THE COURT OF APPEAL

Record Number: 57CJA/23 & 58CJA/23

The President.
McCarthy J.
Kennedy J.

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

JORDAN KEOGH

RESPONDENT

JUDGMENT of the Court delivered on the 14th day of November 2023 by Ms. Justice Isobel Kennedy.

1. This review on grounds of undue leniency relates to sentences imposed in respect of four bills of indictment. The subject matter of the four bills concerned an offence under the Misuse of Drugs Act, offences under the Firearms Act, and offences of money laundering, which resulted in the imposition of an aggregate effective sentence of 6 years' imprisonment.

2. The Director of Public Prosecutions brought 2 applications to review sentence. The details of each Bill and how each one was dealt with are as follows.

3. Bill Number 1723/21 concerns the first offence in time; possession of cannabis contrary to s. 15 of the Misuse of Drugs Act, 1977 where a sentence of 2 years' imprisonment was imposed. Count 1 of Bill Number 14/22 is the second offence in time; money laundering contrary to s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010. A sentence of 3 ½ years' imprisonment was imposed. Bill Number 352/22, the third offence in time, concerns the possession of a firearm and ammunition in suspicious circumstances contrary to s. 27A of the Firearms Act 1964, as amended. A sentence of 3 ½ years was imposed. Count 1 of Bill Number 212/22 is a further money laundering offence in respect of which a sentence of 3 ½ years' imprisonment was imposed.

4. The sentences of 3 ½ years on each money laundering offence were imposed concurrent *inter se* and consecutive to the sentence imposed on Bill No. 1723/21 (the drugs offence). On Bill No. 352/22 (the firearms offence) the sentence of 3 ½ years was imposed consecutive to the sentence of 3 ½ years imposed on the money laundering offences giving rise to a total sentence of 9 years' imprisonment. In consideration of the totality principle, the sentence of 3 ½ years on the firearms offence was reduced to 1 ½ years giving rise to a total sentence of 7 years. Considering the efforts towards rehabilitation, the final 12 months was suspended, leading to an effective sentence of 6 months' incarceration.

Background

Bill No. 1723/21

5. On the evening of the 20th of February 2020, gardaí parked their patrol car behind a Skoda Fabia, the respondent alighted from the rear passenger side of the car and ran with a black refuse bag in his left hand which he then threw under a BMW jeep and continued running down a laneway. On being asked as to the contents of the bag, he replied: "*what bag*?"

6. Gardaí retrieved the black refuse bag from underneath the jeep and found a large vacuum-packed bag of green material, containing 886 grammes of cannabis with a street value of approximately €17,700.

7. In interview, the respondent explained that he had run from gardaí because he had €500 on his person, and he was concerned that gardaí might try and seize that from him. He denied throwing the drugs under the vehicle but entered a guilty plea on the first occasion before the court.

Bill No. 14/22

8. Gardaí were in receipt of information which led them to suspect that the respondent and his father would be involved in the collection of a considerable sum of cash in the Sligo area using a particular vehicle.

9. An operation was mounted and at approximately 7:35am on the 5th of November 2020, gardaí stopped the vehicle on the M4 motorway in Naas in County Kildare. On searching the vehicle, cash of approximately €123,000, predominately in bundles of €10,000 was found under the front passenger seat occupied by the respondent. The vehicle was driven by his father.

10. On approaching the vehicle, the respondent was using a phone. In fact, three mobile phones were found in the vehicle, one being an encrypted device. The software on this device enabled the device to be used without the SIM card being traceable. The device also featured a panic wipe function which allows the user to wipe the device using a PIN code.

11. Both the respondent and his father, his co-accused, were said to be cooperative and made full admissions during interview. The respondent explained that he was told that if he collected the money his debt would be cleared. He said he was paying off a debt of €5,000 at this point in time.

12. The respondent indicated that he had received cannabis for the purpose of selling it, but consumed some himself and then swapped it for cocaine which he also consumed. He acquired a debt as a consequence.

13. Subsequently, a house was searched, and two Rolex watches were found; one genuine and one fake. Both belonging to the respondent according to the gardaí.

14. The respondent was charged on the 6th of November 2020 and released on bail.

Bill No. 352/22

15. On the 16th of April 2021, gardaí acting on foot of information regarding the movement of a firearm by the respondent and his father put surveillance in place relating to a farmhouse and cottage in the Newcastle area of County Dublin.

16. On the 17th of April, a black Land Cruiser was observed by gardaí leaving a house in the Clondalkin area. The respondent was in the front passenger seat. The vehicle travelled to the farmhouse in Newcastle that had been identified the previous day, drove to the rear of the premises and drove back out of the yard. The vehicle continued in the direction from which it had come, was stopped by gardaí and searched.

