THE COURT OF APPEAL

Ryan, P.
Irvine, J.
Hogan, J.

Appeal Number: 77 & 78CJA/13

In the matter of s. 2 of the Criminal Justice Act 1993
THE PEOPLE (at the suit of the DIRECTOR OF PUBLIC PROSECUTIONS)

Applicant

AND
BRIAN BYRNE AND EOGHAN PHAYER

Respondent(s)

JUDGMENT of the Court delivered on the 19th January 2015 by Ms. Justice Irvine

1. On 8th December 2014 the court dealt with two applications brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of the sentences that had been imposed upon the respondents at Ennis Circuit Court on 25th February, 2013, on the grounds of undue leniency. Having heard the submissions of the parties on that date, the court delivered an *ex tempore* judgement in which it set out the basis for its conclusions that the sentences should be set aside on such grounds. Further submissions were then heard and additional materials received relevant to the sentence that the Court should now impose upon the respondents. At that point the Court then adjourned the proceedings to allow it provide a fuller statement of the reasons underlying its decision. What follows is the Court's consideration of such matters.

2. The respondents were initially charged with three offences under the Misuse of Drugs Act, 1977, as amended. Both men entered guilty pleas to count number 1, namely possession for sale and supply of a controlled drug having an aggregate value in excess of €13,000 contrary to s. 15A thereof. A *nolle prosequi* was entered in respect of the other counts.

3. As to the sentence imposed, both respondents were sentenced to a term of five years imprisonment. The sentencing judge then proceeded to suspend the entirety of that sentence for a period of five years from 25th February, 2013, on condition that they each enter into a bond of €500 to keep the peace and be of good behaviour.

The Offence

4. The circumstances of the offence were that, further to a search warrant, members of An Garda Síochána carried out a search of certain premises at Aharinaghmore in Co. Clare. Both respondents were present on the premises at the time of the search. In the attic the Gardai located what was described later as a sophisticated grow house with three hundred or so cannabis plants in various stages of growth. Regardless of the size or maturation of the plants, each was valued by Garda Walsh at €400, thus giving a total value of €120,000 to the drugs present.

5. As to Mr. Phayer's involvement, he initially denied all knowledge of the operation in the attic and even denied the presence of an attic in the house. In the course of his first five interviews he maintained he was merely working as an electrician at the premises, but on his sixth interview he admitted his involvement in setting up the grow house. Mr. Phayer also admitted to having sourced some of the materials necessary for the operation in Limerick and to having been involved in its maintenance. In addition, he advised Garda Kelly that the cannabis crop was expected to produce some forty to fifty thousand euro, in terms of turnover, every six weeks.

6. As to Mr. Phayer's personal circumstances, he had no previous convictions, was thirty four years of age and was single at the time. He was under financial pressure and had significant testimonials to support his good character.

7. As to Mr. Byrne, who is also an electrician, he immediately admitted his involvement in the enterprise during the search of the premises. He admitted having been involved in the setting up and maintenance of the grow house. Mr. Byrne stated that he was under financial pressure and wanted to make some money from the enterprise. He fully co-operated with the Gardai, subject to not naming the main operator of the grow house, whom Garda Kelly accepted was a dangerous individual.

8. As to his personal circumstances, Mr. Byrne was thirty two years of age at the time and the father of two children. He was in financial difficulty and had no previous convictions. Mr. Byrne, according to a range of testimonials from past employers, family members and neighbour, was a man of apparent good character.

Submissions

9. Counsel of behalf of the Director of Public Prosecutions, in addition to the matters raised in her written submissions, made a number of specific points to the Court.

10. Firstly, she claimed that the sentences imposed on these respondents were unduly lenient and that there were no exceptional and specific circumstances such as would have justified the sentencing judge departing from the presumptive minimum imprisonment sentence of ten years for this type of offence and substituting it with a wholly suspended sentence.

