

IRELAND / JUDGMENT

D.P.P.-v- Derek Long [2008] IECCA 133 (31 October 2008)

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[2008] IECCA 133 Court of Criminal Appeal Record Number : 94CJA/08 Date of Delivery: 31 October 2008 Court: Court of Criminal Appeal Composition of Court: Kearns J., Budd J., Clark J. Judgment by: Kearns J. Status of Judgment: Approved Judgments by Result Kearns J. Allow appeal - adjourn for sentencing Outcome: Allow appeal - adjourn for sentencing COURT OF CRIMINAL APPEAL Kearns J. Budd J. Clark J. [C. C. A. No. 94CJA of 2008] 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 DEREK LONG RESPONDENT JUDGMENT of the Court delivered on 31st October, 2008 by Kearns J. This case raises a point of some considerable importance in the area of sentencing under s. 15(A) of the Misuse of Drugs Act, 1977 (as inserted by ss. 4 & 5 of the Criminal Justice Act 1999) and it is this: to what extent should the court take into account the quantity, value and type of drugs seized when determining the appropriate sentence? The present case involves an application brought on behalf of the applicant under s.2 of the Criminal Justice Act, 1993 for a review of a sentence of two years imposed on the respondent in Dublin Circuit Court following his guilty plea to possession of drugs (in this case cocaine) having a street value of €111,370 on the 10th September, 2006 at Blackrock in the County of Dublin. The factual circumstances may be briefly stated. On the basis of information received, members of the Garda Síochána carried out a search of the respondent's home on the 10th September, 2006 where they found 1,591 grams of cocaine with an uncontested street value of €111,370. The respondent was born on the 10th November, 1985 and was thus twenty-one years of age at the time of the offence. The drugs were found in the respondent's family home and he was not present at the time of the search. On his return, the respondent was brought to the local garda station by his father

where he made various admissions. He claimed to be holding the cocaine on behalf of another person to whom he owed €500 which was due for payment of debts in relation to cocaine he himself had consumed. While not accepting that he was addicted to drugs, the respondent did admit to consuming cocaine at weekends, consuming approximately two €100 bags of cocaine per week. The respondent, who is now nearly twenty-three years of age, is the youngest of a family of three children and resides with his parents. He left school at sixteen years of age and held a variety of different jobs. There was evidence at the hearing of significant family difficulties in the background. The respondent's mother had a very severe history of depression with a number of attempted suicides. Following one such episode in March, 2005, the respondent himself became depressed and was put on medication. He was unable to find work in 2006 and began drinking heavily and using cocaine. During this period he ran up a series of debts which he could not repay. At the sentencing hearing, a psychological report which had been compiled by Drs. Jeanine De Volder and Patrick Randall was made available to the Court as was a report from Dr. Kate O'Leary, the respondent's General Practitioner. These reports were relied upon to urge upon the sentencing judge that the respondent was an immature and vulnerable person with low self esteem who would be prone to abusing alcohol and drugs for those reasons. The Managing Director of a development company also gave evidence to state that the respondent had worked with his company between January and June, 2007 and had shown himself to be a helpful and co-operative worker who applied himself in assisting main contractors with painting and decorating. There was also evidence that the respondent had weaned himself off drugs from the time of the offence and had demonstrated signs of genuine remorse and a determination to put his life in order. The respondent had no drug related previous convictions. His only prior convictions related to minor road traffic offences. In the course of his plea for leniency on behalf of the respondent in the Circuit Court, Mr. Michael O'Higgins, senior counsel, compared the facts of the instant case with those of *The People (Director of Public Prosecutions) v. David Spratt*

[2007] I. E. CCA 123, a case in which this Court had substituted a two year term of imprisonment for a five year suspended term. The case was relied upon to suggest that this Court should adopt a similar view. In pointing out what he contended were similarities between the two cases, Mr. O'Higgins was nonetheless careful to point out that the street value of the drugs in that case was about €35,000. On being given this information in the present case the sentencing judge stated:- "That is not a material factor". Shortly afterwards, the sentencing judge pronounced judgment which, not least because of its exceptional brevity, the court proposes to recite in full:- "The accused man in this case has pleaded guilty to a very serious offence, that of s.15(A) of the Drugs Act. The minimum sentence as stipulated by the Act is ten years. Obviously, in special circumstances, I can go below that. It seems to me that those special circumstances (exist): his plea of guilty, his assistance in the investigation of the crime in question, and, in particular, as pointed out to me, his personal circumstances. What I think is very relevant in this case is the relative youth of the accused man on the date of the commission of the crime; he was twenty-one years of

