THE COURT OF APPEAL

Edwards J.
Baker J.
Kennedy J.

Record No. 225/2008

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

MARTIN WANDEN

APPELLANT

Judgment of the Court delivered on the 30th day of July, 2019 by Mr. Justice Edwards

Introduction.
1. In this case the appellant, and two other persons, Perry Wharrie and Joseph Daly, were each convicted by a jury at Cork Circuit Criminal Court on the 22nd of July, 2008 of three offences, namely: -

(i) possession of a controlled drug for sale or supply, namely cocaine, with a value exceeding €13,000, contrary to s.15A of the Misuse of Drugs Act 1977, as amended, (the Act of 1977);

(ii) possession of a controlled drug for sale or supply, namely cocaine, contrary to s. 15 of the Act of 1977; and

(iii) possession of a controlled drug, namely cocaine, contrary to s.3 of the Act of 1977.

2. The appellant and his said co-accused were sentenced on the 23rd of July 2008, and the appellant received a sentence of 30 years imprisonment on the s. 15A count, backdated to the date on which he had gone into custody, i.e., to the 5th of July 2007. The other two counts on which he had been convicted were taken into consideration. His co-accused Perry Wharrie also received a sentence of 30 years imprisonment (later reduced to 17½ years by the Court of Criminal Appeal), while his other co-accused Joseph Daly received a 25 year sentence which was upheld on appeal.

3. A fourth person named on the indictment, Gerard Hagan, had pleaded guilty in advance of the trial and was sentenced separately.

4. The appellant initially sought to appeal against both his conviction and sentence, but later abandoned his appeal against conviction by a Notice of Abandonment filed in this court on the 11th of January, 2019. Accordingly, the current appeal is confined to an appeal against the severity of his sentence.

The grounds of appeal.
5. The appellant's Notice of Application for Leave to Appeal lodged with the office of the former Court of Criminal Appeal was dated the 8th of August 2008. It contained sixteen grounds of appeal, but they were focused almost entirely on the appellant's conviction. *There was just a single ground of appeal in respect of the sentence, and it alleged that "the trial judge has erred in principle in imposing a sentence of thirty years imprisonment, which sentence was manifestly excessive in the circumstances."*

6. Following the abandonment of the appeal against his conviction, and more than ten years after the Notice of Application for Leave to Appeal was lodged, the appellant filed a Notice of Motion before this court, dated the 22nd of February, 2019 seeking leave to rely on further grounds of appeal, namely that: -

(i) The disparity in sentences imposed in the present case in respect of the co-accused are so marked and unjustified that the court should interfere;

(ii) The sentence imposed does not take account of the rehabilitative steps taken by the appellant since his incarceration and the court should interfere with the sentence to reflect the dramatic change in the appellant's attitude towards drugs and this type of offending;

(iii) The appellant was sentenced on 23 July 2008 and his wife passed away in November 2007. This has had a very severe impact upon the appellant and the present court is entitled to consider that his sentence should be mitigated accordingly in order to allow him to be reunited with his daughter.

(iv) The sentencing judge did not take into consideration, properly or at all, the fact that a lengthy custodial sentence imposed on the appellant, a foreign national, would be especially arduous as he was separated from his family.

7. The motion having initially been returned to this court for hearing on the 1st of March 2019, it was adjourned to the hearing of the appeal which took place on the 28th of March 2019. On that date the court was disposed to permit the additional grounds to be

argued de bene esse, taking the view that the initial ground of appeal was so broad that it arguably encompassed them in any event, and that the proposed additional grounds would assist both the parties and the court to address the appeal in a more focussed way. Accordingly, we will at this stage, and for procedural regularity, make a formal order granting the leave sought by the appellant in his Notice of Motion dated the 22nd of February 2019.

The circumstances of the crime as established in evidence.
8. The sentencing court heard that the appellant and his co-accused were operating on behalf of an organised crime group based both in the United Kingdom and in Spain. This crime group could call upon considerable international resources in terms of human resources, logistics, and finance in furtherance of their drug trafficking activities. In this specific instance a catamaran, the Lucky Day, had been purchased in Miami on 7 March 2008 for $110,000 (or approximately €90,000). It was provided with a Lithuanian crew and the objective was to transport a massive amount of cocaine from Columbia initially to Ireland for onward trans-shipment to elsewhere in Europe. The plan had involved the Lucky Day proceeding to location approximately 30 nautical miles southwest of the Irish coast at which there was a weather buoy, known as the *"entry weather buoy"*. The intention was that the catamaran would rendezvous at this point with two rigid inflatable boats (RIBS) that had earlier been launched from Glengarriff Pier on the southwest Irish coast and had proceeded out to meet it. Following the intended rendezvous the Lucky Day's cargo of cocaine was then to be transferred to the RIBS at sea, following which it would be ferried by means of the said RIBS to the Irish mainland, making landfall on the Sheep's Head.

9. The evidence was that up to nine people, including the three accused, were involved both onshore in Ireland and elsewhere with advance preparations for this rendezvous and intended landing, including sourcing, purchasing and importing the RIBS to be used in the operation, reconnoitring the intended landing spot, purchasing and/or hiring vehicles and trailers, the procurement of radios, satellite telephones, GPS equipment, the renting of temporary accommodation and premises, the booking of flights and ferry passages, and so on.

10. There was considerable money expended in advance preparations. Three jeeps which were later found abandoned in Crookhaven and at Dunlough, County Cork, had an estimated value of €50,000. The RIBS, with their powerful engines and trailers, were estimated to have cost about €100,000; and travel, flights, accommodation were thought to have cost another €20,000. Finally, the support logistics in terms of mobile phones, satellite phones, GPS systems, the procurement of false passports, and sundry other outlays would also have represented significant expenditure.

11. The operation came to light in the following circumstances. At approximately 7 a.m. on the 2nd of July, 2007 a person, now known to be Gerard Hagan, called to the home of a Mr. Michael O'Donovan, a farmer living in Dunlough Bay. It was apparent that Mr. Hagan had come from the sea, owing to the fact that he was very wet and had the general appearance of having been in the sea. He indicated to Mr. O'Donovan that there was a danger to life, and that assistance was required, on the basis that someone was still in the water as a result of an incident that had occurred. However, he was evasive as to the exact nature of the incident, and he specified that he did not wish the emergency services to be called.

12. Despite Mr. Hagan's reluctance that he should do so, Mr. O'Donovan alerted the emergency services. Local Coast Guard units, gardaí and the ambulance service were mobilised; and the Castletownbere and Baltimore Lifeboats were launched and proceeded to Dunlough Bay. When they arrived they observed a semi-submerged RIB some 100 to 200 metres offshore, with the appellant in the water near to that RIB and a large number of white bales floating nearby on the surface of the water. The evidence was that the weather conditions on this morning were very poor. There was a high sea swell and moderate to strong winds. One of the lifeboat personnel told the jury in the course of the trial that conditions were atrocious.

