Research for the Department of Justice on the criteria applied by the Courts in sentencing under s. 15A of the Misuse of Drugs Act 1977 (as amended)

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I am asked to research the principles applied by the courts in sentencing under s. 15A of the Misuse of Drugs Act 1977 (as inserted by ss. 4 & 5 of the Criminal Justice Act 1999) with particular reference to the criteria used by the courts in determining whether or not to impose the mandatory minimum sentence of 10 years. The research is based on 55 sentencing transcripts taken from Circuit Court cases. I have also referred where appropriate to some decisions of the Court of Criminal Appeal, particularly where these decisions have arisen on appeals from cases I was supplied with. The section was brought into force on the 26th of May, 1999. The transcripts supplied cover the period from November 1999 to May 2001.

The Statutory provisions

S. 4 & 5 of the Criminal Justice Act 1999 provide, *inter alia*, as follows:

> 4.— The Act of 1977 is hereby amended by the insertion after section 15 of the following section:
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> 15A.—(1) A person shall be guilty of an offence under this section where—
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> > (a) the person has in his possession, whether lawfully or not, one or more controlled drugs for the purpose of selling or otherwise supplying the drug or drugs to another in contravention of regulations under section 5 of this Act, and
> >
> > (b) at any time while the drug or drugs are in the person's possession the market value of the controlled drug or the aggregate of the market values of the controlled drugs, as the case may be, amounts to £10,000 or more.
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> 5.— Section 27 of the Act of 1977 is hereby amended by the insertion after subsection (3) of the following subsections:
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> "(3A) Every person guilty of an offence under section 15A shall be liable, on conviction on indictment—
> > (a) to imprisonment for life or such shorter period as the court may, subject to subsections (3B) and (3C) of this section, determine, and
> > (b) at the court's discretion, to a fine of such amount as the court considers appropriate.
>
> (3B) Where a person (other than a child or young person) is convicted of an offence under section 15A, the court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than 10 years imprisonment.

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

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

(i) the stage at which he indicated the intention to plead guilty, and

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

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

(3G) In imposing a sentence on a person convicted of an offence under section 15A of this Act, a court—

(a) may inquire whether at the time of commission of the offence the person was addicted to one or more controlled drugs, and

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

General overview

By way of preliminary observation it should be noted that out of a total of 55 cases the accused persons pleaded guilty in all but one case (*DPP v. T.D.* being the exception) and were therefore in a position to invoke subsection 3(C)(a) (i) and (ii).

The mandatory minimum sentence was imposed in 3 cases, namely, *DPP v K.B.* (otherwise M.E.) where a 10 year sentence was imposed by Judge AG Murphy, *DPP v J.B.* where an 11 year sentence was imposed by Judge AG Murphy, and *DPP v C.* where Judge AG Murphy imposed a 12 year sentence. In one of those cases, *DPP v K.B.*, the 10 year sentence was reduced on appeal by the Court of Criminal Appeal to one of 5 years, four years to be suspended, with liberty to either side to apply to the court in the event of deportation (CCA, 14/1/02, Denham, Johnson and O'Sullivan JJ). In another case, *DPP v C.* the trial judge's sentence was upheld by the Court of Criminal Appeal (CCA, 27/5/02, Hardiman, O'Sullivan and Finlay Geoghegan JJ).

Factors applied by courts in deciding not to apply the mandatory minimum sentence

Early plea of guilty

By far and away the biggest factor applied by the courts in determining whether or not to disapply the mandatory minimum sentence is that set out in the terms of subsection 3(C) itself, namely, "whether that person pleaded guilty to the offence and, if so, (i) the stage at which he indicated the intention to plead guilty, and (ii) the circumstances

in which the indication was given." In all bar one of the 55 cases the accused pleaded guilty and this was taken into account by the courts in determining whether there were exceptional circumstances which would render a 10 year sentence unjust. The weight to be given to this factor will vary according to when the plea is indicated, but in virtually all of the cases it has been regarded as a substantial mitigating factor by the courts.

Thus in *DPP v D.* where the accused was found with Cannabis resin to the value of approximately £130,000, Judge O'Leary indicated that he while he was initially of the view that the offence warranted a sentence of 15 years imprisonment he would apply a reduction of about six years in view of the early plea of guilty. Taking the other mitigating factors into account he sentenced the accused to a total of 6 years imprisonment. This approach was upheld by the Court of Criminal Appeal (CCA, 21/12/01, Keane CJ, O'Higgins and Butler JJ).

