THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Record No: 83 CJA/2014

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.

Sharon Flanagan

Respondent

Judgment of the Court delivered on the 1st day of May, 2015 by Mr. Justice Edwards

Introduction
1. This is a case in which the respondent was initially charged on indictment with three drug possession offences, namely offences contrary to s.15A, s.15 and s.3, respectively, of the Misuse of Drugs Act 1977. She was co-accused with two other persons, namely Warren Bowen and Kevin Flanagan. The joint trial of all three was due to commence on the 4th December, 2012. On that date the respondent offered a plea to the s.15A count, and this was accepted by the appellant. On the same date Kevin Flanagan offered a plea to the s.15 count, and this was also accepted by the appellant. Following arraignment, the cases of the respondent and Kevin Flanagan were then adjourned to the 27th February, 2013 for sentencing, with a direction that a probation report be prepared in respect of the respondent. Warren Bowen had pleaded not guilty on arraignment, and his case was adjourned to the 7th December, 2012 for trial.

2. On the 7th December, 2012 Warren Bowen asked to be re-arraigned and on this occasion he pleaded guilty to the s.15A count, and counsel for the appellant indicated that this was acceptable to her. Following this development, Warren Bowen's case was also adjourned to the 27th February, 2013 for sentencing, with a direction that a probation report be prepared in respect of him.

3. Following a sentence hearing on the 27th February, 2013, when the probation reports that had been directed were before the Court and had been duly considered by the sentencing judge, the sentencing judge decided to adjourn all three cases for a year, and directed that up to date probation reports should be made available in respect of the respondent and Warren Bowen on the adjourned date.

4. On the 27th February, 2014, having received the up to date probation reports that had been directed, the sentencing judge imposed the following sentences:

> ☐ The respondent was sentenced to five years imprisonment suspended for five years on a bond in the sum of €100.00 to keep the peace for that period;
>
> ☐ Warren Bowen was sentenced to four years imprisonment suspended for four years on a bond in the sum of €100.00 to keep the peace for that period. He was also disqualified from holding a driving licence for a period of two years;
>
> ☐ Kevin Flanagan was sentenced to three years imprisonment suspended for three years on a bond in the sum of €100.00 to keep the peace for that period.

5. The appellant now seeks to appeal the sentence imposed upon the respondent on the grounds that it was unduly lenient.

6. The appellant has also sought to appeal the sentence imposed upon Warren Bowen on the grounds that it was unduly lenient, and the appeal in his case will be the subject of a separate judgment.

The evidence at the sentencing hearing on the 27th of February 2013.
7. The sentencing court heard evidence from Garda Paul McWalter concerning the circumstances of the crime. He told the Court that on the 19th October, 2011, at 11.30am, Gardaí were conducting a surveillance operation on the home of the respondent at Cappacasheen, Kinvara, Co. Galway. The surveillance operation had been mounted on the basis of confidential information received by the Gardaí. An English registered van was observed arriving at this location, which was being driven by Warren Bowen. Both the respondent and Warren Bowen were observed removing one eight foot length of 4 x 4 timber each from the van. These were initially placed on the ground at the side of the adjacent house.

8. After a short while Warren Bowen left the area and then after another short period of time the respondent brought one length of timber to the rear of the house where she sawed it in half and then using a chisel and a hatchet she split open the timber pieces. This action revealed that the length of timber had concealed within it a substance quantity of cannabis resin. The respondent then left the sawed piece of timber at the rear of the house and she drove off in her car.

9. Kevin Flanagan is the father of the respondent. He had been at the residence and was present when the timber was delivered by Warren Bowen. Kevin Flanagan then went to the rear of the house. He picked up the pieces of timber that had been sawed and chiselled and he hid them behind two large barrels and placed a few items over them. Kevin Flanagan then returned to the side of the house and picked up the second piece of timber, which was still intact, and placed this in a shed down in the garden.