13. The circumstances were immediately regarded as suspicious and this later prompted the convening of a joint investigative task force, involving personnel from the gardai and the customs and excise branch of the revenue commissioners, to investigate the incident. The initial focus, however, was on search and rescue and on recovering the appellant, and any other persons who might possibly be in the water. The appellant was safely rescued and, as he was thought to be suffering from possible hypothermia, he was taken to Bantry Hospital where he was detained as an in-patient until the 5th of July, 2007. On being admitted to hospital the appellant gave a false name, that of Anthony Claude Linden. It subsequently transpired that the appellant possessed a false UK passport in that name, bearing his photograph.

14. In the aftermath of the appellant's rescue, 62 of the white bales were recovered from the water. These were found to each contain 25 kg of cocaine. The total amount of cocaine recovered was 1554 kg, which represented the largest seizure of cocaine in the history of the State both up to that point and to date. This was conservatively valued by gardai as being worth at least €108 million on the basis that the street level value of cocaine at that time was €70 a gram, although it was stated in evidence at the trial that the consignment might ultimately generate considerably more than that, possibly up to €400 million, because of its high level of purity.

15. On the following morning the appellant was visited in hospital by gardai and he told them that he had been out fishing in a red punt, and that his craft had sustained some sort of an impact as a result of which he had been thrown into the water, and that he could not remember much after that. His account was considered to lack any credibility.

16. Subsequent inquiries established that the appellant had travelled from South Africa to Frankfurt on the 12th of June, 2007 under the name Anthony Linden. An onwards flight to Stansted had been booked for him by a brother of one of his co-offenders, and he arrived in Stansted on the 14th of June, 2007. Thereafter he travelled by car ferry from Pembroke in Wales to Rosslare in Ireland on the 15th of June, 2007 in a blue Jeep driven by Joseph Daly. This blue Jeep, which was captured on CCTV at both Pembroke and Rosslare, was towing a trailer on which there was a RIB. The blue Jeep was found abandoned in Crookhaven, in the aftermath of the incident in Dunlough Bay on the morning of the 2nd of July, 2007. The appellant was connected forensically and evidentially to this vehicle. His fingerprints were found on various items in this vehicle including a ferry ticket in the name of Anthony Linden, on a set of keys that could start the engines on both the sunken RIB (referred to in the evidence as the "Ballistic RIB") and a second RIB (subsequently located and referred to in the evidence as the "Rescue RIB"), and on manuals for Yamaha engines and a Garmin GPS system. Also found in this Jeep, the windows of which had been blacked out, was a tidal charts booklet on which was written a website address for a website which contains details of all of the weather buoys situated offshore in the waters around the State, including the M3 weather buoy situated 30 miles southwest of Mizen Head.

17. In the course of the recovery operation at Dunlough Bay on the 3rd of July, 2007, a mobile phone, a Garmin GPS unit and a satellite phone were recovered from the water by a customs officer. They were found underneath the 61st bale of cocaine to be recovered. The mobile phone was identified as having been purchased by the appellant in a Vodafone shop in Bantry on the 16th of January 2007 using the false alias Stephen Whitsey. It was established that the appellant also had access to a UK passport in that name which also bore his photograph. This phone had been used to secure accommodation on the Sheeps Head Peninsula in a

farmhouse at Faranamanagh. Further, that address was found under seating, known as sunbed seating, in the bow of the semi-submerged RIB, i.e., the Ballistic RIB, when it was recovered from the water. The appellant's finger marks were also found on this seating. A warrant to search the farmhouse at Faranamanagh was obtained during the subsequent investigation and it was duly searched. Amongst the items recovered during that search were registration documents for the RIB; documents indicating that the RIB had been stored at a marina in the United Kingdom for a number of days during the month of May 2007 prior to its being brought to Ireland; a box for the Garmin GPS device that had been recovered in Dunlough Bay; and a receipt for the purchase of the same Garmin GPS device.

18. Insofar as the appellant's co-accused at trial were concerned, evidence was adduced that in the course of the investigation a green Jeep (a Land Rover Defender) had been found abandoned at the headland overlooking Dunlough Bay and close to where the ballistic RIB had capsized. It was on the public roadway as close as a vehicle could be parked to the locus in quo. On the morning in question two persons, who were very well described, were encountered by members of the local Coast Guard on this headland. They appeared to be making their way towards the green Land Rover Defender. Members of the Coast Guard approached the men and spoke to them. They indicated that there was a man in the sea. However, remarkably, neither man remained in the vicinity despite having stated that to their knowledge a man remained in the sea. Naturally this aroused suspicion. The two men, having removed themselves from the scene, were arrested two days later, in a dishevelled state, having been hiding out in fields in the locality. The identity of these men was later established. They were Mr. Wharrie and Mr. Daly. The particular circumstances of Mr. Wharrie's involvement are described in greater detail in the judgment of the Court of Criminal Appeal dealing with his unsuccessful appeal against his conviction - *The People (Director of Public Prosecutions) v Wharrie* [2013] IECCA 20; while the particulars of Mr. Daly's involvement are further described in the judgment of the Court of Criminal Appeal dealing with his appeal against the severity of his sentence - *The People (Director of Public Prosecutions) v Daly* [2011] IECCA 104.

19. Other evidence adduced at the trial included that the green Land Rover Defender, together with a red Jeep, and a Volkwagon Passat motor car, all of which were believed to have used in connection with the conspiracy, were forensically examined in the course of the investigation and various items were found in these vehicles forensically linking the co-accused Mr. Wharrie and Mr. Daly, and others such as the aforementioned Mr. Hagan, and a Mr. Brown, to the conspiracy. These items included the real passport of Mr. Hagan, and a holdall bag ascribed to the said Mr. Brown which in turn contained a black notebook bearing Mr. Wharrie's fingerprints. In this notebook there were details of co-ordinates which had been programmed into the GPS device recovered from Dunlough Bay, as well as telephone numbers relating to the Whitsey phone and the satellite phone also recovered from Dunlough Bay.

The appellant's personal circumstances

20. The appellant was born in Swanley in England on the 12th of November, 1962. His last known address, as of September 2005, was in Orpington in Kent in England. However, it was known that he had travelled extensively throughout the world and that in recent years he had resided for some time in Cape Town in South Africa with his daughter and late wife. The appellant's wife had passed away in tragic circumstances before the trial. His sister, to whom he was very close, also died in 2007.

21. The evidence was that the appellant has several previous convictions including a relevant previous conviction. On the 12th of March, 1980, at Birmingham Magistrates Court, he was convicted of a public order offence, involving insulting and threatening behaviour, for which he was fined £400 plus costs of £15. On the 16th of June, 1980, at Dartford Magistrates Court, he was convicted of burglary and theft and was fined £25. On the 30th of July, 1984 at Dartford Magistrates Court, he was convicted of obtaining services by deception and was fined £75 and given a conditional discharge of two years. On the 28th of June 1985, at West Kent Magistrates Court, he was convicted of criminal damage and a breach of the aforementioned conditional discharge, for which he was fined £120 on each charge. Then, on the 5th of November, 1986, at Southwark Crown Court, he was convicted of the offences of handling stolen property; of driving a vehicle without authority; of theft; and of an offence under the (English) Misuse of Drugs Act, and received sentences of three months' imprisonment on each offence to be served concurrently. On the 28th of December, 1988, at Bombly Magistrates Court he was convicted of another theft offence for which he was fined £100. Further, on the 5th of October, 1989, at Dartford Magistrates Court he was convicted of various road traffic offences for which he received fines. Finally, on the 12th of June, 2005, at the criminal court of *"One sur Mer"* [per transcript] [sic, possibly "Boulogne sur Mer"] in France, he was convicted of possession, transporting, and smuggling of drugs and banned goods, of smuggling heavy tax goods, and of violent absconding. He was sentenced in absentia and received two years imprisonment.

