**THE COURT OF APPEAL**

**Appeal No.: 94/95CJA/15**

**Sheehan J.**
**Mahon J.**
**Edwards J.**

**In the Matter of an Application pursuant to Section 2 of the Criminal Justice Act 1993**

**Between/**

**The Director of Public Prosecutions**

**Appellant**

**- and -**

**Jonathan Mannion and John Martyn**

**Respondents**

**Judgment of the Court delivered on 31st day of May 2016 by Mr. Justice Mahon**

1. This is the Director's application pursuant to s. 2 of the Criminal Justice Act 1993 seeking a declaration that the sentences imposed on both respondents were unduly lenient.

2. The respondents pleaded guilty on 6th December 2013 at the Circuit Criminal Court sitting in Galway to an offence under s. 15A of the Misuse of Drugs Act 1977 (as amended) namely, the unlawful possession of cannabis with intent to sell or supply. The street value of the cannabis was €199,600. The respondents were each sentenced on 20th March 2015 to five years imprisonment but with the entire of the term suspended on conditions. Mr. Mannion spent a number of months in custody awaiting sentence, but was released on bail before he was sentenced

**Section 2 Criminal Justice Act 1993**
3. Section 2 of the Criminal Justice Act 1993 provides:-

> *"2(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.*
>
> *(2)*
>
> *(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.*
>
> *(4)*

**The background facts**
4. Following the receipt of confidential information, gardaí stopped both respondents in a car on 9th October 2012 at Loughrea in Co. Galway. The car was searched and cannabis was found in a cardboard box in the boot of the car and which had a street value of just under €200,000. The car was the property of Mr. Martyn.

5. Mr. Mannion, who was a passenger in the car, told the investigating gardai that he had taken a lift from Mr. Martyn, they had travelled from Galway to Dublin, collected the consignment of drugs and were en route back to Galway when stopped by the gardai. He stated that he had been told that a drugs debt of €3,800 owed by him would be forgiven in return for his assistance in transporting this consignment of drugs. He told gardaí that he was surprised at the amount of drugs involved and had thought they were of considerably less value than in fact they were. He made immediate admissions, and to that extent co-operated with the gardai.

6. Mr. Mannion has fifteen previous convictions for offences including theft, trespass, burglary, public order, criminal damage, arson and for one relating to the possession of drugs in respect of which he had pleaded guilty on 15th April 2013 (value approximately €5,000), as well as other minor offences. He was sentenced in the District Court in respect of a previous drugs offence on 31st March 2014.

7. In relation to Mr. Martyn, he maintained that he had driven Mr. Mannion to Dublin and back to Galway as a favour to Mr. Mannion, and that he was to receive €200 for his efforts. Mr. Martyn was stated to have fully co-operated with the gardai. Mr. Martyn has no previous convictions. He is twenty four years old, unemployed and has one child.

**The sentencing process in the Circuit Court**
8. The sentencing of both respondents was initially scheduled for 20th March 2014. On that date, the learned sentencing judge heard evidence in relation to the offences and the personal circumstances of the respondents from the relevant garda witnesses.

9. On that occasion, in relation to Mr. Martyn, the learned sentencing judge considered a report provided by the Probation Service. He placed Mr. Martyn under the superivison of the Probation and Welfare Service and adjourned sentencing for a period of twelve months. He remanded Mr. Mannion in custody to await a final decision as to his sentence.

10. In deciding to put the case back for sentence for twelve months, the learned sentencing judge stated:-

> *"Now, it seems to me that if I were to deal with this matter today then the period of probation and supervision would arise at the end of the sentence and it may not be as useful as if I were to deal with it as is suggested by his counsel, which is to put the matter back for twelve months and during that period require him to observe the conditions that are set out in the final report – or, sorry, in the final paragraph of the probation officers report, that he attend counselling for his personal issues or any other service deemed suitable by the probation service, that he attend all appointments with the training and employment officer, that he not come to the adverse attention of the gardai, that he attend all probation appointments and provide urine for random drug screening as requested by this office, and that is the manner in which I purpose to deal with that today."*

11. It was emphasised to Mr. Martyn that the decision to put his case back for twelve months was not to be taken in any way as an indication as to the actual sentence that would eventually be imposed. He was also told that he was *"parking"* the issue as to whether it was appropriate to depart from the statutory requirement to impose a minimum sentence of ten years in respect of an offence under s. 15A of the Misuse of Drugs Act 1977, as amended by s. 84 of the Criminal Justice Act 2006 and s. 33 of the Criminal Justice Act 2007.

