



THE COURT OF APPEAL

[230/2013]
[231/2013]

The President
Irvine J.
Hogan J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993
THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANTS

AND
DESMOND RYAN AND EDWARD ROONEY

RESPONDENTS

JUDGMENT of the Court delivered by the President on the 19th day of January 2015

1. Following the hearing of this application on the 8th December, 2014, the Court delivered an ex tempore judgment in which it held that the application made by the Director had succeeded and that the sentences imposed on the respondents were unduly lenient. In accordance with the jurisprudence and established practice the Court afforded the parties an opportunity of putting forward relevant updated material on the issue of sentence. The Court then adjourned the matter for determination of the appropriate sentence to be imposed on the respondents and said that it would provide a fuller statement of the reasons for its decision on the application. This the Court now does.

2. In the early hours of the morning of 5th April 2012, a truck driven by Mr. Ryan entered the car park of the White Horse Public House in Finglas. Mr. Rooney arrived in his partner's Ford Mondeo and Mr. Ryan handed him a holdall which was then placed in the boot of the car. Mr. Rooney had earlier gone into and out of the car park and then driven away. The Gardaí who had the location under surveillance stopped Mr. Rooney some distance from the car park. It transpired that the holdall contained a consignment of drugs comprising 4,464 grammes of heroin with a market value of €1.2 million and 227 grammes of cocaine valued at almost €16,000. When stopped by the Gardaí Mr. Rooney immediately admitted there were drugs in the boot of his car and that he had collected them from a man at the public house in Finglas. He had no idea as to the nature of the drugs. At subsequent interview Mr. Rooney stated he had been approached by a man at the Social Welfare office to do the job and he was told there would be €500 waiting for him in a car in a City West car park where he was to drop the bag.

3. Mr. Ryan said that he had been approached when sitting in his truck in the U.K. and he was told he would be paid between €2,000 and €3,000 for delivering the holdall which he believed contained cigarettes. He later accepted in his third interview that at the time of handling it over in the car park because of the holdall's weight he realised that it could not have been cigarettes and he thought it was probably cannabis. Certainly, he did not know it was heroin which was a drug - he thought - was liquid rather than solid in form. On a fourth interview he accepted that he suspected that there were drugs in the holdall from the outset. His motivation was to try and help his partner with a debt of €86,000 owed to the Department of Social Welfare.

4. The accused men were arrested and charged in each case with an offence under s.15 15A of the Misuse of Drugs Act 1977 (as amended) and came in due course before the Circuit Court where they pleaded guilty on the 11th March 2013. There were sentence hearings on the 29th July and 11th October, 2013.

5. Mr Ryan was a 52-year old truck driver with a good work history. He has two grown up children and is in a longstanding relationship with a partner who has a child whom he has nurtured. He has no previous convictions and according to the investigating officer, Detective Garda Molloy, is very unlikely to re-offend. He was very upset in the course of his interview, showing genuine remorse. Mitigating features in his case were that he did not add value to the drugs transported and would not have received any share in the profit, his early plea of guilty and material assistance, good work history, financial strain, genuine remorse and that he was unlikely to re-offend. The court had in addition good testimonials from employers and neighbours.

6. Mr Rooney was a labourer/mechanic by occupation. He was in his mid 60's and had four grown up children. He had experienced financial difficulties, owing some €22,000 to his bank and credit union. He had some medical issues. He also had no previous convictions. Mitigating features were the early plea and material assistance. He admitted knowing that he was transporting drugs, although he had no idea of the type of drug or its potential value. He cooperated with the investigation as far as he could subject to having regard for his family's safety. He had sincere remorse and was unlikely to re-offend. He also provided impressive testimonials.

7. The learned sentencing judge adjourned sentencing for a probation report. In giving his judgment he referred to the maximum sentence and the presumptive mandatory minimum and to the import of the legislation. He considered the mitigating and aggravating factors in both cases. He took into account their early pleas, remorse and the fact that both were unlikely to re-offend. They also both had good testimonials. The judge said that he must have regard to the devastation caused to society by drugs. He said that he had the authority under the Act not to impose the minimum sentence and could do this because of what was in the probation report and the way the respondents had met the case. Having regard to the seriousness of the offence, he would impose a ten year sentence in each case and suspend it in its entirety for seven years. Mr. Rooney was also ordered to take part in a restorative justice programme.