The sentencing judge's remarks.

22. In sentencing the appellant, and his co-accused Mr. Wharrie and Mr. Daly, respectively, the sentencing judge said the following:

> *"JUDGE: Very good. Thank you very much. Now, I have obviously considered everything that has been said to me, and I have considered the evidence in the case over the long period that I heard the case. And, the accused are entitled to the assurance, and I give it to them at the start, that their sentence will not be increased by one, not one hour because they fought the case. That is not an aggravating factor; they are entitled to a trial, notwithstanding in Wanden's case that the evidence against him was absolutely overwhelming. He is entitled to put the State on their proofs and he cannot be punished by any increase in sentence because of that.*
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> *What a judge must do in sentencing is, in the circumstances where an accused has been convicted after a full trial, the judge must assess what is the appropriate sentence without any special deduction, such as for a plea, for cooperation or for remorse. And as I said to Mr. Dwyer, in many ways these sentences, which must of their necessity be harsh, are sentences which were personally sought out by the defendants. The defendants came into this case and, as I have said, Mr. Wanden, the evidence against him was overwhelming. They were well aware and would have been advised, of the legal background whereby if you want, in circumstances like that, to keep the sentence to an absolute minimum, there is provision and it's set out in statute, whereby you can plead, cooperate and all of that is to be taken into account in forming the sentence, in mitigating the sentence and making it much lesser.*
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> *Now, that avenue is not available to me, it cannot be available to me because the defendants personally and each of them, they closed it off. They did not want that mitigation; what they wanted is the full appropriate sentence, without deduction. Now, I also heard two of the defendants give evidence. In each of their cases it was transparently fallacious what they were saying, nobody, they didn't give the jury any chance with their stories, they were so blatantly false. It's not that I'm worried that these persons told lies to the jury, that is not what I'm getting at, it is in the manner in which they told the lies, they actually showed, as far as I am concerned, a complete contempt for the jury, and they showed, in my opinion, levels of incorrigibility that are hard to fathom.*
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> *Each of the defendants are entitled to have their own circumstances taken into account, and their personal circumstances as to their age, backgrounds, their previous criminal histories, all of that can be taken, must be taken into account. Also, when sentencing, the court must look at the crime proportionately. Now, take the accused out of it*

for the moment; in proportion to other criminal, other crimes involving possession of drugs for supply, where does this one rank? And any examination of it, given the value and without going overboard on the value of it, suggests that this crime is very much at the top end of the scale on all levels, in terms of organisation, in terms of money spent, number of persons involved, and the commitment of the people involved. Each of the three here showed if, in terms of their own personal commitment, huge dedication to this crime, they were in Ireland for prolonged periods of time, knowing what was going on. These are not men who were innocently caught up. To describe them as mere store men or carriers of the flag is wrong. These were fully committed members of the gang.

In terms of organisation, this crime was huge. The organisation of this crime straddled three continents. It involved meticulous planning, significant money commitments. Now, I believe each of the defendants knew at all stages what was going on and they booked up for this crime. On the evidence there is no evidence to suggest that any one of them was the leader, but they were definitely very willing lieutenants. I will accept the point as made by the Superintendent that you cannot exclusively say that Joe Daly's local knowledge was the significant asset given that there may have been others from that locality involved.

Now, a significant factor in facilitating this crime was the ease with which false passports can be obtained in the UK, the number of passports which were mentioned, there was three for Wanden, Wharrie has one and then there were mention of other passports and false names in the course of the trial. Obviously, a judge should be very slow to comment on matters outside the facts of a case, and you should be slower still to make comments on other jurisdictions, but it does appear that the system of issuing passports in the United Kingdom is wide open to abuse. I do not underestimate the criminal determination of the persons here who looked for and acted on false passports, and have no doubt about it, they were using the false passports to facilitate their criminal enterprise. It may not be that easy to stop it, but there appears to be a gap at that level.

It is almost, it defies all, to think that a man out on licence from a murder conviction, within a short period of time, has his false passport and is involved in this crime. Mr. Wharrie did not give evidence, and as I have said, that would in the normal course of events have stood him apart from the other two and the manner in which they gave their evidence. And it would, in other circumstances, have allowed for some amelioration of his sentence, but given his lamentable antecedence I cannot, in this case, see my way to ameliorating it.

I think these three defendants are committed and dedicated to this criminal act. There is no evidence before me that any of them suffered from any addiction, so they were in it, let's face it, they were in it for the money. They are prepared to deal in drugs, to deal in death and destruction, for profit. And let's strip away everything else, that is what they were at, that is what they knew they were at. The legislature in the Republic has dealt with the sentencing structure on cases like this on numerous occasions in the recent past, and at every time they have dealt with it they set out how serious the view of the legislature is of this crime, and they are constantly stressing how serious it is and the penalty is up to and including life imprisonment.

My, as it were, faith in the life term is of course somewhat undermined when I read of Mr. Wharrie's conviction and his release. Any consideration of a sentence of these men, and accepting their I will accept their own personal circumstances, the fact that they are not of the State, and serving a sentence here will be that much harder for them, they are all now approaching middle age and they are facing a long period in prison, but I think I have no alternative but to impose harsh sentences in the circumstances, particularly on Wanden and Wharrie, who have serious previous convictions; Mr. Daly doesn't have any conviction that is of a concern to me.

Therefore, in view of all the matters which I take into consideration, I sentence Martin Wanden to 30 years in prison, Perry Wharrie to 30 years in prison and Joseph Daly to 25 years in prison, backdated to whatever day they went into custody.

Sentence appeals by the co-accused

23. Mr. Wharrie initially appealed to the Court of Criminal Appeal (CCA) against both his conviction and his sentence. He was unsuccessful in his appeal against his conviction and we have already referred to the judgment in respect of that. Following the rejection of the appeal against his conviction he proceeded with the appeal against his sentence and was successful in securing a reduction in his sentence from 30 years to 17½ years. The basis on which he secured that reduction was as follows. The CCA held that the sentencing judge at first instance had erred in the following respect. It held that it was a mitigating factor, acknowledged by the sentencing judge at first instance, that this accused had not given false evidence at the trial, unlike his co-accused Mr. Wanden (the present appellant) and Mr. Daly; and that the sentencing judge had the erred in failing to give him any credit for this mitigating factor, citing his *"lamentable antecedence"* (sic), as the reason for not doing so. Mr. Wharrie had previous convictions for, *inter alia*, murder, robbery and possession of firearms with intent to endanger life and was out on licence at the time of these offences having received a life sentence for the murder conviction.