11. Secondly, she submitted that the sentencing judge had not paid sufficient regard to the gravity and seriousness of the offence which was, she maintained, a sophisticated ongoing operation. He had, she maintained, afforded too much credit to the respondents in respect of the mitigating factors.

12. Finally, counsel submitted that the sentencing judge had fallen into error in treating the fact that the lead player in the operation was not before the court as a mitigating factor. Overall, the sentence imposed was, she maintained, unduly lenient and amounted to a substantial departure from what might be considered appropriate having regard to the circumstances of the offence as committed by these respondents.

13. Counsel for Mr. Byrne, in addition to his written submissions, maintained that there were wholly exceptional circumstances such as justified the imposition of a wholly suspended sentence. He placed significant emphasis on the early and significant nature of the admissions made by his client which established the *mens rea* of the offence. Counsel also maintained that the plea of guilty was wholly exceptional in that his client had foregone the opportunity to contest the charges in circumstances where proof of the offence could have been extremely difficult for a number of reasons. In particular, he submitted that proof of the value of the drugs would have been problematic for the DPP, given that the plants, in many instances, were only partly grown. He maintained that, having regard to all of the mitigating factors that this case fell into that exceptional category of case where the trial judge was entitled to

take a lenient view and impose a wholly suspended sentence.

14. Counsel on Mr. Phayer's behalf, in addition to his written submissions, maintained that no error in principle had been identified by the Director such as would justify this Court interfering with the sentence imposed. He submitted that the circumstances of the offence and the personal circumstances of his client were so exceptional that the trial judge was entitled to depart from the presumptive mandatory minimum custodial sentence. Counsel emphasised his guilty plea, and the other very significant mitigating factors such as his immediate admissions, his cooperation with in the investigation of the offence, his remorse and his fall from grace within the community. He also reminded the Court that his client did not get away scot free, so to speak, having committed a serious offence. A sentence of five year imprisonment had been imposed and although fully suspended it would hang over him for a period of five years.

Decision

15. The principles to be applied by this Court on an application such as this are set out in a number of decisions, including that of the Court of Criminal Appeal in *DPP v Byrne* [1995] 1 ILRM 279,where at page 287 O'Flaherty J summarised the same in the following manner:

> (1) Since the Director of Public Prosecutions brings the appeal, the onus of proof clearly rests on him to show that the sentence called in question was unduly lenient.
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> (2) The Court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand. He may detect nuances in the evidence that may not be as readily discernible to an Appellate Court, In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced his decision should not be disturbed.
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> (3) It is unlikely to be of help to ask if there had been imposed a more severe sentence, would it have been upheld on appeal by an Appellant as being right in principle. And that is because the test to be applied under the section is not the converse of the inquiry the Court makes when there is an appeal by an Appellant. The inquiry the Court makes in this form of appeal is to determine whether the sentence was unduly lenient.
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> (4) It is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

16. Accordingly, this Court cannot set aside a sentence as being unduly lenient purely on the basis that it would have imposed a greater sentence had it been charged with the imposition of sentence. Nothing less than a substantial departure from what would be regarded as the appropriate sentence can justify the intervention of the Court with respect to the original sentence.

17. Thus, the starting point for this application must be an analysis of what might reasonably be considered to be an appropriate sentence for this type of offence as committed by these respondents. That analysis must take place against the backdrop of the relevant statutory provisions, given that the offence under consideration is one in respect of which the legislature has specified the manner in which the court must approach the imposition of sentence.

18. Section 27 of the Misuse of Drugs Act 1977, as amended by s. 33 of the Criminal Justice Act 2007, provides a maximum sentence of life imprisonment for a person found guilty of an offence under s. 15A. In respect of a person over eighteen years of age it provides that the court, in imposing sentence, shall specify a term of not less than ten years as the minimum term of imprisonment. The consideration underlying that provision is stated in s. 27 (3D) to be the harm that is caused to society by reason of drug trafficking.