10. At 2.20 pm, on the 19th October, 2011, Garda Dermot Gibson and Colin O'Leary executed a search warrant issued under section

26 of the Misuse of Drugs Act on the residence of the respondent at Cappacasheen, Kinvara. A search was carried out on these premises and a quantity of cannabis resin comprising seven kilograms in weight was discovered. This cannabis had a value of €42,596. Gardaí continued to search this residence over the subsequent two days and during the course of this search discovered three quantities of cash. €9,800 was found hidden in a couch in the living room, €8,040 was found hidden under chipping stone at the front of the house and €10,050, which had been wrapped up in plastic, was found hidden under gravel at the front of the house. The total cash discovered amounted to €27,890.

11. The respondent was arrested by Garda Dermot Gibson for an offence under section 15 of the Misuse of Drugs Act and she was detained under section 2 of the Criminal Justice (Drug Trafficking) Act 1996. She was conveyed to Gort Garda Station where she was interviewed on five occasions. During the interviews she admitted possession of the cannabis. She refused to say who she got the drugs from and maintained that she was not at home when the drugs had been delivered, denied that they were delivered by Warren Bowen, her co accused, and stated that the money found hidden on her property was for the purpose of paying for the drugs seized.

12. As a result of the discovery of the drugs at the respondent's residence, a follow up search was carried out at the residence of Warren Bowen. This was carried out on the 19th October, 2011. The warrant was executed by Garda Dermot Gibson. During the course of this search Gardaí located a similar length of timber to the two that had been found at the respondent's house, in an adjacent shed that was used as a workshop. This piece of timber was also found to contain a substantial quantity of cannabis, amounting to four and a half kilograms in weight, and worth €28,974. The Gardaí also found a shorter piece of timber which also contained a quantity of cannabis. In addition, yet another quantity of cannabis was found in a bedroom in the house. In total, the amount of cannabis found at Warren Bowen's home came to over six kilograms and had a value of €37,100.

13. Warren Bowen wasn't present during the course of this search. He was arrested later that evening in Barna, detained under section 26 of the Criminal Justice (Drug Trafficking) Act and conveyed to Loughrea Garda Station where he was interviewed on seven occasions. In interview he admitted to having possession of cannabis at his home and also admitted to delivering cannabis to the respondent's residence at Cappacasheen, Kinvara.

14. Garda McWalter further testified that the drugs in this case were concealed in an unusual manner in that they had been cleverly concealed within the timber itself. An ordinary piece of timber was sliced length ways, and one slice was then hollowed out in various chambers. The drugs were then placed in these chambers and expanded foam was placed around them to prevent movement. The other timber slice was then glued back on top of the hollowed out piece and the whole thing was made to again look like a very ordinary piece of timber. Garda McWalter opined that it was a very professional operation.

15. Garda McWalter also testified that Kevin Flanagan was arrested on the 20th November, 2011 and he was interviewed at Galway Garda Station where he admitted his role in the hiding of the cannabis.

16. Dealing with the personal circumstances of this respondent, Garda McWalter testified that she was born on the 28th October, 1972, and was 41 on the date of his testimony (27th February, 2013). He told the Court that she had resided at Cappacasheen, Kinvara for many years along with her daughter, aged approximately 11, and her son, aged approximately 19. She ran a shop in Galway offering as a service a form of pedicure where fish eat the dead skin off a person's feet.

17. The Court heard evidence that the respondent had a number of criminal convictions. At Gort District Court, on the 26th January, 2010, she was convicted under s. 3 of the Misuse of Drugs Act and was fined €300. At Gort District Court on the 10th December, 2003 she was again convicted of an offence contrary to s. 3 of the Misuse of Drugs Act as well as being convicted of an offence of cultivation under s. 17 of the Misuse of Drugs Act. She was fined €75 for the cultivation offence and the s. 3 offence was taken into consideration. Further, at Gort District Court on the 8th October, 1997 she was convicted under ss. 4 and 8 of the Criminal Justice (Public Order) Act and was fined €101.

18. Under cross examination by counsel for this respondent, Garda McWalter agreed that the respondent had indicated in the course of being interviewed in the Garda station that "I do want to plead guilty as quickly as possible". He also agreed that the gardaí accepted that Kevin Flanagan had not been party to the transaction, that after the respondent had left the scene he had stumbled upon it, recognised it for what it was, was concerned for his daughter and out of misguided loyalty had put one of the 4x4s behind some barrels and moved the second one down to a shed at the bottom of the garden.