12. In relation to Mr. Mannion, the learned sentencing judge also decided to defer his decision on sentence for a period of twelve months. In so doing, he noted that the probation report then available in relation to Mr. Mannion indicated that he was at a very high risk of re-offending within twelve months. He remarked that Mr. Mannion *is aware that he will receive a custodial sentence for the offences before the court*.. He also expressed his concern that if Mr. Mannion was granted his freedom at this point in time, he would *leg it.* He also indicated that he had yet to decide whether or not it was appropriate that the mandatory minimum ten year sentence should apply in his case. He proceeded to remand Mr. Mannion in custody to facilitate the preparation of a psychological report.

13. Mr. Mannion's sentencing was adjourned to 14th May 2014. Over the preceding seven or eight weeks, Mr. Mannion had been reviewed on five occasions by a senior consulting psychologist at Castlerea Prison. Sentence was adjourned to 28th Mary 2014 in order for the exchange and consideration of two psychologists' reports that were then available. On that date, Mr. Mannion's sentencing was again adjourned with a direction that the probation service update its report in the face of the two psychologists' reports that had been available. The matter again came before the court on 11th July 2014. It was again adjourned to 7th November 2014, to enable Mr. Mannion consider the content of the new probation service report.

14. On 7th November 2014, the updated probation service report was noted to be considerably more positive for Mr. Mannion than had the earlier report. On that basis, an application was made by Mr. Mannion's counsel that he be released from custody pending final sentencing so that he could *establish a pattern of good behaviour of twelve months*. This application was not objected to by the appellant; indeed it was effectively consented to on the basis that there would be an interim review at the same time as Mr. Martyn's sentence was scheduled for review (March 2015). Mr. Mannion was duly released from custody on strict bail terms, including that he would reside at No. 1, Woodville, Ballina, Co. Mayo, and that he would comply with the directions of the Probation and Welfare Service. An up to date probation report was also directed.

15. The matter of sentencing both Mr. Mannion and Mr. Martyn finally came before the court on 20th March 2015. At that point in time Mr. Martyn had been at liberty, awaiting sentence, for exactly twelve months, while Mr. Mannion has been at liberty for approximately four months.

16. On 20th March 2015 the court was informed that Mr. Mannion had complied fully with the terms of his release from custody in the previous November. Neither appellant had come to the adverse attention of the Gardaí during their respective periods of liberty. Strong pleas of mitigation were made in respect of both respondents.

17. The learned sentencing judge proceeded to pass sentence on both respondents. He stated that he was satisfied that the circumstances in both cases allowed him to, in accordance with the provisions of s. 27 of the 1977 Act, as amended, properly depart from the statutory requirement to impose mandatory minimum sentences of ten years. He stated as his reasons to be the respondents' pleas of guilty, their co-operation and the steps they had taken to rehabilitate themselves in the interim. The learned sentencing judge went on to consider that an appropriate sentence for both defendants' was one of five years imprisonment (having earlier mentioned as a possibility a seven year sentence). He proceeded however to suspend the entire of both sentences for five years subject to conditions including the supervision of the Probation and Welfare Service for a further twelve months in the case of Mr. Mannion. In arriving at his decision, the learned sentencing judge specifically referred to the fact that he had put these two men to the test over the previous twelve months, that both appeared to have taken steps to distance themselves from drugs. He specifically referred to the social circumstances of each of the men and the impressive steps that they had taken to deal with their problems.

**The appellant's submissions in relation to the sentences**

18. While the appellant does not make the case that the learned sentencing judge inappropriately imposed a sentence less than the mandatory minimum ten year sentence required by s. 27 of the Misuse of Drugs Act 1977 (as amended) she takes issue with the fact that Mr. Mannion did not receive a custodial sentence. She refers to the decision of this court in *DPP v. Flanagan* [22015] IECA 99 in which it is stated *"..that in the overwhelming majority of cases a s. 15A offence will attract and require the imposition of an immediate, and frequently significant, custodial sentence"*. It is submitted on behalf of the appellant that there are no circumstances apparent in Mr. Mannion's case such as would justify a decision not to impose a custodial sentence. It is contended that the learned sentencing judge failed to give sufficient weight to the aggravating factors in the case, the seriousness of the offence, and the intention of the Oireachtas in relation to s. 15A offences. The appellant further relies on the negative conclusions of Mr. Mannion's probation report, and other factors including Mr. Mannion's attempt to lay blame for his involvement in the enterprise with Mr. Martyn and the fact that he was involved in the transportation of this very large quantity of drugs in order to gain profit.

