



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.**

Appeals Numbers: 197, 198 & 199 CJA/2015

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

V

CHOUNG VU

KHAM TU (ORS DAVID TU)

TUAN CONG LE

RESPONDENTS

Appeal Number: 181/2015

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

CHOUNG VU

APPELLANT

Judgment of the Court delivered on 8th February 2016 by Mr. Justice Edwards

Introduction

1. In this case Mr. Choung Vu, Mr. Kham Tu (otherwise known as David Tu) and Mr. Tuan Cong Le were jointly charged and faced trial on indictment before Trim Circuit Criminal Court in respect of various offences arising out of the discovery, by members of An Garda Síochána, of a cannabis grow house at Ballinlough, Kells, Co. Meath on the 6th of June, 2012. They had been sent forward for trial by the District Court on the 6th of December, 2012, and first appeared before Trim Circuit Criminal Court on the 22nd of January, 2013.
2. On the 22nd of January, 2013, Mr. Tu was arraigned and pleaded guilty to a count of cultivation (of plants of the genus cannabis) contrary to s. 17 of the Misuse of Drugs Act 1977 (the Act of 1977) as substituted by s. 11 of the Misuse of Drugs Act 1984 (the Act of 1984). This was acceptable to the Director of Public Prosecutions and a *nolle prosequi* was later entered in respect of the other counts on the indictment relating to that accused. Mr. Tu was then remanded on bail in the first instance pending sentencing. However, although Mr. Tu was not in fact sentenced until the 9th of July, 2015, he went into custody on the 10th of September, 2014, following his arrest on that date for another similar offence.
3. The cases of Mr. Vu and Mr. Cong Le were adjourned on the 22nd of January, 2013, for trial at a later date. An application pursuant to s. 4E of the Criminal Procedure Act 1967, as substituted by the Criminal Justice Act 1999, was unsuccessfully brought on their behalf on the 13th of February, 2014, and their trial ultimately came on for hearing on the 30th of June, 2015.
4. On the morning of the trial, Mr. Cong Le also pleaded guilty on arraignment to a count of cultivation contrary to s. 17 of the Act of 1977 (as substituted). This was acceptable to the Director of Public Prosecutions and, as in the case of Mr. Tu, a *nolle prosequi* was later entered in respect of the other counts on the indictment relating to him. Mr. Cong Le was remanded on bail to be sentenced at a later date.
5. The trial against Mr. Vu proceeded on the 30th of June, 2015, and lasted five days. He was convicted by the jury on all counts that he faced, namely (Count No. 1) possession of a controlled drug for the purpose of selling or otherwise supplying it to another, contrary to s. 15 of the Misuse of Drugs Act 1977; (Count No. 2) possession of a controlled drug, contrary to s. 3 of the Misuse of Drugs Act 1977; and (Count No. 3) cultivation (of plants of the genus cannabis) contrary to s. 17 of the Misuse of Drugs Act 1977, as substituted. However, Mr. Vu appealed his said convictions to this Court. In a judgment delivered on the 16th of November, 2015, this Court allowed Mr. Vu's appeal against his conviction on Count No. 1 and Count No. 2, respectively, but dismissed his appeal and affirmed his conviction on Count No. 3. Mr. Vu had been on bail up until his sentencing, save for three weeks immediately after his arrest while he was making arrangements to enable him to take up bail.
6. All three accused were sentenced on the 9th of July, 2015. Mr. Vu received a sentence of six years imprisonment with the final three years thereof suspended, backdated to take account of the three weeks he had spent in custody. Mr. Tu received a sentence of four years imprisonment with the last two and a half years thereof suspended, consecutive to a sentence of three years imprisonment that had been imposed upon him on the previous day, the 8th of July, 2015, at Naas Circuit Criminal Court for the aforementioned similar offence. In the case of Mr. Tu, the sentencing judge declined to give him credit for time served on the basis that this had already been taken into account by Naas Circuit Criminal Court. Finally, Mr. Cong Le received a sentence of four years imprisonment, the final three years of which were suspended, to date from the date of sentencing. Mr. Cong Le had been on bail at all stages.
7. The DPP seeks a review pursuant to s. 2 of the Criminal Justice Act 1993 (the Act of 1993) of the sentences imposed on Mr. Vu,

Mr. Tu and Mr. Cong Le, respectively, on the grounds that they were unduly lenient.

8. In addition, Mr. Vu alone has appealed the severity of his sentence. In the circumstances his appeal is, in effect, a cross-appeal to the DPP's application for a s. 2 review of his case.

The Facts of the Case

9. Mr. Vu, Mr. Tu and Mr. Cong Le are all Vietnamese nationals.

10. A Mr. Donal Corrigan was the owner of a house at Ballinlough, Kells, Co. Meath. In August, 2011 he was seeking to rent this house and was approached by an Asian man who expressed interest in renting it. The Asian man said that he wanted to rent it for both his wife and his daughter who was studying accountancy. Mr. Corrigan agreed to do so, and he thought no more about it. The Asian man signed the lease in the name of "Andy Lu". However, he was subsequently identified as being Mr. Tu.