Relevant Reports

19. At the first sentence hearing on the 27th February, 2013 the Court had before it a Probation Report of the same date which reviewed in detail the offences to which the respondent had pleaded guilty, her previous offending behaviour, her personal background and history, her education, and her employment history, her emotional and psychological issues, and her history of substance misuse. This Court has carefully considered this report, and without going into the detail of it, it is fair to say that it records a particularly unhappy and difficult life history in the course of which the respondent has faced many adversities. These included childhood poverty and neglect, minimal education, parental alcoholism, a nomadic lifestyle, parental physical abuse, sexual abuse by a relative, a savage rape, teenage pregnancy and marriage, domestic violence in the marriage, marriage breakdown, a succession of further extremely violent relationships, financial difficulties, mental health issues, alcoholism and drug addiction. The report then concluded:

> "Conclusion"
>
> Ms Flanagan has pleaded guilty in relation to charges of possession and supply of cannabis. Ms Flanagan accepts responsibility for her actions and acknowledges the seriousness of the offence. She outlined significant addiction to cannabis prior to treatment.
>
> Ms Flanagan has previous conviction for drug related offences. Prior to this referral she has no previous contact with the Probation Service.
>
> There is no doubt Ms Flanagan is an articulate and intelligent individual who has failed to realise her potential to date. She has sought emotional refuge from her personal difficulties in alcohol and illicit drug misuse. Ms Flanagan has a tragic background history but despite this she never allowed it to justify her offending.
>
> Ms Flanagan has a history of drug misuse and her offending was in that context. Clearly she engaged in law breaking activity to obtain her supply of drugs. However this led onto a much more serious involvement including the supply of drugs to others which is unacceptable to the Court and community alike. It would appear she has now tackled her drug misuse successfully by completing a residential programme.

A Risk Assessment Tool applied indicates that Ms Flanagan is moderate risk of reoffending and highlights a number of areas in her life setting which would need to be addressed in order to potentially reduce the risk of recidivism. Significant improvements in her circumstances have occurred since the offence. She completed a four week residential treatment programme; she attends after care weekly and attends counselling for personal and emotional issues. Ms Flanagan initiated contact with the counselling service and Bushy Park residential treatment programme by her own efforts. Additionally her commitments to her Healing Fish Spa business act as a protective factor in restructuring her life. Ms Flanagan is making a number of changes mentioned above which should reduce her risk of re-offending.

If the Court is considering Probation Supervision as part of the overall sentence, I do believe a period of Probation supervision would be beneficial to Ms Flanagan. During this period she will be required to abstain from alcohol and all illicit substances. Attend after care for two years and continue to attend counselling for her personal issues as long as deemed necessary. Ms Flanagan would also be required to attend random drug screening as requested by this Officer. The strict enforcements procedures regarding such an Order have been fully explained to Ms Flanagan who has indicated a willingness to engage in such a disposal should today's Court see fit to consider such an option."

20. The sentencing judge was also furnished with a detailed psychological report on the respondent dated the 13th February, 2013 from Dr Kevin Lambe, Consultant Clinical Psychologist, which independently confirmed, and indeed elaborated upon, both the history and psychological features of the case referred to by the Probation Officer in her report. He concludes by saying:-

"There is no excuse for her behaviour around these drugs charges. Ms. Flanagan knows this. But, if we can accept that her actions belong in the past, and that she is now on a slow and steady path toward recovery, there may be some merit in considering the extent of the cumulative traumas in her life as being causative of her drug addiction and her miserable existence in that subculture. There is some time left so that her 10-year-old daughter may be saved from the worst but this family nightmare may only be perpetuated by her visits to her mother in prison. I wonder should this woman be given an opportunity, with the strictest of conditions should she breach any direction of the Court. From the evidence, I am cautiously optimistic about her potential, but this is most dependent on her continuing her aftercare program for two years, and re-establishing counselling at least once weekly. After a period of preparation, she may finally be in a position to do the community some service."

