



Record No: 215/2021

**Edwards J.
Kennedy J.
Ní Raifeartaigh J.**

Between/

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

RESPONDENT

V

JAMES HOWLIN

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of June, 2022 by Mr Justice Edwards

Introduction

1. The appellant appeared for sentencing in the Circuit Criminal Court, Bray on the 12th of November 2021, following the entering of a guilty plea during arraignment on the 7th of July 2020 to Count 1 on the indictment, that of an offence of possession of a controlled drug with a value of €13,000 or more, for the purpose of supplying it to another contrary to s.15A of the Misuse of Drugs Act 1977 (as amended).
2. A *nolle prosequi* was entered by the prosecution at the end of the sentence hearing in relation to Count 2, that of possession of a controlled drug for the purpose of supplying to another contrary to s.15 and s.27 of the Misuse of Drugs Act 1977 ("the Act of 1977") as amended; Count 3, that of possession of a controlled drug contrary to s.3 and s.27 of the Act of 1977 as amended and Count 4, that of obstruction of a peace officer in the execution of their duty contrary to s.19 of the Criminal Justice (Public Order) Act 1994 as amended. The appellant had not entered a guilty plea in relation to counts 2, 3 and 4 on the indictment.
3. The appellant was sentenced by the court to a ten-year term of imprisonment, the court seeing fit to apply the presumptive mandatory minimum sentence provided for by the legislature in relation to the offence pleaded to.
4. The appellant now appeals against the severity of his sentence.

The Evidence Before the Sentencing Court

5. Evidence was given in court by Sergeant David Shore detailing the circumstances of the case the subject of this appeal.

6. While on routine patrol with his colleague in Bray, Co. Wicklow on the 10th of October 2019, Sergeant Shore observed the appellant walking and swinging a bag at Father Colohan Terrace. He then observed the appellant acting suspiciously by leaving a blue plastic bag at the butt of a tree, walking five steps away and then seating himself on a wall.
7. When approached by Sergeant Shore the appellant grabbed the bag and ran away towards McDonalds Restaurant on Killarney Road, Bray despite the Sergeant shouting for him to stop. The Sergeant gave chase on foot and following apprehension of the appellant, a search of the bag was conducted and a quantity of suspected cocaine was found, comprising of three blocks and two bags of the substance. Following subsequent analysis of the contents of the bag, it was confirmed that said contents were cocaine with a total weight of 1.749kgs and an estimated street value of €122,437.
8. The accused was arrested and taken to Bray Garda Station where he was detained and interviewed. During interviews he made full admissions in relation to the sale and supply of the cocaine and was cooperative.
9. The appellant attributed his offending behaviour to his addiction to cocaine and the €10,000 drug debt that he had accrued. During garda interviews conducted on the 10th of October 2020, he stated that he was using up to an ounce of cocaine a week.
10. On questioning he admitted that although he didn't look in the bag, he knew it contained cocaine and that he had been instructed to supply people with the contents stating *"I was told to see a few people and give them stuff. I owe a fortune."* He stated that he was told that his drug debt would be reduced by a €1,000 following completion of the offending activity and he viewed it as an *"easy way to get some of the money off what I owed."*
11. He further stated that he didn't want to have a *"big bag of cocaine on the Killarney Road"* but he didn't have an option as if he didn't acquiesce to the demands *"someone would be calling to his door."*
12. During cross examination Sergeant Shore stated that although the appellant hadn't been caught in possession of controlled drugs before, it was his belief that this was not the first time the appellant had been used as a mule, as he had been entrusted with the possession of nearly two kilos of cocaine. The context in which this occurred was that the witness was being questioned about the appellant's involvement in a flatpack furniture business that he had established, called "Mr Flatpack". It was put to the witness that that business had been going well for the appellant at the time, and the witness accepted that, commenting that the appellant had a lot of appointments on his phone and *"he seemed to have a lot of bookings for assembling furniture at the time."* The sentencing judge then interjected, leading to the following exchanges:

"JUDGE: Well, how does that marry in then with the suggestion that his drug addiction was at the base of this carryon?"

WITNESS: Judge, he said that he was using up to an ounce of cocaine a week, Judge, that's what he told us. But as I say, Judge, fair enough, people might become involved because of their addiction but you might be used as a mule but the first time you're used as a mule, you're not going to be given nearly two kilos of coke to carry around like. I'd imagine this wasn't his first time, Judge. This is just the first time he got caught.

DEFENCE COUNSEL: Yes. And a lot of people, I think you'd accept, would agree to do these things so that they can continue to feed their habit cost free to themselves?

WITNESS: Cost free, Judge, but he was probably -- like, he was surely being receiving some payment or he was surely -- he wasn't a bottom feeder in this operation anyway, that's for sure, Judge."

13. While in fairness to defence counsel, the gratuitous speculative opinions volunteered by the witness in response to the judge's interjection and the follow up question, could perhaps not have been anticipated, we do regard it as extraordinary that there was no protest made after those opinions were volunteered, and that no submission was made to the sentencing judge that such evidence should be disregarded, at least in part, in any assessment of the appellant's culpability. While the point made as to the trust that had been ostensibly reposed in the appellant by those who had enlisted his assistance was a valid and unobjectionable circumstance surrounding the commission of the offence which the court could legitimately take account of in light of the Court of Criminal Appeal's decision in *The People (DPP) v. Gilligan (No 2)* [2004] 3 IR 87, the further suggestions that the appellant had been receiving payment, that the witness would imagine that this was not his first time, and that this was just the first time he was caught, were all a step too far and represented evidence that should never have been given, and certainly no account could be taken of it, bearing in mind the decision of the former Court of Criminal Appeal in *The People (DPP) v. Bollard* (unreported, Court of Criminal Appeal, Fennelly J, 05/10/2001, 2001 WJSC-CCA 4253, [2001] 10 JIC 0503), to which we will allude to further later in this judgment.
14. It should further be noted that in a Probation Service report put before the court at sentencing, the appellant is recorded as having admitted to his probation officer that he had been "*selling cocaine for an 18 months period to support his own personal use*". This became a matter of some importance in light of certain observations of the trial judge at a later stage in the sentencing hearing, a matter we will be returning to.
15. The sentencing court heard the following further evidence, elicited by defence counsel in cross-examination of Sergeant Shore, concerning what had occurred and what was said during interviews with the appellant in the Garda Station, and with respect to subsequent examination of the appellant's phones:

"DEFENCE COUNSEL: And I think he was asked did he understand the reasons for his arrest. He says he owns his own business but: 'I've a problem with cocaine.'

