



**Record No: 45CJA/2022**

**Edwards J.  
McCarthy J.  
Kennedy J.**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL  
JUSTICE ACT 1993**

**AND**

**Between/**

**THE PEOPLE (AT THE SUIT OF  
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

**APPLICANT**

**V**

**ADAM GRAHAM**

**RESPONDENT**

**JUDGMENT of the Court delivered by Mr. Justice Edwards on the 19th of May 2023.**

**Introduction**

1. The subject of the present appeal is an application brought by the Director of Public Prosecutions (i.e. "the applicant" or "the Director") pursuant to s. 2 of the Criminal Justice Act 1993 for review of the sentence imposed on Mr. Adam Graham (i.e. "the respondent") by Portlaoise Circuit Court sitting in Tullamore on the 8th of February 2022 on the basis that the said sentence was, in the Director's view, unduly lenient. The respondent was arraigned before the Circuit Criminal Court on the 28th of October 2021 whereupon he then entered a guilty plea in respect of one count of the three charges preferred against him on the indictment (Bill LSDP0058/2018). This count was a count of possession of one or more controlled drugs with aggregate value of €13,000.00 or more, for the purpose of selling or otherwise supplying to another, contrary to s. 15A of the Misuse of Drugs Act 1977, as amended (i.e. "the Act of 1977").
2. Following a sentencing hearing on the 8th of February 2022, the respondent was sentenced by the Circuit Criminal Court to 3 years' imprisonment, which custodial sentence was suspended in its entirety for a period of 7 years on certain probation conditions, namely:

*"- That the Accused enter a bond in the sum of €500, that he keep the peace and be of good behaviour for a period of 7 years.*

- That he submit himself to the supervision of Probation Service for a period of 18 months and that he follow all directions given to him in dealing with his offending behaviours and addictions.

- That he refrain from the use of illicit substances for the duration of this recognisance and that he will provide urinalysis if and when requested by Gardai or the Probation Service to ensure compliance with this condition.

- That he will pay the sum of €10,000 to Merchant's Quay for their charitable efforts, the first installment of €2000 to be paid within 6 months of today's date and thereafter by annual installments of €2000 until the balance is paid in full.

- That he engage with Probation Service to engage in meaningful employment.

And further that he will come up if called on to do so to serve the sentence imposed on him and suspended on him entering into this Recognisance."

### **Factual Background**

3. At the sentencing hearing of the 8th of February 2022, a Garda Stephen Murphy gave evidence in relation to the factual background of the respondent's offending.
4. On the 19th of September 2016, two off-duty gardaí observed the respondent and another man, a Mr. Fitzpatrick (i.e. "the co-accused"), on Patrick Street in Durrow, County Laois. The suspicions of the two members were aroused when they observed the respondent "manhandle" the co-accused into the back of a taxi. The two off-duty members then observed the co-accused escape from the other side of this taxi, and he was observed "fleeing" into the nearby Castle Arms Hotel. The two off-duty members alerted a mobile Garda unit on patrol in the general locality, and this unit comprising Garda Murphy and a Garda Sgt. Kerry made their way in the direction of Durrow.
5. As gardaí approached Durrow from the direction of Abbeyleix, they observed the taxi which had been described to them turning in the direction of Ballinakill. Gardaí, having pulled the taxi over, observed the respondent seated in the rear of the vehicle and indicated to him that they wanted to search the vehicle under s. 23 of the Act of 1977. Having conducted this search, gardaí did not find any evidence of controlled drugs in the vehicle. However, a passer-by alerted the two gardaí to a black holdall bag that he had witnessed being thrown from the taxi into a nearby ditch, and gardaí, having located and having inspected this bag, discovered that it contained heroin to the value of just over €34,000. The respondent was later arrested that evening, and his fingerprints were taken.
6. The Garda investigation continued, taking down CCTV footage from the Castle Arms Hotel in Durrow and CCTV footage at the junction of the Durrow/Abbeyleix Road and at the junction leading off to Ballinakill. The hotel CCTV footage confirmed to investigating gardaí the account reported by the off-duty members who had witnessed the respondent "manhandle" the co-accused into a taxi. The CCTV footage from the junction leading off to Ballinakill confirmed that the black holdall bag had been thrown from the taxi into the

nearby ditch. Gardaí sent the black holdall bag for forensic analysis, which analysis revealed a match between fingerprints found on an exterior part of the bag and the fingerprints of the respondent. It is this discovery that grounded the application to re-arrest the respondent.