17. A compartment was located underneath a carpet in the rear portion of the vehicle and a firearm and ammunition were found there inside a green first aid box. Upon examination, the firearm was found to be a .45 ACP calibre Les Baer custom 1911 semi-automatic pistol. The ammunition comprised two magazines of seven rounds of .45 ACP calibre ammunition, suitable for use in such a weapon.

18. The respondent and his co-accused were arrested and detained. In interview, the respondent indicated that he was asked to collect the firearm and ammunition by the persons to whom he was in debt. He expressed concern as to what might happen to him should he not do what he was asked to do. He indicated that he had moved money, (which related to the €123,000) and had been caught and was told that the people to whom he owed money sought its return and that he could be killed, or petrol bombed if he did not do what was asked of him.

19. The respondent confirmed that he knew what he had collected and transported was a gun but indicated that he was not sure what type of gun it was as he did not look at it, but as far as he knew it was a handgun.

Bill No. 212/22

20. On this occasion, gardaí were again in receipt of confidential information which directed them towards the respondent and a silver Passat of a particular registration. The information was received that the vehicle would be travelling from Athlone to Dublin.

21. On the 14th of September 2021, the vehicle was stopped at junction 4 of the N4 in Dublin. The respondent was sitting in the passenger seat. A search of the vehicle uncovered €49,950 cash concealed within the engine area of the vehicle in front of the battery. The respondent's person was also searched and a sum of €1,000 in €50 notes was recovered.

22. As gardaí approached the vehicle, they observed the respondent rapidly typing into the keypad of a phone which was in his hands. They were in a position to see the message "*sim card locked*" appear on the screen after he had typed in this fashion. It was said that this phone was a modern Apple iPhone. Possession of this device was the subject of another count on this bill number which was taken into consideration: s. 183 of the Criminal Justice Act, 2006, possession of an article in connection with certain offences.

23. The respondent was arrested and made full admissions in interview. He explained that he had been forced to conduct this activity because he had been caught with drugs and firearms and had a debt. He indicated that he told the person who was driving the vehicle that he was buying a new car and needed a lift.

Personal Circumstances

24. The respondent was 26 years of age at the time of the hearing of evidence by the sentencing court. He has two young sons and a long-term partner who wrote to the sentencing court detailing the impact of his incarceration on her and their young family as well as the attacks suffered by him in prison.

25. The respondent has 52 previous convictions: 51 road traffic offences and 1 s. 13 conviction for failing to appear which were all dealt with in the District Court.

26. A psychological assessment of the respondent was completed by a Dr O'Leary who stated that while he does not meet the diagnostic criteria for a mental illness, he should be considered a psychologically vulnerable man.

Sentencing Remarks

27. The sentencing judge took into account as aggravating factors the seriousness of the offending and the fact that offences were committed while the respondent was on bail.

28. In terms of mitigation, the judge took into account the respondent's early pleas of guilty, that his previous offending is unrelated to these types of offences, his cooperation with gardaí, save for in the first bill, his long-term partner and young family and the effect of his offending on them, that he was acting under duress, his educational difficulties as a child and the impact of those difficulties on him as an adult, his addiction to cocaine and the efforts made by him to detox, his work record in custody and enhanced prisoner status, the difficulty his partner has suffered due to his offending, his own difficulties in custody, his psychological vulnerabilities and other findings of the psychologist's report, his genuine remorse, his time spent on remand during Covid-19 and the contents of the Probation Report.

29. In relation to Bill No. 1723/21, the court nominated a headline sentence of 3 ½ years on count 2, the s. 15 offence, reducing this to 2 years in light of the mitigation available.

30. In relation to Bill No. 14/22, the court nominated a pre-mitigation sentence of five years on count 1, money laundering, and reduced this to 3 ½ years in light of the mitigation available. Count 2 was taken into consideration.

31. In relation to Bill No. 352/22, the possession of firearms and possession of ammunition, the court set a headline sentence of seven years' imprisonment which was reduced to 3 ½ years on each count, concurrent *inter se.*

32. In relation to Bill No. 212/22, the court nominated a headline sentence of five years on count 1, money laundering, and reduced this to 3 ½ years in light of the mitigation available. Counts 2 and 3 were taken into consideration.

33. The sentencing judge made the second and fourth bill concurrent to one another and consecutive to the first bill and the third bill consecutive to the second and fourth bill, leading to a total sentence of nine years' imprisonment.

34. The judge then decided to reduce the sentence on the third bill by two years to reflect the principles of proportionality and totality, the sentence on the third bill then became one of 1 ½ years. This led to a total of seven years' imprisonment.

35. The judge then suspended the final 12 months on the third bill for a period of 12 months in order to reflect the need to encourage the respondent's ongoing rehabilitation, leading to an ultimate effective sentence of six years' imprisonment for the entire offending.