This is page 33 [of the Book of Evidence], Judge. That's how this came about and he has a daughter and he was asked where he lived. He said 'In Wheatfield. I'm not long in there. I'd a problem with cocaine so I had to move out. I owe money. I'm starting a new work. I used to work for IKEA. I'm in with a load of new companies.' This is the flatpack assembly that you're speaking of, I think?

WITNESS: Yes, Judge.

DEFENCE COUNSEL: Yes. And he had a number of lads working with him and he chased down the contracts on page 34 there. And he needed a new high roof van and: 'I was supposed to be starting a new contract in a couple of months.' He was asked was he clean now, he said no. 'What were you using in the height of it?' 'I was using about 14 grams on the weekend. My nose and my stomach is ruined from it.' 'How much would you be on now?' 'It depends. Two weeks ago, I took 10 grams. My body can't take much more. When I was in Germany I couldn't eat with it.' And he moved out of the place he had been living in and he was asked: 'Do you owe money?' He said 'yes'. He said how much? He said about 10 grand. 'Is it just your brother and sister?' Yes. 'So, you're the middle one?' Yes. 'How long are you with Megan?' 'About five years.' And he talks about driving and work et cetera, et cetera. 'Where did you get the van?' He said: 'I can't say that ...' -- this is at page 36, Judge. 'There will be threats on my house over this.' 'So, you got back to Bray around 10.30?' And he talks about who he meets up with et cetera and describes the van and how much he paid for it which was just €500, I think. He describes its colour. And at page 37 and he's asked about sitting on the wall where he was found with the bag and then he's asked: 'How long had you the drugs at this stage?' This is the bottom of page 37. 'A while, man, I don't even know.' 'What happened then?' 'Tom pulled up. I nearly died. I nearly had a heart attack.' 'What was in the bags?' 'I don't know.' 'What was in the bags you collected?' 'Coke.' And he makes that full admission early on; isn't that right?

WITNESS: That's right, Judge.

DEFENCE COUNSEL: 'Did you know you were collecting coke?' And he admits: 'Yes. I was just told to give it out.' 'Give what out?' 'Give it out to someone.' 'Are these the questions asked and the answers given?' 'Yes.' 'Do you need to add anything?' And he says no. And then he was re-interviewed a while later and after the first couple of pages of introduction there he explains how he went into a panic as soon as you arrived on the scene and saw him with the bag. He was asked why he ran. He said: 'I was scared of getting caught with that and what was going to happen to me.' He was asked then further down: 'Obviously I was told to see a few people.' 'What was your instructions, see a few people and what?' 'I was told to see a few people and give them stuff. I owe a fortune.' 'See them with this or what?' 'Yes, I was told what to do.' This is on page 42, Judge. 'This is what was in the bag that you were carrying, three blocks of cocaine and two bags of cocaine. One of the blocks is cocaine and that it has been tested already.' And he said: 'I

haven't even seen them.' 'This is the blue bag that all these blocks were in, do you recognise this?' And he makes the admission yes. 'Tell me about the bag?' 'That's the bag I had beside me' he says. 'Do you accept that those drugs were in the bag?' 'It must have been, yes.' 'Do you accept that you'd those drugs in your possession yesterday?' 'If I had the bag I must have had them.' 'Was it a fair job to give these drugs to different people?' 'Yes. It was an easy way to get some of the money off what I owed.' 'How much were you getting?' '€1,000.' 'Did you know that there were drugs in the bag?' 'Yes. I knew there was something in the bag that I shouldn't have.' 'So, you knew there was drugs in the bag?' And he makes that admission yes. 'And you were going to supply people with these drugs? You weren't getting money but you were the middle man.' 'I was told what to do and it was going to help me.' And then he looks at the phone and he admits that it's his phone and he's enquired about whether there's evidence of dealing on it. Did you examine the phone? I think you told us a moment ago you did?

WITNESS: Yes, Judge. We got the phone and we examined the phone, Judge, yes.

JUDGE: But you said that when you examined the phone he showed -- it showed evidence of a good business and plenty of contacts.

WITNESS: Yes, Judge. He had two phones. He had one phone --

JUDGE: Sorry?

WITNESS: He two phones, Judge. He had one phone he was using for work, Judge, and he had another phone that he was using for other activities.

DEFENCE COUNSEL: And when you say the other activities, did it indicate that he had been doing what you caught him doing effectively?

WITNESS: Yes, Judge.

DEFENCE COUNSEL: All right. 'I didn't want to have the cocaine on me' he says on page 44. 'But I didn't have an option. I didn't want to have a big bag of cocaine on the Killarney Road. I'd no other option or someone was calling to my door.' And I think that's where the interviews end; isn't that right? So, his position was that he was saying he had a large drug debt, he was trying to pay some of it off and that that was the reason why he had that bag on that occasion?

WITNESS: That was his story, yes, Judge.

JUDGE: That's what he said, Sergeant, but do you accept that?

WITNESS: Judge, going by the messages on his phone, Judge, it wasn't his first time to be delivering stuff down around to people in Bray, Judge. And as soon as -- it's busy on that junction, Judge, it was a quarter past 4 in the day so there was a lot of people around and, Judge, people started leaving groups that were on his

phone and deleting their messages out of them. So, by the time we had even gotten back to the station, people had started leaving groups. So, word had travelled fairly fast that he had been arrested, Judge. So, he was obviously someone of some notoriety in those circles. He was unknown to us at the time though, Judge. We didn't know of him until he was caught that day."

16. We will address the appropriateness of the judge's question as to whether the witness accepted the appellant's account in light of the Bollard jurisprudence later in this judgment. It is sufficient to note at this stage that the question was not objected to, and the witness was allowed to answer. Again, in the answer proffered, there are gratuitous speculative opinions offered by the witness, to the effect that, *"it wasn't his first time to be delivering stuff down around to people in Bray"*, that because people had started *"leaving groups that were on his phone and deleting their messages out of them"* and started the timing of that, it could be inferred that *"word had travelled fairly fast that he had been arrested"*, and that *"he was obviously someone of some notoriety in those circles."*
17. Once again, for reasons which are not apparent, neither was any protest made by defence counsel following the volunteering of these views, nor was any submission made to the sentencing judge that they should be disregarded.
18. On the issue of the level of the appellant's co-operation with the gardaí and other agencies, there were the following exchanges of relevance:

"DEFENCE COUNSEL: ... he has been working with the Bray Community Addiction Team since his arrest and release. Have you any -- made any enquiries as to how he might be getting on there?"