24. Then, having found that error of principle, the CCA quashed the sentence imposed by the court below and proceeded to resentence Mr. Wharrie as follows. They substituted a headline sentence of 22½ imprisonment for the headline sentence of 30 years nominated by the sentencing judge in the court below and discounted from that by 5 years to reflect all applicable mitigating factors to include the fact that he had not given false evidence at trial.

25. The citation for the relevant sentencing judgment is *The People (Director of Public Prosecutions) v Wharrie* [2016] IECCA 1.

26. A number of observations require to be made in respect of that judgment. The first is that the CCA in fixing the headline sentence at 22½ years stated that:

"13. In determining an appropriate headline sentence within the applicable range, a court will have regard to a range of relevant factors. These include: the nature and quantity of the drugs in question, the level of involvement of an accused in the particular enterprise and the criminal antecedents (if any) of a particular accused. In this case, the amount of drugs was very large. The appellant's criminal history is undoubtedly serious. As already pointed out, the offences were committed while the appellant was on Licence, which is also an aggravating factor, but one which will probably attract adverse consequences for the appellant independently of the sentence to be imposed in respect of this offending.

14. The evidence does not suggest that the appellant was a main organiser or beneficiary of the enterprise in question,

but rather demonstrates that he played a significant role in organising and conducting the transport of this very large quantity of drugs to its ultimate destination. Consequently, the appellant may be characterised as an important and essential cog in the wheels of this operation, without being placed at the top level of potential participation in such offences. That being said, the circumstances in which the perpetrators were apprehended, do not suggest that the appellant, or other persons involved, were particularly competent or talented criminals."

27. The second thing to be noted is that while Mr. Wharrie had an appalling criminal record, and was out on licence at the time that these offences were committed having previously received a life sentence for a murder conviction, he did not have a previous conviction for a relevant offence, such as might be regarded as an aggravating factor in respect of the present offence. His previous convictions would only have served to lose him the credit he would have been entitled to if he had been of previous good character. It is well established in sentencing law that non-relevant previous convictions merely give rise to progressive loss of the mitigation that the offender would otherwise have for being of good character. Given what the sentencing judge accurately characterised as his lamentable antecedents, it is undoubtedly the case that Mr. Wharrie had long since lost all possible mitigation under that heading. However, none of his previous convictions would have served to positively aggravate his culpability for the offence for which he was being sentenced. Regrettably, that is not the case in so far as the present appellant is concerned. He does have a relevant previous conviction, i.e., a conviction for a drug trafficking type offence, being the conviction which he acquired in France in June, 2005; a matter we will return to later in this judgment.

28. Moreover, in respect of the breach of Mr. Wharrie's licence, it is in principle a potentially aggravating factor for an offence to be committed where the offender has been released on licence, and this was expressly acknowledged by the CCA. However, it is also important that an offender is not doubly punished for any breach of the terms of his licence. In this instance, the sentencing judge had been told that the UK authorities had issued a European arrest warrant seeking his surrender so that he might face separate proceedings in that jurisdiction in respect of that breach. It would not therefore have been appropriate, in circumstances where separate action in respect of the breach was envisaged in due course, to have treated the breach of licence in his case as an aggravating factor, lest he face punishment for this on the double; and quite correctly neither the sentencing judge at first instance, nor the CCA, treated it as having aggravated Mr. Wharrie's culpability.

29. Yet another, and highly important, matter which requires to be noted in respect of the CCA's sentencing judgment in the *Wharrie* case, is that the Director of Public Prosecutions subsequently appealed successfully, but without prejudice, to the Supreme Court on a point of law arising from that judgment. In *The People (Director of Public Prosecutions) v Wharrie* [2017] IESC 47 the Supreme Court was asked:

"Is it a correct principle of sentencing to treat as mitigation the fact that an accused person who is convicted following a trial did not give false evidence at his trial?"

The Supreme Court answered this question in the negative, and the effect of its judgment was that the legal basis for the ultimate sentence imposed on Mr. Wharrie was significantly undermined, albeit that that sentence would nevertheless be allowed to stand in circumstances where the appeal to the Supreme Court had been without prejudice.

30. Turning then to the case of Mr. Daly, he also appealed initially against both his conviction and the severity of sentence. However, he withdrew the appeal against his conviction before it came on for hearing. In those circumstances only his appeal against the severity of his sentence proceeded. This was dealt with by the Court of Criminal Appeal (CCA) on the 20th of October 2011 – see *The People (Director of Public Prosecutions) v Daly* [2011] IECCA 104. The main point argued on this appeal on behalf of Mr. Daly was that there was too great a disparity between the sentence imposed on him and the sentence that had been imposed on Mr. Hagan who, having pleaded guilty, had been sentenced on a separate occasion and had received a sentence of 10 years imprisonment. The CCA did not consider that the role of Mr. Hagan could be considered less culpable than that of Mr. Daly. Moreover, the crucial difference between them, as identified by the sentencing judge, had been the plea. The CCA concluded:

"… the contrast between Mr.. Daly's and Mr.. Hagan's level of involvement and their respective attitudes to the offences charged would appear to be too severely reflected in the 15 year differential in sentence. This is not to say that a substantially different sentence may have been warranted in the case of Hagan. Nevertheless, the disparity is too great and not immediately explainable. Let us suppose Mr.. Hagan had been sentenced before the others; could an additional 15 years have been imposed within the parameters of parity? We strongly doubt it. In fact it is impossible in the present situation to achieve parity between those involved in this crime. To bring Mr.. Daly's sentence in line with Mr.. Hagan's, even if we were minded so to do, would be to further distance it from what Mr.. Wanden and Mr.. Wharrie received, which were not appealed. To leave it as it is likewise creates a disparity. In such circumstances, whilst the appellant may understandably wish to associate himself with Mr.. Hagan, the court cannot facilitate him in such regard as to so do would be to breach the fundamental sentencing principles above outlined.

104. Further, it would significantly undermine the integrity of the justice system which cannot be countenanced.

105. Consequently, being satisfied that the imposed sentence is an appropriate one, leave to appeal will be refused."

31. It bears commenting upon that McKechnie J.'s judgment, on behalf of the Court of Criminal Appeal in Mr. Daly's case, suggests that that the court was seemingly under the misapprehension that neither Mr. Wanden nor Mr. Wharrie had appealed against their sentences. That was not the case. It was simply the position that they had conviction appeals which required to be disposed of first before any appeals against their sentences would arise for possible consideration.

Submissions on behalf of the appellant

32. In written submissions on behalf of the appellant, what is described as *"the nub"* of the appellant's case is that the 17½ year sentence imposed on Mr. Wharrie should be considered the *"ceiling"* in terms of what sentence ought to have been imposed on the appellant. This submission was advanced on the basis of: -

(i) the manner in which the court dealt with the appeal by Mr. Wharrie; and

(ii) the fact that the appellant benefits from arguably better mitigation than Mr. Wharrie.