age. It seems to me from reading the medical evidence and psychological reports that he was particularly immature for his age. It also seems to me that he was suffering from a condition that would certainly impair his judgement and certainly weaken his defence against committing acts that would get him into trouble. So in all the circumstances, particularly bearing in mind his youth, psychological condition on the date in question and the special circumstances outlined, the plea of guilty and the assistance (given by the respondent), and taking into account the case of DPP v. Spratt, I will impose the same sentence as indicated in that case. I think that the appropriate sentence is one of two years imprisonment.” The application for review of sentence in the instant case is primarily grounded upon the assertion that, when imposing sentence, the Circuit Court erred in failing to take into account the gravity of the offence having regard to the substantial value of the drugs which formed the subject matter of the charge, namely cocaine to the value of €111,370. It was also submitted, however, that the sentencing court erred in attaching undue weight to both the personal circumstances of the respondent, the reports before the court in relation to him, the fact that the respondent was twenty-one years of age and the manner in which the respondent had met the case. It was submitted that these factors, either individually or collectively, did not warrant the excessively lenient approach adopted by the sentencing judge when imposing sentence. DECISION This judgment does not purport to revisit the general area of sentencing considerations under s. 15(A) of the Misuse of Drugs Act, 1977 (as inserted by ss.4 and 5 of the Criminal Justice Act, 1999). That is not to say that the Court does not have due regard to the factors to which, in a wide number of cases covering many different circumstances, the courts have had regard in deciding not to apply the provisional mandatory minimum sentence. These factors include such features as an early plea of guilty, the rendering of material assistance, the fact that the offender is a foreign national and other factors which from time to time are taken into account to by the court so as to disapply the provisional minimum sentence. Other considerations might include the fact that the respondent was a vulnerable person, that it was a “one off” offence where the offender was unlikely to re-offend, that the offender was an addict himself or owed debts to the gang for whom he was holding drugs or that he was under duress or in fear of his own safety. The Court is exclusively concerned in this judgment with the role which the quantity, value and type of drugs seized should play when sentence comes to be passed. At the very outset, the Court has no hesitation in concluding that the quantity and value of drugs seized are critical factors to be taken into account in evaluating the overall seriousness of the offence. That is implicit from the terms of s.15(A) itself which provides a separate and more draconian regime of sentencing for a person found in possession of controlled drugs which exceed a certain value. The Court thus rejects as mistaken the views of the Circuit Court judge in this case which were unambiguously to the effect that the value of a particular haul or the difference in value of a particular haul between €35,000 and €111,370 was “not a material factor” when it came to sentencing. This approach, if correct, would lead to some startling consequences, including the possibility that the importer of several million euros worth of heroin could legitimately expect to be treated in exactly the same fashion as a person

acting as a storeman or minder of an extremely modest amount of drugs having a small street value. It is perhaps surprising that it should be contended that there is an area of uncertainty in this area. It is true that this Court has not specifically stated until this case that the value of the drugs seized is an important factor in sentencing but that is plainly to be inferred from a number of pronouncements of this Court when dealing with drug cases. In *The People (Director of Public Prosecutions) v Botha*