19. In relation to Mr. Martyn the appellant's submissions are broadly similar to those made by her in relation to Mr. Mannion, albeit with due acknowledgment of the fact that Mr. Martyn had no previous convictions and had a more positive report from the probation service compared to that for Mr. Mannion.

20. In relation to both respondents, the appellant is also critical of the failure by the learned sentencing judge to identify headline sentences before discounting for mitigation, as appropriate. Counsel for the appellant placed the offences at 'mid range' in terms of

their gravity.

**Were the sentences unduly lenient?**
21. The onus of establishing that the sentences were unduly lenient rests with the applicant. It is not sufficient to show that the sentences were lenient, or indeed very lenient, (as is undoubtedly the position in Mr. Mannion's case) but that the sentences were unduly lenient. In *DPP v. McCormack* [2000] 4 I.R.36, Barron J. stated:-

> *"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.*
>
> *Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. 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 dependent 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."*

22. Finally, it is important to emphasise that the issue of undue leniency should not be considered on the basis of the sentences which this court might have considered appropriate in the circumstances relevant to these two respondents, but rather, on an objective examination of the sentences imposed having regard to all the circumstances, and with due regard also to the discretion which is properly afforded to a sentencing court imposing sentence in the first instance having heard relevant evidence.

23. It is generally the case, and it is now well accepted that this is so, that s. 15A offences will normally attract an immediate custodial sentence, and one of significance, particularly where drugs of considerable street value are concerned, in the absence of there being present exceptional circumstances which require a different and non-custodial approach. Such cases are likely to be rare. Such an approach is warranted, not simply because such cases are inherently serious with obvious adverse consequences to society generally, and young people in particular, but also in recognition that the Oireachtas has, through its legislation, taken steps to emphasise the serious nature of this type of offence and its requirement that persons convicted of such offences be severely dealt with. The position was well stated in the judgment of the court delivered by Mr. Justice Edwards in DPP v. Flanagan [2015] IECA 99, at para 30, thus:-

> *"The Court has considered each of these cases and they clearly illustrate that in the overwhelming majority of cases, a s.15A offence will attract and require the imposition of an immediate, and frequently significant, custodial sentence. In acknowledging that, however, it is important not to lose sight of the requirement that a sentencing judge is not sentencing for the offence per se, but for the offence as committed by the particular offender in the particular circumstances of the individual case. While it is clear that a custodial sentence will be the norm in s. 15A cases, having regard to the position taken by the legislature in especially deprecating the harm caused to society by drug trafficking, and in setting a presumptive mandatory minimum sentence of ten years for such offences that is only to be departed from where exceptional circumstances exist, it cannot be the case that the legislature intended to so emasculate the discretion of a sentencing judge as to preclude him from ever imposing a non-custodial sentence in a wholly exceptional but nonetheless appropriate case. It is accepted, however, that such cases are likely to be rare and infrequent."*

24. The subject of the appropriate sentencing for s. 15A offences was also considered in some detail in *DPP v. Ryan* [2015] IECA 10. In delivering the court's judgment in that case, the President stated:-

> *"Couriers play an essential role in the illegal drugs trade and if they willingly go into it for financial reward cannot expect less than severe treatment from the courts in accordance with the clear and unambiguous policy of the legislation: DPP v Hogarty (21/12/2001) per Keane C.J. Nevertheless, there have been cases under s.15A where wholly suspended sentences were upheld by the CCA; it is clearly not wrong in principle to do so but that will only arise in rare cases. One such was People v McGinty [2007] 1 IR 633 in which Murray CJ said that a term of imprisonment is normally what should be imposed. "However, 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""*

25. In *DPP v. Botha* [2004] 2 I IR 375, the court commented on the policy of the legislature evident from the provision of s. 15A of the Misuse of Drugs Act 1977, as follows:-

> *"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 indeed be very exceptional."*

26. The sentence in *Botha* was one of five years imprisonment following a plea of guilty to a s15A charge.

**Mr. Mannion**
27. Although technically Mr. Mannion received a wholly suspended five year sentence it is nevertheless a fact that he spent a period of approximately eight months in prison after conviction, and during the sentencing process. Allowing for remission on the usual basis, such a term in custody is the approximate equivalent to a one year prison sentence. For the purposes of this application therefore, the court has approached the application on the basis that Mr. Mannion received the equivalent of an immediate twelve months custodial sentence.