WITNESS: I haven't, Judge. As I say, Judge, I'm in Waterford for the last, pretty much two years, Judge. I don't have much involvement up here anymore.

DEFENCE COUNSEL: Yes. And I think he's also cooperated with the Probation Services?"

WITNESS: Yes, Judge. In fairness, he was fully cooperative with us from the time he got caught as well.

DEFENCE COUNSEL: Yes. And by giving you the phone and other things, I presume he assisted in the investigation of the offence that you were investigating at the time and perhaps assisted in other ways by virtue of the intelligence that would be on these phones?"

WITNESS: I suppose he helped us as best as he could, Judge, in regards of his own side, Judge, that was it."

19. The appellant was in due course charged. He was subsequently remanded on continuing bail to the 7th of July 2020, to Bray Circuit Criminal Court. He intimated an intention to

plead guilty to the s.15A offence at an early stage and subsequently did so at his first appearance before the Circuit Criminal Court. Thereafter the matter was adjourned from time to time pending a sentencing hearing and to facilitate the preparation of a Probation and Welfare report.

20. At the sentencing hearing a report from the Carlton Clinic established that the appellant was drug free at that time. A large number of positive testimonials were also submitted to the sentencing judge. They are referenced in the transcript and we have also had sight of them.

The appellant's personal circumstances

21. The appellant was 27 years of age at the time the offences the subject of this appeal were committed.
22. The appellant comes from a supportive family living in the Bray area and has two siblings, a sister and brother. The Probation and Welfare report states that the appellant recalled a happy childhood and that his parents had a positive relationship. He further admitted that his behaviour and misuse of drugs had caused significant stress on his relationship with his family in the past, but that this had improved when he became drug free. At the time of sentencing the appellant had been in a relationship and lived in stable accommodation with his partner of nine years and their 6-year-old daughter.
23. The appellant left school following completion of his Junior Certificate at the age of 16 years. The Probation Service report outlines that during his time at school the appellant had been suspended on occasion for behavioural difficulties. Following enrolment in a Youthreach programme at the age of 17 years, the appellant completed his FETAC level 4 and progressed to a college of further education where he completed a two-year level 7 course in Computer Development.
24. Following parttime work in a café and in a furniture business, at the age of 23 years the appellant, with the support of his father, purchased an advertised flatpack furniture business. During the first three years of this business, he worked independently and was unable to work full time or grow the business due to his addiction difficulties. The Probation Service's report states that since becoming substance free the business has expanded and employs five employees.
25. In relation to the appellant's health and addiction issues the Probation Service report stated that he had engaged with the Bray Community Addiction Team (BCAT) on a weekly basis since December 2019 and had successfully completed the Community Reinforcement Programme. The appellant admitted to a brief relapse on cocaine in January 2020, however, he stated that he had remained drug free since this time.
26. The Probation Service report further stated that following his arrest his drug debt had increased to €47,000 due to the said cocaine being seized by gardaí. This debt was repaid through loans from family members and financial institutions. He continues to repay these loans.

27. A number of testimonials were handed into the court from various sources including Smart Recovery, the appellant's partner, New Hope Residential Centre (following a financial donation to this organisation from the appellant), Course Superintendent at Bray Golf Club, Mrs O'Brien at his national GAA club and a number of business contacts, outlining the appellant's good character.
28. The Probation Service's report assessed the appellant as being at moderate risk of reoffending due to his criminal history, addiction history, current financial debt and criminal acquaintances/peers.
29. The appellant has five previous convictions, one for a s.6 public order offence in 2014 for which he received a fine of €400, three for road traffic offences in 2013 for which he received fines and a disqualification from driving for three years and one for a s.3 assault causing harm offence committed in 2007, for which he received a two-year, six-month sentence suspended for three years, from Wicklow Circuit Court in 2009.

Sentencing judge's remarks

30. Having recited the circumstances in which the appellant's offending conduct was detected as established in evidence, the sentencing judge commented:

"It was the evidence of the garda that the accused was supplying a drug to dealers in the area. He -- having regard to the quantity of drugs found, it was the garda's belief that this wasn't the first [time] he had done it and indeed, the accused has admitted to the Probation and Welfare Services that he had been supplying cocaine for 18 months. He was not, in the words of the garda 'the bottom feeder', as sometimes one finds in these cases."

31. The sentencing judge went on to say that it appeared that the appellant may have had a drug addiction issue at the time, noting as well that he was young and that he had a partner. He then went on to say, *"but nonetheless he was involved in this activity"*, observing that *"drug dealing and drug abuse in Wicklow is a problem and the moving of €120,000 worth of drugs around the [county] over a protracted period, or any period, is a matter of grave concern to [him] and to the Courts."*

32. The sentencing judge then remarked that,

"[t]he first issue that I have to determine is whether or not I should depart from the minimum mandatory sentence of 10 years' imprisonment in this case. It's urged upon me that I should do so for the reasons that the accused had pleaded guilty, that he was -- he had cooperated fully, there was an early admission, and that he is someone that has changed his life around."

33. In then considering whether he should depart from imposing the minimum mandatory sentence for the s.15(A) offence, he stated;

"First of all, to deal with the early plea of guilt, not every plea of guilt that is entered early will carry the same weight. The Court of Criminal Appeal has

repeatedly emphasised that where a plea of guilt flows from the person having been caught red-handed, as occurs in many drug offences which come before the Courts, it's considered less exceptional than an early plea in other circumstances In the People (Director of Public Prosecutions) v. Anderson, the Court stated, and I quote: 'An early plea of guilt is of value in every case but the extent to which it is of value will depend on the circumstances of the case, and very often will depend on the nature of the evidence available against an accused person. If he is caught red-handed, such a plea is of less value than it might be in other cases. There are also particular cases such as sexual assault, rape and so forth where a plea spares the victim an ordeal of giving evidence and appearing in Court, where a plea is always of value.' In this case, I regard the plea of guilt of no exceptional value. He was caught red-handed. The evidence, if it had gone to Court, whilst it might have taken trial time, would have been from Garda witnesses or State -- otherwise, State witnesses. So, whilst that's one of the matters I have to take into consideration, in my review of the matter, it's not one that I believe in this case warrants a departure from the principles of the mandatory minimum sentence.