19. The same section nonetheless allows the sentencing judge, in respect of a person convicted for the first time of a s 15A or 15B offence, depart from the presumptive minimum term of ten years imprisonment if satisfied that there are exceptional and specific circumstances relating to the offence or the person convicted of the offence as would render it unjust in all the circumstances to impose such a term of imprisonment.

20. However, from the use of the word "shall" in s. 27 it is clear that even in respect of the least grave offence captured by s. 15A, the court must, when considering the appropriate sentence to impose, have regard to the statutory provisions which set out the relevant sentencing parameters to be applied by the court save in exceptional circumstances.

21. It is also clear from the wording of s. 27 (3D) that where the sentencing judge is satisfied that such exceptional and specific circumstances exist a lesser sentence than the presumptive mandatory minimum may be imposed. In that regard the sentence of five years imprisonment imposed in this case, even though wholly suspended, does qualify as a lesser sentence within the meaning of that provision. However, it has to be said that a wholly suspended sentence constitutes a very radical departure from the presumptive statutory minimum term of ten years.

22. While there are decisions of the court approving of the imposition of a wholly suspended sentence in respect of s. 15A offences, those cases are rare. The principle that emerges from them is that the court can only impose a non-custodial sentence where it is satisfied that there are "wholly exceptional circumstances" . As Murray J. stated in *The People (Director of Public Prosecutions) v. Alexiou [2003]* 3 IR, 513:-,

> "Even where there are exceptional and specific circumstances which would make a sentence of not less than ten years imprisonment unjust, a substantial term of imprisonment, although less than ten years, will generally be the appropriate sentence. That does not, however, exclude wholly exceptional and specific circumstances where a suspended sentence may be considered appropriate in order to do justice in the particular place".

23. Taking guidance from that decision, it is reasonable to conclude that where the court is satisfied that exceptional and specific circumstances exist, the person convicted may expect to avoid the mandatory minimum sentence of ten years imprisonment and to receive a custodial sentence of a lesser period. However, to receive a wholly suspended sentence, it would appear that the threshold is much higher and the court must be satisfied as to the existence of circumstances which are wholly exceptional.

24. As to what may be considered to amount to wholly exceptional circumstances, some assistance can be gleaned from the case law referred to in the course of submissions. One such decision was that of the Court of Criminal Appeal in *The People (DPP) v. Walsh* [2010] IECCA 74 and another that of *The People (DPP) v. McGinty* [2007] 1 IR 633.

25. In *Walsh*, a six year wholly suspended sentence was upheld in respect of a s. 15A offence concerning cocaine valued to the sum of €34,000. In that case the accused had acted at a low level of command, was of low intelligence and had taken the brave step of providing the names of the bigger players to the Gardaí

26. In *McGinty*, the accused, who was 29 years of age at the relevant time, pleaded guilty to an offence contrary to s. 15 A. The evidence established that the breakdown of his parent's marriage when he was in his teenage years had had a traumatic effect on his progress through school. As a result he left to become a carpenter following his Junior certificate. He later became cocaine dependent. It was accepted that at the time he was arrested he was trying to break his addiction and clear off his debts. One month after his arrest he enrolled in a programme at Coolmine house with a view to ending his addiction. He was so successful in that programme that he became a programme leader with significant responsibilities and a role model for other recovering addicts to look up to. Mr McGinty had been drug-free for 14 months at the time of the sentencing hearing. He had also participated in a programme run at the same centre to assist those with parenting difficulties and as a result had become reconciled with his teenage son from whom he had become estranged as a result of his addiction. There was evidence that this reconciliation had substantially improved his son's progress both socially and academically. In addition to these factors when arrested he cooperated fully with the Gardaí advising them of the location and extent of the drugs in his possession.

27. In *The People (Director of Public Prosecutions) v. Jervis and Doyle* [2014] IECCA 14 the Court of Criminal Appeal emphasised that in order for the Court to impose a wholly suspended sentence in respect of a s. 15A offence, the proof required went well beyond the ordinary requirement that there be exceptional and specific circumstances which would render it unjust to impose the presumptive mandatory minimum ten year custodial sentence. It stressed that the need to prove "wholly exceptional" circumstances which threshold could not be met by totalling up a combination of mitigating factors.