11. On the 6th of June, 2012, the gardaí, having previously had the house under surveillance, applied for and obtained a warrant to search it. On their arrival, they observed Mr. Tu at the back door, and a white Hi-Ace van belonging to him parked nearby. Mr. Tu provided his name and accepted that the van belonged to him. Mr. Corrigan would later identify this white van as being a vehicle that he had previously seen being driven by the Asian man to whom he had let the house.

12. On entering the house, the garda search party found that the entire house was in the process of being converted to facilitate the cultivation of cannabis, and some cannabis plants were already being grown there. There were sophisticated electrical adaptations, involving the bypassing of the electrical meter and the installation of special lighting units, fans, power ballast units and the cabling associated with such equipment. The floors were covered with plastic sheeting, and the windows were covered over. Bags of compost, plant pots and numerous drums of plant food were also found. In addition, 126 actual cannabis plants with a potential value of €100,800 were found to be growing on the premises.

13. While the search was still ongoing, a red Chevrolet Aveo car arrived at the rear of the property. There were two males present in the vehicle. The driver identified himself to one of the gardaí present as Tuan Cong Le. The passenger gave his name as Choung Vu, and provided a date of birth and an address in England. The car was searched, and it was found to contain a number of items that gardaí believed would be used for the cultivation of cannabis plants, namely, more lighting units similar to those found in the house, more power ballast units, plant food, nutrients and tools.

14. It was later established in the course of the garda investigation that both Mr. Cong Le and Mr. Vu had earlier visited B & Q Naas, where they had been captured on CCTV, and had purchased there at least some of the tools and cultivation paraphernalia found in the car.

15. The red Chevrolet having been searched, gardaí concluded at that point that Mr. Tu along with Mr. Cong Le and Mr. Vu were involved in the cultivation of cannabis plants in the house for sale or supply, and they proceeded to arrest all three.

16. Mr. Tu and Mr. Vu were both taken to Kells garda station where they were detained and interviewed while in detention. Mr. Cong Le was taken to Trim garda station where he too was detained and interviewed while in detention.

Mr. Choung Vu's Circumstances

17. Mr. Vu denied involvement in the grow house operation throughout his interviews, maintaining that he had come to Ireland to set up a fish spa and was staying with friends. He claimed to have known Mr. Cong Le for only a week and to have been invited to travel in Mr. Cong Le's car "as a come along person". He said that he availed of that offer because he was interested in viewing properties for potential purchase. He was born on the 1st of April, 1970, and resides as a permanent resident in London. The Court was told that he married in 1992 and that he has two children, a daughter and a son. He has modest educational achievements and had worked most of his life in the catering and restaurant business, both as a waiter and as a chef, before starting his own restaurant business. At the present time, he is involved in a Vietnamese Deli business. He has no previous convictions.

18. At the sentencing hearing in the Circuit Court, the judge was furnished with a number of testimonials concerning Mr. Vu. These included one from his daughter, Vivienne Vu, and one from his son, Victor Vu, testifying to the fact that he is a good father and also a good eldest son to his mother, who had recently suffered a stroke. There was also a testimonial from a Mr. Abdul Chowdhry, who is a mathematics teacher and businessman as well as a long time friend of Mr. Vu, asserting that Mr. Vu is an honourable and good family man, and also suggesting that he had acted out of character and was remorseful.

Mr. Kham Tu's Circumstances

19. Mr. Kham Tu initially denied involvement in the cultivation of cannabis at the house at Ballinlough, claiming he was there to paint the front and back door of the premises. However, he was later co-operative and admitted tending the plants and spraying them. He claimed to have been recruited by a Vietnamese national resident in England. Mr. Tu pleaded guilty at the first available opportunity.

20. Mr. Tu was born on the 13th of June, 1953, and had been residing in Celbridge, Co. Kildare for some time. He had a solid work history. Indeed, he had been running a Chinese restaurant in Clondalkin until relatively recently, but he claims that he was forced to sell it due to the economic downturn and that he became involved in the cultivation of cannabis because he was in financial difficulty. He had no previous convictions prior to the detection of his involvement in the Ballinlough grow house. Unfortunately for Mr. Tu, while he was on bail in respect of this matter, he was detected as being involved again in the growing of cannabis plants, this time at his home in Celbridge where the gardaí discovered 51 plants in the course of a search. He was charged with, and pleaded guilty to, a charge of cultivation contrary to s. 17 of the Act of 1977 (as substituted) arising out of this incident, and on the 8th of July, 2015, (the day before the sentencing hearing in the present case) he was sentenced to three years imprisonment by Naas Circuit Criminal Court.

21. The sentencing judge received and took account of a letter from Mr. Tu himself expressing remorse for his involvement in the offence and personal regret that, due to his remand in custody, he had been unable to say farewell to his father who had recently died. The sentencing judge also had a testimonial from his stepdaughter, Ms. Lisa Tang, as well as a letter from King's College Hospital, Denmark Street, London confirming that his father had been a patient there. There were also three letters from the prison authorities at Cloverhill Prison confirming that he is getting on well, and is indeed working in the kitchen.

Mr. Tuan Cong Le's Circumstances

22. Mr. Tuan Cong Le was born on the 11th of April, 1963, and resides in Clondalkin. He came to Ireland in 1995; he is from a poor background. He has worked in a number of takeaway restaurants, and also as a handyman. Mr. Cong Le now has permanent residency status. He is a married man with three children, one of whom is a daughter who was born in Ireland. He is also a grandfather to his

oldest daughter's two children. He has limited English. Mr. Cong Le has a previous conviction for an assault causing harm, contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997, on the 14th of June, 2001, for which he received a sentence of one year imprisonment in circumstances where compensation of €3809.21 had been paid to the victim. He also has a number of minor road traffic convictions.