In relation to the other matters, the question of cooperation et cetera, it seems to me that the accused had no other option. He was caught red-handed. He -- I accept the evidence of the garda, this was not his first time. He was not a bottom feeder. It was a substantial amount of money. He was involved in terms of shipping into the county a quantity of cocaine. I see no reason to depart in this case from the minimum mandatory sentence of 10 years' imprisonment, and I propose to impose that sentence on the accused."

34. He continued that,

"if this matter goes further, despite all the many matters so eloquently put forward in the accused's plea of mitigation, I wouldn't be disposed, even if I were obliged to move away from the minimum mandatory, to depart very much from the 10 years. He was supplying substantial quantities of cocaine into the Bray area."

Grounds of appeal

35. The appellant appeals his sentence on the following grounds:

1. The trial judge erred in principle by imposing a sentence which was overly severe, excessive and disproportionate to the offending behaviour.
2. The trial judge erred in principle by imposing the mandatory minimum sentence of ten years.
3. The trial judge erred in principle by failing to determine that it would have been unjust in all the circumstances to impose the mandatory minimum sentence of ten years, and in so erring he failed to:
 - (a) give any or any sufficient weight to the fact that the appellant pleaded guilty;

- (b) give any or any sufficient weight to the circumstances in which the indication of the plea of guilty was given;
 - (c) give any or any sufficient weight to the fact that at the time of the offending the accused was suffering from a heavy cocaine addiction;
 - (d) give any or any sufficient weight to the fact that upon arrest the accused cooperated fully with the Gardaí and materially assisted in the investigation of the offence by admitting his role.
 - (e) give any or sufficient weight to the personal circumstances of the accused both at the time he committed the offence and at the time of sentencing.
4. The trial judge further erred in principle (and this is a stand-alone ground as well as underpinning the complaint at 3 above) by minimising to nil the value of the plea of guilty and the admissions made, on the basis that the appellant had been caught red handed.
 5. The trial judge erred in principle by failing to adopt an appropriate methodology when constructing the sentence imposed, and in particular he failed to identify the headline sentence appropriate to the case prior to then giving the appellant credit for the mitigating factors in his case (without prejudice to the complaint that insufficient credit was in fact given).
 6. By reason of his failure to identify a headline sentence the appellant does not know whether the sentence of ten years was imposed solely by virtue of the mandatory minimum sentence requirement in section 27(3C) of the Misuse of Drugs Act, 1977 as amended or whether the headline sentence (if known) was one in excess of ten years and that a sentence of ten years was arrived at following an appropriate deduction for mitigation being made.
 7. The trial judge failed to have adequate regard to the mitigating factors (these include those identified by section [27] [(13D)] (b)(i) & (ii) [of the Act of 1977]) and the appellant's personal circumstances.
 8. The trial judge erred in principle by imposing a sentence which lacked transparency such that the appellant cannot know how the final sentence was arrived at.

[Clarifying text in square brackets in 7 above, added by the Court]

Submissions of the appellant

36. In written submissions to this Court counsel for the appellant puts forward three overarching complaints: -

1. The trial judge erred in law and in principle in imposing the mandatory minimum sentence of 10 years, which was overly severe in the circumstances of this case, and out of kilter with the normal range of sentences for similar type offences. Thus, it was disproportionate. The trial judge by-passed the appropriate methodology in the construction of a sentence and went directly to, and imposed the mandatory

minimum sentence without having any regard to the mitigating factors and personal circumstances of the appellant.

2. The trial judge gave short shrift to a number of important aspects of the defence case relating to the mitigating factors and the personal circumstances of the appellant (including his efforts to rehabilitate from his cocaine addiction). The judge effectively minimized to nil the value of the appellant's guilty plea and his admissions – in doing so he pronounced that the appellant had no choice but to co-operate with the gardaí. Although the trial judge stated that he took all matters into account, this was not actually given any real or adequate effect to, this submission can be made in light of the sentence actually imposed – also see the judge's final sentencing remarks. In imposing the mandatory minimum sentence, the judge was firmly focused on the fact that the appellant had been caught "red handed" and as he perceived it, had "no choice" but to co-operate with the investigation. The personal circumstances of the appellant were not considered.
 3. The learned trial judge failed to adopt an appropriate methodology when constructing the sentence he imposed, he failed to identify the headline sentence appropriate to the offence prior to giving the appellant such credit as was warranted for the mitigating factors in the case. The failure to adopt an appropriate methodology may well have contributed to the judge's failure to take the mitigating factors and personal circumstances into account. An additional consequence of this failure is that the sentence lacks transparency.
37. Although evidence in court revealed that the appellant cooperated with, and provided assistance to the garda investigation, counsel for the appellant submitted that in admitting to the sale and supply of drugs for 18 months to enable him to support his personal cocaine habit, his candour appears to ultimately have weighed heavily against him during sentencing, as evidenced in the remarks of the judge, *"Somebody moving €120,000 worth of drugs around Wicklow and into Wicklow over a protracted period, or indeed over any period, is a matter of grave concern to me and to the Courts."* Counsel views this as worrisome in light of the court's remarks within the sentencing judgment in the following terms *"As I've indicated previously this afternoon, drug dealing and drug abuse in Wicklow is a problem."*
38. In respect of the methodology adopted by the court in sentencing, counsel relies on the decision of this Court in the case of *DPP v. Stephen Sarsfield* [2019] IECA 260, in which Birmingham P., giving judgment for the Court, stated that:

"14. In the case of s. 15A offences, the headline or pre-mitigation sentence is only a first step, and as always, save where the sentence is a mandatory one, it will be necessary to have regard to the individual circumstances of the individual offender. Those circumstances will vary widely from the individual with relevant previous convictions making a conscious and unforced decision to become involved, to individuals falling into offending in circumstances of extreme distress and vulnerability. The circumstances can be expected to vary so widely that there can

*be no real expectation of uniformity of actual sentences imposed, **as distinct from consistency in identifying a headline or pre-mitigation sentence and the principles to be applied in arriving at the ultimate sentence.***"

[Emphasis as in counsel's submissions]

39. The President had then added at paragraphs 18 to 20:

"18. 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. Where the offence involves significant involvement in a very high-level drug offence, the headline or pre-mitigation sentence is likely to be well in excess of the statutory presumptive minimum. In the case of high-level commercial drug dealing involving very large quantities of drugs, we would expect that the headline or pre-mitigation sentence is likely to be of the order of fourteen or fifteen years, and in some exceptional cases, significantly higher.