33. It was further submitted that had the appeals been heard together then the justice of the cases would probably have been met by either ensuring that the appellant received the same sentence as Mr. Hagan (10 years imprisonment), modified to reflect the fact that he lost credit for running a trial; or, perhaps more conveniently, the same sentence as Mr. Wharrie (17 ½ years) modified to reflect the stark difference in their respective criminal records. It was submitted that a sentence of in or around 15 years would have

been appropriate.

34. It was argued that in terms of matters by means of which the appellant can distinguish himself favourably from Mr. Wharrie, that the latter had an atrocious criminal record, including convictions for murder, possession of a firearm with intent to endanger life and possession of a firearm while committing a scheduled offence, it appears from submissions made to us at the appeal hearing in the present case (and the judgment of the Court of Criminal Appeal in Mr. Wharrie's case reflects this) that the circumstances of his conviction for murder were that the unfortunate victim was a policeman who was shot during the commission of a robbery. Mr. Wharrie had been found liable with others for the policeman's murder based on his participation in a joint enterprise. Further, Mr. Wharrie had only two years prior to his arrest for the present offences been released on licence from a life sentence imposed upon him for that murder. He had breached that licence by leaving the UK. Accordingly, there were marked differences in the respective antecedent histories of the appellant and Mr. Wharrie.

35. Mindful of the Supreme Court's decision that the fact that Mr. Wharrie had not given false evidence at his trial was not a mitigating circumstance, counsel for the appellant has submitted that *"the fact that the Supreme Court expressly disapproved of this notion gaining traction operates in the present appellant's favor in terms of why this should not be a reason for limiting the extent to which any sentence imposed on the appellant should be less than that imposed on Wharrie, given the marked disparity in their respective criminal records".*

36. It was submitted that the appellant's criminal record could properly be described as sporadic and that his offending had mostly been dealt with by way of financial penalties (albeit that he was convicted of drug smuggling in France in 2005) whilst Mr. Wharrie's record falls to be considered opposite ends of the spectrum. It is suggested that the trial judge equated their records and that this was an error. Counsel the appellant points in that regard to the trial judge's observation that *"they are all now approaching middle age and they are facing a long period in prison, but I think I have no alternative but to impose harsh sentences in the circumstances, particularly on Wanden and Wharrie, who have serious previous convictions"*.

37. Counsel for the appellant also relies on the submission that the trial judge insufficiently recognised the hardship which the appellant would face in serving his sentence in this jurisdiction in circumstances where he had lost his wife in tragic circumstances a few months after his arrest and before his trial. He had missed out on his daughter's childhood. It was submitted that being incarcerated overseas has also meant that visits with his family and friends, which the court can safely regard as being critical to a prisoner's well-being and ability to cope with extended periods in custody, have been very significantly curtailed. It was submitted that these feelings have been intensified in the appellant's case by the fact that he feels deep personal shame for putting his daughter in a position where she has been left without a parent to care for her. Significance is attached to the failure by the trial judge to reference the fact that the appellant's wife had died whilst he was in custody and that his daughter was effectively orphaned. It was submitted that it is difficult to ascertain whether and to what extent, if any, the trial judge took this into consideration when imposing sentence.

38. It was submitted that in the present case the disparity between the sentences imposed on this appellant and on his co-accused is very marked and the difference in treatment so glaring that a real and justifiable sense of grievance is engendered.

39. It was submitted that there is no basis for differentiating the present appellant from his co-accused based on involvement and that the trial judge had been correct to recognize this. In the circumstances, it was submitted that in terms of fixing a headline sentence the same error was committed in this appellant's case as was committed in Mr. Wharrie's case, namely that it was quite simply too high, and that it was excessive to a very significant degree. During oral submissions at the appeal hearing, counsel for the appellant sought to characterize the post mitigation sentence of 30 years imprisonment that had been imposed on his client as a *"crushing sentence"* and maintained that it was manifestly a disproportionate sentence on that account. If the post mitigation sentence was one of 30 years imprisonment then, assuming there had to have been some level of deduction for mitigation, the headline sentence, although not specifically identified, must have been even greater than 30 years.

40. In conclusion, this court was invited to consider that the absence of some of the features accepted as being aggravating in Mr. Wharrie's case may have meant a "headline" sentence of in or around 20 years, and that the appellant should be afforded a similar reduction to that granted to Mr. Wharrie, namely a reduction of 5 years, which would bring the appropriate sentence to in or around 15 years.

Submissions on behalf of the respondent

41. It was submitted in reply on behalf of the respondent that it is noteworthy that no reference at all had been made to the related case of *The People (Director of Public Prosecutions) v Daly* [2011] IECCA 104 during the submissions made on behalf of the appellant. In his judgment in that case McKechnie J had cited with approval the remarks of Walsh J in *The People (Director of Public Prosecutions) v Poyning* [1972] IR 402, where he had stated:

> "If in any particular case one such joint accused has received too short a sentence, that is not *per se* a ground on which this Court would necessarily interfere with a longer sentence passed on the other"

42. It was submitted that it was implicit in the remarks of McKechnie J. in the *Daly* case that the CCA took the view that the sentence imposed on Gerard Hagan might well have been to light. At paragraph 103 of the judgment, the court said as follows:

> "Having regard to the above, the contrast between Mr.. Daley's and Mr.. Hagan's level of involvement and their respective attitudes to the offences charged would appear to be too severely reflected in the 15 year differential in sentence".

43. The CCA had gone on to say:

> "In fact it is impossible in the present situation to achieve parity between those involved in this crime. To bring Mr.. Daly's sentence in line with Mr.. Hagan's, even if we were minded to do so, would be to further distances from what Mr.. Wandan and Mr.. Wharrie received …"

44. Our attention has been drawn to the outcome of the appeal process, including the appeal to the Supreme Court, in Mr. Wharrie's case. The point is made that "but for" the fact that the appeal to the Supreme Court was a "without prejudice" appeal, the 17 ½ year sentence substituted by the CCA would almost certainly have been interfered with and increased. Accordingly, no guidance can be, or should be, drawn from the judgment of the CCA in Mr. Wharrie's case.

45. The respondent has submitted that the appellant has failed to identify any basis upon which it can be said that the sentencing judge made an error in principle.

46. The respondent engages with the contention by the appellant that the headline sentence, whatever it might have been, was manifestly too severe in circumstances where the post mitigation sentence was one of 30 years imprisonment. The respondent points to the fact that it is express statutory policy that drug trafficking Offences are to be treated as being very serious and of the highest gravity. The Oireachtas has provided for a presumptive mandatory minimum sentence of 10 years imprisonment for a section 15A offence, and has set the maximum sentence that may be imposed at life imprisonment.