7. The respondent was re-arrested on the 16th of December 2016 and was taken into Garda custody and detained pursuant to s. 2 of the Criminal Justice (Drug Trafficking) Act 1996. Throughout the respondent's detention he exercised his right to silence, and he responded "*no comment*" to every question put to him in the three interviews which took place. The only exception to his approach was in respect of the hotel CCTV footage, the respondent accepting that he was the individual captured therein.
8. The respondent was returned for trial before the Circuit Criminal Court on the 19th of December 2018, and awaited trial for a period of approximately three years. On the 28th of October 2021, he entered a guilty plea in respect of count no. 1 on the indictment. Garda Murphy noted that the respondent had been on bail since his arraignment and had complied with his bail conditions.

#### **Respondent's Personal Circumstances**

9. Garda Murphy further gave evidence in relation to the personal circumstances of the respondent. He noted that the respondent had 37 previous convictions and had prepared a tableau of those previous convictions for the sentencing court. The timeline of these previous convictions ranged from 2010 to 2020, and the majority of the previous convictions related to road traffic offences. Garda Murphy confirmed in cross-examination that the largest portion of the respondent's previous convictions were dealt with summarily at District Court level and that the respondent had never been before the Circuit Criminal Court for "*anything so serious*". Garda Murphy noted that the respondent had two previous drugs-related offences both dealt with summarily (possession of controlled drugs contrary to s. 3(1) of the Act of 1977, and possession of controlled drugs for unlawful sale or supply contrary to s. 15 of the Act of 1977 for which he served a three months' custodial sentence) and one previous assault conviction, though the member did not provide detail as to the particulars of this assault.
10. Garda Murphy noted that the respondent was born on the 8th of June 1990, making him approximately 26 years of age at the time of offending and approximately 31 years of age at the time of sentencing. The respondent was originally from Crumlin in Dublin. Garda Murphy noted that the respondent was a single man but that he had a number of dependent children, however he could not provide an exact number to the sentencing court. Garda Murphy noted that the respondent was a mature student and was in a relationship with a partner.
11. Garda Murphy confirmed that the respondent seemed to be transporting the €34,000 worth of heroin in black holdall bag rather than dealing the drugs, the respondent having none of the trappings of somebody who was involved in serious drug dealing. The respondent had a history of "*various difficulties*" with heroin addiction and had completed

a period of rehabilitation at a service provider called "*Siam Rehab*" in Thailand, in respect of which a certificate was made available by the defence to the sentencing court.

### **The Co-accused**

12. Counsel on behalf of the Director drew the sentencing court's attention to its approach in relation to the co-accused's offending. Counsel noted that, in circumstances where the co-accused had been arraigned on the same charges as the respondent, had entered an early guilty plea, and the sentencing court had concluded that he was acting under duress, the sentencing court nominated a headline sentence of 5 years' imprisonment, reduced to 3 years' imprisonment to account for mitigation, and suspended the final 1 year thereof for a probation period of 10 years. Neither Garda Murphy nor counsel on behalf of the Director were able to detail the co-accused's previous convictions other than to say that they were "*minor*".

### **Plea in Mitigation**

13. Counsel on behalf of the defence made reference to the rehabilitation certificate which was available to the sentencing court and submitted that the delay in entering a guilty plea stemmed from the respondent wanting "*to put his best foot forward*" by first engaging with rehabilitation. Counsel submitted that the respondent had received a job offer on the day of the sentencing hearing and his employer was present in court. Counsel submitted that the respondent had apologised "*profusely*" for his actions and understood the ramifications of his behaviour. In this regard, the sentencing court was furnished with a letter of apology penned by the respondent, which letter, counsel submitted, was indicative of personal growth.
14. Counsel submitted that in the period of six years since the offending, the respondent had grown his young family, repaired relationships with family and friends, and had bettered himself overall. An employment reference was furnished to the sentencing court, which testimonial indicated that the respondent had made "*great strides in changing his ways*" and had a "*proven*" work ethic. Counsel submitted that this was demonstrative of a "*proven track record over six years*" of a "*changed man*". Noting what counsel on behalf of the Director had outlined in relation to the sentencing approach adopted towards the co-accused, counsel on behalf of the defence submitted that "*each individual has to be regarded with their own merits and circumstances*" and that the respondent's circumstances were exceptional and warranted not imposing an immediate custodial sentence.
15. While acknowledging the severity of the respondent's offending, in particular the type of drug involved which counsel described as "*one of the more poisonous substances that is circulated in our society*", counsel nevertheless submitted that the respondent had not come to Garda attention for anything as significant as this in the six years since the offending and had turned his life around in that time.
16. Counsel drew the sentencing court's attention to the Probation Report and the respondent's "*very candid*" contributions in which he immediately accepted his substance abuse. Counsel submitted that the respondent did not try to obfuscate or hide the reality

of this substance abuse and was completely transparent in this regard. The respondent had a long history of addiction, dabbling in illegal drugs and alcohol from a young age and experiencing a "very difficult slippery slope" in this regard from the age of 15 years onwards. Nevertheless, and notwithstanding setbacks in his rehabilitation, counsel submitted that the respondent was presenting to the sentencing court as an "intoxicant-free, sensible and responsible young 32-year-old man". Counsel submitted that while the Probation Report had identified the respondent as a person with a high-risk of re-offending over the following 12 month-period, the identified risk factors of addiction and unemployment had since been remedied.

