing a totally subservient role. Those living in abject poverty and deprivation analogous to the situation of the “gardeners” in cultivation cases is one such situation that comes to mind. On the other hand, there may be cases where the quantity of drugs is less, though perhaps still substantial, but the manner in which the individual dealt with the drugs left no room for doubt that he was the actual owner, was in effective control, and/or was the individual, or one of the individuals, who stood to make major profit from the exercise. In general, the greater the authority exercised, the greater the culpability. Where the decision to become involved in drug trafficking was one taken in order to make a financial gain, that too will increase the level of culpability.

13. The absence of financial gain and the fact that the offence achieved nothing more for the offender than being provided with a small quantity of drugs for immediate personal use would tend to reduce culpability. Duress, even at a level falling short of what would provide a defence in law, may still be relevant. However, sentencing courts will need to be conscious that it is easy to assert that one is acting under duress and such assertions are not infrequent. A factual basis to support the assertion is required. It is not unknown for the prosecution and for investigating Gardaí to accept that duress was a factor, and indeed, to introduce the issue of duress into the case. Where that happens it is likely to have a significant impact on the case.
14. In the case of s. 15A offences, the headline or pre-mitigation sentence is only a first step, and as always, save where the sentence is a mandatory one, it will be necessary to have regard to the individual circumstances of the individual offender. Those circumstances will vary widely from the individual with relevant previous convictions making a conscious and unforced decision to become involved, to individuals falling into offending in circumstances of extreme distress and vulnerability. The circumstances can be expected to vary so widely that there can be no real expectation of uniformity of actual sentences imposed, as distinct from consistency in identifying a headline or pre-mitigation sentence and the principles to be applied in arriving at the ultimate sentence.

The Survey

15. In response to the Court’s request for information on sentencing patterns, the Court was provided with a detailed survey undertaken of 104 misuse of drugs cases dealt with by this Court, or its predecessor, the Court of Criminal Appeal. Some caution in relation to the survey is required, in that by definition, the fact that the case went to the Court of Criminal Appeal or the Court of Appeal meant that one side or another felt that the sentence originally imposed in the Circuit Court was not appropriate, being either too

severe or unduly lenient. It is important to recognise that of the 104 offenders, all but eight pleaded guilty resulting in a guilty plea rate of 92%. This is generally consistent with the levels of pleas across all s.15A cases which is understood to be running at 95%. Of the eight who were convicted following trial, six received heavy sentences ranging from twelve to twenty-five years. The survey is of effective sentences i.e. sentences to be served, where sentences contained part-suspended elements, only the custodial portion has found its way into the survey. The results of the survey are as follows:

25 Years	1	(estimated €108m to €400m)
18 Years	1	(estimated €6.2m)
17.5 Years	1	(estimated €108 to €400m)
14 Years	1	(€12m)
12 Years	5	(€43,120 to €2m)
11 Years	1	(€619,000)
10 Years	11	(€45,000 to €5.1m)
9 Years	1	(€748,000 to €1.2m)
8 Years	4	(564,175 to €2.87m)
7.5 Years	2	(€400,000 to €2.5m)
7 Years	9	(€33,000 to €2m)
6.5 Years	2	(€140,000 to €143,000)
6 Years	9	(€101,000 to €1.5m)
5.5 Years	1	(€400,000)
5 Years	10	(€34,386 to €700,000)
4.5 Years	1	(€1.4m)
4 Years	7	(€153,000 to €1.3m)
3.5 Years	2	(€90,000 to €350,000)
3 Years	15	(€444,000 to €1.2m)
2.5 Years	2	(€64,000 to €122,000)
2 Years	2	(€632,000 to €1m)

1.5 Years	2	(€43,000 to €45,000)
1 Year	2	(€60,000 to €40,000)
Fully Suspended	11	(€34,000 to €2.87m)

16. Additional material and statistical information was put before the Court, including a review of sixty-seven sentence appeals involving offences contrary to s. 15A of the Misuse of Drugs Act 1977, as amended dealt with by this Court between 2014 and 2019. Paragraph 1 of that analysis referred to seventeen sentence appeals involving drugs valued in excess of €1m and it concluded that the average sentence was one of nine years' imprisonment with the average suspended sentence being two and a quarter years. Accordingly, the average time actually served was six and three-quarters years. It was this extract that caused counsel for the appellant to say that the sentence imposed in this case was "on the nose" and that the appeal was unstatable on the basis that the sentence imposed did not represent any departure from the norm, still less, the substantial departure that would be required to alter the sentence on grounds of undue leniency. Again, a degree of caution is required because the level of involvement with the drugs may vary greatly from case to case. There may be times where the evidence does not indicate that the person before the Court was the beneficial owner of the drugs or the individual who would make the ultimate profit but nonetheless establishes that the individual was very actively involved in the project and was committed to its success. Such persons could not be seen as mere facilitators or low-level operatives and could not expect to be treated as such.