23. Mr. Cong Le was co-operative with the gardaí during the course of his interviews. He admitted having been at the grow house before on the previous day and contended that he had been paid €2,000 to do certain electrical work at the house. When searched, he had approximately €1,800 on his person, and he claimed to have spent the remaining €200 on materials, some of which he admitted purchasing at B&Q Naas.

24. Mr. Cong Le claims to have committed the offence because he was in financial difficulty, having run up debts due to a gambling addiction. He contended that he was remorseful, and the Court was provided with a testimonial from his daughter confirming that he is a good father.

The Sentencing Judge's Remarks:

The assessment of seriousness

25. In assessing the seriousness of the offending conduct, the sentencing judge said (*inter alia*):-

"These three gentlemen are all being sentenced in connection with the operation of a -- the operation of a what's colloquially known as a "grow house" which was a relatively -- which was a quite sophisticated operation for the production of cannabis really on a commercial level as a business enterprise, and that is a very serious offence for any person to be involved with and it's inevitable it will have serious consequences for the people who are involved with that."

26. The sentencing judge noted the number of plants found on the premises, viz. 126, and that if each of those plants had been allowed to grow to maturity, and cannabis harvested from them, each plant would have yielded a quantity of the drug worth €800 that could have been sold on the street. Based on 126 plants, that would have yielded an amount in excess of €100,000. The sentencing judge then went on to say:-

"However, in one sense, I don't know if the value matters greatly because what is happening, the allegation here is that a facility was being offered for some time with a turnover of product and it's the long-term income that's being produced -- I suppose income over time is being produced from the premises which is really what adds to the seriousness of the crime, so in fact it could, on this view, be seen as significantly more serious than someone who's actually found with drugs with a large value on them."

27. He added:-

"I'm not assessing the liability of any of these accused persons on the basis of valuation of the drugs. I'm assessing liability rather on the fact that all three were engaged in an ongoing commercial operation to to whatever extent, whatever extent the individuals engaged, they were involved in an ongoing operation to produce drugs"

28. He also remarked:-

"Mr. Choung Vu has been convicted of possession and that's a matter I'll deal with, but the cultivation of its own, it involved a commercial activity. It's an extremely serious matter and I regard the highest of -- the greatest aggravating factor in this case, effectively the commercial nature of the operation being conducted"

29. The sentencing judge also stated that he regarded it as an aggravating factor in the case of Mr. Tu and Mr. Cong Le, respectively, that:-

"...both of them chose to abuse the community that they came to live amongst and where they did raise their families and they came to a community and they did damage to other people's family having engaged in the production of drugs."

Mr. Choung Vu

30. In sentencing Mr. Vu, the sentencing judge stated:-

"In this case, the strongest benefits that Mr. Choung Vu has is that he has no previous convictions of any kind. That being so he's of good character, he has a good work history and those have to stand to him to a considerable extent. He's a permanent resident in the United Kingdom. I accept that his mother is extremely ill, that he has a 16-year-old son, I'm sure he would wish to be there to be a father to, and the fact of serving a prison sentence in a foreign jurisdiction - whatever possibilities exist for a transfer, but I have to assume that his sentence will be served in this jurisdiction - will be an added burden to Mr. Choung Vu."

He is also entitled to credit as having made significant concessions by his counsel during the trial which did result in the trial being less lengthy or perhaps failing completely on a point where one of those issues was contested. It might be unlikely but it's a faint possibility and he's entitled to real credit because of that. It hasn't been canvassed by either the prosecution or the defence as to what his attitude and approach to the gardaí was at interview. Obviously, as I heard the trial, I have some knowledge of that but, since neither side canvassed it, I'm not taking that into account in any factor and the relevance that would go both ways had it been canvassed and I'm treating that as a wholly neutral factor."

It's very difficult to say how to put Mr. Choung Vu into the organisation, in circumstances where there really is no information and, as I say, one approach would be to say that, where a very serious crime is committed it's the value of the drugs and the commercial operation that should set the tariff in the absence of any evidence to reduce that, a large sentence should follow. I think that would be unduly harsh and I think I just have to try to take the jury finding didn't go beyond some degree of involvement. The jury certainly found there was involvement in the criminal enterprise that was involved here, but I certainly can't say his degree of involvement was greater than the other two accused persons on

the evidence before me. I'm entitled to that.

I've seen testimonials from his 16-year-old son, Victor, and from his daughter, Vivienne, both of whom support him completely and that family support is a positive aspect. I've also seen the testimonial from his friend, Mr. Charvery, and they speak of someone who's entitled to credit for good character. I'm told, as a consequence of facing these charges, he had to sell his business in London. The timescale would seem to work out on that basis. He will be in a different country away from his family. He has no previous convictions. Those are all mitigating factors. Specific aggravating factors, because I know so little of what Mr. Choung Vu did or didn't go, I can't really identify any, despite the very common one and the very heavy one of being involved in a criminal, commercial activity.