### **Sentencing Judge's Remarks**

17. The sentencing judge noted that the respondent had pleaded guilty to a count of possession of drugs of value €13,000.00 contrary to s. 15A of the Act 1977 in circumstances where he had in possession for sale and supply heroin to a value in excess of €34,000. The sentencing judge noted that this offence carries a mandatory presumptive minimum sentence of 10 years' imprisonment.
18. The sentencing judge had regard to the factual background of the offending as described in Garda Murphy's evidence. He observed that the respondent did not offer any co-operation to the gardaí at the time of his arrest. He noted that the Oireachtas had set down very stringent and heavy penalties for the type of offending the respondent had engaged in on account of the damage that is done to society by the proliferation of illicit drugs. He observed that the respondent is a "prime example" of a person who had become involved in crime to feed his drug habit resulting in a complete spiralling out of control of his life, acknowledging the Probation Report as indicative of the respondent having "fallen off the wagon" at the time of the offending.
19. The sentencing judge then briefly outlined his approach to sentencing:

*"In determining sentence in this case, the Court has to take into account all the aggravating factors and the mitigating factors. In addition to that, the Court has to look at the gravity of the offence and the culpability of the accused. The Court must impose a sentence that's fair and proportionate taking into account the five pillars of sentencing: namely, protection of the public, punishment, deterrence, restitution and rehabilitation."*
20. The sentencing judge then identified the following as aggravating factors at play in the present case: the "significant" quantity of drugs involved; the nature of the drugs being heroin, which operated as an "extremely aggravating factor" on account of the huge amount of damage that heroin wreaks in society; the effect that those drugs could have had on society had they been sold on the market, and; the Probation Service's assessment of the respondent as a person at high-risk of re-offending.
21. In relation to the last aggravating factor, the sentencing judge was cognisant of the respondent's efforts to address his addiction issues. The sentencing judge was "impressed" by the respondent's journey to Thailand for the purposes of undergoing a 12-

week rehabilitation course in 2020 and his subsequent remaining drug-free following this endeavour. Further to this, the sentencing judge noted the offer of employment that the respondent had received. The sentencing judge went on to remark that the respondent's high-risk of re-offending had been "*considerably reduced*" as a result.

22. In mitigation, the sentencing judge identified the following factors: the respondent's guilty plea, which he regarded as warranting "*considerable mitigation*" and taking into account that it was made during Covid times; the respondent's co-operation with gardaí following his guilty plea; the respondent's remorse and efforts at rehabilitation, and; his good family background and that he enjoys the support of his mother and has good relationships with his two children, aged 6 and 13 years of age, which relationships he had repaired following their damaging by his drug addiction.
23. The sentencing judge held that s. 27(3D)(a) of the Act of 1977 was engaged in the present case, that there were exceptional and specific circumstances relating to the respondent's offending such as to warrant a departure from the statutory presumptive minimum sentence to avoid giving rise to an injustice. Accordingly, the sentencing judge held that the sentencing court had discretion in terms of nominating a headline sentence, which he set at 5 years' imprisonment. Accounting for mitigation, the sentencing judge then deducted 2 years from the headline, resulting in a net custodial sentence of 3 years.
24. The sentencing judge then had regard to whether all or part of that foregoing post-mitigation sentence should be suspended. In considering whether to impose a non-custodial sentence, the sentencing judge noted that he must weigh up the factors and look at how the best interests of society might be served in the present case. The sentencing judge acknowledged that the respondent had embarked on the road to rehabilitation and noted that imposing a custodial sentence, while satisfying society's need for punishment, could have the adverse effect of damaging society's need for the respondent to continue his rehabilitation. The sentencing judge concluded that "*with a bit of constructive thinking*" the respondent's sentence could be structured in such a way that he would be under a "*significant obligation*", which the sentencing judge regarded as a significant punishment in and of itself, while society would be offered restorative justice.
25. Accordingly, the sentencing judge suspended the post-mitigation sentence of 3 years' imprisonment in its entirety for a probation period of 7 years, subject to certain probation conditions which are outlined at para. 2 of this judgment, above.