21. In light of the contents of these reports, and a separate report relating to Warren Bowen, the trial judge adopted the following initial approach in both this respondent's case and in Warren Bowen's case. He said:-

"Well, I propose to adjourn these serious matters for a period of one year. Now, in doing this, there can be no doubt but that the gravity of these offences, given the quantity of controlled drugs that are available and while they are cannabis and some people have a particular view that cannabis is in some way less offensive or less illegal than any other, the legislature don't take that view. They it's a controlled drug. It's an illegal drug and given the quantity of it and given on the evidence that I've heard the sophistication of this particular operation, it may be impossible or at least very difficult for the people involved to avoid a custodial sentence. Nonetheless, at this stage, based on the reports that I have I have been given that those are probation reports and medical reports, I believe that justice would not be served by finalising these matters today.

Ms. Flanagan, in the period of adjournment, will remain under the supervision of the Probation and Welfare Service on the terms recommend in the last paragraph of the report dated the 22nd of February 2013, which I propose should be appended to this sentence hearing just in case there's any doubt. I also believe that the that these matters should be dealt with together by the same Judge and at the same time. So, I think it would be appropriate then that they be adjourned to the first sittings in after Christmas next year."

22. When the matter came back before the sentencing judge on the 27th February, 2014, after twelve months had elapsed, the Court was furnished with an up to date Probation Report, dated 27th February, 2014. This further report was very positive with respect to the respondent's engagement with, and progress while under, supervision by the Probation Service. It reported that:-

"Updated Information"

Ms Flanagan has co-operated fully in the preparation of this report by keeping all her appointments and has adhered to all her bail conditions set down by this Court.

Ms Flanagan has not tried to minimize or excuse her actions. Her level of honesty in this regard has been a significant factor in her recovery. She is fully aware of the dangers illegal drugs can do to individuals. She presents as a woman who is treating these charges with the utmost seriousness. She has of her own choice taken the initiative to deal with her drug problem to the extent she is drug free for over fourteen months. Ms Flanagan completed a four week residential addiction treatment programme in Bushy Park. Ennis, Co. Clare in January 2013. A requirement of this programme is to attend weekly aftercare for two years. She has completed one year of the after care programme and appears to derive great benefit from attending these meetings.

During this adjournment she attended random drug screening with her General Practitioner as requested by this Officer. Her results gave tested negative for cannabis. She has not re offended since she was charged with this offence and the risk assessment completed on her indicated that she is unlikely to do so while she continues to remain drug free. In addition to this Ms Flanagan continues to attend psychotherapy fortnightly to address her personal issues. I have had sight of her psychotherapist report dated the 20.2.14 which states Ms Flanagan's attendance is punctual and that she has showed a sincere willingness and commitment to addressing her personal issues.

Ms Flanagan set up a small tourist camping site which was up and running over the summer. Ms Flanagan was delighted how this project materialized and has received further bookings for this year. This project took a lot of work and Ms Flanagan is grateful for the positive focus it provided her with. In addition to this she manages a. fair trade craft stall in the Galway markets every Saturday. I have viewed a reference from her employer who states she is conscientious and a trust worthy worker. Ms Flanagan has an excellent work ethic.

Having completed the initial assessment and supervised Ms Flanagan for twelve months. I have found her committed and sincere in adhering to the conditions set down by this Court. Her co-operation with probation supervision was excellent during the twelve months. If the Court is considering disposing of today's matters by means of a community sanction whilst Ms Flanagan is amenable to Probation Supervision, I do not see any focus for continued intervention by the service

at this juncture, given that Ms Flanagan is drug free, attends weekly after care, attends psychotherapy fortnightly for persona] issues and has employment. She is not in need of any further intervention by the Probation Service."

The Judge's remarks at sentencing

23. Having listened to pleas in mitigation on behalf of the respondent, and her co-accused, the trial judge made the following remarks relevant to the respondent's case:-