19. What we have to say about the ultimate sentence is more tentative still, having regard to the very wide variation in the circumstances of offenders coming before the Courts. The Court would, however, observe that in the sort of very high-end commercial drug trafficking cases to which we have been referring, a plea of guilty, of itself, without something more, is unlikely to justify a reduction below the presumptive minimum sentence. Such a situation is particularly likely if the plea was entered against a backdrop of very strong or overwhelming evidence, not an unusual situation in the context of s. 15A cases.

20. The non-exhaustive list of factors which a sentencing court may have regard to in determining whether to deviate from the presumptive minimum are set out in s. 27(3D)(b)-(c) as follows:

"(b) ...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.”

40. Further reliance was placed on the cases of *The People (Director of Public Prosecutions) v. Edward Anthony Farrell* [2010] IECCA 116, *The People (Director of Public Prosecutions) v. M.* [1994] 2 I.L.R.M. 541 and in *People (Director of Public Prosecutions) v. Renald.*(C.C.A. – 23rd November, 2001 - Unreported) in submitting that notwithstanding the presence of a presumptive mandatory minimum sentence, a sentencing judge ought to first identify a headline sentence and that she/he should have regard to the individual circumstances of the individual offender. It was submitted that the sentencing judge had neither adhered to the recommended methodology, nor had he properly applied the statute.
41. Counsel contends that the trial judge’s failure to adopt the correct approach was evidenced in the remark of the judge, “(t)he first issue that I have to determine is whether or not I should depart from the minimum mandatory sentence of 10 years’ imprisonment in this case.”
42. Counsel submitted that by focusing in the first instance on the possibility of imposing the presumptive mandatory minimum sentence provided for in s. 27(3D)(a) of the Act of 1977, the sentencing judge failed to determine in the first instance, and to have regard to, what would be a proportionate sentence for the offence but for the presumptive mandatory minimum. He needed to know this as it was a potentially relevant circumstance, amongst others, to be considered in assessing whether there were 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. The greater the departure represented by the presumptive minimum from what would otherwise be a proportionate sentence, the more difficult it would be to stand over the presumptive minimum as being just.
43. Counsel further contended that the judge effectively minimised to nil the value of the appellant’s guilty plea, his admissions and cooperation with the investigation and in doing so pronounced that the appellant had no choice but to cooperate with the gardaí as he had been caught red-handed. That this was the judge’s attitude is said to have been evidenced in the following exchange between the bench and defence counsel during the presentation of the plea in mitigation.

"DEFENCE COUNSEL: He then cooperates fully with the investigation.

JUDGE: I don't understand what that means. I mean he handed over a phone which he had in his possession.

DEFENCE COUNSEL: No, no but he makes admissions throughout the interview and very early on and the Garda Sergeant has said --

JUDGE: But what -- sure he had to make admissions, he was found in possession of the bag and the phone.

DEFENCE COUNSEL: Well, some people could go in and say "no comment", "no comment", "no comment".

JUDGE: I mean, where does that get us?"

44. In relation to the contention that the term of the sentence imposed was out of kilter with other sentences for similar type offending, counsel relied again on the judgment of Birmingham P. in *Sarsfield* where it was stated, at paras 17 and 18, that:

"17. The difficulty in addressing the issue of sentencing in this area is that comparators are at their most useful when one is comparing headline or pre-mitigation sentences with each other. However, the presumptive minimum sentences identified by the Oireachtas, and indeed, subject to constitutional issues, the actual mandatory sentences stipulated in certain cases relate to actual custodial sentences to be served. Matters are further complicated by the fact that the imposition of sentences less than the mandatory presumptive minimum is not at all unusual, in part because pleas of guilty in s. 15A cases are so widespread.

18. Our observations are for that reason, somewhat tentative."

45. The President went on to say, at paragraph 19,

"19. What we have to say about the ultimate sentence is more tentative still, having regard to the very wide variation in the circumstances of offenders coming before the Courts. The Court would, however, observe that in the sort of very high-end commercial drug trafficking cases to which we have been referring, a plea of guilty, of itself, without something more, is unlikely to justify a reduction below the presumptive minimum sentence. Such a situation is particularly likely if the plea was entered against a backdrop of very strong or overwhelming evidence, not an unusual situation in the context of s. 15A cases."

and further to say at paragraph 22,

"the information provided by the parties, including the survey of 104 cases to which reference has been made, suggests that the average time to be served, where the drugs involved are valued in excess of €1m, is 6 and three-quarter years."

46. It was submitted that the present case is far from a high-end commercial drug trafficking case.
47. In respect of the sentencing judge's concluding remarks counsel contends that the obligation to properly take into account the appellant's circumstances and mitigating factors was not fulfilled, as evidenced by the line "*I wouldn't be disposed, even if I were obliged to move away from the minimum mandatory, to depart very much from the 10 years*".
48. Finally, at the oral hearing of this appeal, counsel for the appellant further submitted that the sentencing judge was also guilty of error in ostensibly having regard to evidence that should not have been admitted (albeit that it was not objected to), and allowing himself to be influenced by such evidence. This complaint is not, on the face of it, embraced by the grounds of appeal pleaded in the Notice of Appeal. Despite that being so, no pleading point was taken by counsel for the respondent, nor did he seek to contend that he was disadvantaged by not having had notice of this complaint. On the contrary, he engaged with the issue, a matter we will elaborate on in the next section of this judgment.