**Notice of Application for Review of Sentence**

26. In Notice of Application for Review of Sentence lodged on the 2nd of March 2022, the Director now applies to this Court pursuant to s. 2 of the Criminal Justice Act 1993 for review of the sentence imposed on the respondent on the 8th of February 2022, it appearing to the Director to have been unduly lenient. In support of this application, the Director now advances seven grounds, which in essence may be distilled into five distinct grounds:

1. That the sentencing judge failed to have adequate regard to / correctly apply the provisions of s. 27 of the Act of 1977 in the present case (Grounds 1 to 3).
  2. That the sentencing judge erred in nominating a headline sentence that insufficiently captured the gravity of the offence (Ground 4).
  3. That the sentencing judge erred in attaching undue and excessive weight to mitigating factors at play in the present case (Ground 5).
  4. That the sentencing judge erred in imposing a wholly suspended sentence for an offence contrary to s. 15A of the Act of 1977 (Ground 6).
- 5. That the sentence imposed was in all of the circumstances unduly lenient and represented a substantial departure from what would be regarded as an appropriate sentence in the present case (Ground 7).**
- Parties' Submissions to the Court of Appeal**

*Applicant's (Director's) Submissions*

27. The starting point of the applicant's submissions to this Court is *DPP v. Sarsfield* [2019] IECA 260 in which this Court (Birmingham P.) restated, at para. 18, the appropriate approach to sentencing for s. 15A offences:

*"It has long been recognised that the proper approach to sentencing is for a judge to identify the appropriate sentence without reference to the presumptive minimum. If the appropriate sentence is at or in excess of the statutory minimum, nothing further is required. If the sentence under contemplation is below the presumptive minimum, the Court will have to address the presumptive minimum and consider whether the imposition of the mandatory presumptive minimum would, in all the circumstances of the case, be unjust."*

28. It is the applicant's submission that the sentencing judge did not adopt the above stated appropriate approach. While the applicant does not quibble *per se* with the nomination of 5 years' imprisonment as a headline sentence without reference to the presumptive minimum, she nevertheless submits that the sentencing judge erred in not properly addressing the statutory presumptive minimum sentence by incorrectly determining that there were "*exceptional and specific circumstances*" such as to render a custodial sentence below the statutory presumptive minimum unjust in all the circumstances; and by attaching too much weight to the mitigating factors in the present case determining upon a post-mitigation sentence that was below the threshold for an immediate actual custodial disposal which the Director says the case merited, and substituting in its place a suspended sentence (conditioned *inter alia* upon the payment of a substantial sum to Merchant's Quay, Ireland, which condition amounted *de facto* if not *de jure* to a fine, albeit that the provisions of s. 99 of the Criminal Justice Act 2006 would require to be invoked rather than the Fines (Recovery) Act 2014 should there need to be enforcement action.)

29. The applicant submits that the Oireachtas, in fixing a statutory presumptive minimum sentence, expressly references *inter alia* a guilty plea, the timing/circumstances of the plea, an accused's material co-operation with gardaí, and an accused's previous convictions for drug trafficking offences. The applicant submits that these all weigh against the imposition of a sentence beneath the presumptive minimum in the present case:
30. The applicant submits that the respondent entered his plea of guilty approximately three years after the date of offending and was entered into in circumstances where he had been caught "red handed" on CCTV footage and where fingerprint evidence was available. While the applicant concedes that guilty pleas are of value to accused persons in mitigation, she nevertheless points to *DPP v. Howlin* [2022] IECA 150 as authority for the proposition that "some pleas are more valuable than others". The applicant submits that having regard to the timing of and the circumstances in which the plea was entered into by the respondent, its weight in mitigation was diminished "in the extreme" such as to render it incapable of displacing the statutory presumptive minimum. The applicant further submits that there was no evidence of any material co-operation on the part of the respondent with gardaí in the course of their investigation of the offence. While reference was made by the sentencing judge to co-operation in the period following the guilty plea, the applicant submits that it is not clear what the sentencing judge was referring to in those remarks. The applicant further draws this Court's attention to the presence of relevant previous convictions, in particular a summary conviction for an offence contrary to s. 15 of the Act of 1977 dating back to 2011. Lastly, the applicant submits that the circumstances of the present case did not involve any elements of duress or financial difficulties on the part of the respondent such as to motivate his commission of a s. 15A offence.
31. The applicant thus submits that the circumstances to which that the sentencing court could have had regard in mitigation comprised (i) the respondent's participation in a drug rehabilitation course in Thailand and his drug-free status at the time of sentencing, (ii) his supporting family, (iii) the offer of employment, (iv) that he had not come to adverse Garda attention since the offence, and (v) his expression of remorse. The applicant submits that if one weighs up all of these factors as against the very late plea, his absence of cooperation with gardaí and relevant previous conviction history, the sentencing court erred in determination that there were "exceptional and specific circumstances" such as to warrant a departure from the presumptive statutory minimum.
32. As regards the applicant's ground that the sentencing judge erred in wholly suspending the respondent's custodial sentence, the applicant submits that even if the sentencing judge was justified in departing from the statutory presumptive minimum sentence, the imposition of an immediate non-custodial disposal represented an error in principle. In this regard, the applicant relies upon the dicta of Geoghegan J. in *DPP v. Ducque* [2005] IECCA 92 and the approval of the Court of Criminal Appeal in that case of an earlier decision of that court in *The People (DPP) v. Renald* (Unreported, Court of Criminal Appeal, 23rd of November 2001). In essence, the applicant submits that these authorities