28. Coming to the facts of this case, the learned sentencing judge when imposing sentence did not, as it happens, specifically refer in the course of his deliberations to the statutory provisions which set out the parameters to be adopted by the court when sentencing in respect of any s. 15A offence. In particular he did not mention the presumptive mandatory minimum sentence of ten years imprisonment.

29. It is clear from the transcript of the trial judge's deliberations that he took the view that there were very significant mitigating circumstances at play in respect of each respondent. These were articulated by counsel who referred to the significant pleas of guilty and the very material admissions going to the *mens rea* of the offence. The sentencing judge then referred to the fact that both men were of otherwise good character and the fact that he considered them to have been pawns that had been used by the leader of the operation. Three times in the course of imposing sentence he mentioned the fact that the leader of the operation had not been brought before the court and it is clear from the final sentence of his decision that he took this into account as a mitigating factor.

30. While the Court is satisfied that the trial judge was entitled to attach significant weight to the very considerable mitigating factors and to conclude that there were exceptional and specific circumstances which would have rendered it unjust to impose the presumptive mandatory minimum sentence. It is nonetheless satisfied that these fell well short of what the court would consider to be wholly exceptional circumstances of the type that would justify the imposition of a wholly suspended sentence. The relevant factors are qualitatively simply not of the same calibre as those circumstances that existed in cases such as *McGinty, Walsh* and *Botha* . There is nothing so out of the ordinary or so wholly exceptional in relation to the offences under consideration, or the respondents themselves, that could justify the court concluding that a wholly suspended sentence could legitimately have been imposed.

31. In this case, the respondents were not acting under any form of duress. Neither were they driven in their actions by any type of addiction. Further, it was wrong in the view of this Court that for the purposes of assessing their culpability, these respondents were categorised as pawns in the operation. They had been involved from the outset in setting up the grow house and had used their skills as electricians to ensure that the cultivation of the cannabis plants would be successful. Mr. Byrne is described in the course of the sentencing hearing as a maintenance man involved in running the system and as someone out to make a financial gain. Both respondents had decided for their own financial gain to participate in maintaining this business which, at least insofar as Mr. Phayer was concerned, was going to produce an ongoing turnover of approximately forty to fifty thousand Euros every six weeks.

32. While the respondents may have been under financial strain the Court had no evidence that their difficulties were much different from those experienced by so many other members of society in these recent rough financial times. Further, counsel, quite properly, did not seek to rely upon such financial circumstances as a mitigating factor.

33. The Court is also satisfied that the learned sentencing judge fell into error in treating the fact that the leader of the operation was not before the court and was still at large as a mitigating factor when considering the sentence to be imposed on the respondents. Of course, it is only human to feel that it is unjust that a lesser player in any crime should go to prison while the leader of the same operation remains at large. However, whether the leader of any operation is charged or convicted is a separate matter and in this case could never have had the effect of altering the culpability of the respondents. Their culpability was fixed at the point in time when the offence was committed and cannot be varied by the happenstance of subsequent events.

34. Having considered the circumstances of the offence and those of the respondents, this Court is satisfied that there may have been exceptional and specific circumstances sufficient to justify the court departing from the presumptive mandatory minimum sentence of ten years imprisonment. However, the valid mitigating factors did not constitute the type of wholly exceptional circumstances as would have justified the imposition of an entirely non-custodial sentence.

35. For the aforementioned reasons the Court is satisfied, having regard to the relevant statutory provisions and the circumstances of the offence as committed by these respondents, that the sentences imposed were unduly lenient and constituted a substantial departure from what might reasonably be regarded as appropriate in all of the circumstances. Accordingly, the applicant has established that the trial judge in imposing sentence erred in principle.