Grounds of Application

Application 1

36. *"The learned sentencing judge erred in law and in fact in: -*

-imposing a sentence which was unduly lenient sentence in all the circumstances;

-failing to have appropriate regard to the aggravating factors;

-in particular, and without prejudice, failing to have appropriate regard to the fact that the offence was committed while on bail for other offences;

-failing to have adequate regard to the very serious nature of the offending in question and to the elements of serious organised criminality associated with the convicted person's possession of firearms and ammunition in suspicious circumstances and, in particular, the said possession on behalf of a criminal gang and/or in the context of his conviction for other offending as outlined in other indictments, the sentences for which are also the subject matter of an appeal to this Honourable Court, including possession of drugs, money laundering and the possession of a highly sophisticated encrypted mobile phone;

-failing to have adequate regard or otherwise undermining the intention of the legislature in terms of the presumptive minimum sentence for an offence under section 27A of the 1964 Act by reason inter alia of the excessive mitigation the judge applied to the headline identified;

-Imposing sentences that are unduly lenient individually and cumulatively;

-Without prejudice to the foregoing, the mitigation of the 7-years headline sentence identified by the Judge to a sentence of 1½ years and to then suspend the final 12-months, giving an effective sentence to serve of 6-months to serve, was excessive and the ultimate sentence unduly lenient."

Application 2

37. *"The learned sentencing judge erred in law and in fact in:-*

-imposing a sentence which was both individually and cumulatively unduly lenient in all the circumstances

-failing to have appropriate regard to the aggravating factors in respect of the offences on each of the bill numbers

-in particular, failing to have appropriate regard to the aggravating factor that each of the later offences was committed after having been detected committing the earlier offences and while on bail for some of those offences

-failing to have adequate regard to the very serious nature of the offending in question and to the elements of serious organised criminality associated with the offending including possession of drugs, the secretion of large amounts of cash and the possession of a highly sophisticated encrypted mobile telephone and, on another Bill Number also before the Court and the subject of a separate appeal, possession of firearms and ammunition

-failing to have adequate regard to the efforts of the defendant to destroy evidence contained on phones on two occasions upon his detection

-in imposing a sentence which failed to provide adequate specific or general deterrence, particular to the aggravating factors in this case or otherwise."

Application 1

Submissions of the Applicant on Bill No. 352/22

38. The essence of the Director's application regarding the sentence imposed on Bill No. 352/22 is that an effective sentence of 6 months' imprisonment was imposed for an offence which carries a statutory presumptive minimum of 5 years' imprisonment, in circumstances where the offence was committed while the respondent was on bail.

39. The Director sets out the relevant provisions in full: s. 27A of the Firearms Act, 1964, as amended and s. 11 of the Criminal Justice Act, 1984, which provides for the imposition of consecutive sentences for offences committed while on bail and that:

"the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor."

40. The Director relies on a number of cases from this Court and this Court's predecessor, the Court of Criminal Appeal, which provide guidance on sentencing for s. 27A offending: in *People (DPP) v Barry* [2008] IECCA 98, the Court of Criminal Appeal considered a sentence of 4 years' imprisonment for s. 27A offending to be *"at the very low range of an appropriate sentence*."

41. In *People (DPP) v Clail* [2009] IECCA 13 the Court of Criminal Appeal considered that the appropriate sentencing range pre-mitigation was 7 to 8 years for an accused who pleaded guilty to s. 27A offending where one of the weapons was a non-functioning Glock semi-automatic pistol.

42. *People (DPP) v Walsh* [2009] IECCA 150 concerned the correct application of s. 27A(5). It was held that a sentence of five years' imprisonment for possession of a sawn-off shotgun was *"certainly at the very lowest end of what is appropriate in all the circumstances of this case"* but that there was no error in principle.

43. In *People (DPP) v Creighton* [2010] IECCA 56 there was found to be no error in principle where an effective sentence of two years' imprisonment was imposed for s. 27A offending on a 22-year-old woman with addiction, no previous convictions and who had been persuaded to hold items, drugs, and weapons.

44. In *People (DPP) v Geasley* (Unreported, Court of Criminal Appeal, 10th June 2013), the Court described the possession of a Glock pistol as *"the enormous crime of possessing a lethal weapon"* and increased a 7-year sentence to one of 10 years' imprisonment with 1 year suspended.

45. *People (DPP) v Conroy* [2017] IECA 338 involved an appeal against the severity of a sentence of five years' imprisonment for s. 27A offending to be served consecutive to a sentence the appellant was then serving. This Court did not find any error on the part of the trial judge when he concluded that this was not a case for a departure from the presumptive statutory minimum.

46. The Director provides an analysis of the offending herein in light of the relevant factors identified by the Court of Criminal Appeal in *People (DPP) v Ryan* [2014] IECCA 11.