support the proposition that in fixing a mandatory minimum sentence the Oireachtas had benchmarked the seriousness of an offence contrary to s. 15A of the Act of 1977 and that this benchmarking of seriousness must inform a sentencing court's approach when measuring sentence regardless of the prevalence of exceptional and specific circumstances in any case. The applicant further submits the seriousness of a s. 15A offence is also reflected by the manner in which a fine penalty is placed within the sentencing regime, and she contrasts the general approach whereby a sentencing court is afforded some discretion in respect of other offences whether to impose a custodial sentence *or* a fine *or* a custodial sentence *and* a fine, with the approach prescribed under s. 27(3A) of the Act of 1977 whereby the discretion of a sentencing court in sentencing for a s. 15A offence is delimited by the terms of the provision which only countenance a fine as additional to a custodial disposal. Thus, the applicant submits that the principal penalty for a s. 15A offence is custodial in nature and that the sentencing judge's decision to wholly suspend the respondent's sentence "*entirely lost sight*" of this.

#### *Respondent's Submissions*

33. The respondent submits that the sentencing judge in evaluating whether a departure from the statutory presumptive minimum sentence of 10 years was merited was entitled to have regard to any matters it considered appropriate and that he did just that in the present case.
34. The respondent submits that the sentencing judge had heard full and complete evidence in respect of the aggravating factors at play in the present case and was aware that they were to be balanced as against any mitigating factors. The respondent notes that the sentencing court had established that the plea of guilty was valuable and that it was submitted at the sentencing hearing, and unchallenged by the applicant, that the lateness of the plea was intended to demonstrate to the sentencing court that the respondent had addressed his substance addiction which was the primary reason for his offending behaviour. The respondent therefore submits that it is incorrect for the applicant to suggest that the weight of the respondent's plea was "*diminished to the extreme*" such that it could not displace the statutory presumptive minimum and that the applicant did not advance this argument at the sentencing hearing.
35. The respondent submits that the sentencing court did not err in considering whether or not a person "*materially assisted in the investigation of the offence*", noting that the court had conducted an evaluation of the entirety of the information before it and did not determine that the respondent had provided such assistance. The respondent noted that this evaluation of the information available to the sentencing court included having regard to the respondent's good behaviour pre-/post-incident, his engagement with rehabilitation and probation services, and his addressing of the risk factors leading to recidivism.
36. The respondent submits that the sentencing court had regard to the approach adopted in relation to sentencing the respondent's co-accused and that an identical headline sentence of 5 years' imprisonment was nominated. In circumstances where no previous conviction history of the co-accused was provided to the sentencing court, the applicant

could not readily distinguish between the two men at the time of the respondent's sentencing.

37. The respondent submits that the principle of proportionality is applicable in the present case, taking account of the particular offence and particular offender, and relies in this regard on the dicta of Denham J., as she then was, in *The People (DPP) v. M.* [1994] 3 I.R. 306, at 317, and the restatement of this principle by the Court of Criminal Appeal in *The People (DPP) v. McCormack* [2000] 4 I.R. 356, at 359.
38. Further to this, the respondent submits that a suspended sentence is a genuinely punitive measure and must be seen in the context of possible activation in the event of non-compliance with the probation conditions attaching to the suspension. In this regard, the respondent relies upon the commentary of Prof. Thomas O'Malley in T. O'Malley, *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006), para. 22-08, and the cases of *The People (A.G.) v. Michael O'Driscoll*, *The People (A.G.) v. Thomas O'Driscoll* (1972) 1 Frewen 351 and *McCormack, supra*. The respondent submits, having regard to these foregoing authorities, that a custodial sentence is not always necessary and that the purpose of sentencing is not simply to deter but to encourage an accused to lead an honest life.
39. The respondent submits that *McCormack* requires that the applicant demonstrates an error in principle. The respondent submits that there was no such error in principle by the sentencing judge and that insofar as there were any exceptional circumstances, they were weighted in favour of the respondent given all the mitigating factors. The respondent relies upon *DPP v. Byrne* [1995] 1 I.L.R.M. 279 as authority for the proposition that in dealing with undue leniency applications the Court should not disturb the sentence if the sentencing judge at first instance had applied the principle of proportionality, and it is further submitted that this case is also authority for the proposition that a successful undue leniency application requires the Director to demonstrate a substantial departure from what would be regarded as the appropriate sentence.
40. The respondent submits that each case must be taken on its own merits and that the sentencing judge at first instance was best placed to weigh up the various aggravating and mitigating factors at play in the present case. The respondent submits that the sentencing judge, in carrying out this exercise, had access to relevant information. The respondent submits that once this exercise had been carried out it was a matter for the sentencing judge to set the appropriate length of the custodial sentence having regard to the principle of proportionality. The respondent submits that the sentencing judge took account of the various mitigating factors and balanced them appropriately with the statutory requirements and the aggravating factors at play. Having done this, the sentencing judge imposed a lengthy suspended sentence which the respondent notes was imposed with stringent conditions which included a significant financial penalty and future obligation on the respondent.