In the case of *DPP v K.B.* the trial judge (AG Murphy) imposed the 10 year minimum sentence notwithstanding an early plea of guilty by the accused. On appeal however this was varied by the Court of Criminal Appeal (CCA, 14/1/02, Denham, Johnson and O'Sullivan JJ) which found that "whilst it is a serious offence it is not at the top of the spectrum of this type of offence. Consequently, in general it would attract a sentence of ten years. Having determined the sentence it is then necessary for the court to consider the particular circumstances of the crime and offender in the light of the law in general and the specific legislation set out above. First, there is a deduction of a third for the plea of guilty which plea was made at as early a stage as possible… The court is satisfied that all the circumstances of this case relating to the applicant make a sentence of not less than ten years unjust in all the circumstances. The court has already taken into account of the early plea of guilty which was made as early as possible and consistently and in ease of the process."

The early plea of guilty was supported in a number of cases by the accused electing to waive preliminary examination with a view to expediting matters. This was also a factor taken into account by the courts, although in light of the provisions of the Criminal Justice Act 1999 (abolishing preliminary examinations) is unlikely to arise very often in future cases. The courts have also had regard to the circumstances in which the plea was furnished, for example, where the accused was perceived to have had little option because he was caught "red handed" and used this as a factor in determining what weight to give to the plea. In *DPP v. C.* the Court of Criminal Appeal referred to the fact that the applicant had been caught red handed and commented on his plea of guilty as follows "We feel that the plea of guilty certainly is a matter to be taken into account but it was a plea of guilty where the Applicant's options were very limited." The court refused to set aside a sentence of 12 years imprisonment imposed by the trial judge. Equally regard has been had to the time of the plea. In a number of the cases a plea was indicated at the earliest possible opportunity. In some however it was furnished at a later date. In *DPP v H.* (accused arrested with Ecstasy tablets to the value of £250,000) Judge Groarke noted that the accused came before the court on a plea of guilty, "albeit that plea is offered at a very late stage, following the swearing in of a jury. It is a matter I am entitled to, and must have regard to… an accused is entitled to be given some benefit, some credit for a plea of guilty – the measure of that benefit is proportionate in part at least to the timing of the plea." A term of 7 years imprisonment was ultimately imposed by the

court. Nevertheless in all cases the courts have given substantial weight to a plea of guilty in accordance with the terms of subsection 3(C).

In the one case where the accused did not plead guilty, *DPP v T.D.*, the trial judge (Judge McCartan) had regard to other factors which entitled him to disapply the statutory minimum sentence (the fact he had no previous convictions and was little more than a courier in the context of the offence).

Material Assistance

A second factor (also derived from the terms of subsection 3(C)) which has been particularly prominent in the cases is whether and to what extent the accused "materially assisted in the investigation of the offence."

Assistance or co-operation furnished to the Gardai in the investigation of the offence has been regarded as a substantial mitigating factor by the courts. This co-operation can take a number of forms. In a great number of the cases the accused persons have made statements of admission in custody in relation to the drugs. In a number of cases the co-operation has gone further and has extended to the providing of intelligence information to the gardai. This has involved providing gardai with valuable information in relation to the source of the drugs, information (names, addresses etc) in relation to Irish and International contacts, information in relation to how drugs were being smuggled in and so forth. In a few cases it has even extended to the accused persons agreeing to participate in controlled deliveries of the drugs in question with a view to tracing contacts in Dublin. Indeed in all but a few cases the accused provided some form of assistance to the gardai and even in cases where the accused provided little by way of co-operation in relation to his or her contacts or associates the court appeared to accept that the accused had a genuine fear for his own safety. (Moreover the accused persons concerned often assisted to some degree by making cautioned statements of admission)

Thus in *DPP v. A.* (Judge Yvonne Murphy) the court heard, in Chambers, that the accused person in addition to making an immediate statement of admission and pleading at the earliest opportunity, had agreed to participate in a controlled delivery of the drugs (monitored by the Gardai) with a view to detecting her contact in Dublin. While the efforts came to nothing in the circumstances (through no fault of the accused) the court had regard to it (along with her previous good record, early plea of guilty and the fact that it was a 'one off' offence) in imposing a sentence of 4 years imprisonment, 3 and a half years suspended, on her undertaking to leave the jurisdiction.