8. In light of these sentences, the Director of Public Prosecutions brings an application to this Court under s. 2 of the Criminal Justice Act 1993, for review of the sentences on the ground that they were unduly lenient and, if appropriate, to have each of them quashed and replaced by another sentence that this Court considers appropriate. The Director submits that the sentences represented a substantial departure from what would be considered appropriate in all of the circumstances; that the learned sentencing judge had excessive regard to the mitigating circumstances in deviating from the mandatory minimum and in then suspending the totality of the sentence; he had insufficient regard to the aggravating factors, including the manner in which the drugs had been transported and their value; that the facts were not sufficiently exceptional to justify the imposition of a suspended sentence for a s.15A offence; and that the sentences contained no deterrent effect.

9. Counsel for each of the respondents submitted that the sentence was not unduly lenient and that the applicant had failed to identify any error in principle that would give rise to the statutory jurisdiction to review the sentences imposed.

Jurisdiction to Review: Section 2 of the Criminal Justice Act 1993

10. Section 2 of the Criminal Justice Act 1993, in so far as relevant provides:-

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the 'sentencing court') on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

(3) On such an application, the Court may either -

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

11. In *Director of Public Prosecutions v. Byrne* [1995] 1 I.L.R.M. 279 at p. 287, the Court of Criminal Appeal stated four principles to be applied when a review of sentence under s. 2 of the Act of 1993 is brought:-

1. The onus of proof to show that the sentence was 'unduly lenient' rests on the Director of Public Prosecutions

2. Great weight should be afforded to the trial judge's reasons for imposing the sentence at issue. In particular, if the trial judge has kept a balance between the circumstances of the case and the relevant circumstances of the offender the decision should not be disturbed.

3. The test is not the converse of that when there is an appeal by an appellant; it is not a query as to whether a more severe sentence could have been imposed and upheld as being right in principle. Rather, it is an inquiry as to whether the sentence was 'unduly lenient'.

4. Nothing but a substantial departure from what would be regarded as the appropriate sentence would justify intervention.

12. The term 'undue leniency' was further explored in that court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356. Delivering the judgment of the Court Barron J. said at p. 359:-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

.... The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependant upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

13. In *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390, Hardiman J set out the role of the appellate court in a matter of this nature. In considering the cases set out above, and reviewing similar statutory provisions in Australia and England, he held that an error of principle was required for an appellate court to interfere with a sentence given by a sentencing judge. It was not enough that the members of court might impose a different sentence, whether more lenient or severe, to that given at first instance. The sentencing judge must have been found to have made an error of principle.

Penalty for section 15A offence: Section 27 of the 1977 Act as amended

14. Section 33 of the Criminal Justice Act, 2007 inserted new subsections (3A) to (3K) in s. 27 of the 1977 Act as follows:

"(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment—

(a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and

(b) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.

(3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3D) (a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.

(b) 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 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.

(3E) Subsections (3C) and (3D) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3F) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this Act are to be construed as references to a first such offence.

(3F) Where a person (other than a person under the age of 18 years)—

- (a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or
- (b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections,

the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

(3G) The power conferred by section 23 of the Criminal Justice Act 1951 to commute or remit a punishment shall not, in the case of a person serving a sentence imposed under subsection (3A) of this section, be exercised before the expiry of the minimum term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section less any reduction of that term under subsection (3H) of this section.

(3H) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct shall apply in the case of a person serving a sentence imposed under subsection (3A) of this section and the minimum term specified by the court under subsection (3C) of this section shall be reduced by the amount of any remission so earned by the person.

(3I) Any powers conferred by rules made under section 2 of the Criminal Justice Act 1960 to release temporarily a person serving a sentence of imprisonment shall not, in the case of a person serving a sentence imposed under subsection (3A) of this section, be exercised during the term for which the commutation or remission of his or her punishment is prohibited by subsection (3G) of this section unless for a grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by such reason.

(3J) In imposing a sentence on a person convicted of an offence under section 15A or 15B of this Act, a court—

- (a) may inquire whether at the time of the commission of the offence the person was addicted to one or more controlled drugs, and
- (b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the term specified by the court under subsection (3C) or (3F), as may be appropriate, of this section.

(3K) On reviewing a sentence listed under subsection (3J)(b) of this section, the court—

- (a) may suspend the remainder of the sentence on any conditions it considers fit, and
- (b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate.