36. In light of the aforementioned conclusions the Court will set aside the sentences imposed by the learned trial judge on 25th February, 2013, and will now proceed to consider the sentence to be imposed on the respondents at this time.

Sentence

37. Counsel for each respondent has submitted that even though this Court has set aside the sentences earlier imposed on the grounds of undue leniency, that it might nonetheless conclude, at this time, that there are wholly exceptional and specific circumstances relating to the offence and/or the offenders, which would justify not only a departure from the imposition of the presumptive statutory minimum sentence of ten years imprisonment but the imposition of a wholly suspended sentence. In this regard the Court has been asked to factor into its consideration the circumstances of the offence, the past and present personal circumstances of the respondents, and the manner in which they have conducted themselves since the date of the original

sentencing hearing.

Decision
38. In coming to its conclusions as to the appropriate sentence to be imposed on these respondents the Court must firstly consider the gravity of the offence which they committed.

39. The value of the drugs involved in the grow house operation is an important factor to be taken into account when considering the gravity of the offence in question and that is because s.15A categorises offences by reference to their value rather than their type. So, while the Court may have regard to the type of drug involved when dealing with aggravating factors, as was advised by Kearns J. in *The People (D.P.P.) v. Long* [2009] I.R. 486, 492, the fact that cannabis was the controlled drug in this instance cannot mitigate the gravity of the offence.

40. Garda Walsh was of the opinion that the drugs in the grow house had a value of €120,000. Even making some allowance for the submission made on Mr. Byrne's behalf as to the value of the cannabis plants, which were not fully grown, the drugs were clearly worth a significant multiple of the €13,000 threshold provided for in the section.

41. As to their culpability, the respondents were obviously not the prime movers in the operation. Neither, however, can they be viewed as having played an insignificant role. They used their skills as electricians to set up the grow house and were, in that sense, essential to the operation. The respondents are obviously men of intelligence who embarked upon the grow house project with their eyes open and with the intention of receiving ongoing financial reward, even if the level of that remuneration had not been agreed. Further, it was intended that the production of cannabis would continue on an ongoing basis.

42. Regrettably, the respondents were tempted to involve themselves in the pursuit of unlawful financial gain due to the fact that they were experiencing hard times. However, it is accepted that such circumstances cannot reduce their culpability. They were not acting under any type of duress and there was no element of coercion or exploitation involved. Accordingly, in terms of its gravity, this offence while clearly falling well within the lower end of the spectrum of s.15A offences is not one that can be stated to sit comfortably at the very lowest level of such offences.

43. As to the sentence to be imposed, the Court must be guided by the provisions of sections 27 (3A), (3B) ,(3C), (3D) and (3E)of the Act of 1977, as amended by s. 33 of the Criminal Justice Act, 2007, which provides as follows:-

"S. 27

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

(a) to imprisonment for life or such shorter period as the court may, subject to subsections (3B) and (3C) of this section, determine, 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 15 A or 15 B 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 15 A or 15 B 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 15 A or 15 B 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 of the circumstances to do so.

(b) Subsection (3C) of this section shall not apply the court is satisfied that there are exceptional and certain 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 on just in all of the circumstances and for that purpose the court may, subject to this subsection, have regard to any matter it considers appropriate, including

(i) whether that person pleaded guilty to the offence and, if so-
(I) the stage at which he indicated the intention to plead guilty, and

(II) the circumstances in which the indication was given, and

(III) 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 of the circumstances, may have regard, in particular, to –
(I) whether the person convicted of the offence concerned was previously convicted of 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 15 A 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 mention subsections to an offence under section 15A or 15 B of this act are to be construed as references to a first such offence.

44. Given that both of the respondents are a first time offenders in the context of section 15A offences, and having regard to the submissions made on their behalf, the court must consider whether there are exceptional and specific circumstances relating to the offence and/or these offenders that would make it unjust for the court to impose as a minimum the presumptive mandatory custodial sentence of 10 years.