Discussion

17. The difficulty in addressing the issue of sentencing in this area is that comparators are at their most useful when one is comparing headline or pre-mitigation sentences with each other. However, the presumptive minimum sentences identified by the Oireachtas, and indeed, subject to constitutional issues, the actual mandatory sentences stipulated in certain cases relate to actual custodial sentences to be served. Matters are further complicated by the fact that the imposition of sentences less than the mandatory presumptive minimum is not at all unusual, in part because pleas of guilty in s. 15A cases are so widespread.
18. Our observations are for that reason, somewhat tentative. It has long been recognised that the proper approach to sentencing is for a judge to identify the appropriate sentence without reference to the presumptive minimum. If the appropriate sentence is at or in excess of the statutory minimum, nothing further is required. If the sentence under contemplation is below the presumptive minimum, the Court will have to address the presumptive minimum and consider whether the imposition of the mandatory presumptive minimum would, in all the circumstances of the case, be unjust. Where the offence involves significant involvement in a very high-level drug offence, the headline or pre-mitigation sentence is likely to be well in excess of the statutory presumptive minimum. In the case of high-level commercial drug dealing involving very large quantities of drugs, we would expect that the headline or pre-mitigation sentence is likely

to be of the order of fourteen or fifteen years, and in some exceptional cases, significantly higher.

19. What we have to say about the ultimate sentence is more tentative still, having regard to the very wide variation in the circumstances of offenders coming before the Courts. The Court would, however, observe that in the sort of very high-end commercial drug trafficking cases to which we have been referring, a plea of guilty, of itself, without something more, is unlikely to justify a reduction below the presumptive minimum sentence. Such a situation is particularly likely if the plea was entered against a backdrop of very strong or overwhelming evidence, not an unusual situation in the context of s. 15A cases.
20. The non-exhaustive list of factors which a sentencing court may have regard to in determining whether to deviate from the presumptive minimum are set out in s. 27(3D)(b)-(c) as follows:
 - “(b) ...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 subsection, have regard to any matters it considers appropriate, including—
 - (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 paragraph (b) of this subsection whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to—
 - (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 the imposition of a lesser sentence.”
21. The wording of these sections shows that a particular emphasis is placed on the assistance, if any, provided by the offender to the Gardai in combating drug trafficking. Mr. Sarsfield did offer what has been described by both parties as an “early plea”, albeit it was one which was provided in a context where he was caught “red-handed”. However, beyond the plea, nothing very much was put forward by way of material assistance. There is also, however, the substantial mitigation which was put before the sentencing judge to consider.

22. The information provided by the parties, including the survey of 104 cases to which reference has been made, suggests that the average time to be served, where the drugs involved are valued in excess of €1m, is 6 and three-quarter years. It is this that caused counsel for Mr. Sarsfield to observe that the sentence imposed on his client was "on the nose". However, it must be said that even for these high-end drug cases, those with an entry threshold of €1m, the drugs here were four times that amount. It is more than 300 times the statutory threshold for the imposition of the statutory presumptive minimum sentence.
23. The Court is very conscious of the jurisprudence applicable to cases where reviews of sentences are sought on grounds of undue leniency. It is fully aware that considerable regard must be had to the views of the sentencing judge. That general proposition is reinforced in the circumstances of the present case when the sentence sought to be reviewed was imposed by one of the most experienced, if not, in fact, the most experienced sentencing judge in the country. Notwithstanding that, we are of the view that having regard to the seriousness of the offending in issue, and the enormous scale of the activity interrupted by Gardaí, that the sentence imposed represented a substantial departure from what was to be expected and was, indeed, unduly lenient.
24. It therefore falls to this Court to resentence. In the Court's view, a pre-mitigation or headline sentence of fifteen years would have been appropriate. Giving full allowance for all the factors present in favour of Mr. Sarsfield, including his plea of guilty and the absence of relevant previous convictions, we believe that the ultimate sentence could not be less than the mandatory presumptive minimum, and indeed, a sentence greater than the mandatory presumptive minimum could be justified. However, in a situation where we are intervening to resentence, we will confine ourselves to imposing a sentence of ten years imprisonment. We do so in a situation where we cannot see any basis for concluding that the imposition of the presumptive minimum sentence would, in all the circumstances of the case, be unjust. In so deciding, we confirm that we are resentencing as of today's date; that we are conscious that having a sentence increased at this stage must be deeply disappointing for Mr. Sarsfield, and that we have had regard to the up to date information put before the Court.
25. Accordingly, we will quash the sentence imposed in the Circuit Court and substitute for it a sentence of ten years imprisonment.