I'm of the view that effectively the section 17 and the section 15 offences should be treated in the same manner. It's serious in either event. There is some benefit for remorse and, on that basis, I'm imposing a sentence to run concurrently in each of those counts of six years' imprisonment, each suspended for three years on the basis of his good character to date and the lack of convictions and the section 3 offence being taken into account.

Mr. Kham Tu

31. When he came to sentencing Mr. Tu, the sentencing judge said:-

"Mr. Kham Tu was born 13th of June of 1953. He came to Ireland in 1990. I've considered the documentation that's been put forward on his behalf and there is his own letter which he wrote, which is -- I take it that it does indicate a degree of remorse and he does indicate that he does -- it is genuine in his expressions. There is a letter from his stepdaughter which is one of these examples of the damage that this crime does to people's families. It does avert to Mr. Kham Tu's gambling problem as well. There's the various letters from Cloverhill, which have shown that Mr. Kham Tu has used his time in prison well and has showed a positive attitude towards these matters. And there's a medical report which I take it relates to Mr. Kham Tu's 85-year-old father, that he was in intensive care throughout the course of 2014 -- through some part of 2014. And I take those into account.

In any event, Mr. Kham Tu, he came to Ireland in 1990. He did plead guilty in respect of these offences at the earliest opportunity and if I suppose, as tended to happen from other clients, there was a very solid search warrant point at that stage. It stands to his credit that he pleaded guilty at the earliest opportunity and didn't seek to avail the section 4(e) procedure or any procedure depending on a search warrant.

It does appear that he's a man of considerable organisational skills. He ran a Chinese restaurant himself. He was the person who contacted the householder and entered into the lease to rent the premises, which does speak of a relatively high degree of involvement in the matter. He's also the person who's most linked to the operation of the grow house on an ongoing basis and those are very aggravating factors. And not just the fact that his greater degree of involvement in the crime is a considerable aggravating factor but notwithstanding all that, because of the very early plea that he entered and because of his previous good character and the use of the time he's made in prison, setting that against his level of involvement he would be in a not difficult position if he -- apart from the fact that he committed a second offence while on bail for this, and that is a very grave aggravating factor of this matter. It's a matter which I have to take into account and it means a degree of benefit that he be given is reduced against that and also strongly of the view that any sentence that is imposed in respect of this matter can only be consecutive to the sentence that was imposed yesterday.

I know that the actual mandatory -- sorry, it's my understanding that the actual mandatory requirement that a sentence follow consecutive to the other is when you're sentencing for a sentence which was committed on bail, and you make that sentence consecutive to the previous sentence. This is the other way around. He's been given a sentence first for the offence that he committed on bail and he's now being sentenced for the first offence but it's in the discretion of the Court to make a decision as to whether or not a sentence imposed should be consecutive or concurrent. In those circumstances I feel any sentence can only be consecutive.

Now that being so, he will profit probably from a greater degree of suspension of a sentence on the basis of the principle of proportionality, the totality of the sentence he's serving than would otherwise be the case. But I am imposing a sentence, a four years' imprisonment to run consecutively to the sentence that he's now serving and the time that he's been in custody isn't take into account -- the time that he's been in custody has already been taken into account in the commencement of this sentence and I'm going to impose that sentence of four years. However, on the basis of the mitigating factors that do exist and, despite the level of operation and the degree of damage he's doing to the community by being engaged in the production of drugs, I'm going to suspend the final two and a half years of that sentence."

Mr. Tuan Cong Le

32. In dealing with Mr. Cong Le, the sentencing judge said:-

"In respect of Mr. Cong Le, he was born on 14 April 1963 and the letter I have seen is a moving and very well constructed and, I believe, sincere letter from his daughter and I understand Mr. Cong Le's position is that he has been in Ireland since 1995 but has extremely poor English, and I regard it as being a significant mitigating factor that he did co-operate in interview with the gardaí. He did say that he knew what he did was wrong when he took the money. He did admit to getting into a house on a previous occasion - it was the day before - and there is a guilty plea entered, which he is entitled to the benefit of. Even though it was at a late, stage nonetheless it is an expression of remorse for which he is entitled to a credit.

Now, against that, he does appear to have certainly been in control of the money in respect of the provisioning supplies. That may be because he was the person who knew what to buy because he was the handyman. If that was the reason he was involved, he was an essential part of the operation. And I don't know how long he was involved in it. I can only sentence him for what's before the Court, so I'm only sentencing him for being involved on the 5th and 6th of June 2012. But, obviously, having skills as a handyman would be of considerable assistance and an essential role in the operation and, indeed, the fact that Mr. Cong Le's English is extremely poor wouldn't stop him being in some kind of

greater organisational role and it isn't a prerequisite that he has a high degree of English for that. Against that, there's no evidence from which I can conclude that so I'm taking the role that his role was as a handyman. Even though he had control of money, it was in connection with that and that he was an essential person in the operation but that he wasn't involved.

Now, with regards to just because I have dealt with ... Mr. Kham Tu I am going to mention this now. The fact it was a big part of Mr. Kham Tu, the early plea and the previous good character, in this case certainly, in the case of Mr. Cong Le, I have to deal with the question of his good character and he does have a previous offence. It does go back to 14 years. It is a crime that appears to be more a heat of the moment crime than a crime of planned dishonesty, and I don't regard that as a significant aggravating circumstance and I regard generally his conduct going to his credit and being of mitigation, notwithstanding that sentence. He did serve a prison sentence and he does know the seriousness of criminal conduct but, notwithstanding that, I tend to take the view that his character is a positive rather than a negative in respect of this matter.