45. As already stated earlier in this judgment when dealing with the sentence that was initially imposed on these respondents in the Circuit Court, the Court is satisfied that there are exceptional and specific circumstances that would make it unjust for the court to impose such a sentence. It is also satisfied that the public interest in preventing drug trafficking can also be served by the imposition of a sentence less than the presumptive mandatory minimum custodial sentence.

46. In coming to this conclusion the court has taken into account the following factors namely: –

i. The respondents pleaded guilty at an early stage of the investigation to count number 1, namely the possession for sale or supply of a controlled drug having an aggregate value in excess of €13,000 contrary to section 15A. The Court must assume that such pleas resulted in a saving to the State both in terms of financial cost and resources. While the Court is mindful of the fact that a guilty plea, on its own, is rarely treated as an exceptional and specific circumstance for the purpose of departing from the presumptive mandatory minimum sentence, it can however, when taken in conjunction with other factors, justify a downward departure from that sentence.

ii. The respondents, subject to not naming the main player in the grow house operation, cooperated fully with the Gardai in the course of their investigations. They identified in a fulsome way their role in the setting up of the project and their ongoing involvement in it. In this regard it is relevant to note that the court has, in a number of cases, ruled that in order to avail of the provisions of subsection 3D (b) (ii) that the assistance rendered does not necessarily have to concern the investigation of the involvement of others in the offence. (see *People (Director of Public Prosecutions .v. Botha* [2004] 2 I.R.375 and *The People (Director of Public Prosecutions) v. Jervis and Doyle*[2014] IECCA 14.

iii. Both men made admissions at an early stage, which were significant to the establishment of the necessary *mens rea* for the s.15A offence with which they were charged. Without such admissions, they might well have been in a position to avoid conviction altogether.

iv. Not only do these respondents have no previous s. 15A convictions, a condition precedent to their right to contend for a sentence less than the mandatory minimum, they appear to have had no engagement whatsoever with the criminal courts prior to becoming involved in the operation the subject matter of the relevant offence.

v. The respondents have produced a number of testimonials to attest to their good characters and their capabilities as hard-working members of the community. Both had reasonable work records prior to the downturn in the economy and since the initial sentencing hearing have managed to remain purposefully employed. Mr. Phayer, has recently been employed in a number of positions of responsibility with a Canadian engineering and construction company, known as Kentz Canada. He has worked for this company in the Dominican Republic, Abu Dhabi and Alberta. He is described by his employer as honest, reliable and hardworking. Mr. Byrne has likewise been working as an electrician, in Ireland. The Court received a reference from a Mr. Guilfoyle, stating that he had found Mr. Byrne to be a good worker over the years and that he would engage him in the future. A further character reference was received from the aunt and uncle of his fiancée, attesting to the fact that he has given their two children, who have multiple disabilities, great assistance over the years. He is also financially supporting his fiancée and their two children, who according to a letter written by her and addressed to the Court would miss him terribly if he were to be imprisoned.

vi. Neither respondent appears to be a real risk in terms of re-offending.

vii. It is accepted that both men are immensely remorseful for their involvement in this offence.

viii. While the respondents have not been in custody, and to that extent have been in a position to get on with their lives since the initial sentencing hearing, they have nonetheless lived under the shadow of the five-year suspended sentence which was imposed upon them in the Circuit Criminal Court and have experienced the consequences of a fall from grace within their respective communities. Further, in light of the present appeal, it is undoubtedly the case that the respondents would have been advised by their lawyers that in the event of the present appeal proving successful they might ultimately have to serve a custodial sentence. Consequently, it is reasonable to assume that for the past two years ago, they have lived with a significant degree of anxiety and fear concerning such a possibility and now face the disappointment of that reality. This situation is often referred to as double jeopardy, a circumstance which has been recognised by the courts in other countries as justifying some degree of additional leniency by the court when imposing sentence afresh.