- *The nature and quantity of the firearm or firearms concerned.*

  It is acknowledged that only one firearm was involved but it is said that it is significant that it was a .45 calibre semi-automatic pistol in good condition accompanied by a magazine and relevant ammunition which was in fair condition.

- *The extent to which any firearm was either actually used or brandished in a way which would have caused people to be concerned that it might be used.*

  It is conceded that this gun was concealed in a secret compartment that had been made in the back of the Land Cruiser.

- *The extent that the offence arose or might be inferred to have arisen out of criminality generally (and if so the seriousness of same) or out of specific and personal circumstances.*

  The Director relies on the fact that the respondent accepted that he was required to collect and deliver the gun on behalf of criminals and that the evidence at the sentencing hearing was that the respondent was involved with an organised crime group, not at the top but not at the bottom either.

- *Any circumstances concerning the culpability of the accused, such as the extent of the involvement of the accused or the extent to which it might be said that the accused was operating under a threat.*

  It is noted that the respondent claimed he was under pressure to carry transport the firearms and ammunition by reason of his drug debt and associated threats.

47. At the sentencing hearing, the Director submitted that the offence lay either at the top end of the middle range of the sentencing spectrum as set out in *Ryan*, being a sentence of 7-10 years or at the bottom end of the top range, being 10-14 years. While the sentencing judge did in fact fix the headline sentence at 7 years, the Director's complaint lies in the fact that she mitigated the sentence down to 3 ½ years and then to 1 ½ years and then suspended the final 12 months giving rise to an effective sentence of 6 months' imprisonment for the s. 27A offending. It is submitted that such a sentence is unduly lenient in the context of the presumptive mandatory minimum 5-year sentence.

48. The Director also highlights the fact that these offences were committed on bail. It is submitted that in *People (DPP) v Alcorn and Graham* [2011] IECCA 8, an undue leniency application was upheld in a serious assault case on the basis that it constituted an error of principle on the part of the sentencing judge *inter alia* to fail to have regard to the fact that the offences were committed on bail. The Probation Report which assesses the respondent at a "*high risk*" of reoffending in the next twelve months is also highlighted.

Submissions of the Respondent on Bill No. 352/22

49. The respondent's position is that the applicant's submissions depend on divorcing the sentence imposed on Bill No. 352/22 from the other consecutive sentences imposed on the same date and divorcing it therefore from the totality of the sentence imposed. It is submitted that this creates a somewhat distorted perspective.

50. The respondent submits that the headline sentence of 7 years' imprisonment nominated for the s. 27A offending on Bill No. 352/22 was appropriate. It is noted that the sentencing judge commented that the headline sentence was set at "*the top end--top of the mid-range*" and that she took into account the maximum sentence of 14 years.

51. The sentencing judge then reduced the sentence to one of 3 years and 6 months, taking into account the mitigation before the court, before applying the principles of proportionality and totality to further reduce the sentence to 1 year and six months. This sentence was suspended by 12 months to encourage the respondent's ongoing efforts at rehabilitation. It is submitted that the reduction of the 7-year headline sentence was driven primarily by the context of the totality of offending as well as the usual appropriate mitigation.

52. It is further submitted that the sentences relating to each bill number, although individual, should be looked at as a whole. It is not accepted that the sentence of 6 months was unduly lenient when viewed in its proper context of an overall effective sentence of 6 years.

53. The respondent relies on *People (DPP) v FE* [2021] 1 IR 217 in relation to imposing concurrent or consecutive sentences as follows:

> *"33. Some jurisdictions have an approach to sentencing which may result in what the Director of Public Prosecutions refers to in submissions as a "crushing sentence". Hence, the final sentence should be appropriate for what the accused is guilty of. That can be achieved by reducing the term that is appropriate to consecutive sentences, thus reflecting the overall gravity in the main crime in a series of offences, or the court should arrive at a main sentence for the worst offence, with others concurrent, which reflects the overall gravity of the events. Hence, this following passage in Emmins (page 148-149) reflects current practice in this jurisdiction:*
>
> *It is well established that sentences must have regard to the total length of the sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour. This effect will not be*

achieved merely by adding the sentences of a multiple vendor together, for this will soon result in a total sentence out of all proportion to the kind of offending which has taken place. This principle, which has its clearest application in relation to custodial sentences has achieved an oblique recognition in the Criminal Justice Act 1991, s. 28(2)(b) which states that nothing shall prevent a court 'in the case of an offender who was convicted of one or more other offences from mitigating his sentence by applying any rule of law as to the totality of sentences'…. If offences are committed on different occasions, or are not part of the 'same transaction', there is no objection to imposing consecutive sentence but this approach should not be regarded as inevitable…. Bearing in mind the totality principle, it may be more convenient for the sentence, particularly when sentencing for a series of similar offences, to pass a proportionate sentence for the most serious offence, coupled with shorter, concurrent terms for the less serious matters. In that way the various terms reflect the relative seriousness of the offences for which they are imposed, but the overall punishment remains in proportion to the overall gravity of the offender's criminal conduct." (emphasis added)