- [2004] IECCA 1, this Court noted that s. 27 of the Misuse of Drugs Act 1977, as amended, provided for a minimum sentence on the basis of the value, rather than the nature, of the substance. Further, as pointed out by Murray C. J. in *The People (Director of Public Prosecutions) v. McGinty*
- [2007] 1 I. R. 635 (at p.637):- “There is no doubt that the possession of illegal drugs for the purpose of sale or supply, particularly in any significant quantity, is a very serious offence which of itself would normally warrant a custodial sentence.” (Emphasis added) In *The People (Director of Public Prosecutions) v. Duffy* [Unreported, CCA, 21 December, 2001] this Court by obvious implication indicated that a sentencing court must take into account the quantity of the drugs seized, the Court noting:- “While the consignment of cannabis resin found in the boot of the car was clearly of a quantity sufficient to attract the statutory minimum sentence, absent any countervailing considerations, a sentence of 20 years would not have been far off the longest sentences which have been imposed by the courts in recent years for offences in relation to the sale and supply of drugs, although in some at least of those cases the quantity of drugs in question was far higher than in this case.” I can only think that the absence heretofore of a specific statement from this Court to the effect that the quantity and value of the drugs is a critical factor in sentencing is attributable to the fact that the courts regarded that proposition as self-evident from the scheme of the legislation. That is not of course to say that the value of a drugs haul is determinative of the sentence to be imposed. There may well be cases where the person found in possession of the drugs is unaware and could not have known of the quantity or value of the drugs, such as in the case of a drugs mule who is handed a suitcase at a foreign airport and asked to import it into Ireland for reward. Each case will necessarily turn upon its own particular facts. The Court would also be of the view that the type of drugs is also a consideration to which the sentencing court may have regard. The more dangerous the drug the more that factor may be seen as playing some limited role in the matter of sentencing. In *The People (Director of Public Prosecutions) v. Renard* (Unreported, Court of Criminal Appeal, 23rd November, 2001) the accused was arrested with cannabis with a street value of €18,000. Counsel for the accused submitted that in deciding upon the appropriate sentence following conviction the sentencing court should have taken into account the nature, value and quantity of the drug found in possession of the accused. It was argued that the controlled drug in question was cannabis and that this is less harmful than other controlled drugs. In upholding a sentence of five years, but suspending the final two years, Murphy J. in delivering the judgment of the court noted that in the Misuse of Drugs Acts 1977-1984, the Oireachtas had drawn a distinction

between cannabis or cannabis resin on the one hand and other controlled drugs on the other. He stated:- “In that context it may be said that offences relating to cannabis might be treated less severely than those relating to other drugs. It is however an argument of very limited value. However, it is a factor to which a sentencing judge in his or her discretion might attach some limited significance.” This Court would reiterate the views expressed by Murphy J. to say that to the extent that a particular drug may be shown to be actually or potentially more harmful than another is a factor of some value to which a sentencing judge may have regard in an appropriate case. The critical factor, however, in determining sentence is clearly the value of the drugs in question. The trial judge unfortunately failed to give due regard to that consideration in this case. The Court is also satisfied that the learned sentencing judge in the instant case attached excessive importance to the respondent’s age, immaturity and psychological vulnerability. The Court is satisfied that none of these factors, either individually or collectively, were such as to warrant or justify the course adopted by the sentencing judge. In particular, the psychological report did not suggest or conclude that the respondent was incapable of exercising a judgement as to what was criminal behaviour and was not. In *The People (Director of Public Prosecutions) v. David Spratt*

[2007] I. E. CCA 123, the respondent was twenty-one years of age and had learning difficulties. He was found in possession of three bags of cocaine having a street value of just under €35,000. He was immediately co-operative and pleaded guilty at the earliest possible time. In the course of delivering the judgment of the court, Finnegan J. noted that the drugs in question were not paid for and that the respondent was in fear of the supplier. He also had a gambling problem and was attending Gamblers Anonymous. He owed €3,000 in debts to members of his family and because of his indebtedness he was to some extent vulnerable. He suffered from attention deficit disorder and depression, but does not appear to have been a drug user himself. He had a good record of employment and good prospects of rehabilitation. Thus it will be seen there were, as pointed out by Mr. O’Higgins, similarities between that case and the present one, but for the reasons already indicated, this Court is of the view that the critical difference is the value of the drugs haul in the instant case. It places the offence in the instant case on a completely different level of seriousness and gravity. It is also worth pointing out that in *Spratt*, Finnegan J. expressly took into account the value of the drugs found and at no point did he suggest that their value was not a material factor. While the Court accepts Mr. O’Higgins submission that excessive criticism should not be applied to the “living transcript” of a sentencing hearing, the Court feels compelled to state that the terseness of the judgment delivered in the instant case gives rise to a measure of concern. It is important, particularly in cases of this nature, that the sentencing judge delivers a reasoned judgment. The Court does not accept that the sentencing judge should be taken or interpreted as saying that the value of the drugs was not a material factor in the present case only. Unfortunately, any construction of his observation and subsequent judgment can lead only to one conclusion namely, that he did not regard the value of the drugs as a “material factor” when imposing sentence.

The Court is satisfied that these errors led to a substantial departure in the instant case from the appropriate sentence which should have been imposed. At the conclusion of the hearing, the Court indicated that Mr. O'Higgins should have the right to make further submissions or tender other documentation when this court is itself framing the appropriate sentence and the case will now be re-listed for that purpose. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IECCA/2008/C133.html>

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