47. As to whether there are wholly exceptional circumstances which would justify the court departing from the presumptive mandatory minimum sentence and replacing it with an entirely non-custodial sentence, the court has earlier in this judgement stated why, on the facts of this offence and having regard to the circumstances of these offenders, the court could not reasonably come to that conclusion. Qualitatively, some exceptional factor or factors must exist, having regard to the statutory regime that would justify such a radical departure. The threshold of proving the existence of wholly exceptional circumstances cannot be met by accumulating or totalling a number of the oft presented mitigating factors.

48. The Court specifically rejects the submission made on Mr. Byrne's behalf that his guilty plea was so significant that his overall circumstances, and those of the offence, should be considered to be wholly exceptional, thus justifying the imposition of a wholly suspended sentence. He relied on the significant difficulties that might have been faced by the Director of Public Prosecutions in prosecuting the offence and, in particular, in proving the value of the drugs.

49. The Court accepts that an accused person who pleads guilty to an offence may say that the prosecution would have had difficulty in obtaining a conviction, and that, consequently, they are entitled to a discount in relation to their sentence by virtue of their plea. However, a person who pleads guilty to an offence cannot expect to be treated, in terms of their sentence in a manner not too far removed from that of the person who has been acquitted of such an offence.

50. Every accused person has the option of defending the charge levelled against them, and they may decide to take that option, particularly if they believe they have a strong chance of being acquitted. However, if they are convicted, they will lose the discount that they would otherwise have been entitled to receive in respect of their sentence had they pleaded guilty. If they end up being

acquitted, they will, of course, walk free. But what they cannot do is plead guilty to an offence such as the present one, which carries a presumptive minimum term of imprisonment of 10 years and then maintain that they should not go to jail because they had a very significant chance of successfully defending the charge. That would be to make a nonsense of the legislation. Mr. Browne decided not to take the risk of defending the charge and pleaded guilty.

51. The sentence to be imposed by this Court on Mr Browne and Mr Phayer must at this time, of course, be proportionate to the circumstances of the offence which they committed and what amounts to a proportionate sentence must be guided by the range of penalties provided for in respect of s. 15A offences. By way of example, it might be stated that the sentence to be imposed on these respondents must be calibrated by reference to the fact that a court would be obliged to impose a ten year custodial sentence on an individual who either pleaded guilty or was found guilty of a s. 15A offence, in respect of €15,000 worth of drugs, who could not establish the existence of exceptional and special circumstances to avoid such a penalty. It is important for the court when carrying out its sentencing role in this case to bear in mind the sentencing parameters fixed by the relevant legislation in respect of s. 15A offences because it is these very same parameters that must guide the court as to what might be considered a proportionate sentence in relation to other drugs offences not falling within s. 15A.

52. The court, in *Botha*, when dealing with an application for leave to appeal a sentence of five years imprisonment following a plea of guilty to a charge under s. 15 A commented on the policy of the legislature 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."

Accordingly, the court, in reaching its conclusion as to the appropriate sentence to impose on the respondents, has had regard to the express statutory provisions governing the offence in question and to the underlying policy considerations.

53. The gravity of the offence in question as committed by these respondents has already been dealt with earlier in this judgement and it is therefore not necessary to repeat the facts supporting the court's conclusion it fell within the lower range of offences caught by s. 15A. The Court is accordingly satisfied that the appropriate notional sentence, prior to a consideration of the mitigating factors, would be a term of seven years imprisonment.

54. The mitigating factors which must now be taken into account have already been extensively dealt with by the court when considering whether or not exceptional and specific circumstances existed such as would justify the court departing from imposing the presumptive mandatory minimum sentence and it is therefore unnecessary to repeat them. Having regard to those factors the court is satisfied that the appropriate sentence to be imposed at this time is a sentence of three years imprisonment in respect of each respondent. In coming to this conclusion the court has reduced by two years the sentence it would otherwise have imposed to reflect those matters concerning the lives of the respondents since first sentenced and which are referred to earlier at Para. 46 (viii) of this judgment.