15. Some relevant elements of the provisions may be summarised. The maximum penalty for an offence under section 15A or 15B is imprisonment for life. The subsection as inserted also provides for a minimum sentence, for which it expresses a policy justification that was not part of the provisions that these subsections replace. "In view of the harm caused to society by drug trafficking," where a person over 18 years is convicted of an offence under section 15A, the court must specify a minimum term of imprisonment of not less than 10 years. However, this is not absolute. If it is a first such offence and there are exceptional and specific circumstances relating to the offence or the convicted person which would make the minimum sentence unjust, the court may impose a lesser punishment. For this purpose the court may have regard to anything it considers appropriate, including—(i) whether the person pleaded guilty and if so the stage and circumstances in which the indication to do so was given; (ii) whether the person materially assisted in the investigation of the offence; (iii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence; (iv) the court can also take into account whether the convicted person has a previous conviction for drug trafficking but a section 15A offence on the person's record outrules the discretion to depart from the 10 year minimum—see subsection 3(H). The statutory power to commute or remit a punishment cannot be exercised before the expiry of the minimum term less any remission. Neither can temporary release be granted except for a grave humanitarian reason and then only for such time as is justified by the reason. If the person was addicted to drugs at the time and that was a substantial factor leading to the offence, the court may review the sentence after the expiration of half the specified term.

16. The subsection envisages that among the exceptional and specific circumstances are an early plea of guilty and material assistance in the investigation of the offence. The court is entitled (but not obliged) to take a plea of guilty into account, particularly

if it is signalled early and if it has extra value. As to co-operation, that applies to material assistance in the investigation of the offence, that is, the crime of possession by the person of controlled drugs having excess value. Information that the person provided about others, for example, would arguably be considered to go outside the specific and instant offence and to refer to other crimes; for such assistance the court can if it wishes allow additional mitigation or invoke the clause on the public interest in preventing drug trafficking. The terms of the section imply that an early indication of guilt and relevant admissions as to the person's own role cannot be discounted as being unexceptional. The court may take them into account. It has to be a first such offence to give rise to the discretion to depart from the minimum sentence but it would be relevant that a convicted person did not have previous convictions of any kind. It is not sufficient that there are exceptional and specific circumstances in the case, whether relating to the crime or the guilty person, because the subsection requires that these features make it unjust to apply the minimum.

17. The penalty provisions cited above that are applicable in these cases are similar in all material respects to those that were considered in a series of appeals to the Court of Criminal Appeal so that jurisprudence is valuable as authoritative precedent. The present contents of s.27 (3A) and following subsections are replacements of provisions inserted by s.5 of the Criminal Justice Act, 1999. There is, however, one significant difference: now, the statutory purpose behind the mandatory sentence is now expressly stated: see s. 27(3D)(a). The previous court's authoritative analyses of the earlier provisions make clear that the legislative purpose was indeed understood, although it was then to be inferred. It may be therefore presumed that the explicit iteration of purpose in the present section was intended to reinforce the authority of the court's interpretation and to leave no room for uncertainty. Having said that, the significance of the explicit declaration of the statutory purpose of s. 15A should not, perhaps, be overstated. In *Molyneux v. Ireland* [1997] 2 I.L.R.M. 241, 244 Costello P. stated:

"...it is not necessary for the Court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure - it will usually be possible for the Court to make reasonable inferences from the provisions of the statute itself and the facts of the case".

The express statement that drug dealing has profoundly serious consequences for society is admittedly no different from that which, in line with *Molyneux*, the Court of Criminal Appeal had previously inferred in pre-2007 Act cases, such as *Renald, Botha* and *Lernihan*. Yet the fact that the Oireachtas saw fit to re-state this policy objective in express language must be taken as tantamount to a legislative reminder of the baneful effect of the drugs trade and the importance of ensuring that the severe penalties which are contained in these sections are not diluted by judicial decision. It is noteworthy that the new version of s. 15A penalty provisions inserted by the 2007 Act now precludes the Court from deviating at all from the 10 year minimum sentence following a second conviction for a s. 15A offence: see *The People (Director of Public Prosecutions) v. Geraghty* [2014] IECA 5. This implicitly reinforces the legislative categorisation of any s. 15A offence as a very serious matter.