47. Our attention was drawn to a number of comparators involving very substantial quantities of drugs. We were referred in the first instance to *The People (Director of Public Prosecutions) v Gilligan [No 2]* [2004] 3 I.R. 87. In that case the appellant had been convicted before the Special Criminal Court of eleven drug-related Offences involving the importation and possession for the purpose of sale or supply of 180 kg of cannabis resin, between certain dates, and which at the time would have had a street value of well over IR£1,000,000. He had been sentenced in respect thereof to concurrent terms of 12 years and 28 years imprisonment respectively, and he appealed against the severity of the sentences imposed. The Court of Criminal Appeal upheld the sentences of 12 years imposed in respect of importation offences but reduced the sentences of 28 years for possession for sale or supply to sentences of 20 years imprisonment.

48. McCracken J., giving judgment on behalf of the CCA, set as follows:

> "The court is urged on behalf of the appellant to have regard to the fact that the drug concerned is Cannabis resin, which is perhaps generally regarded as a less harmful drug than many others. The respondent argues correctly that the legislature in this country has determined not to categorise illegal drugs but to treat them all equally, unlike the situation in the United Kingdom. Notwithstanding that, this court does consider that the nature of the drug is one of the surrounding circumstances which may be taken into account."

49. McCracken J. further went on to deal with the argument made in that case that a sentence of 28 years imprisonment was in effect greater than a life sentence. He said:

> "A life sentence must be regarded as a sentence for the natural life of the convicted person and must be regarded as greater than a finite sentence which will end during the lifetime of that person. The maximum sentence provided by statute for possession of a controlled drug for sale or supply is life imprisonment and as far as this court is concerned we must consider 28 years imprisonment as less than the maximum sentence."

50. In reducing the sentence for possession for sale or supply to 20 years imprisonment, McCracken J. observed:

> "With regard to the charges in relation to possession for the purpose of sale or supply, which offence carries a maximum sentence of life imprisonment, this court feels that the Offences must be dealt with severely. Even if one has regard to the 180 kg involved in the six charges, those drugs would have a street value of well over IR£1 million. The surrounding circumstances clearly show that the accused had a serious involvement in organised crime. Whilst it was not the law at the time these offences were committed, it is now the law that possession for the purposes of sale or supply of as little as IR£10,000 [now €13,000] worth of Cannabis warrants a 10 year sentence unless there are exceptional circumstances. This of course is not in any way binding on us which we think it can be used to give some sense of proportion to the sentence that was actually imposed on the appellant."

51. We were also referred to *The People (Director of Public Prosecutions) v O'Toole* (Unreported, Court of Criminal Appeal, 25th of March 2003). That case had been concerned with offences involving importation of, and possession for sale or supply of, cocaine with a street value of €52 million. The accused was sentenced at first instance to a term of imprisonment for 20 years. This was reduced by the CCA to a term of imprisonment for 16 years. The basis of the reduction was the fact that the offence was committed under circumstances of duress, and it was accepted that the sentencing judge at first instance had failed to take sufficient account of this.

52. The respondent makes the point that the mitigating circumstances which were a significant feature in the *O'Toole* case did not arise in the present case. There was no evidence to suggest that the appellant in the present case was under duress of any time. Further, at the time of the *Gilligan* and *O'Toole* sentencings there was no provision in statute law for the imposition of a presumptive mandatory sentence. Further, the quantity of drugs involved in the present case far exceeded the quantities involved in either the *Gilligan* or *O'Toole* cases. It was the largest seizure drugs in the history of the State, involving 1554 kg conservatively valued at in excess of €108 million. Moreover, the purity level of the drug far exceeded normal purity levels.

53. We were also referred to the case of *The People (Director of Public Prosecutions) v Doo, Wiggins and Mufford* (unreported, Circuit Criminal Court, Cork, Moran J., 8th of May 2009), and provided with the transcript of the sentencing hearing. That case had involved three accused who had pleaded guilty to offences under s. 15A of the Act of 1977 involving the interception of a yacht named *"Dances with Waves"* by the Irish naval service (acting as part of a joint task force with gardai and the customs service), which had on board a cargo comprising 75 packages which contained a total of 1504 kg of cocaine, with a potential street value of €400 million. The operation was an elaborate one. The accused had travelled from Spain to Caracas in Venezuela, and from there to Trinidad. They had purchased the yacht in Trinidad and returned to Venezuela to collect the consignment of drugs. They then sailed for Europe in circumstances where their intended destination was believed to be Holyhead or Carnarfon Bay in North Wales. The yacht was intercepted off the southwest coast of Ireland and was brought to Castletownbere where it was searched and the crew was arrested. The three accused had pleaded guilty and had been cooperative with the investigation. None of the three accused had any previous convictions, nor had they any connections to organized crime. The evidence was that they had fallen on hard times, that they were financially challenged and that they had become involved for financial reward. The sentencing judge imposed sentences of 10 years' imprisonment on each of the accused, backdated to the date on which they went into custody. The transcript gives no indication as to what the headline sentences were. The sentences in question do not appear to have been appealed. The respondent maintains that the circumstances of the accused in that case were markedly different from those of the appellant and his co-accused in the present case, but that it was nevertheless thought proper to bring that case to our attention.

54. Finally, the respondent contends that the sentence imposed in the first instance should be upheld not least because of its deterrent effect. It is said to be essential that offenders involved in crimes of this nature should be aware that the Irish courts take a harsh view of them. It is suggested that deterrence should be endorsed by this court as the predominant sentencing consideration in this type of case.

Discussion and Decision

55. In respect of the sentence under appeal, the maximum available penalty is one of imprisonment for life. It scarcely needs to be stated that the circumstances of this case were so egregious, in terms of its gravity, as to require a headline sentence towards the high end of the available range. Gravity is assessed by reference to culpability and the harm done or, in a case such as this, the

potential for harm to be done. The culpability of the appellant was very significant. It is true that he was not at the apex of the criminal organisation that was behind the attempted importation of this massive quantity of cocaine, but he was majorly involved at an operational level. Moreover, there was the significant aggravating circumstance in that this was not the first occasion on which this accused had been involved in drug smuggling. He was convicted of the possession, transporting and smuggling of drugs in France in 2005.

56. In the most drug trafficking cases it is not possible to identify an individual victim or victims who has/have suffered specific harm. Accordingly, in so far as harm is concerned, a sentencing court is required to consider the potential harm that might have been caused if the drugs that were intercepted had reached the illicit market for which they were intended. The court must consider the detrimental effects of illicit drug use on society, in terms of how drugs can destroy the lives of individual drug users, in some instances ravage whole neighbourhoods, and place an enormous burden on the wider community. These are facts that are not reasonably disputable, and they are a matter in respect of which judicial notice can be taken. In *Bank of Ireland v. Keehan* [2013] IEHC 631, Ryan J said [at para 24] that *"courts have to take judicial notice of the obvious and commonplace facts and circumstances of ordinary life."* We adopt with approval his remarks in that regard and consider that the detrimental effects of illicit drug use on society are at this stage so well known that judicial notice can be taken of them. Accordingly, specific evidence of the harm caused by drugs is not required at a sentencing for a drugs offence. There can be no doubt about this in circumstances where the harm caused to society by drug trafficking is expressly recognised in s. 27(3D)(a) of the Act of 1977.