I'm informed that on instructions that Mr. Cong Le had a gambling problem and matrimonial difficulties which added to his difficulties. He's a married man with three children, including two grandchildren. I accept fully that he's very committed to them and that they are a great support to him and that he has an extremely supportive family and that's a factor which will tell in the future. I also accept because of the language difficulties, in particular, that his time in prison is likely to be much harsher than that which is experienced by Mr. Kham Tu and that will be more of a burden on him. I think that there was real co-operation with the gardaí during his time in the interview. The plea that he entered wasn't an early plea but it still was a guilty plea, it was still a sign of remorse so there's benefit for that. I think in the case of Mr. Cong Le I see the greatest capacity for rehabilitation or from turning away from this involvement in crime. Of the three of them, I see the greatest possibility there.

Aggravating factors, of course, are that he provided an important service for the operation. There is the question of the section 3 assault. Nonetheless I am also imposing a sentence of four years' imprisonment upon Mr. Cong Le because, although his involvement wasn't as protracted as that of Mr. Kham Tu, it still was essential but it wasn't proven before me, it wasn't as protracted and I'm going to impose a sentence of four years. I'm going to suspend three of those because of the co-operation with the gardaí and because of the capacity for rehabilitation, which I believe is real and take into account but it's certainly a case that has to be marked with imprisonment"

The Grounds on which the Sentences are said to be Unduly Lenient

33. It was submitted that the respondents to the s. 2 applications stand before the court convicted of the cultivation of plants of the genus cannabis, contrary to s. 17 of the Misuse of Drugs Act 1977, which carries a maximum sentence of 14 years imprisonment.

34. One of the principle complaints articulated by counsel for the DPP in these applications is that the sentencing judge did not clearly indicate where on the range the offences fell, i.e., what his starting point in each case was before making appropriate allowance for mitigating factors.

35. It was suggested that these were mid range offences and that even if it might be inferred that the sentencing judge's starting point was six years in the case of Mr. Vu and four years in the cases of Mr. Tu and Mr. Cong Le, respectively, these starting points were simply too low in each case. In that regard, the Court was invited to consider such comparators as are available.

36. The offence of cultivation was considered by the Court of Criminal Appeal in a number of decisions, to which our attention has been drawn. In *The People (Director of Public Prosecutions) v. Gerry Coffey* [2012] IECCA 31 (Court of Criminal Appeal, ex tempore, 6th February, 2012) the appellant had pleaded guilty to two counts of cultivation of cannabis contrary to s. 17 of the Act of 1977 in respect of two premises: one an industrial unit, where cannabis to the value of approximately €327,500 was found; and one adjacent to his residence, where cannabis to the value of approximately €20,000 was found. From the record of the Court of Criminal Appeal's ex tempore judgment, Mr. Coffey's role appears to have been to tend the plants at the industrial unit and to provide his employers with the benefit of a certain expertise that he had. Mr. Coffey had a keen interest in gardening, and he provided advice on the cloning of the cannabis plants. (This Court is aware from other cases that have come before it that so called cloning involves using cuttings as the method of propagation of second and subsequent crops, as opposed to their propagation by seed, so as to ensure that only female plants are grown.) It appears that Mr. Coffey's reward was to have been modest. In that case, the Court of Criminal Appeal indicated that the sentencing judge was correct in identifying the offence at above the middle level and stated that, in those circumstances, the Court would fix the appropriate sentence as being one of eight years imprisonment before any account was taken of mitigating factors. In mitigation, his early guilty plea, immediate co-operation, prior good character, age and health were identified as justifying a reduction to a sentence of four years. Thereafter, the final year of the four year sentence was suspended to encourage rehabilitation, having particular regard to his addiction to cannabis.

37. In *The People (Director of Public Prosecutions) v. Ba Nguyen and Ha Nguyen* [2014] IECA 55, a three year sentence, the balance of which was suspended as of the 4th of December, 2014, was substituted for a six year sentence with the final two years suspended. In total, the appellants in that case served two years imprisonment. Of particular significance in that case was the acceptance by the investigating garda that the appellants had been trafficked into the jurisdiction to work as gardeners in a grow-house.

38. In *The People (Director of Public Prosecutions) v. Phuc Nguyen Le and Hong Thi Nguyen* [2015] IECA 157, the appellants were sentenced to 10 years imprisonment, with the final three years and the final four and a half years suspended, respectively, arising from the seizure of approximately €600,000 of dried cannabis and plants with a potential value of €1,000,000. The appellant's role as "gardeners" and the manner of their involvement was deemed to be central in the case (at para. 6 per Mahon J.):-

"The court is satisfied that there was an error of principle in the learned sentencing judge's approach to both sentences. While he correctly identified the sophistication of the operation as well as the appellant's essential role in that operation, he failed to adequately take account of the fact that these appellants were not involved in its setting up, planning and financing, and that their only benefit from it was the provision of a modest income and very basic living conditions. They were merely workers, and had been brought into this country for that purpose. They were obviously vulnerable to exploitation and may not have had absolute freedom to walk away from their involvement. On this basis the placement of the offences at the higher end of the gravity scale was not appropriate in the particular circumstances of the appellants' involvement, nor was the sentence of ten years in both cases."