The failure to provide material assistance to gardai has not of itself prevented the court from disapplying the mandatory minimum sentence. In *DPP v M.P.* the court accepted that the accused had provided no material assistance to the gardai in relation to the investigation generally but nevertheless had regard to his plea of guilty, to the fact that he had made a number of admissions, and to the fact that his refusal to provide information as to his associates was based on fear of his life being under threat if he co-operated. A seven year sentence was imposed. A similar approach was applied by Judge McCartan in *DPP v B.* where again the accused pleaded guilty and voluntarily made incriminating statements but nevertheless refused to identify

associates because of fear for his own and his family's safety from the members of a criminal gang. (He had been seriously assaulted by an associate and his father's car had been found burn out). Judge McCartan took this into account and the fact that he was an addict himself in imposing a sentence of 4 years imprisonment.

In summary therefore material assistance to the gardai, either in the form of making prompt admissions in relation to the offence, or by supplying information in relation to contacts and/or the source of the drugs or other intelligence information is an important factor taken into account in determining whether to disapply the statutory minimum sentence. A failure to provide such information, particularly where the accused has pleaded guilty, may not be fatal however where the court is satisfied that this is based on fear for his safety. Conversely the fact that the accused co-operated and indeed pleaded guilty may not of itself result in the court disapplying the statutory minimum sentence. In *DPP v C.* (Cannabis, street value £80,000) the accused pleaded guilty, had made a statement of admission when arrested, waived preliminary examination and had co-operated with the gardai by identifying associates and sources of supply. He was also a foreign national. Nevertheless because he was engaged in the importation and supply of drugs as a business and was a 'main mover' Judge AG Murphy imposed a sentence of 12 years. (Judge Murphy indicated that he initially considered a sentence of 16-18 years to be appropriate but reduced it to 12 in consideration of the various factors). This was upheld on appeal by the Court of Criminal Appeal which noted in relation to the accused that "We feel that the plea of guilty certainly is a matter to be taken into account but it was a plea of guilty where the Applicant's options were very limited. The co-operation he gave was given in the same context."

Foreign National

A factor which has been taken into account by the courts in a number of cases is that the accused was a foreign national and as such a term of imprisonment would bear more heavily on him than on an Irish national. In adopting this approach the courts were following a number of decisions of the Court of Criminal Appeal, namely the cases of *People (DPP) v. W.B.* (CCA, 21/12/1994, O'Flaherty, Keane and Carney JJ), and *People (DPP) v. A.C.* (CCA, 17/11/1997, Barron, Laffoy and O'Donovan JJ). The rationale behind this approach is that a foreign national (1) is separated from family and friends and would not have the benefit of visits and other contacts that an Irish prisoner might have (2) may have socialisation difficulties where for example he cannot speak English which might prevent him communicating with other prisoners (3) may encounter various cultural difficulties in custody (for example difficulties with the food, religious practices, racism and so on).

A good example of the application of this principle occurred in *DPP v. I.* where the accused was found with cocaine with a street value of £1.2 million to £2.5 million. Judge Haugh referred to the difficulties the accused would experience in serving her sentence given that that she was a Brazilian national, serving a sentence far away on the other side of the world from her own people, having no useful knowledge of the English language, which would cause her huge difficulty in communicating with and socialising with other people during her confinement, so that her spell in custody would be much harder than for an Irish prisoner. He imposed a sentence of 5 years imprisonment.

The importance of this factor should not be overemphasised however and will vary according to the facts of the particular case. Thus in *DPP v. C.* (referred to above) the defence, on appeal to the Court of Criminal Appeal, relied on the fact that the accused was a Nigerian national who allegedly had difficulty in custody including *inter alia* difficulty with the food. The Court of Criminal Appeal (*per* Hardiman J) commented as follows:-