28. The learned sentencing judge decided to deal with the sentencing of Mr. Mannion on the basis that the final decision on sentence should be deferred for approximately twelve months during which time a number of psychological and probation reports were undertaken. It was on the basis that the learned sentencing took the view that Mr. Mannion had significantly progressed in terms of his rehabilitation over that period, and particularly within the four month or so period between the date of his release from custody in November 2014, and the date of sentence, that he decided that a custodial sentence would not be imposed. His view as to the appropriate sentence was also clearly influenced by Mr. Mannion's difficult background, and undoubtedly, a comparison as between the probation report dated 20th March 2015 and the probation report twelve months earlier which indicated significant rehabilitation suggesting that a corner has been turned in terms of Mr. Mannion's criminal past. The court has not been informed of any relapse into criminal or anti social activity in the further additional period of twelve months that has elapsed since sentence was imposed.

29. The court is satisfied that the sentence imposed on Mr. Mannion was unduly lenient notwithstanding the strong mitigating factors that were present, and the impressive extent of his rehabilitation over a period of twelve months. The significant value of drugs involved in this case, (€200,000 approximately), coupled with the existence of twenty nine previous convictions, including one particularly relevant conviction for a drugs offence, warranted in the court's view, an immediate custodial sentence of two years or more. The "headline" sentence of five years, identified by the learned sentencing judge as appropriate, could not be said to be unreasonable in all the circumstances, and was certainly within the learned sentencing judge's discretion. To have entirely suspended that term, albeit for a period of five years, was however unduly lenient.

30. Having so found, the court must now sentence Mr. Mannion afresh. Reference has already been made to Mr. Mannion's improved position in terms of his probation reports and the fact of his continued rehabilitation. These are certainly matters of significant mitigation which alone warrant a more lenient sentence than might otherwise be appropriate.

31. It is, in this context, worth quoting from Mr. Mannions' HSE accredited Counsellor in his report dated 28th April 2016. He states:-

> *"Jonathan's engagement with me has been exemplary, thorough and profound. He has always presented well, and on time for sessions. He is determined to lead a drug free life and be a responsible member of society. He has successfully completed a First Aid Course and is currently a student on an Accounting Technician course. Jonathan is highly motivated and resolute in his desire to pursue a new direction in life."*

32. The sentence which this court must now impose must necessarily take account of all mitigating factors, being those which were apparent at the time of sentencing in the lower court, and which were well recognised by the learned sentencing judge, and those additional factors which are now apparent and which can be attributed to the interim period between 20th March 2014 and now, and, in particular, the significant and impressive strides made by the appellant to rehabilitate himself, including his return to education in preparation for a career in accountancy. While being of the view, as already indicated, that the 'headline sentence' identified in the court below was correct and appropriate, the sentence now imposed, for the reasons stated, will be one of two years imprisonment. It is accepted that Mr. Mannion has already served the equivalent of a one year prison term. Because of that fact and the particular circumstances in the case, and in recognition of the fact that Mr. Mannion having been detained for a period of approximately eight months was then released pending final sentence with, almost certainly, the expectation on his part that he would not be returned to prison, and, importantly, the fact that the appellant very much acquiesced in this approach, (what might reasonably be described as an unusually lenient approach to sentence), and did not prior to the commencement of this sentence review application indicate any degree of concern as to the course being adopted by the learned sentencing judge, the court will suspend the newly imposed two year custodial sentence for a period of two years from today's date and will not require Mr. Mannion's return to prison. A requirement that Mr. Mannion again returns to prison, in the particular circumstances of this case, risks undoing the impressive rehabilitation that has taken place to date, and which is continuing, and would not be in the public interest.

**Mr. Martyn**

33. Mr. Martyn's case is very different to that of Mr. Mannion. The mitigating factors in his case are even greater than those relevant to Mr. Mannion, and indeed this is evident from the different approach taken by the learned sentencing judge in relation to both men. Mr. Martyn was never required to spend any time in custody. His probation reports were very positive from the outset, and there has been impressive rehabilitation evident over the past two years. It is very much to his credit that Mr. Martyn has, by all accounts embarked on a successful career with Hewlett Packard in Galway and has received a glowing reference from his superior in that company.

34. Also of great significance, in terms of sentencing, is the fact that Mr. Martyn had no previous convictions, and had a lesser role in the enterprise than had Mr. Mannion. Mr. Martyn's involvement in this incident has the hallmarks of being a 'once off', and very much out of character. The learned sentencing judge had good reason to treat Mr. Martyn with considerable leniency in the circumstances. Mr. Martyn's sentence of a wholly suspended five year term was, in the court's view very lenient, but stops short of being unduly lenient. On this basis, the court will dismiss the appellant's application in relation to Mr. Martyn.