> "Well, these are unusual offences. On the one hand, we have reports, and the probation reports that are to hand are about as positive as you could imagine in these very serious offences, but, on the other hand, you have evidence of a -- an enterprise of considerable sophistication where the drugs in question were concealed with deliberation and care inside fabricated wooden structures of one type or another. It has all the hallmarks of a sophisticated operation, and, on the face of it, a sophisticated operation of this nature involving controlled drugs of the value in question here, which I am told is about €80,000, would warrant an immediate custodial sentence and an immediate lengthy custodial sentence."
>
> "In respect of Sharon Flanagan, the gravity of her offence … warrants a sentence of seven years' imprisonment. Bearing in mind, and this applies to each of the parties that they have pleaded guilty to offences of the most serious kind that the legislature have decided carry a maximum sentence of life imprisonment. In the case of Sharon Flanagan, having regard to the plea to the section 15 subsection A count, where the drugs exceed a specified value, this offence in the first instance carries a presumptive minimum sentence of 10 years, and the first step I have to take is to decide in circumstances if that is applicable. Now, the legislature sets down circumstances where it may be unjust to impose the maximum -- the minimum sentence of 10 years where there are exceptional and specific circumstances. And I take the view that in this case there are exceptional and specific circumstances that would make it unjust to impose the minimum sentence. The early plea of guilty and the cooperation allied with the circumstances of the accused are matters that I'm entitled to take into account and do. So, where does that leave us? Having regard to the matters outlined to me, I believe that the offending in the case of Sharon have to be viewed in the light of her previous involvement and drugs-related offences and the steps that she has since taken to confront and deal with this problem that she has. I'm also taking account of the psychological report that has been put before me. It seems to me that a five-year sentence of imprisonment would be proportionate to the gravity of the offence and take -- have regard to the mitigating circumstances that have been outlined to me and the aggravating circumstances, which in this case are her previous drugs offending. Now, as a deterrent to the -- to Sharon from re-offending in this regard and as an incentive to her to continue the path that she appears now to have adopted and she has certainly satisfied the probation and welfare service that she is on a different path now than she was, I propose to suspend the entirety of the sentence for a period of five years."

Grounds of Appeal

24. The appellant contends that his sentence ought to be set aside on the grounds that it was unduly lenient, and specifically:-

> "(a) That the sentence imposed on Sharon Flanagan was unduly lenient having regard to all of the circumstances of the case including the nature of the charge and the circumstances attending the commission of the offence.
>
> (b) That the said sentence did not adequately reflect the nature of the charges and the consequences of the accused's acts and their potential effect on society.
>
> (c) That the learned trial judge erred in principle in failing to give any sufficient weight to the evidence of the prosecution as to the circumstances of and surrounding the commission of the offence admitted, and in particular:-
>
> (i) The provisions of the legislation in relation to the applicability of a mandatory minimum sentence of 10 years for an offence under section 15A of the Misuse of Drugs Act of 1977 (as amended).
>
> (ii) The sophistication and professionalism of the operation undertaken by Warren Bowen.
>
> (iii) The thoroughness of the premeditation involved in the commission of the offence.
>
> (iv) The failure of the accused to fully co-operate with the Garda investigation.
>
> (v) The prior history of offending Sharon Flanagan.
>
> (vi) The failure to impose a custodial sentence in the matter."

Discussion and Analysis

25. The essence of the appellant's case is succinctly summarised in paragraph 38 of the written submissions filed by her counsel. The appellant contends therein that while it is accepted that the learned trial judge was entitled to find that it would be unjust to apply the presumptive mandatory minimum sentence of 10 years in this case, he erred in principle in then not having due regard to the inherent seriousness and fundamental gravity of the offending conduct, as he was required to do in accordance with the judgment in *The People (Director of Public Prosecutions) v. Renald* (unreported, Court of Criminal Appeal, Murray J., 23rd November, 2001). It was submitted that the overwhelming tenor of the case law in relation to sentencing in s.15A cases indicates that custodial sentences are unavoidable in cases involving the proven facts and circumstances in these cases.

26. Before referring with particularity to the passages relied upon in *Renald*, it may be helpful to set out the terms of s. 27 of the Act of 1977, as amended by s. 84 of the Criminal Justice Act 2006 and s. 33 of the Criminal Justice Act 2007, to which there is considerable reference in that judgment:-

> "(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment:-
>
> (a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and

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

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

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

(3D)

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

(b) Subsection (3C) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including—

(i) whether that person pleaded guilty to the offence and, if so—

(ii) the stage at which he or she indicated the intention to plead guilty and

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

(iv) whether that person materially assisted in the investigation of the offence.

(c) The court, in considering for the purposes of paragraph (b) of this subsection whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to-

(i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and

(ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence."