Submissions of the respondent

49. To start with the last point made in the summary just provided, namely that the sentencing judge was guilty of error in ostensibly having regard to evidence that should not have been admitted and allowing himself to be influenced by it, counsel for respondent in engaging with the complaint pointed out that the controversial evidence had not been led by the prosecution, but rather had emerged (without the elicitation of any protest) during cross-examination by counsel for the defence, and supplementary questioning of the witness by the judge. In substance, he maintained that even if the evidence in controversy ought not to have been given, the fact that it had nonetheless been received did not merit the significance now being attached to it. Defence counsel having put it to the State's witness for his agreement that the appellant's account had been that he had been delivering the bag in return for a discount on his drug debt, to which the witness's response had been "*that was his story, yes*", the trial judge had interjected with his own question "*do you accept that?*". This elicited the extensive reply to which objection was now being taken, albeit that none was taken at the time. (In this context it should be noted that leading counsel representing the appellant on the appeal was not the same counsel who had represented him at the sentencing hearing in the court). Counsel for the respondent maintained that as the line of evidence being pursued immediately prior to the judge's question had represented an attempt to place a characterisation on the activity of the appellant, that the sergeant's somewhat Delphic answer, i.e., "*that was his story, yes*", suggested that he did not agree with it, the sentencing judge had been within his rights to ask the question he did and from there to inform himself as to the role of the appellant in this wrongdoing. Even if the evidence in question ought not to have been given, it was for the appellant to show that if there had been an error of principle, it had resulted in an incorrect sentence. In the respondent's contention he had failed to do so, on the basis that the sentence ultimately imposed was not unjust having regard to all the circumstances of the case.

50. With regard to the complaints as pleaded, the respondent submitted that a sentencing judge must have sufficient grounds identified to him by the defence to justify him in departing from the presumptive minimum. It requires that the judge must be 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 ten years imprisonment unjust in all the circumstances. The sentencing judge here had not been so satisfied. The statute provided that in making this assessment the court may 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. The sentencing judge did consider the plea, its time and the circumstances in which it was given but deemed it to be of "*no exceptional value*" in circumstances where the appellant had been caught red-handed. This was a conclusion that the sentencing judge had been entitled to come to. Similarly, with regard to the claim of co-operation he was entitled to consider that, where the accused had been caught red handed, the claimed co-operation was not "material", and in truth did not demonstrate, or contribute to demonstrating, the existence of that of which the sentencing judge was required to be satisfied, namely the existence of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than ten years imprisonment unjust in all the circumstances of the case. The strength of the prosecution evidence was a factor that the court had been obliged to consider.
51. Counsel further submitted that the trial judge was entitled to take a view as to the level of seriousness of the appellant's involvement in the drugs trade, following evidence that, notwithstanding his claim of being chronically addicted he still managed to run his flatpack business. Counsel contends that in attempting to gauge the role of the appellant in the wrongdoing, the trial judge was within his rights to interject during an exchange in court and ask whether the prosecuting guard accepted that repayment of a drug debt was the reason for the committing of the offence, to which the prosecuting guard stated, "*it wasn't his first time to be delivering stuff to people in Bray.*" Further admissions were made by the appellant to the probation officer that he had been supplying cocaine for 18 months. This was admissible evidence, notwithstanding that it was hearsay, by virtue of it being a declaration against interest.

Analysis and Decision

52. Earlier in this judgment we expressed the view that certain speculative opinions volunteered by Sergeant Shore should not have been given in evidence. While these featured to some extent in oral argument at the appeal, they were not, as we have already observed, the subject of any ground of appeal. However, notwithstanding that fact, they represented an issue of clear concern to us following a reading of the transcript. Ultimately, although there was no application to amend the grounds of appeal, or to add additional grounds, they formed part of the appellant's case as canvassed before us in oral argument, and this occurred without objection by counsel for the respondent. In substance it was argued that the sentencing judge had erred in principle in taking account

of, and allowed himself to be influenced by, inadmissible opinions and speculations proffered inappropriately by the State's witness. We received the submissions in question *de bene esse*, expressing no view at the appeal hearing concerning whether we could, or should be prepared to, engage with the complaints made and act upon them if we felt they had been sustained.

53. We are satisfied that this appeal can be decided on other grounds, and it is therefore not necessary for us to found our decision in the case on any complaints not pleaded. That having been said, we felt that it was incumbent on us to offer the observations made earlier in this judgment, and we think that at this point we ought to make some further observations, concerning the controversial evidence.
54. It is true that the evidence in question was not adduced by the prosecution. Moreover, the actual questions asked of the witness by counsel for the appellant were not such as would have caused apprehension on the part of his counsel that such evidence might be given. That was not true to the same extent of the follow-up questions asked by the trial judge in his interjections, which we judge to have been unwise and fraught with danger. However, they were not objected to at the time. It is of concern, however, that the judge in his sentencing remarks appears to have been influenced by the opinions and speculations offered by Sergeant Shore, particularly his willingness to accept that witness's speculative opinion that it was not the appellant's first time engaging in such conduct, and that the appellant had likely committed similar offences on previous occasions, which offending was not the subject matter of any count on the indictment; and further in finding support for that in the admission said to have been made by appellant to his probation officer.
55. The decision in *The People (DPP) v. Gilligan (No 2)* [2004] 3 IR 87 is instructive in this area. In this case the appellant before the Court of Criminal Appeal, Mr Gilligan, had been convicted before the Special Criminal Court of eleven drug related offences involving the importation and possession for the purpose of sale and supply of cannabis resin between certain dates, and had been sentenced in respect thereof to concurrent terms of twelve and twenty-eight years imprisonment respectively. He appealed against the severity of the sentences.
56. Counsel for the appellant contended *inter alia* that, as the particulars of the offence in each of the counts relating to specific periods charged and that the alleged offence was "on a date unknown", each of those counts could relate only to one specific date within the given period. Whilst there might have been evidence of other occasions of importation or possession, there had been no conviction in relation to them, and therefore a sentence could not legitimately take them into account.
57. Addressing this issue in giving judgment for the court, McCracken J. noted that a similar issue had received consideration in England in a case of *R v. Kidd* [1998] 1 WLR 604. He stated:

"6. ... *In that case, the issue was posed as follows at p 606:-*

'The issue may be expressed as follows: if a defendant is indicted and convicted on a count charging him with criminal conduct of a specified kind on a single specified occasion or on a single occasion within a specified period, and such conduct is said by the prosecution to be representative of other criminal conduct of the same kind on other occasions not the subject of any other count in the indictment, may the court take account of such other conduct so as to increase the sentence it imposes if the defendant does not admit the commission of other offences and does not ask the court to take them into consideration when passing sentence?'

7. *This was decisively answered by Lord Bingham of Cornhill at p 607 in the following terms:-*

'A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see Reg v. Anderson (Keith) [1978] AC 964. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit.

It is said that the trial judge, in the light of the jury's verdict, can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the incidents specified in individual counts. But this, as it was put in Reg v. Huchison [1972] 1 WLR 398 at p 400 is to 'deprive the appellant of his right to trial by jury in respect of the other alleged offences'. Unless such other offences are admitted, such deprivation cannot in our view be consistent with principle.'