### **The Court's Analysis and Decision**

41. The law with regard to undue leniency reviews is well settled and was not the subject of any controversy in the arguments before us. The relevant statutory provision is s. 2 of the Criminal Justice Act 1993. It has received detailed judicial consideration and the relevant jurisprudence by which we must be guided includes, *The People (DPP) v. Byrne* [1995] 1 I.L.R.M. 279; *The People (DPP) v. McCormack* [2000] 4 I.R. 356; *The People (DPP) v. Redmond* [2001] 3 I.R. 390, and; *The People (DPP) v. Stronge* [2011] IECCA 79. In the latter case, McKechnie J., giving judgment for the Court of Criminal Appeal, provided a helpful summary of the applicable principles at para. 17 thereof:

*"(i) the onus of proving undue leniency is on the D.P.P.;*

*(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;*

*(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;*

*(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;*

*(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;*

*(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally,*

*(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."*

42. The penalty provisions that apply in respect of an offence contrary to s. 15A of the Act of 1977 are to be found in s. 27 of the same Act. To the extent that it is relevant to the present case, this section provides:

*"(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 [...], 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—*

(I) *the stage at which he or she indicated the intention to plead guilty, and*

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

*and*

(ii) *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.*

*(3E) Subsections (3C) and (3D) of this section apply and have effect only in relation to a person convicted of a first offence under section 15A or 15B of this Act (other than a person who falls under paragraph (b) of subsection (3F) of this section), and accordingly references in those first-mentioned subsections to an offence under section 15A or 15B of this Act are to be construed as references to a first such offence."*

43. Although it was not submitted by counsel on either side that they had any, or any potential, specific relevance in this case we should, for completeness, allude to, and confirm that we have noted, subsections (3J) and (3K), which further provide:

*"(3J) In imposing a sentence on a person convicted of an offence under section 15A or 15B of this Act, a court—*

- (a) may inquire whether at the time of the commission of the offence the person was addicted to one or more controlled drugs, and*
- (b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the term specified by the court under subsection (3C) of this section.*

*(3K) On reviewing a sentence listed under subsection (3J)(b) of this section, the court—*

- (a) may suspend the remainder of the sentence on any conditions it considers fit, and*
- (b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate."*

44. We think it is important to highlight yet again (because it has been done already in other cases), that s. 27(3D)(a) is a very unusual provision. Providing that legislation enacted by Oireachtas respects the independence of the judiciary, and the separation of powers, it is entitled to set sentencing policy by legislation. However, it has historically been the case that the Oireachtas has used that power sparingly, preferring in most instances to simply set the range of available penalties for a particular offence and in that way to determine the cardinal seriousness of the offence, but leaving it thereafter to the courts to develop more detailed sentencing policy over time in their consideration of the ordinal seriousness of individual cases. Unusually, although not uniquely, the Oireachtas has seen fit, in the case of s. 15A and s. 15B offending, to state what should be the appropriate sentencing policy in such cases in s.27(3C), and the basis for that policy in s. 27(3D)(a). It has been done in a way that respects individualisation in sentencing, hence the qualification and exception provided for s. 27(3D)(b) but serious regard must be had to the express statutory policy set out. Importantly, The Oireachtas has gone further in seeking to guide the approach to be applied by the courts, while being careful nonetheless to respect judicial independence and discretion, by providing that where a court is considering

departing from the presumptive minimum it 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 (this Court's emphasis). The language used is not mandatory, but it nonetheless represents a strong legislative indication of what the Oireachtas considers should, amongst other considerations, be taken into account and afforded appropriate weight.