39. Ultimately, sentences of five years imprisonment, with the final year suspended, and three and a half years imprisonment, with the final six months suspended, were imposed; the distinction arising from the fact that the former had a relevant previous conviction, while the latter had co-operated to a greater degree. It was suggested that it was relevant that both had been brought into the county to work in the grow house and consequently the sentence would be served far from both home and their more recent base.

40. In *The People (Director of Public Prosecutions) v. Xiao Fei Weng and Shi Dong He* [2015] IECA 261, the appellants pleaded guilty to offences contrary to s. 15 and s. 17 of the Misuse of Drugs Act 1977 arising out the search of a industrial unit in County Mayo, in the course of which cannabis and cannabis plants to the approximate value of €1,200,000.00 were found. Both appellants were characterised as live-in 'gardeners', entered pleas at the first available opportunity and were undocumented migrants. Noting the foregoing, a sentence of 4 years imprisonment was imposed.

41. Based on these comparators, it was submitted that the following factors can be identified as material in assessing position of the offence on a scale of offending:

- a. Whether the cultivation was commercial.
- b. The level of sophistication and extent of the operation.
- c. The role of the accused, whether they were mere gardeners or involved in the setting up, planning and financing of the operation.
- d. Whether the participation of the accused was voluntary or involuntary.
- e. The reason for the participation of the accused and their likely reward.

42. It was submitted that it is a feature of cases such as this that one is almost invariably left with the admissions of the accused as the only admissible evidence upon which a court can assess the role of the accused. In that regard, it was submitted that the role of the Mr. Cong Le was analogous to that of Mr. Coffey, and that that of Mr. Tu was more significant, or involved, as he was involved in setting up the operation from the beginning. In respect of Mr. Vu, it is not possible to definitively assess his role save to say that there was no evidence upon which one could conclude that he was a mere gardener.

43. It was submitted that while no starting points were indicated by the learned sentencing judge, it was clear from the ultimate sentences that they must have been significantly less than the eight year sentence identified in the Coffey case.

44. Thereafter, it is contended, many of the commonly identified mitigating factors in cultivation cases were not present in the cases of Mr. Vu, Mr. Tu and Mr. Cong Le.

45. It was submitted that Mr. Vu did not plead guilty, and there is no evidence upon which one could conclude that his involvement was involuntary.

46. In Mr. Tu's case, he is a naturalised Irish resident, was involved for monetary gain and was convicted of a subsequent offence, and thus it could not be said that he was remorseful. While his plea was entered at the first available opportunity, it was submitted that it had occurred in circumstances where he was caught red-handed.

47. It was submitted that Mr. Cong Le is a long term Irish resident, was involved for monetary reward and that while he had entered a late plea, it was also in circumstances where he was caught red-handed.

48. While both Mr. Tu and Mr. Cong Le co-operated with the investigation and entered pleas, it was submitted that the level of mitigation arising therefrom was limited, as indicated by Finnegan J. in *The People (Director of Public Prosecutions) v. David Coles* [2009] IECCA 144 (in the context of a s. 15A offence), where he stated:-

"But merely to admit one's own part may not merit a great deal of consideration in terms of sentence and particularly as here, where the applicant was caught red-handed."

49. It was further submitted that while the sentencing judge clearly identified the two central aggravating or material features of this case, namely, the roles of the respondents and the commercial nature of the operation, he thereafter failed to correctly position the offence on a notional scale of offending and consequently applied the mitigating features to too low a base, thereby arriving at sentences which were unduly lenient in all the circumstances.

50. Furthermore, it was also submitted that the sentencing judge applied too great a discount to the headline sentences in each case having regard to the available mitigation, thus magnifying the leniency of the sentences and again giving rise to a situation where the sentence was unduly lenient.

51. This Court is asked to note that the sentences imposed in all three cases is significantly less than that imposed in *The People (Director of Public Prosecutions) v. Phuc Nguyen Le and Hong Thi Nguyen* and *The People (Director of Public Prosecutions) v Xiao Fei Weng and Shi Dong He*, notwithstanding the fact that both of those case involved illegal migrants acting as live-in gardeners and thus being persons vulnerable to exploitation. It was therefore submitted that the sentences imposed represent a clear divergence from the norm or normative range of appropriate sentences for cases such as these and are thus unduly lenient.

52. Finally, it was submitted that the sentence imposed upon Mr. Tu for this offence had to be considered unduly lenient, particularly having regard to his role in setting up the grow-house and his involvement for monetary reward. In that regard, it was submitted that the sentence is significantly out of kilter with that imposed in *Coffey*, which was a case with many similarities. Moreover, it was submitted that notwithstanding the fact that the respondent was convicted of an identical subsequent offence committed while on bail, the sentencing judge, by his purported application of the totality principle, over ameliorated the effect of the consecutive sentences that he had determined upon, thereby rendering both the overall sentence and the sentence imposed for this offence unduly lenient.

Discussion

53. The relevant principles that must guide this Court in the conduct of a review such as the present are well established.

54. The jurisdiction to review a sentence on the grounds that it was unduly lenient derives from s. 2 of the Act of 1993, as amended,

which (to the extent relevant) provides:-

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

(2) An application under this section shall be made, on notice given to the convicted person, within 28 days, or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine, from the day on which the sentence was imposed.