The Authorities

18. Section 15A requires both exceptional and specific circumstances about the offence or the perpetrator that make it unjust to impose the 10 year minimum sentence before the court is able to depart from that regime: *The People (Director of Public Prosecutions) v Botha* [2004] 2 IR 375. Even if it would be unjust to impose the 10 year minimum sentence, an offence under s.15A is a very serious one and the court must have regard to the minimum and maximum punishment –the latter is life imprisonment—when determining the appropriate sentence. The fact that there is a severe minimum albeit subject to some exceptions is an important guide to gravity: *The People (Director of Public Prosecutions) v. Renald* (Court of Criminal Appeal, 23 November 2001). The quantity and value of the drugs are critically important in assessing gravity: *The People (Director of Public Prosecutions) v. Long* [2009] 3 IR 486. This also follows from the specification of €13,000 in the section. People who enter into the trade for reward must expect severe treatment from the courts, in enforcing the statutory policy clearly laid down by the Oireachtas: see *The People (Director of Public Prosecutions) v. Duffy*, Court of Criminal Appeal, 21st December; *The People (Director of Public Prosecutions) v. Lernihan* [2007] IECCA 21. Couriers play an essential role in the illegal drugs trade and if they willingly go into it for financial reward they cannot expect less than severe treatment from the courts in accordance with the clear and unambiguous policy of the legislation: see *The People (Director of Public Prosecutions) v. Hogarty*, Court of Criminal Appeal, 21st December 2001, per Keane CJ. There have, nevertheless, been cases under s.15A where wholly suspended sentences were upheld by the Court of Criminal Appeal; it is clearly not wrong in principle to do so but that will only arise in rare cases. One such was *The People (Director of Public Prosecutions) v McGinty* [2007] 1 IR 633, in which Murray CJ said that while a term of imprisonment is normally what should be imposed, yet "...where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interests of justice".

19. This approach has been endorsed in many subsequent cases and the test may be stated thus: Are there special reasons of a substantial nature combined with wholly exceptional circumstances such that the imposition of a suspended sentence is correct and appropriate in the interests of justice? In *The People (Director of Public Prosecutions) v. Jervis and Doyle* [2014] IECCA 14 the Court of Criminal Appeal said that the test laid down in *McGinty*:

"goes well beyond the ordinary requirement that there be exceptional and specific circumstances, as ordinarily understood. There must, in addition be "special reasons of a substantial nature" which must be, not only exceptional, but "wholly exceptional" something quite out of the ordinary. A totality of factors where the court combines all the mitigating factors is not sufficient."

20. In *The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513, the Court said that when the court held that the statutory proposed minimum would be unjust there should normally be a substantial term of imprisonment. It also said that considerations of vulnerability on the part of the guilty person were relevant matters to be taken into account but those "considerations by no means automatically override others, such as the impact on victims and the gravity of the offence. More often than not any alleged vulnerability will have little or only marginal effect on the sentence having regard to the gravity of the offence and the fact that the accused knowingly and freely committed an offence which entailed the prospect of a serious custodial sentence. They are factors which can arise in any case and the weight to be given them will vary."

21. *The People (Director of Public Prosecutions) v Botha* [2004] 2 IR 375 is an early and authoritative analysis of the previous form of the penalty provision which is similar to the present version. The application for leave to appeal a sentence of five years imprisonment imposed following a plea of guilty to a charge under s.15 (A) of the Misuse of Drugs Act, 1997 was rejected. The court commented thus on the policy of the legislature:

22. "The Oireachtas, as it is entitled to do, has indicated that this offence is to be considered a very grave one capable of attracting a sentence which might be regarded as harsh in certain circumstances and on certain individuals. It is important that sentencing courts should bear this in mind. Furthermore, consistency of sentencing is desirable in this as in other areas. It is true that the desideratum of consistency cannot be carried to the point of imposing a sentence which is actually unjust. We would however say that the circumstances in which a sentence less than the one imposed for this offence could be imposed must be indeed very

exceptional.”

The court concluded that:

“There was no error in principle in the sentencing and indeed a somewhat harsher sentence would not, in our opinion, have been erroneous in principle either. Every mitigating factor was given all the weight it could possibly bear and the learned trial judge was, if anything, generous to the applicant.”

Discussion

23. There were significant mitigating features in the case of each of the accused persons, although they did not include financial difficulties. In Mr. Ryan’s case, he made an early plea, he had a good work record, he exhibited genuine remorse and he was unlikely to re-offend. He did not add value, so to speak, to the drugs transported. He received no financial benefit in fact and he had good testimonials from his employer and neighbours. Mr. Ryan was 52 at the time with grown up children. He had a long standing relationship. His disposition in the course of Garda interviews demonstrated genuine remorse.

24. Mr. Rooney similarly pleaded guilty at an early stage, gave material assistance, admitted knowing he was transporting drugs, said he had no idea of the type of drug or its potential value which was accepted, had sincere remorse and was unlikely to re-offend. He cooperated subject to having regard for his family’s safety. He has some medical issues and had testimonials. Mr. Rooney is 66 years.

25. The nature of the crimes committed was intrinsically serious, a fact demonstrated by the value of the drugs. There were also significant aggravating features in the mature ages of the respondents, the motive in each case of financial gain, the fact that each man was not driven by addiction or compulsion to commit these crimes, but rather did so by choice.