54. The following portion of the judgment in which Charleton J sets out Street CJ's description of the totality principle in *R v MMK* (2006) 164 A Crim R 481 is also relied on:

"The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences." (emphasis added)

55. The following from *FE* is also considered by the respondent to be relevant*:*

"See also, in Canada R v M [1996] 1 SCR 500, paragraph 42 and The People (DPP) v McC[2003] 3 IR 609 at 618. Finally, what should not be lost sight of is that sentencing is about punishing the offender, protecting society and offering the possibility of rehabilitation within the penal system of a violent perpetrator. In prison, offenders have

access to counselling, education, training and exercise. More might be wished for, but rehabilitation is up to the offender, starting with a clear self-analysis. While the courts act for society, and while victims have an expectation of redress, this is not to be equated with engaging in retribution or in exacting revenge; The People (DPP) v MS [2000] 2 IR 592, and the approach of Roach JA in R v Warner [1946] OR 808 at 815. These principles were made clear by the Supreme Court in The People (DPP) v M [1994] 3 IR 306 through Denham J at pp 316-8. She pointed out that the "nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing". This approach she described as "the essence of the discretionary nature of sentencing." (emphasis added)

56. The respondent lists the mitigating factors herein as;

- *the co-operation with Gardaí,*
- *Early guilty plea*
- *The very significant duress under which the Applicant was acting*
- *The social impact of imprisonment on his long-term partner and young family and the effect of the offending on them*
- *the fact that his previous convictions do not relate to the matters before the sentencing court*

57. It is noted that when considering the personal circumstances of the respondent, the court had regard to the undisputed duress that he was under. Garda O'Gara gave evidence in this regard at the sentencing hearing, that the respondent had a drug debt of €5,000 that had grown exponentially to €180,000 when he was arrested for the relevant offence.

58. It is further noted that Garda O'Gara gave evidence during cross-examination that the respondent is "*the sort of person who does what he's told without asking questions*" and that he is somebody who acts impulsively and who "*could do things without thinking through the consequences.*"

59. It is submitted and was submitted at the sentencing hearing that the respondent was on a runaway train in respect of first owing astronomical sums of money and then having to address the debt by committing further offences.

60. It is further submitted that if one were to take away the respondent's issues with drugs there is significant possibility that he could live a pro-social life. The report of Dr O'Leary is relied on in this regard in which she stated that "*in the event that Mr. Keogh can maintain abstinence*

from substances and eliminate all contact with drug users and drug dealers when he is released from prison, he should be considered to pose a Low risk of reoffending."

61. In addition, it is noted that the sentencing court heard that the respondent "*has made efforts to rehabilitate while in custody.*" It is said that it is clear that the sentence imposed was designed to rehabilitate the respondent and reintegrate him back into the community where it is hoped he could eventually live a pro-social life.

Application 2

Submissions of the Applicant on Bill No's 1723/21, 14/22 and 212/22

62. The Director's position is that the respondent was detected committing one serious offence, a drugs offence, carrying a maximum of life in prison and went on to commit further separate serious offences thereafter, some after having been admitted to bail and thus amounting to bail breaches. The Director maintains that the sentences imposed were both individually and cumulatively unduly lenient.

63. The Director acknowledges that the law concerning appeals pursuant to s. 2 of the Criminal Justice Act, 1993 is well-settled; that it is insufficient that this Court merely be of the view that it would have imposed a harsher sentence, it must be shown that the sentence imposed represents a "*substantial departure*" from sentencing norms, that considerable deference will be shown to the decision of the sentencing judge and that the burden of establishing that the sentence imposed was unduly lenient is borne by her as applicant. *People (DPP) v Byrne* [1995] 1 ILRM 279, *People (DPP) v McGinty* [2007] 1 IR 633, *People (DPP) v Redmond* [2001] 3 IR 390 and *People (DPP) v Wall* [2011] IECCA 10 are cited in this regard.

64. In relation to the first offence, the offence contrary to s. 17 of the 1977 Act, it is noted that this offence was serious in and of itself and that the offence carries a maximum of life imprisonment. It is further noted that the value of the drugs in question in fact crossed the threshold to justify a s. 15A charge which would have resulted in a presumptive mandatory minimum sentence. It is said that the respondent was non-cooperative in relation to the first offence bar his entry of a plea.

65. It is submitted that the sentence of two years' imprisonment for this offence was, in itself, lenient and when viewed against the background of the subsequent offending and the cumulative sentence ultimately imposed, it was cumulatively unduly lenient.

66. It is complained that the fact that notwithstanding detection by the gardaí for the first, serious offence, the respondent went on to commit further very serious offences was a clear aggravating factor not reflected in the ultimate sentence imposed.