45. It is also well established that the correct methodology to be applied by a judge in sentencing an offender for a s. 15A offence is to determine in the first instance what would the appropriate sentence be without reference to the presumptive mandatory minimum figure. If the figure arrived at is at or above the presumptive minimum, nothing further is required. However, if the figure arrived at is below the presumptive minimum then the sentencing judge should consider whether he or she is required to impose the presumptive minimum. In that regard he or she will be concerned to evaluate whether, "*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.*" If the judge is satisfied that such circumstances do exist, and that it would be unjust to impose the presumptive minimum, he or she may depart from it. If not, he or she must impose the presumptive minimum. It is mandatory to do so. See *The People (DPP) v. Renald* (unreported, Court of Criminal Appeal, 23rd of November 2001); *The People (DPP) v. Sarsfield* [2019] IECA 260 and *The People (DPP) v. Samuilis* [2018] IECA 316.
46. The judge in the present case did not follow the approach just outlined. He determined that exceptional and specific circumstances existed and that he would not apply the presumptive minimum before he addressed the issues of what might otherwise be the appropriate headline sentence and what he would discount for mitigation. That was an error of principle.
47. Further, while he expressed himself satisfied that exceptional and specific circumstances existed such as to render it unjust that the presumptive minimum should be applied, he did not identify with specificity what were those exceptional and specific circumstances. That again was an error of principle.
48. Further, in determining that exceptional and specific circumstances existed such as would render it unjust to impose the presumptive mandatory minimum sentence there is nothing on the transcript to suggest that (a) he gave consideration to whether, and if so to what extent, it was relevant that the respondent had a previous conviction for possession of controlled drugs for sale or supply; and (b) that he gave consideration to whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence than the presumptive mandatory minimum term. While s. 27(3D)(c) is expressed in permissive rather than mandatory terms, we consider that it was an error of principle not to have expressly considered these factors in the circumstances of the present case.

49. It is also not clear that he sufficiently took into account the significance of the presumptive mandatory minimum. While he did refer to the fact that “[t]he Oireachtas has set down very stringent and heavy penalties for this type of offending”, he did not specifically reference the reason for that, and the express sentencing policy statement in s. 27(3D)(a), namely that the purpose of the provision was to provide, **in view of the harm caused to society by drug trafficking**, for a presumptive mandatory minimum, which could only be departed from where 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 impose it, 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 the Act of 1977, should specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.
50. The importance of having regard to, and internalising, the Oireachtas’s policy was emphasised in *Renald*, where the Court of Criminal Appeal said:
- “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. Perhaps the most important single factor in determining an appropriate sentence the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the seriousness of the offence may be obtained from the maximum penalty imposed for its commission. This is particularly true in the case of modern legislation. What is even more instructive is legislation which, as in the present case, fixes a [presumptive] mandatory minimum sentence. Even though that sentence may not be applicable in a particular case the very existence of a lengthy [presumptive] 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.”*
51. Turning then to the headline sentence nominated by the sentencing judge in the present case. The drug involved was heroin, one of the most addictive and harmful opiates in the catalogue of drugs the possession of which is controlled. The quantity involved was substantial. Being valued at €34,000 it amounted to almost 3 times the threshold value of €13,000 which has been set for s. 15A purposes. As regards the respondent’s individual culpability, the evidence was that his role was to transport the drugs in question but that he was not the orchestrator or main person behind this particular drug trafficking operation. Importantly, however, the circumstances in which the respondent possessed those drugs for sale or supply was significantly aggravated by the fact that he had a previous conviction for a relevant offence, namely for possession of drugs for sale or supply contrary to s. 15 of the Act of 1977.
52. The sentencing judge at first instance nominated a headline sentence of 5 years’ imprisonment. It seems to us that having regard to the circumstances in which the crime was committed by this accused, the nature of the drug and the quantity involved, his risk of reoffending as assessed by the probation service, the stated policy of the Oireachtas,

and taking account of the guidance provided by previous jurisprudence, in particular this Court's guideline judgement in *The People (DPP) v. Sarsfield* [2019] IECA 260, the headline sentence nominated was within the sentencing judge's legitimate range of discretion, albeit at the low end of the range within which he might appropriately have nominated a headline sentence without reference to the presumptive minimum.