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

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

(b) refuse the application."

55. In terms of the general principles governing such reviews, the leading authority is *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279. This was a judgment of the former Court of Criminal Appeal in the first case referred to it under s. 2 of the Act of 1993, and in it O'Flaherty J., giving judgment for the Court, sets out a number of principles and considerations relevant to the conduct of such reviews. He said (at p.287):-

"In the first place, 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'.

Secondly, 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; even where the victims chose not to come to court as in this case — both women were very adamant that they did not want to come to court — 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: what Flood J. has termed the 'constitutional principle of proportionality'

(see *People (DPP) v. W.C.* [1994] 1 ILRM 321), his decision should not be disturbed.

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr. Grogan SC, the test to be applied under the section is not the converse of the enquiry the court makes where 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'.

Finally, 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."

56. Since then, the relevant statutory provision has also been considered by the Supreme Court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356. In that case, at p.359, Barron J. stated:-

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

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

57. This Court has given careful consideration to the submissions on both sides. While taking due note of the comparators put forward, the circumstances of the present case are not identical to any of those other cases, either in terms of the scale of the operation in question or the particular roles of the individuals concerned.

58. As this Court has stated recently in *The People (Director of Public Prosecutions) v. Brendan O'Mahoney* [2016] IECA :-

"...we do not consider that in referring to a **divergence from the norm** the Supreme Court in ***The People (Director of Public Prosecutions) v. McCormack*** intended that the word norm should applied and understood in the narrow sense of being a usual situation referable to comparators. Rather, we believe the norm spoken of refers to what might be predicted to be the result, within a reasonable margin of appreciation, of a faithful application to the facts of the individual case of the appropriate sentencing principles, whether or not there are any useful comparators."

59. While the comparators offered by counsel for the DPP are undoubtedly of some assistance in indicating the general approach of this and other courts to sentencing in these type of cases, and we are grateful to have had them drawn to our attention, we consider that direct comparisons, such as that with the *Coffey* case as has been suggested, are not particularly helpful in circumstances where, despite superficial similarities, the facts of the relevant cases are different in many respects from those of the present cases.

60. We do not agree that the transcript bears out counsel for the DPP's complaint that the sentencing judge failed to select where on the range the offending conduct lay in respect of each accused. Because the sentencing judge utilised the mechanism of a partly suspended sentence in each case to reflect, and give due allowance for, mitigating circumstances, it is clearly to be inferred that the full unsuspended figure identified by him as being appropriate in each case represented the headline sentences which were intended to reflect the seriousness of the offending conduct before any mitigation was taken into account. When these figures are measured against the full available range, their position thereon can be readily ascertained.

61. While it is true that the sentencing judge does not at any stage refer in explicit terms to the range of penalties available for the cultivation offences, the transcript discloses that he had been expressly informed by counsel of the available range just moments before he began his sentencing remarks, and could not but have been aware of it. Moreover, he was at pains in dealing with Mr. Vu's case to emphasise his cognisance of the fact that the s. 15 possession offence of which Mr. Vu also stood convicted at that time carried a life sentence (in contrast to the finite sentence available for the s. 17 offence).

62. Counsel for the DPP has submitted that, properly assessed, the offending conduct of each of the convicted persons in this case fell to be measured as falling into the mid range, where the range runs from non-custodial options up to imprisonment for a term of fourteen years. It was further argued that Mr. Tu merited a sentence greater than Mr. Vu and Mr. Cong Le, though still within that range, in circumstances where he was an admitted primary participant whereas the involvement of Mr. Vu and Mr. Cong Le was capable of being regarded as secondary participation on the available evidence.

63. Reference to a mid range implies dividing the range or spectrum of penalties into at least three tranches, i.e., a low range, a mid range and an upper range. Applying a crude mathematical division would result in a low range from zero (being non-custodial options) to 56 months (i.e., 4 years and 8 months), a mid range from 57 months to 112 months (i.e., 9 years and 4 months), and an upper range from 113 months to 169 months (i.e., 14 years).

64. Applying this yardstick, the headline sentence of six years in the case of Mr. Vu fell squarely into the mid range, whereas the four year sentences of Mr. Tu and Mr. Cong Le fell into the upper end of the lower range. Mr. Tu's sentence was clearly influenced by the sentencing judge's determination that it should be consecutive to the sentence imposed at Naas Circuit Court, and the need to respect the totality principle so as to ensure that the resulting overall combined sentence was a proportionate one. It is reasonable to assume that if Mr. Tu had not faced consecutive sentencing, the headline sentence for the present offence would probably have been very much greater than four years, and somewhere in the mid range. It could very possibly have been in excess of six years in circumstances where the sentencing judge regarded Mr. Tu as having the greatest degree of involvement, being a primary participant, and also bearing in mind the judge's assessment of the seriousness of Mr. Vu's offending conduct, which on the evidence amounted to secondary participation. While Mr. Tu's headline sentence of four years was undoubtedly very lenient, this Court considers that it was within the sentencing judge's margin of reasonable appreciation in circumstances where it was the product of the application of the totality principle in the consecutive sentencing scenario that arose in Mr. Tu's case.