67. Attention is again drawn to s. 11 of the 1984 Act. It is submitted that when an accused person receives bail for serious offences, if he abuses that trust by going on to commit further offences, there should be serious consequences in terms of sentence. Reference is made to the requirement that both personal and general deterrence to be built into the sentence imposed for such offending.

68. It is emphasised that these offences were associated with the activities of organised crime gangs, that there was a degree of sophistication inherent in their commission involving as they did secret compartments and highly encrypted phones and that these offences were of benefit to organised crime gangs.

69. It is submitted that it is inconceivable that any one of these individual offences could have attracted a headline sentence of six years let alone, in their totality, only attract an effective sentence of six years.

70. In relation to the imposition of concurrent sentence, the Director says that the respondent was effectively given a "*free ride*" for the second money laundering case since he did not receive any extra time for it and submits that the overall leniency was further increased by the imposition of a mere six-month effective sentence for the firearms case. It is commented that the respondent received only an extra 6 months effective for both the second money laundering case and the firearms case together.

71. Reliance is placed on the decision of this Court in *People (DPP) v Sinnott, Long and Joyce* [2021] IECA 42 which sets out some of the principles by which the seriousness of money laundering cases are to be assessed:

> *"Having regard to the above authorities, it is clear that among the key factors which the sentencing court must consider when identifying a "headline" sentence are (a) the amount of money involved, (b) the role played by the accused in relation to the money, and (c) whether the conduct of the accused was intended to assist a criminal organisation and if so, the nature and scale of that organisation. Frequently, the first two matters are linked insofar as the more central the role of a person within a criminal organisation (if the evidence suggests a criminal organisation was involved), the more likely it is that larger sums of money will be entrusted to his or her safekeeping either for storage or for delivery*

to another. Conversely, the more peripheral the involvement of the accused with the organisation, the less likely it is that he or she will be entrusted with large sums of money."

72. Further reliance is placed on the *People (DPP) v Carew* [2019] IECA 77 case which was reviewed by this Court in *Sinnott.* In *Carew*, this Court upheld an 8-year sentence imposed by the sentencing judge as a global sentence on two money laundering offences which were committed during the suspensory period of a sentence imposed on another money laundering offence. The Court commented as follows that by:

"facilitating the commission of further criminal offences, money laundering is an essential component of a criminal organisation's capacity to perpetuate the carrying out of serious criminal activities. The potential public harm caused by money laundering is heightened in the case of serious organised crime such as the drugs trade. Sight must not be lost of the fact that for money laundering to take place there must be a predicate offence or offences, since the money being laundered is the proceeds of criminal conduct."

73. It is submitted that viewed against the backdrop of *Sinnott* and *Carew* the sentence imposed in the instant case is clearly unduly lenient.

Submissions of the Respondent on Bill No's 1723/21, 14/22 and 212/22

74. It is the respondent's position that the ultimate sentence of 7 years' imprisonment with the final 12 months suspended reflects the gravity of the offending while at the same time having regard to the particular personal circumstances of the respondent. Reliance is placed on the role of duress in the offending, that the respondent was acting at the behest of others and that from the second offence onwards each arrest and seizure by the gardaí increased the vulnerability of the respondent and the pressure on him.

75. The respondent also acknowledges the principles applicable in an application for a review on the basis of undue leniency and highlights the following from the decision of *People (DPP) v Stronge* [2011] IECCA 79:

"…the following principles can be said to apply in an application for review under s.2 of the 1993 Act. These are: -

[…]

(iv) The 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. [...]***
>
> *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****."* (emphasis added)

76. It is submitted that the sentencing judge articulated in unequivocal terms the seriousness with which the court viewed each bill number by confirming the headline sentence and the range in which each offence fell.

77. While the applicant complains that the sentencing court did not give sufficient weight to the respondent's commission of further offences while on bail, the respondent points out that the court clearly sets this out as an aggravating factor in advance of enumerating the sentences imposed.

78. In relation to general deterrence, the respondent relies on Prof. O'Malley's text *Sentencing Law and Practice* as follows:

> *"In a system which purports to treat offenders as autonomous beings entitled to respect for their intrinsic worth and dignity, a purely instrumental approach to punishment is hard to defend. This does not necessarily entail the abandonment of all deterrent or other utilitarian objectives as long as the penalty remains proportionate to the offence."*

79. It is submitted that no error of principle arises in respect of the headline sentence, or the sentences imposed after credit for mitigation in respect of the money laundering and drugs offences. Attention is drawn to *People (DPP) v Bale and Fowler* [2016] IECA 209 wherein it was stated:

> *"in applying these principles, we note from the sentencing remarks of the trial judge that he was fully aware of the seriousness of the offences he was dealing with, and equally aware of the jurisprudence in this area."*

80. The respondent draws attention to the mitigating factors in the instant case including the drug debt amassed, the effect of the threats and duress on the respondent and members of his family and the progress made by him in custody. It is submitted that the sentencing judge had regard to all testimonials, reports and mitigation when deciding the overall sentence to be imposed.