27. In the *Renald* case, Murray J. had stated:-

"Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored…even though that sentence may not be applicable in a particular case, the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provision, that is to say the maximum sentence. It would be wrong to assume that the offence of importing controlled drugs in excess of the prescribed amount or value will attract only the mandatory minimum sentence, long though it may be.

Clearly subsection (3C) requires the sentencing Court to examine circumstances relating to the offence or the person convicted of the offence which, it is alleged, are exceptional and specific and which in the opinion of the Court would render a sentence of not less than ten years imprisonment unjust. To perform that task the sentencing Court must form some view of what an appropriate sentence would be having taken into account the matters which the Court considers appropriate including the matters expressly specified in subsection (3C) aforesaid. If the Court is satisfied that factors exist which would render the mandatory minimum sentence unjust then the Court is not required to impose it but the existence of such matters or circumstances does not reduce the inherent seriousness of the offence. It remains the task of the Court to impose a sentence which is appropriate having regard to the relevant circumstances and also the fundamental gravity of the offence as determined by the Oireachtas and reflected in the sentences which it has prescribed.

The statute does not expressly authorise the use of the minimum sentence as a "benchmark" in the sense of providing a figure by reference to which particular reductions or discounts should be afforded having regard to material circumstances existing in the particular case. On the other hand the sentencing limitations imposed by the Oireachtas are, as has been pointed out, of the utmost importance in recognising the gravity of the offence and determining the appropriate punishment."

28. In the present case the basic complaints are twofold. First, that the trial judge failed to attach sufficient weight to the seriousness of the offending conduct. As a subset of this it is complained that he erred in principle in failing to advert to the declaratory principle of section (3D) (a) of the Act of 1977, as amended and the harm caused to society by drug trafficking. It was further contended that his findings that factors existed which rendered the mandatory minimum sentence unjust did not reduce the inherent seriousness of the offences. Secondly, it is complained that he attached too much weight to the mitigating factors in the case. In that context it was submitted, *inter alia*, that relatively little weight could attach to the early plea in circumstances where the respondent was effectively caught red handed.

29. This Court was invited to consider a large of number of comparators, including *The People (Director of Public Prosecutions) v. John Duffy* (unreported, Court of Criminal Appeal, 21st December, 2001); *The People (Director of Public Prosecutions) v. Roy Foster* (unreported, Court of Criminal Appeal, 15th May, 2002); *The People (Director of Public Prosecutions) v. Martin Galligan* (unreported,

Court of Criminal Appeal, 23rd July, 2003); *The People (Director of Public Prosecutions) v. Gary Goodspeed* [2009] IECCA 81 (*ex tempore*, Court of Criminal Appeal, 13th July, 2009) ; *The People (Director of Public Prosecutions) v. Robert Henry* (unreported, Court of Criminal Appeal, 15th May, 2002); *The People (Director of Public Prosecutions) v. David Kinahan* [2008] IECCA 5 (*ex tempore*, Court of Criminal Appeal, 14th January, 2008); *The People (Director of Public Prosecutions) v. Rory Lernihan* [2007] IECCA 21 (unreported, Court of Criminal Appeal, 18th April, 2007); *The People (Director of Public Prosecutions) v. Derek Long* [2009] 3 I.R. 486; *The People (Director of Public Prosecutions) v. David Spratt* [2007] IECCA 123 (*ex tempore*, Court of Criminal Appeal, 10th December, 2007); *The People (Director of Public Prosecutions) v. Brian Byrne and Eoghan Phayer* [2015] IECA 5 (unreported, Court of Appeal, 19th January, 2015); *The People (Director of Public Prosecutions) v. Rooney and Ryan* [2015] IECA 2 (unreported, Court of Appeal, 19th January, 2015; and *The People (Director of Public Prosecutions) v. Cathal Murtagh* (unreported, [2015] IECA 3 (unreported, Court of Appeal, 19th January, 2015).