8. *That seems to this court to be a clear and unambiguous statement of principle with which the court entirely agrees. Indeed, counsel on behalf of the respondent does not really challenge it. He does seek to argue, however, that the sentencing court is entitled to have regard to the overall evidence of the activities of an accused in determining the gravity of the individual charges in respect of which he has been convicted. In the present case, he points to the fact that the offences took place over a period of some 28 months, that there was clear evidence that these offences were part of organised crime and that indeed the applicant was closely involved in the organisation and that he would appear to have been motivated purely by greed.*

9 *While this court accepts the reasoning in Reg v Kidd [1998] 1 WLR 604, quite clearly a sentencing court cannot act in blinkers. While the sentence must relate to the convictions on the individual counts, and clearly the applicant must not be sentenced in respect of offences with which he was neither charged nor convicted and which he has not asked to be taken into account, nevertheless the court in looking at each individual conviction is entitled to, and indeed possibly bound to, take into consideration the facts and circumstances surrounding that conviction. Indeed, if that were not so and these were treated as isolated incidents occurring at six month intervals, it might well be that the proper course for the court to adopt would be to impose consecutive sentences. The court does, therefore, accept the basic principle behind the argument of counsel for the respondent. However, the court does think it important to emphasise that in many cases there may be a very narrow dividing line between sentencing for offences for which there has been no conviction and taking into account surrounding circumstances, which may include evidence of other offences, in determining the proper sentence for offences of which there has been a conviction. It is important that courts should scrupulously respect this dividing line."*

58. The decision of the Court of Criminal Appeal in *The People (DPP) v. Bollard* (unreported, Court of Criminal Appeal, Fennelly J, 05/10/2001, 2001 WJSC-CCA 4253, [2001] 10 JIC 0503) provides a further example of circumstances in which a judicial intervention fell on the wrong side of the dividing line spoken of earlier. In *Bollard* the appellant before the Court of Criminal Appeal had pleaded guilty in the Dublin Circuit Criminal Court to the offence of possession of a controlled drug for the purpose of selling or otherwise supplying it to another. He was sentenced to four years imprisonment and appealed against the severity of his sentence on various grounds, one of which was as follows. It was apparent from the transcript that the sentencing judge at first instance had intervened in the questioning of the garda officer and had asked in effect whether the garda officer was satisfied that the accused, as he had said himself, had been acting as a dealer only for the period of some six weeks. This enquiry elicited from the garda officer that the officer in question did not accept that but believed that the accused had been involved in drug dealing for a period of ten months to a year before that and that he had been under garda observation. It was complained that the sentencing court had erred in taking into account activity that was not the subject of any prosecution.

59. Giving judgment for the court, and upholding this aspect of the appeal (although ultimately deciding that the four year sentence had not been inappropriate), Fennelly J. said:

"6. Objection in principle is taken to that because it implies that the court in sentencing Mr Bollard in this case taking (sic) into account earlier criminal activity which had not been the subject of any prosecution and Mr Condon has cited the decision of this court delivered ex tempore on the 28th February last year in the DPP v Philip Delaney in which in a sentencing hearing a garda officer was asked to

grade the drug dealing activity of the accused in that case out of ten and that was considered objectionable and for the same reason the court would accept Mr Condon's submission that it is not appropriate for the learned trial judge to investigate earlier criminal activity of the same type for which he was brought before the court."

60. We are concerned that the sentencing judge in the present case may have been on the wrong side of the dividing line spoken of by McCracken J. in *Gilligan* in accepting Sergeant Shore's opinion that it was likely that it was not the first time that the appellant had offended in this way. While it is true that the appellant was said in the probation report to have admitted to selling cocaine for an 18 month period to support his own drug use, we do not think that it was appropriate for the sentencing judge to have relied on this to support his acceptance of the opinion proffered by Sergeant Shore. While the admission to the probation officer was technically capable of being relied upon as coming within the exception to the hearsay rule (which permits declarations against interest to be admitted notwithstanding that they are hearsay) if the prosecution had sought to adduce it in appropriate circumstances, the Probation Service report did not form part of the prosecution's evidence at sentencing. Rather, it was a report provided to the sentencing court with respect to the appellant's suitability or otherwise for probation supervision. It must be remembered that a sentencing hearing is fundamentally an adversarial process. It is not an inquisitorial process. While voluntary admissions obtained fairly can be introduced in a fair procedure at sentencing and relied upon, they must be put before the court in evidence adduced by the prosecution, or be proffered in court by the accused, or by his lawyers so that they can be taken into consideration. The Probation Service perform a vital service in the criminal justice system and it is desirable that they are seen to be independent and impartial, and not an arm of the prosecution. It is not appropriate that their reports should be utilised, or drawn upon, as a primary source of evidence concerning the nature and extent of the offender's criminality, either in respect of conduct the subject matter of charges before the court, or (and we would say all the more so) in respect of previous offending on the part of the accused of which he/she may not even have been charged, much less tried and found guilty. Rather, it is for the gardaí to gather the necessary evidence as to the circumstances of the crime and concerning the accused's culpability in respect of the matters for which he/she faces sentencing, and it is for the prosecution to adduce evidence in that regard before the sentencing court, bearing in mind the dividing line emphasised in the *Gilligan* jurisprudence.
61. A person facing sentencing should be able to engage with his/her probation officer, and be candid and co-operative with the assessment process, without fear that something said by them during the assessment would be used against them, either at the instigation of the prosecution or the bench, to support the prosecution's case as to the level of their culpability at sentencing. It would be inimical to the policy of encouraging engagement and co-operation with the Probation Service, that offenders would feel inhibited in engaging and co-operating with the said service for fear that they would be prejudiced by doing so. In our view, it was procedurally unfair that the sentencing judge should, on his own initiative, seek evidential support for an inadmissible speculative opinion expressed

by the State's witness in what the appellant had said to his Probation Officer during a probation assessment.