26. The DPP brings this application to have the sentences reviewed on the ground of undue leniency and set aside and replaced by appropriate terms of imprisonment. The basis of the application is that the trial judge paid too little attention to the seriousness of the crime and laid too much emphasis on the personal circumstances and mitigating features that operated in favour of the accused. The law sets a high standard for the DPP to achieve in order to set aside a sentence on this basis. It is not enough that this court would impose a different sentence or that it considers the sentence imposed to have been lenient or even very lenient. There must be an error of principle. The Director’s case here is that the judge’s decision is out of kilter with the decided cases because there were not wholly exceptional circumstances of a rare kind to enable the sentencing court to avoid an immediate custodial sentence.

27. In view of the circumstances, the trial judge was entitled to depart from the statutory minimum sentence of 10 years and the Director does not challenge that. However, the question of a wholly suspended sentence is another matter. There was and is in the view of this Court no adequate basis to conclude that the case presented a sufficiently exceptional and rare set of circumstances that would justify a non-custodial approach. At its height, and without considering the aggravating matters, each case could be said to have a totality of factors contributing to mitigation. Each case nonetheless lacks the necessary ingredient that is “*wholly exceptional*” and something quite out of the ordinary. A totality of factors - where the court combines all the mitigating factors - is not sufficient as is clear from the judgment of Fennelly J. for the Court of Criminal Appeal said *Jervis and Doyle*.

28. The aggravating features include the value of the drugs, the ages of the respondents, the motive in each case of financial gain, the fact that neither of the respondents was driven by addiction or coercion and the serious nature of the particular drugs. They elevate the seriousness of the culpability of the respondents and their presence is another reason why the sentence imposed was not consistent with the terms of s.27 (C) and (D) and the jurisprudence we have just set out. The trial court fell into error in failing to give effect to the statutory intention.

29. In all the circumstances, the Court is satisfied that the Director has succeeded in the application on the ground of undue leniency under s. 2 of the Act. It follows therefore that the suspended sentences imposed on the respondents must be set aside and replaced by appropriate sentences. That undertaking must be approached as of today’s date, that is, 19th January, 2015. At the end of the argument on the Director’s application the Court announced in a brief *ex tempore* judgment that it held in favour of the application and invited counsel for the respondents to submit relevant material for consideration in determining the appropriate sentence and reserved judgment on the matter to this date.

30. An issue that now arises is that the respondents have been at liberty, admittedly subject to the terms on which the sentences were suspended and to the Director’s application for review, since the 11th October, 2013 and now come to be imprisoned. There is additional disappointment at the end of an extra period of anxiety for a person who has survived more or less unscathed in one court sentencing process to find himself facing sentence following a successful prosecution appeal. Obviously, legal advisers will inform an accused person of the possibility of a more severe sentence being imposed on appeal and the party is on notice as soon as the Director’s application comes in within the short time frame permitted. Nevertheless, the stressful nature of that experience has been recognised as, perhaps, justifying some degree of leniency. This situation has been referred to as double jeopardy and courts in other countries have made allowance for it by reducing the new term of imprisonment. There is also the fact that a considerable period has elapsed since the date of sentence. The court is of the view that some significant allowance should be made under these headings.

31. The court has now considered the case as a whole and with reference particularly to the new material furnished by counsel. These testimonials and references amount to further mitigation of the culpability of the respondents. As stated above, the Court is satisfied that the learned sentencing judge was not in error in departing from the statutory minimum on the ground of injustice but that suspended sentences cannot be upheld. The offending was serious and there must be imprisonment. The value of the drugs was very substantial and their nature was in the most dangerous category. Whether the respondents actually knew which drugs they were moving is of little relevance because they were willing to get involved in the business whatever particular drugs were to be transported. They chose this way to make money—small amounts admittedly—and played roles that are essential to the business of drug dealing. In the scale of offending in this class of crime, where the mandatory sentence would be unjust but the cases remain very serious, the policy of the legislature is abundantly clear and must be enforced.

32. Allowing the maximum mitigation, the appropriate sentences for these offences and these offenders is five years imprisonment but because of the extra material that was submitted and the other considerations including that the accused have been at liberty for a substantial period and have reorganised their lives albeit with this hearing looming over them, the Court will reduce that to a sentence of three years imprisonment in each case to date from today. The Court wishes to emphasise that it considers that this approach does not indicate the appropriate sentence to be imposed but only in the particular circumstances that arise here.