81. It is said that it was accepted during the sentencing court's hearing of the evidence that the exponential growth of the respondent's drug debt *"caused him and his family incredible torment and hardship by way of the threats"* There was evidence before the sentencing court of the

respondent's car being burnt out and his partner's car being burnt out. It was Garda O'Neill's belief that the respondent was "*on the lower rung of the scale when it comes to -- he was just receiving instructions and the money wasn't his and he was going to pay off a debt*."

82. It is submitted that the latitude afforded to the respondent by the sentencing judge was because of his personal circumstances, in particular, the duress he and his family were under. Reliance in this regard is placed on *People (DPP) v McCormack* [2000] 4 IR 356:

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

83. It is noted that there was evidence before the sentencing court that if the respondent was to dissociate from bad company and conquer his drug use, he could lead a different life. Further, that the prosecuting garda did not dispute that custody was difficult for the respondent with there being attacks on his person.

Discussion and Decision

84. The principles governing reviews of sentence are well-established. The onus rests with the Director to demonstrate undue leniency to the extent that the disparity between the sentence actually imposed and the sentence which ought to have been imposed amounts to an error in principle before this Court will intervene. In effect, the sentence imposed must be a substantial departure from the sentence which ought to have been imposed. It is not simply a situation of establishing that a sentence is lenient, it must be shown to be unduly lenient. Applying those principles to the present review, we must not only consider the sentence imposed on each separate bill, but also consider the overall or ultimate sentence imposed bearing in mind the element of mandatory consecutive sentencing and the principles of totality and proportionality.

85. In the context of consecutive sentencing, it is imperative to bear in mind that the sentences imposed must reflect the overall seriousness of the offending conduct.

86. Firstly, we observe that the sentencing judge took conspicuous care in her approach to sentence on each of the four bills of indictment. She commenced with identifying the root cause giving rise to the offending conduct before her, being the respondent's voluntary engagement with

the drugs trade for gain, but where he then consumed those substances himself and ran up a drug debt. That was the starting point.

87. Thereafter, the respondent contends that he was under pressure to carry out the other offences, losing the controlled substances for which he was initially arrested and then the sums of money which he was moving. It appears from the transcript that the gardaí did not dispute that he and his family were under some threat.

88. These are factors which the sentencing judge clearly bore in mind in nominating the headline sentence for each offence.

89. The sentencing judge nominated a headline sentence of 3 ½ years on the drugs offence which was the first offence in time. The events giving rise to this offence having occurred on the 20th February 2020. While the ultimate sentence imposed of two years could be said to be lenient, it is not a substantial departure from the appropriate sentence in the circumstances of the case. The respondent was charged with this offence on the 16th June 2021.

90. The next matter addressed was that of the money laundering offence contrary to s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010, where the maximum penalty is that of 14 years' imprisonment. The sum of money found was approximately €123,000. The headline nominated was that of 5 years' imprisonment with a reduction to 3 ½ years for mitigation. The count relating to the possession of an encrypted mobile device was taken into consideration. The respondent was charged with these offences on the 6th November 2020. There is no doubt that these were serious offences. Count 2 was taken into consideration and the possession of a specialised device aggravated the money laundering offence. The value of the money being moved by the respondent was significant. The offences were aggravated by the fact that it was committed after the respondent had been apprehended for a serious drugs offence.

91. It is clear that the sentencing judge took a very measured and humane approach to the respondent's offending. There is no doubt that these are serious offences and they were recognised as such by the sentencing judge. She acknowledged that the respondent was in effect the author of his own misfortune – obtaining drugs to sell for gain and consuming them himself, leading to the accrual of a debt and the loss of substantial illicit funds when stopped by the gardaí, thus leading to further offending on the respondent's contention.

92. However, the question of general deterrence must arise in these kinds of circumstances and the movement of monies of the sums involved here requires a greater sentence than that imposed by the judge with the consequential impact of a greater ultimate sentence.

93. Moving then to the next offending in time, that of the firearms offences. Again, the serious nature of these offences is set out above. These offences were committed on bail, thus aggravating the offending. Moreover, it is germane that these offences were committed following the commission of prior serious offences and were committed in the context of organised criminal activity. There was a planning element to the offending with the concealment of the weapon and the ammunition. The statute expressly recognises the serious nature of firearms offences in terms of the presumptive minimum sentence for an offence contrary to s. 27A of the 1964 Act.