65. Whatever about Mr. Tu's case, it is undoubtedly the position that there was little ostensible justification for differentiating between Mr. Vu and Mr. Cong Le in terms of fixing their headline sentences, although there was plenty of scope for differentiating between them once it came to making due allowance for mitigation. Be that as it may, in this Court's assessment, neither the six year headline sentence in the case of Mr. Vu nor the four year headline sentence in the case of Mr. Cong Le was so far outside the margin of appreciation available to the sentencing judge, in terms of rating the seriousness of the offending conduct, as to represent a manifest error. Having regard to their roles which on the evidence involved secondary participation, their conduct could legitimately have been rated as belonging either in the upper end of the lower range or alternatively in the lower end of the mid range without the sentencing judge falling into error; in practical terms, any headline sentence of between four years and six years could not be regarded as being so divergent from what might have been expected to be the product of a proper application of sentencing principles as to be erroneous.

66. The error, if any, was in assessing Mr. Vu and Mr. Cong Le as meriting different headline sentences, in circumstances where the sentencing judge had found that he could not say that Mr. Vu's involvement was any greater than that of Mr. Cong Le. However, the existence of such an anomaly does not, per se, imply either that Mr. Cong Le's ultimate sentence was unduly lenient or that Mr. Vu's ultimate sentence was too severe. At present, we are concerned only with the headline sentences selected, and these (though different in each case) were both within the margin of reasonable appreciation enjoyed by the sentencing judge.

67. In terms of the s. 2 reviews with which the Court is presently concerned, the sole question for the Court is whether the sentences ultimately imposed were so divergent from the norm as to be unduly lenient. Taking into account available mitigation, the sentencing judge suspended three years of the headline sentence he had determined upon in the case of Mr. Vu, three years of the headline sentence he had determined upon in the case of Mr. Cong Le, and two and a half years of the headline sentence he had determined upon in the case of Mr. Tu.

68. As between Mr. Vu and Mr. Cong Le, the sentencing judge's approach to mitigation again appears to have been anomalous. They both received the same amount of allowance, by way of the partial suspension of their sentences, to reflect mitigation. This was so notwithstanding that Mr. Cong Le had pleaded guilty and had made admissions, whereas Mr. Vu had fought the case and had not made any admissions. While Mr. Vu had no previous convictions, Mr. Cong Le's character was also reasonably good. He had only one significant conviction, and it was for a not particularly relevant offence committed some fourteen years previously. There was little enough between them in terms of their family and social circumstances. All of that being so, Mr. Vu appears to have been the beneficiary of a perhaps overly generous allowance for mitigation, while in this Court's view Mr. Cong Le appears to have received the appropriate discount for the mitigation available in his case.

69. We consider that the allowance for mitigation afforded to Mr. Tu was appropriate in the circumstances of the case. Because he was the beneficiary of a somewhat lower headline sentence by reason of the need to take account of the principles of totality and proportionality in a consecutive sentencing scenario, it was appropriate that there should be a *pro rata* reduction in the discount for mitigation to which he would otherwise have been entitled.

70. Taking into account all the circumstances of the case, this Court does not consider the bottom line sentences ultimately imposed to have been unduly lenient. The sentences in the case of Mr. Tu and Mr. Cong Le were certainly very lenient, but we are not satisfied that they were unduly lenient. The sentence in the case of Mr. Vu was less lenient. The assessment of the headline sentence could not be said to have been lenient, though not necessarily excessive, and the effect of it was undoubtedly leavened by the very generous discount which Mr. Vu received for mitigation. It is unnecessary at this point to express a view on Mr. Vu's contention that his headline sentence, and indeed his ultimate sentence, was in fact excessive. That is the subject of his cross-appeal which will be dealt with separately below. What can be said with certainty is that Mr. Vu's sentence was not unduly lenient.

71. In the circumstances, the Court dismisses the s. 2 applications of the DPP in each respondent's case.

Mr. Vu's Appeal against the Severity of his Sentence

72. The Court considers that Mr. Vu's cross-appeal contending that his sentence was too severe is without merit. While the sentencing judge assessed the appropriate headline sentence in his case at six years, that figure was within the range of what was appropriate, and accordingly we are satisfied that he did not err in principle in doing so. It has to be acknowledged that the sentencing judge did err in principle in not treating Mr. Vu and Mr. Cong Le as meriting the same headline sentences, but we are

satisfied that this error provides no support for Mr. Vu's claim that the sentence ultimately imposed upon him was excessive. While Mr. Cong Le may have been the beneficiary of a very (though not unduly) lenient headline sentence, when he ought perhaps to have been assessed as meriting the same as was imposed on Mr. Vu, by the same token there ought to have been a significant differentiation between Mr. Cong Le and Mr. Vu in terms of discount or allowance for mitigation. They in fact received the same allowance for mitigation. In circumstances where the allowance granted in Mr. Cong Le's case was appropriate, as the Court has already indicated, it follows that Mr. Vu received more allowance than he was entitled to, thereby leavening the effect of the more severe headline sentence imposed on him.

73. Overall, we are satisfied that while the sentencing judge may have erred in principle in the manner indicated, any such error did not at the end of the day result in the imposition of a sentence on Mr. Vu that was too severe.

74. In the circumstances, the Court therefore dismisses Mr. Vu's appeal against the severity of his sentence.