57. What is relevant as regards harm, however, is the nature of the drug concerned and its quantity. In this instance we are speaking about a narcotic and an immense quantity. The potential for harm was correspondingly great.

58. By any yardstick, having regard to the gravity of the offending conduct committed by this appellant, nothing less than a very substantial custodial sentence could have been contemplated as the headline or pre-mitigation sentence. This was required to meet two important objectives of sentencing, namely retribution and deterrence. This was conduct that merited severe but proportionate punishment for retributive purposes. The selected punishment needed to adequately convey the censure of society. However, more than mere deprecation or censure was required. In the circumstances of this case, a deserved level of "hard treatment", in terms of the deprivation of the liberty of the offender for a substantial period, was also required. Such a punishment would seek to address the offender as a moral agent and impress upon him, and others, that he had egregiously breached societal norms, and that his conduct was unacceptable to the point where society claimed the right to visit significant unpleasant consequences on him. The clearest possible societal mandate for this is to be found in s. 27(3D) of the Act of 1997 which makes provision for a presumptive mandatory minimum sentence in s.15A cases "in view of the harm caused to society by drug trafficking."

59. In so far as the objective of deterrence is concerned, there is a strong case for seeking to promote it, both generally and specifically, in a drugs trafficking case. The penal objectives of retribution and deterrence are seen by many sentencing theorists to be interrelated to a degree, and as representing perhaps different sides of the same coin. The relationship between them is indeed arguably symbiotic. Thus, McAuley and McCutcheon in their work *"Criminal Liability A Grammar"* (2000: Round Hall Sweet and Maxwell) make the point that *"it is not true that the principle of deterrence operates independently of retributive considerations"*. Further, the renowned legal philosopher and penal theorist Andrew Von Hirsch who in *Censure and Sanctions* (1993: Oxford University Press) and Deserved Criminal Sentences (2017: Bloomsbury Professional), amongst his other works, champions the *"desert model"* of retribution, ostensibly shares this view in that he acknowledges that proportionate punishment which is desert based and which is intended to act upon the offender by treating him as a moral agent, and by communicating to him society's disapprobation and censure for his wrong doing, frequently also carries with it what he characterises as a *"prudential disincentive"* to offending or re-offending. Put more simply, punishment for retributive purposes under his desert model also has a degree of deterrent effect. Indeed, in von Hirsch's conception in order to adequately convey the censure message a deserved punishment must involve, in addition to the expression of disapprobation, a degree of *"hard treatment"* as *"a further reason -- a prudential one – for resisting the temptation"* to offend (in the case of those whom it is hoped might be generally deterred) or re-offend (in the case of the particular offender whom it is hoped might be specifically deterred).

60. While every sentence arguably has some deterrent effect, there is a large body of literature concerning whether increasing sentence severity in fact achieves any additional deterrent effect i.e., what is known amongst sentencing scholars as *"marginal deterrence"*, and there is reason to doubt that it does. Be that as it may, there is no doubt that judges are entitled to impose exemplary sentences to prioritise deterrence amongst other sentencing objectives. There are limits, however, and the principal limiting factor is the constitutionally derived requirement that any sentence to be imposed must be proportionate, both to the gravity of the offending conduct and to the circumstances of the offender. The sentence must be appropriate to the offence as committed by the offender in his or her particular circumstances.

61. The Court of Appeal has previously addressed the issue of exemplary sentences imposed for deterrent purposes, in the case of in *The People (DPP) v WM* [2018] IECA 281, where we said:

> *"The important thing to appreciate is that pursuit of deterrence, or any of the other recognised sentencing policy objectives, may only operate to influence the calibration of what should be the appropriate sentence from within the scope of the judge's legitimate margin of appreciation in terms of proportionate sentencing. The sentence selected, regardless of what policy objectives are being pursued, must at the end of the day be proportionate both to the gravity of the offending conduct and to the personal circumstances of the offender. Pursuit of a sentencing policy objective cannot be used to justify the imposition of a disproportionate sentence."*

62. We consider that in circumstances where the appellant was not at the apex of this drug trafficking conspiracy the sentencing judge was justified in resorting to a determinate sentence rather than imposing a life sentence. However, the case is made that the determinate sentence selected, namely a post mitigation sentence of 30 years, which meant that the unspecified headline or pre-mitigation sentence was inevitably somewhat higher than 30 years, was a "crushing" one, and manifestly disproportionate.

63. The post-mitigation sentence of 25 years upheld by the former Court of Criminal Appeal (CCA) in Mr. Daly's case was, to date, the longest determinate sentence for a drugs offence in this State to have survived appellate review. Two points require to be made about that.

64. The first is that the sentencing judge at first instance had regarded Mr. Daly, Mr. Wharrie and the appellant as having been equally culpable. However, he differentiated between Mr. Daly on the one hand, and Mr. Wharrie and the appellant on the other hand, on the basis that *"Wanden and Wharrie …have serious previous convictions"* whereas *"Mr. Daly doesn't have any conviction that is of concern to me"*. Commenting on this, the CCA was at pains to make the point that Mr. Daly did in fact have previous convictions, and that he was not a first time offender. In that regard, McKechnie J. stated at paragraph 33 of his judgment on behalf of the court:

> *"33. When dealing with his previous record the trial judge expressly stated at p. 30 that "Mr. Daly doesn't have any conviction that is a concern to me." In furtherance of this view, he also distinguished the appellant from Mr.. Wharrie and Mr.. Wanden, both of whom had serious antecedents. However, it is quite a different point to suggest that the appellant should realistically be treated as a first time offender: in the court's view this is quite doubtful. It should be noted that he was aged between 23 years and 32 years when he committed the offences for which he was convicted, including an assault on a police officer in 1990 and possession of a blade in 1998. Moreover, given the gravity of the offences with which he was convicted, the passage quoted from O'Malley has uncertain application. Whichever, it is clear that the judge viewed the appellant's previous convictions as having no importance and proceeded accordingly."*

65. The second point to be made is that Mr. Daly made the case, *inter alia*, on appeal that the level at which his sentence was set justified per se the intervention of the court. The Court of Criminal Appeal (CCA) rejected that following a review of the sentences imposed in a number of other drug trafficking cases, including the cases of *O'Toole*, and *Gilligan (No 2)* cited earlier in this judgment, and a further case of *The People (Director of Public Prosecutions) v Long* [2006] IECCA 49, as well as considering a submission of the DPP that an exemplary sentence, such as that imposed, was required for deterrent purposes, and that in a case such as that deterrence should be *"the predominant sentencing consideration."* The CCA expressed the view that, with respect to the submission on deterrence, *"the facts of this case comfortably come within these parameters"*.

66. We consider that the sentence upheld in Mr. Daly's case provides a closer benchmark against which to judge the proportionality of the sentence imposed on the appellant, than the 17½ years imposed in the case of Mr. Wharrie, the result of which cannot safely be relied upon as a comparator by virtue of the error found by the Supreme Court in the aforementioned "without prejudice" appeal. In those circumstances the appellant's contention that this Court is required to intervene, having regard to the principle of parity, to give him the same sentence as Mr. Wharrie received is entirely misconceived.