62. All of that having been said, we are in any case independently satisfied that the appeal must be allowed on other grounds. In that regard, we must uphold the complaint concerning the sentencing judge's failure to consider in the first instance, and without reference to the presumptive mandatory minimum, what would have been the proportionate sentence for the appellant's offending conduct, and in the event that the post mitigation sentence he had determined upon was below the presumptive mandatory minimum to only then, and at that point, consider whether there were exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than ten years imprisonment unjust in all the circumstances. To have approached the matter on the basis that "[t]he first issue that I have to determine is whether or not I should depart from the minimum mandatory sentence of 10 years' imprisonment in this case" was erroneous, and contrary to the approach mandated in the jurisprudence of the superior courts to which we have referred to earlier in this judgment.

63. We also consider that the judge was in error in his view that the plea of guilty was "of no exceptional value" by virtue of the appellant having been caught red handed. First, the plea does not have to be of "exceptional value". On the contrary, what the statute says is that, to be allowed to depart from the presumptive minimum, a sentencer must be 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." However, for that purpose the court may 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.

It then goes on to state,

"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."

64. On a proper construction of the statute, the plea does not have to have exceptional value. The existence of a plea, its timing and the circumstances in which it was tendered, are merely matters, amongst others, that the court may take into account in considering whether 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.
65. We also consider that the trial judge's assessment of the weight to be attached to the plea was erroneous. He effectively treated the plea as having no value. Every plea has some value even where an accused has been caught red handed, or where the State's case is otherwise very strong. Even in such a case, if an accused pleaded not guilty there would be court resources taken up for the duration of the trial, there would be expense involved and there would be risk involved. Even strong cases may fail due to unanticipated events such as a key witness becoming suddenly unavailable due to death or illness, or the development of some other problem. Moreover, juries can be unpredictable. There is no such thing as a certainty of conviction. What a plea does, even in a strong case, is that it removes that uncertainty. Accordingly, every plea has a value. That said, it is accepted that some pleas are more valuable than others. We consider, however, that the trial judge erred in failing to take sufficient account of the plea in this case.
66. We also believe that the trial judge's assessment that the appellant's co-operation was not "material" in circumstances where, by virtue of being caught red handed he had no choice but to co-operate, was erroneous and against the weight of the evidence. The State's witness accepted in the course of his evidence that the appellant had been "*fully cooperative with us from the time he got caught*", that he had made admissions, and that "*he helped us as best as he could in regards of his own side*". The courts have long applied a liberal interpretation to the concept of material assistance, and we are satisfied that such evidence as was before the sentencing judge would, and should, have qualified as the provision of material assistance.
67. We are also satisfied that, ignoring the presumptive mandatory minimum sentence, a post mitigation sentence of ten years imprisonment would have been disproportionate in the circumstances of this case, and out of kilter with sentences that are routinely and typically imposed for offending involving gravity similar to that in this case. The cases surveyed in the *Sarsfield* decision provide support for our view in that regard.
68. Finally, we consider that the failure of the sentencing judge to nominate a headline sentence and to indicate the level of discount he would have afforded, if he had not felt constrained to impose the presumptive mandatory minimum sentence, represents a further difficulty for us in upholding this sentence. It is not an error per se to fail to do so, but as we pointed out in *The People (DPP) v. Flynn* [2015] IECA 290 if this Court when asked to review a sentence cannot readily discern the trial judge's rationale for how he or she ended up where they did having regard to accepted principles of sentencing, it may not be possible to uphold the sentence under review even though the trial judge may

have had perfectly good, but unspoken reasons for imposing the sentence in question. We acknowledged in the Flynn case that the mere fact that best practice has not been followed in terms of adequately stating the rationale behind a sentence, this will not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle, the sentence may still be upheld. In this case, however, it is clear to us that the final sentence is not correct, and we have identified a number of apparent errors of principle.

69. In all the circumstances of the case we are satisfied that the appeal must be allowed. Further, we must quash the sentence imposed by the court below, and we must re-sentence the appellant afresh.

Re-sentencing

70. Ignoring for the moment the presumptive mandatory minimum sentence, we consider that the gravity of the appellant's offending would have merited a headline sentence of imprisonment for seven and a half years. We consider that taking into account the early plea of guilty (albeit in circumstances where the evidence against the appellant was strong); the appellant's limited, but none the less material, co-operation; his addiction problem, his work record, the positive testimonials proffered on his behalf, and his family and other personal circumstances, it would be appropriate to discount from the headline sentence by a year. The result is a provisional post-mitigation sentence of imprisonment for six and a half years.
71. At this point we are obliged to consider the presumptive mandatory minimum sentence. It has been urged upon us 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. In that regard, counsel for the appellant points to his client's early plea albeit that he had been caught red handed, and to the fact that he provided some material co-operation. We have considered those circumstances, the circumstances of the crime, the fact that the accused was not previously convicted for a drug trafficking offence, the fact that he appears motivated to turn his life around and also the degree of departure represented by the presumptive minimum from what would otherwise be a proportionate sentence. In the latter regard, we have also considered whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence and have concluded that it would be having regard to his determination to rehabilitate and reform as demonstrated by his engagement thus far with the relevant services. We have concluded following a cumulative consideration of these factors that we can be satisfied that there are indeed exceptional and specific circumstances relating both to the offence, and to the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances. We will not therefore impose the presumptive mandatory minimum sentence and are minded instead to impose the previously determined upon post-mitigation sentence of six and a half years.
72. However, we are asked to also acknowledge in our re-sentencing the fact that the appellant is doing well in prison (in that regard we note the positive Governor's report,

the report from the prison education unit, and a urine analysis report dated 21/06/2022 which confirms that he was drug free at the time of screening); his positive engagement with addiction services, and his positive engagement with the Probation Service. We are prepared to do so and to that end, and in order to incentivise the appellant's continuing rehabilitation, we will suspend a further year of the post-mitigation sentence.

73. The final and ultimate sentence is therefore one of six and a half years' imprisonment, with the final twelve months suspended for twelve months following his release, giving a net sentence to be served of five and a half years' imprisonment (providing the conditions of suspension are met), the sentence to date from the same date as the sentence imposed by the court below. The conditions of the suspension are that:

- he enters into his own bond in the sum of €100 to keep the peace and be of good behaviour;
- that he engages appropriately and cooperates with the probation service upon his release;
- that he undertakes to comply with any probation service direction in relation to drug intervention and urinalysis screening;
- that he cooperates with any referral to other services (e.g. therapeutic) that may be deemed appropriate to his needs by his probation officer;
- that he adheres to all lawful directions by the probation service;
- that he attends all appointments offered by the probation service;
- that he should notify the probation service of any change to his contact details.