94. We are not persuaded that the judge erred in the nomination of 7 years' imprisonment by way of a headline sentence for these offences bearing in mind the maximum penalty is one of 14 years. However, we do believe that she erred in reducing those sentences to 3 ½ years' imprisonment in light of the mitigation present, and further reducing by 2 years to give effect to the principle of totality; giving a sentence of 1 ½ years. The final year of the overall sentence imposed was suspended, thus leaving a sentence of 6 months effectively for these serious firearms offences. This constitutes a substantial departure from the norm.

95. Finally, the last offending in time was another money laundering offence, on this occasion the sum of money being moved was that of approximately €49,000. Again, this offence was committed while on bail and following the commission of serious offences for which the respondent had been apprehended. On one hand, the repeated commission of these kinds of offences points to a type of desperation on the part of the respondent and lends weight to the contention of fear and threats. On the other hand, there is the issue of general deterrence and the serious activity in which the respondent was involved. On this offence the judge nominated a headline sentence of 5 years which she then reduced to that of 3 ½ years.

96. We have set out the manner in which the judge addressed the imposition of consecutive sentences, resulting in an overall sentence of 7 years' imprisonment with the final year suspended to incentivise rehabilitation.

Decision

97. If the only matter before this Court was the drugs offence, then while that sentence of 2 years is a lenient one, we would not be justified in intervening as it is not unduly lenient. However, the situation became much more serious in that the respondent continued to offend and to do so in a significant way, underpinned by organised criminal activity. The ultimate sentence on the first money laundering offence is again a lenient one even if taken as a standalone offence, however, again the argument could be advanced that it is not unduly lenient. The same may be said for the ultimate

sentence imposed on the second money laundering offence. While that offence involved a lesser sum of money, the fact that it was a second money laundering offence and was committed on bail, means that it merited a sentence at least equivalent to that imposed on the first money laundering offence and indeed the judge imposed the same sentence on this offence as for the first money laundering offence.

98. However, as we have already stated, the sentence imposed on the firearms offences is unduly lenient for the reasons given above. The adjustments for mitigation and to give effect to the principle of totality were in our view too generous in the circumstances of the overall offending and we are persuaded that the overall sentence imposed does not reflect the seriousness of the totality of the offending. Accordingly, we are persuaded that the overall sentence imposed is unduly lenient and so, we will quash the sentence imposed and proceed to re-sentence the respondent *de novo.*

Re-Sentence

99. We have reviewed the evidence adduced in the court below and the testimonials and psychological report furnished to us. The respondent has completed numerous courses whilst incarcerated and has produced certificates in that regard. We also note his family situation.

100. There is no doubt that there are significant mitigating factors present. His pleas of guilty, his co-operation with the gardaí, his family support, his educational difficulties and his efforts to rehabilitate, which are ongoing. We also recognise that he has had difficulties whilst incarcerated, that he had psychological vulnerabilities and has expressed remorse.

101. In the circumstances we will not intervene in the sentence imposed for the offence contrary to s. 15 of the Misuse of Drugs Act, 1977, that being a sentence of 2 years' imprisonment.

102. On the second bill number, 14/22, being the money laundering offence, we will substitute a headline sentence of 6 years' imprisonment, we will reduce that to one of 4 years' imprisonment and will take into consideration count 2 on that indictment. That sentence is concurrent to the 2-year sentence on the first bill.

103. On the third bill, number 352/2022, the firearms offences, we agree with the judge's nomination of a 7 year notional sentence on each count. However, here we depart from the judge's reduction for mitigation to 3 ½ years and in lieu we will reduce to a sentence of 5 years' imprisonment. We do not see a basis to depart from the presumptive minimum of 5 years notwithstanding the respondent's plea of guilty and co-operation. We do not believe that this is unjust in the circumstances.

104. On the final bill number, 212/2022, we impose a headline sentence of 6 years on count 1 and will reduce that to a sentence of 4 years' imprisonment and will take into consideration counts 2 and 3 on that bill of indictment.

105. The firearms offences were committed on bail and mandate consecutive sentences, therefore the sentences of 5 years' imprisonment imposed on each count on that bill are imposed concurrent *inter se* but consecutive to the sentence of 4 years imposed on bill number 14/22, amounting to 9 years' imprisonment.

106. The offences on bill number 212/22 were also committed on bail, the sentence on count 1 of 4 years is therefore consecutive to the sentence imposed on the firearms offence, amounting to a total sentence of 13 years.

107. We now consider the issue of totality, the objective of which is to ensure proportionality and to reflect the overall seriousness of the offending behaviour. In consequence, we will reduce the sentence of 13 years to one of 11 years' imprisonment. We give effect to that by reducing the sentence on each of the money laundering offences to 3 years, being less than in the court below on those counts, but we are doing so in light of the overall sentence to reflect the gravity of the overall offending.

108. We will suspend the final 2 years of the sentence imposed on the final bill (no. 212/22) on the same terms as in the court below, but for a period of 2 years from his release.