53. When it came to mitigation the sentencing judge was prepared to discount by 2 years or 40% from the headline sentence. However, he then went on to wholly suspend the remaining 3 years. In doing so he stated that he had to look at how at the best interests of society might be served, and he attached importance to the fact that the accused had embarked on the road to rehabilitation. He opined that his committal to prison, while it may satisfy society's need for him to be punished for what is done, may also damage society's need for him to continue on the road to rehabilitation and to stay out of trouble. The difficulty with this is that while it does reference society's need for him to be punished for what he had done, it does not seem to represent an engagement with the question posed in s. 27(3D)(d) as to whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence. It might be suggested that it implicitly concludes that the overall public interest would best be served by securing and incentivising the offender's rehabilitation, rather than seeing the respondent subjected to the hard treatment associated with having to serve a custodial sentence. However, if that was the sentencing judge's rationale it does not engage with the sentencing objective of deterrence. It refers to society's need for him to be punished, i.e. to exact retribution for his criminal conduct. It is silent, however, with respect to the objective of deterrence which is what the s. 27(3D)(d) consideration is directed towards. It does not seem to us that having regard to the important policy considerations set forth in the legislation, in particular the need to address the harm caused by drug trafficking, that the sentencing judge gave sufficient consideration to the sentencing objective of deterrence, both general and specific, but particularly general deterrence, in the circumstances of this case. That was a further error of principle.
54. In the circumstances we have no hesitation in concluding that the sentence imposed in this case was unduly lenient. We must therefore proceed to re-sentence the respondent.
55. In doing so, and ignoring the presumptive mandatory minimum for the moment, we think it would be appropriate to nominate a headline sentence of 6 years' imprisonment. From that, again ignoring the presumptive minimum, we would be prepared to discount by 18 months or 25% to reflect the mitigating circumstances in the case. Those include the plea of guilty, albeit that it was not an early plea, and progress to date towards addressing his substance abuse issues. He is not entitled however to credit for being of good character having regard to his previous convictions. He is also not entitled to credit for co-operation. He provided little or no meaningful co-operation to the gardai. We further do note and take account of his personal and family circumstances.
56. We do not disagree with the sentencing judge at first instance that it is important, and in the interests of society, that this offender should be encouraged and incentivised to



continue along the path of rehabilitation. This is particularly important in circumstances where the respondent has been assessed by the Probation Service as being at high risk of reoffending but that his risk will reduce if he stays away from drugs and associated behaviour. Our quarrel with the sentencing judge's approach is with the extent to which he did so. We agree that it is an appropriate case in which to offer an incentive towards continued rehabilitation, but the incentive cannot be set, in our view, having regard to the previous conviction for drug dealing and the circumstances of the offending in this case, and the important policy statements by the Oireachtas, at a level that takes the case below the custody threshold. We would be prepared in principle, subject to consideration momentarily of whether to impose the presumptive mandatory minimum term, to suspend 2 years of the post mitigation sentence to that end. We will also be prepared, in reflection of the fact that he has recently paid, albeit late in the day, the sum of €4000 to Merchant's Quay Ireland, to suspend a further 6 months on that account.

57. Accordingly, in our view the appropriate post mitigation sentence, ignoring the presumptive mandatory minimum, is 4 years and 6 months with the final 2 years and 6 months thereof suspended, leaving a net sentence to be actually served of 2 years' imprisonment.
58. The question then arises as to whether we are obliged to impose the presumptive mandatory minimum term of 10 years. The case has been made that taking into account that the appellant pleaded guilty, the fact that he provided some limited co-operation, and the fact that he has taken significant steps to date towards his rehabilitation provides the court with exceptional and specific circumstances relating to the offence, and the respondent, such as would make a sentence of not less than 10 years' imprisonment unjust in all the circumstances. In considering that submission we explicitly reject the idea that there has been sufficient co-operation for that to be relied upon. However, we do accept that there was a plea and that every plea is valuable. Further, we do accept that the respondent has taken meaningful steps towards addressing his addiction issues and substance abuse problems. We do therefore find that there are exceptional and specific circumstances relating to the person of the accused. The question is, in those circumstances, whether it would be unjust in the overall circumstances of the case to impose the presumptive minimum, particularly having regard to the fact that he has a previous conviction for drug dealing. We must also ask ourselves whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence. Having considered these issues, we are satisfied that, albeit that the decision has been a finely balanced one, it is not necessary to impose the presumptive mandatory minimum. The fact that the appellant has been required to serve an actual custodial sentence in the circumstances of this case would be sufficient to respect the public interest in preventing drug trafficking. The justice of the case does not require the imposition of the presumptive mandatory minimum.
59. The appellant is therefore sentenced to 4 years and 6 months imprisonment with the final 2 years and 6 months thereof suspended for a term of 2 years following upon his release and subject to the conditions that he submits to the supervision of the probation and

welfare service, that he fully engages with them and attends all appointments arranged by them, that he engages with the training and employment officer of the probation service and that he continues to abstain from illegal drugs. The court grants liberty to re-enter the matter before the Circuit Court in event of non-compliance. The judgment imposed today takes account of the part payment by the appellant of €4,000 towards the sum of €10,000 that the court below had required him to pay to Merchant's Quay as a condition of the suspension of the entirety of his sentence. He is relieved of any requirement to pay the balance in circumstances where he is now required to serve a period in actual custody. However, but for the fact that he has paid the said sum of €4,000 the period in custody he is now being required to serve would have been longer.