> "Of the points urged by [the accused] the one which has the most substance to it is that relating to whether the foreign status of the Applicant and the hardships which either actually exist or might be presumed to exist on that basis, have been adequately taken into account. The cases … relied on were of course cases which arose before the change in the law instituted by the Oireachtas in 1999. We certainly consider that all provable factors in relation to an accused person are matters which in principle may be taken into account. The fact that the Applicant is a foreign national is certainly a factor to be taken into account but that in itself is not a very informative statement because the weight to be given to it may vary enormously. For example the case of the Estonians mentioned by the learned trial judge who couldn't speak English and were deprived of communicating with anybody together with such other hardships as they might undergo was certainly a case where very significant weight was properly given to it. One of these cases cited … was that of Clarke who, the evidence was, had been subjected to racist attacks in prison and in order to protect him from further such attacks, had to be held under a harsher regime, presumably in some form of solitary confinement, and that quite clearly was a factor to be taken into account.
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> In this particular case the Applicant though a foreign national is, on the evidence of the doctor who was called, articulate, well able to communicate and reasonably well educated. It is a substantial fact that he deliberately came to this country, lived here for some time and on his own statement, took to dealing in drugs only after he started to live here. The alleged consequences really of his foreign status are first of all, that the food is difficult for him in the view of his doctor and in the view of the learned trial judge and secondly, he is deprived of easy contact with his family.
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> In the circumstances of this case, and … every case must be decided on it's own circumstances, we cannot consider that these matters render the sentence wrong in principle. Even if it would have been more correct specifically to mention the difficulty in visitation as well as the food difficulty, we do not consider that the omission do so invalidates the sentence in principle since the learned trial judge took into account his foreign status generally. Indeed the reference to difficulty in visitation was itself speculation on the part of his doctor and was not further borne out in evidence. This was a very serious offence, cold bloodedly engaged in for profit which he had been making for some time by a gentleman who deliberately and undecidedly became involved in the drugs trade. He took its benefits and now falls to suffer its drawbacks."

In the light of this statement of principle the weight to given to an accused's foreign status will have to be assessed in each case on its own merits. Nevertheless it is a

factor which the court is entitled to take into account in principle in determining whether to disapply the statutory minimum.

Other factors leading the courts to impose a sentence of less than 10 years

The courts have also considered a number of other factors in determining whether to disapply the statutory minimum sentence. The considerations taken into account are obviously quite wide ranging and vary according to the circumstances of the particular case, but have included: that the accused had a previous good record with no convictions; that he was a mere 'bag man' or 'mule' getting relatively little money for it; that he was under duress or in fear of his safety; that he was a vulnerable person who was 'down and out' when recruited; that it was a 'one off' run; that the accused was unlikely to re-offend; that the accused had committed the offence to pay off substantial business debts; the accused owed debts to the gang for whom he was carrying the drugs; that his role was limited; the health/age/family status of the accused; that he was an addict himself[1].

Because it has often been the cumulative effect of a number of these factors arising in the same case which has persuaded the court to disapply the mandatory minimum sentence, their operation can best be seen by examining some of the decided cases.

In *DPP v J.R.* the accused was arrested importing cocaine with a street value of £70,000. There was evidence before the court that the accused had been a hard working individual with no previous convictions who owned and ran his own bread company. He owed substantial business debts of about £4000 which resulted when a customer of his bread company had failed leaving him with substantial debts to his supplier. He had been approached while on holiday in Spain to deliver drugs to the airport. He accepted the consignment with a view to raising cash to pay off his debts. He was to receive £2000 for the delivery. He was 27 and the father of a small child. Judge Dunne took into account plea of guilty entered into at an early stage, inculpatory statement made by accused when arrested and a general co-operative attitude, the fact he had no previous convictions, and the personal circumstances of the accused in imposing a sentence of six years and six months.

In *DPP v H.* the accused was caught with ecstasy tablets to the value of €250,000. The accused had pleaded guilty and made statements of admission in relation to the offence. There was evidence before the court that the accused had borrowed £400 (to buy presents for his children) from a significant criminal figure. Having had no means of repayment he had been required by that same person to carry the consignment in discharge of the debt. There was evidence he had been threatened with violence if did not make the delivery, a threat which the gardai accepted was credible. There was also evidence that he had never before trafficked drugs, and while he knew that the contents of the bag contained drugs, was surprised by the quantity involved. Judge Groarke concluded that there were exceptional and specific circumstances which would have made the minimum sentence unjust. Firstly the accused had offered a plea of guilty, albeit a late one. Secondly he had materially assisted the gardai in the investigation of the offence. Thirdly he was simply acting as

[1] For eg. *DPP v G.G.* where the fact that the accused had successfully addressed his addiction persuaded Judge Dunne to impose a 5 year suspended sentence, subject to ongoing review.

a bag man, and not acting for profit in the sense of dealing. Fourthly, it was a once off run and he was not in the ordinary way given to acting as bagman. Fifthly he got involved in the commission of the offence in circumstances where he was in debt to a major criminal figure, and was subject to duress so far as the debt was concerned. He was also under threats of violence, which the court accepted as real, if he did not comply with orders and directions given to him. Taking into account all those factors the court imposed a prison sentence of 7 years.