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

31. To state that a sentencing judge must have the freedom to have recourse to the full range of sentencing options open to him, including non-custodial options, even in s.15A cases, is merely to reiterate what was clearly stated in *The People (Director of Public Prosecutions) v. Jervis and Doyle* [2007] IECCA 14 (unreported, Court of Criminal Appeal, 25th March, 2014), on which the respondent relies. However, as Irvine J., giving judgment for this Court in the *Byrne and Phayer* case, cited above, succinctly put it:

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

32. The decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. McGinty* [2006] IECCA 37 (unreported, Court of Criminal Appeal, 3rd April, 2006) represents a further authority in support of the view that where there are special reasons of a substantial nature and particularly exceptional circumstances a sentencing judge can impose a non-custodial sentence even in a s.15A case. Giving judgment for the court in that case, Murray C.J. said:-

> "There is no doubt that the possession of illegal drugs for the purpose of sale or supply, particularly in any significant quantity, is a very serious offence which of itself would normally warrant a custodial sentence. Insofar as the submission of the D.P.P. contends that a judge sentencing a person for such an offence should also have regard to the gravity attached to this by the Oireachtas in providing for a maximum sentence of life imprisonment and a minimum of 10 years imprisonment the Court agrees. Both the inherently serious nature of the offence and the seriousness with which the offence has been viewed by the Oireachtas as expressed in the relevant statutory provisions, are matters for a trial judge to take into account when deciding on sentence. Thus even in cases where a trial judge properly concludes that subsection (3B) as regards the minimum term of imprisonment does not apply to the particular case before him or her, the appropriate sentence should normally involve a term of imprisonment, including, depending on the circumstances, a very substantial term of imprisonment.
>
> However, insofar as the submission of the D.P.P. contended that a suspended sentence must always, and in every circumstance, be considered wrong in principle, the Court does not accept that this is a correct principle to be applied. First of all there is nothing in the legislation to suggest that the Oireachtas intended to compromise to that extent the judicial function to impose the appropriate sentence in the circumstances of the case. On the contrary, the Oireachtas expressly provided for a trial judge to exercise his or her judicial discretion according to the justice and circumstances of the case when it provided for the non-application of subsection (3B) in certain circumstances. Generally speaking legislation is incapable of dealing specifically with the vast range of circumstances and factual elements that differentiate one case from another even though they involve an offence under the same section and this the Oireachtas has recognised in the provisions just referred to. It cannot be said that there could never be circumstances in which, having regard to the interests of society as a whole, the facts of the particular case and the circumstances of the accused, where a suspended sentence would be appropriate. Undoubtedly a trial judge sentencing a convicted person for an offence such as that in question here is constrained by the considerations already referred to above to consider that a term of imprisonment is normally what should be imposed. However, where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interest of justice. This is a combination of factors which could only arise in a relatively rare number of cases. This Court has previously upheld a sentence of such a nature in the case of *D.P.P. -v- Alexiou* [2003] 3 I.R. because there were such exceptional circumstances and special reasons."

33. The correct approach to a s.2 undue leniency appeal has been reiterated many times. That the reviewing court might not have imposed the same sentence is irrelevant, as is the consideration that the sentence might be widely regarded as being very lenient. The correct question is whether it is an unduly lenient sentence, and in that regard it has been held that undue leniency connotes a clear divergence from the norm usually as a result of an obvious error of principle. See *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 36 where Barron J. said (at page 359):-

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

34. O'Malley on *Sentencing* 2nd ed., (Dublin, 2006) quotes an earlier decision of the Federal Court of Australia to similar effect: *R v Tait and Bartley* (1979) 24 A.L.R. 473 where it said:-

> "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."

35. The present case involves a wholly suspended sentence, which the appellant contends was unduly lenient. In circumstances where the offence in question was undoubtedly grave enough to normally warrant a custodial sentence, and a substantial one at that having regard to the sophistication of the modus operandi and the quantity of drugs involved, an important question for this Court in considering whether the wholly suspended sentence actually imposed was unduly lenient is whether there existed special reasons of a substantial nature and particularly exceptional circumstances such as might have justified the imposition of such a sentence. In considering this issue, the complaints made with respect to where the trial judge fixed the case on the range of potential sentences, and also with respect to the allowances made for mitigation, clearly require to be engaged with.