67. Although the sentencing judge found that there was no meaningful basis to differentiate between Mr. Daly, Mr. Wharrie and the appellant in terms of their involvement, it cannot be said that they were equally culpable. The appellant, unlike his co-accused, had a relevant previous conviction, i.e., his conviction on the 12th of June 2005 by a court in France of (*inter alia*) the offence(s) of "possession, transporting and smuggling of drugs",which aggravated his culpability and which would have justified a somewhat higher headline sentence than in Mr. Daly's case. We do not know what the headline sentence in fact was in Mr. Daly's case, but the mitigation to which he was entitled was slight. He had not pleaded guilty, he had not been co-operative, he was not of previous good character, and unlike the appellant he was not a foreign national who would be required to serve his sentence other than in his home country. Accordingly, although it is somewhat to speculate, we consider that the headline sentence in his case is unlikely to have been more than a year or two higher than the 25 year post mitigation sentence that he received.

68. Be that as it may, and in contrast, the starting point or headline sentence in the appellant's case was north of 30 years. There is a point at which a determinate sentence goes beyond being justly deserved and becomes oppressive and disproportionate. While it would not be appropriate to delineate the precise point at which that line was crossed in the present case, we are satisfied that it was in fact crossed, and we agree with the submission that a starting point or headline sentence north of 30 years has to be regarded as inappropriate and disproportionate notwithstanding the egregious circumstances of this case.

69. We have been influenced in part in coming to this conclusion by the Supreme Court's recent judgment in *The People (Director of Public Prosecutions) v Mahon* [2019] IESC 24. That case was concerned with an appeal against the severity of a sentence in a manslaughter case, and in accepting the case the Supreme Court had certified three points of law as being of general public importance, one of which was:

> "How does a trial judge approach setting a proper sentence which is valid in the context of the gravity of the crime of manslaughter, widely variable as such sentence is primarily based on the individual facts of the crime, but perhaps aggravated or mitigated by other factors?"

70. In considering this question, Charleton J, who gave judgment for the Supreme Court, in a section of the judgment entitled "Life sentences and long determinate sentences" considered an argument "often made, where a lengthy determinate sentence is under appellate consideration, … that some condign terms are equivalent to a life sentence." He remarked:

> "There are differences, however. Murder, alone, carries a mandatory life sentence, save for those perpetrators aged under 18. The term of such a sentence is indeterminate from the outset. Hence, prisoners commencing such a term do not have their presumed release date, taking account of remission, calculated. Such an exercise is impossible since release on a life sentence is at the discretion of the Executive, perhaps with input from the Parole Board. While it is possible to find a mean length of sentence before conditional release on a life sentence, no prisoner can predict that result. Furthermore, both the longest term served, and the mean length of time before release, have increased over the last two decades. An analysis of existing and past statistics is instructive in that regard."

71. The Supreme Court's judgment goes on to consider statistics from various sources, including certain material published in Charleton, McDermott and Bolger - Criminal Law (Dublin, Butterworths, 1999), and somewhat more up to date material published in January 2019 by the Irish Prison Service. The latter provided figures covering 2001 to 2016 inclusive and a table reproduced in the judgment suggests (a) a mostly rising graph in terms of length of time spent in custody, and (b) that during the five most recent years surveyed, i.e., between 2012 and 2016, the average time that had been spent in custody by prisoners released in those years from life imprisonment varied between 17½ years and 22 years. The average was 22 years in 2012, 17½ years in 2013, 20 years in 2014, 17½ years in 2015 and 22 years in 2016. The judgment then comments:

> "44. There has been an increase in the time served, on average, by those sentenced to life imprisonment over the two decades. According to Diarmaid Griffin - The Release and Recall of Life Sentence Prisoners: Policy, Practice and Politics, (2015) 53(1) Irish Jurist 1 at page 2, the average time served on a life sentence before release had been 7.5 years between 1975 and 1984; 12 years between 1985 and 1994; 14 years between 1995 and 2004; 17 years between 2004 and 2009; and 19.5 years between 2010 and 2013. The Irish Parole Board's 2017 annual report stated that of the 14 prisoners serving a life sentence who had subsequently received parole that year, the average sentence served was 18 years. Such figures for release are sentences without any remission. Thus, release after 15 years would be equivalent in normal circumstances to a determinate sentence of 20 year imprisonment."

72. The corollary of all of this is that a 30-year post mitigation sentence, assuming standard remission of 25% will be earned and applied, equates to life sentence in which the prisoner is released after 22½ years. We consider that it has been of assistance to us to know, in terms of considering the proportionality of the 30 year post mitigation sentence imposed in this case, that such a sentence approximates to a prisoner being released on licence from a life sentence after 22½ years, in circumstances where, in

recent times, the average time spent in custody by a person serving a life sentence has never exceeded 22 years. We accept, of course, that that is not to say that there may not have been individual cases where the average figure was exceeded, and perhaps substantially exceeded. Nevertheless, we have found it informative to learn how a 30-year post mitigation sentence compares (albeit crudely and acknowledging the limitations inherent in the exercise identified by Charleton J) with the average time spent in custody in recent years by a person serving a life sentence.

73. In concluding that a determinate post mitigation sentence of imprisonment for 30 years was disproportionate in the circumstances of this case, we do not gainsay for one moment but that there may in the future be other cases in which recourse to the life sentence which the Oireachtas has allowed for might well be appropriate. However, it would not have been appropriate here, and neither was a post-mitigation sentence of 30 years. For the sentencing judge to have started so high, and to have ended up with a post mitigation sentence of 30 years, was an error in principle in our assessment.

74. In circumstances where we have found an error, we must proceed to re-sentence the appellant. Taking all of the circumstances of the case into account we consider that an appropriate headline or pre-mitigation sentence in the appellant's case would have been a sentence of imprisonment for 27 years. This takes account of the aggravating circumstance in his case that he has a previous conviction for "possession, transporting and smuggling of drugs".

75. On the mitigation side, this appellant also did not plead guilty, was not co-operative, and was not of good character, and accordingly cannot avail of mitigation under any of those headings. However, he was not in a situation where he could avail of no mitigation. It is important to take into account the tragedy of his wife's death while he was awaiting trial, the further bereavement involving the loss of his sister in 2007, the inevitable separation from his daughter, who is his closest remaining family member, that must follow the imposition of a lengthy sentence on him, and the fact that he is a foreigner who will be required to serve his sentence in an Irish jail. While the grounds of appeal made mention of rehabilitative steps taken by the appellant since his incarceration, we have received no evidence of that. Since judgment was reserved, we have had forwarded to us an undated Prison Governor's report, which merely states that he is on enhanced privileges, that he has received ten disciplinary reports since his committal, that he is co-operative with staff, has attended school and that he works as a Gym cleaner.

76. Taking all of this into account, we will discount by four years from the headline sentence of twenty seven years imprisonment that we have nominated, leaving a net post mitigation sentence of twenty three years imprisonment.