36. The trial judge sought to locate the offence on the range of potential penalties before consideration of any mitigating factors, and in doing so indicated that warranted a sentence of seven years imprisonment. He was satisfied as to the existence of exceptional circumstances sufficient to justify him in departing from the mandatory minimum sentence, and the appellant takes no issue with that. The sophistication and professionalism of the *modus operandi* of concealment of the drugs was an aggravating factor, but as he had earlier referred specifically to this factor it may be inferred that he took it into account in arriving at his headline figure of seven years. The fact that she had previous convictions for low level drug offending was also an aggravating factor, but it is clear from his statement that "I believe that the offending in the case of Sharon has to be viewed in the light of her previous involvement and drugs-related offences" that these were taken into account. He was also required to consider the offence as committed by this particular offender, and whether there were any factors such as drug addiction that might reduce culpability. While there is no specific reference to her history of poly substance abuse and addiction the Court is satisfied from the statement that "I'm also taking account of the psychological report that has been put before me", that they were taken into consideration. The first question for this Court is therefore whether the sentencing judge erred in fixing on a headline sentence figure of seven years before mitigation.

37. This Court considers that a headline sentence figure of seven years before mitigation was appropriate and within the permissible range for this offence as committed by this offender. Accordingly there was no error of principle up to this point in the process.

38. It is necessary then to consider whether there was excessive allowance for mitigation. The sentence ruling is somewhat ambiguous as to exactly how much allowance was being made for mitigation. The judge initially said that he would reduce the sentence to one of five years on account of mitigation, but then he went on to suspend the entirety of the proposed five year sentence. He then added that he was doing so "as a deterrent to the -- to Sharon from reoffending in this regard and as an incentive to her to continue the path that she appears now to have adopted", while noting that " she has certainly satisfied the probation and welfare service that she is on a different path now than she was".

39. There were undoubtedly substantial mitigating factors in this case that would have justified a generous allowance in terms of a reducing of the headline sentence in mitigation. The Court recognises that the sentencing judge's remarks indicated that he was attaching considerable importance to the legitimate sentencing objective of rehabilitation. As has been stated in numerous previous decisions it is important to leave some light at the end of the tunnel if that is a viable option. The questions are: did the sentencing judge go too far? Did he grant an excessive allowance for mitigation; or, were there special reasons of a substantial nature and particularly exceptional circumstances that justified a wholly suspended sentence in this particular case? To address these questions it is necessary to examine the mitigating factors in some detail.

40. First, there was the plea of guilty. While the Court accepts that the circumstances in which the crime in this case was detected meant that the plea here was not as useful or as valuable as a plea might be in other "thinner" cases, the respondent was still entitled to some credit. The entry of a plea of guilty is an important acknowledgment of culpability and responsibility in and of itself, and it represents an important earnest of true remorse. It addition, it always results in the saving of time and expense in terms of the involvement of Gardaí, lawyers, jurors, officials and judges. On account of these factors alone, an accused who pleads guilty is entitled to some credit regardless of the strength of the case against her.

41. Secondly, there was her remorse which is ostensibly genuine.

42. Thirdly, there was her co-operation with the investigation.

43. Fourthly, there was the very positive probation report emphasising her positive engagement with rehabilitation, her successful completion of a residential drugs rehabilitation program and the fact that she is now drug free, the fact while she is of moderate risk of offending because of the proliferation of issues in her life she was nonetheless well motivated and committed to taking stock of her life, the fact that she had made and was continuing to make changes that would reduce her risk of re-offending, her attendance at counselling, her work ethic and record in establishing her own business, and her good relationship with and parenting of her own children.

44. Fifthly, there was her extraordinarily difficult background and life history as detailed in both the Probation Report and Psychologist's Report.

45. Finally, there was the fact that she had not come to adverse attention throughout the period of the twelve month adjournment, or indeed at all since her arrest, and she had been assessed as suitable for Probation Supervision should the court be disposed to impose it.

46. Unlike in the case of her co-accused, Warren Bowen, this Court can readily appreciate how the sentencing court could have justifiably treated this offender with exceptional leniency having regard to all of the facts just listed. Her extraordinarily difficult background and life history, coupled with her recent positive engagement with the Probation Service, with psychological and counselling services, and with Bushy Park Residential Drug Treatment Centre, to the point where against tremendous odds she is now drug free and taking control of her life for the first time, constitutes special reasons of a substantial nature and particularly exceptional circumstances such as justified a wholly suspended sentence in this case. The Court therefore considers that excessive weight was not attached to mitigating factors and that the trial judge did not fall into error.

Decision
47. The appeal is dismissed.