In *DPP v M.* the accused (a South African national) was found in possession of herbal Cannabis valued £42,920. He had pleaded guilty and co-operated with the gardai. He was 41 years of age, and had been employed for most of his life as a fitter but had been made redundant, as a result of which he had been unemployed for a number of years and had fallen on hard times when approached to make the delivery. He also had a drink problem. He was getting approximately £1000 for the delivery. He had a son with Downs Syndrome and Leukaemia which involved significant medical expenses. There was evidence before the court that he was a person of low intelligence. His suitcase containing the drugs had been lost at the airport and he had waited around for two days at the airport for it to be located and filled in a baggage reclaim form giving a London address (this was what initially drawn him to the attention of the authorities). Judge Harvey Kenny indicated that he considered giving 10 years but took into account the early plea of guilty and his co-operation with the gardai, and imposed a sentence of 6 years imprisonment.

Aggravating factors which have led the courts to impose a sentence greater than 10 years

There have been three cases where the Circuit Court has imposed a sentence equal to or greater than the statutory minimum. One of these, *DPP v K.B.*, was overturned on appeal by the Court of Criminal Appeal. In the two other cases, *DPP v B.* and *DPP v C.* the primary factor which appears to have caused the court to impose a sentence exceeding the statutory minimum was the fact that the accused person was involved in the importation and supply of drugs as a business and was considered to be a main mover in the offence (as distinct from a small courier).

In *DPP v B.* the accused was arrested with ecstasy tablets with a street value of £500,000. The arresting Garda gave evidence that the accused was one of the main dealers in the city, a career drugs dealer known to the Gardai for a number of years and subject of numerous surveillance operations. Judge AG Murphy in passing sentence noted that the accused was in drugs as a business. He was not an addict. He was of the view that a proper sentence for the offence would be in the region of 15 to 20 years but took into account the accused's poor health, plea of guilty and co-operation and imposed a sentence of 11 years.

In *DPP v C.* the accused was arrested with Cannabis with a street value of £80,000. Evidence was given by prosecuting gardai that he was the organiser from the Irish side. Judge AG Murphy contrasted the position of the accused with a case of two Estonians whom he had sentenced shortly beforehand who were "foolish stupid people who were not in the drug business but who undertook to do one trip - that was the evidence - to carry drugs once by sea". Judge Murphy noted that the accused was "a businessman in the business of importing selling and distributing drugs, a main

mover.....". He viewed the appropriate sentence as being 16-18 years but gave a discount for the plea of guilty and co-operation with gardai and imposed a sentence of 12 years imprisonment. This approach was confirmed on appeal by the Court of Criminal Appeal which remarked that the accused "was a businessman who was engaged in a business for profit, no doubt lived as high as he could on the profits while the business was going on and must not expect to elicit a great deal of sympathy therefore when he is caught….This was a very serious offence, cold bloodedly engaged in for profit which he had been making for some time by a gentleman who deliberately … became involved in the drugs trade. He took its benefits and now falls to suffer its drawbacks." The court upheld the trial judge's sentence.

Quantity, value and type of Drugs seized.

A possible ambiguity in the Act is whether and to what extent Judges can take into account the type and quantity/value of the drugs seized in sentencing under the section. It would seem on the face of it that the type of drug seized as well as its value would be proper matters to be taken into account in evaluating the overall seriousness of the offence, which in turn would be relevant in assessing whether or not to apply the exception contained in s. 3(C). It might be thought that there is a significant qualitative difference between possession of cannabis resin worth £15,000 on the one hand, and heroin worth £900,000 on the other. Surprisingly some Circuit Court Judges have taken the view that they cannot take into account the type and value of drugs seized. In *DPP v V.* Judge Dunne stated that "it seems to me in considering this matter it does not matter in practical terms in dealing with the sentence whether the quantity concerned is £10,000 or £13,000 worth of cannabis or £1million worth of heroin… I am not…entitled to take into account those differences…it does not matter what type of drugs they are." The Court of Criminal Appeal has modified this approach to some degree. In *DPP v R.* (CCA, 23/11/01, Murphy, Lavan and Budd JJ) the accused was arrested with cannabis with a street value of £18,000. Counsel for the accused in the Court of Criminal Appeal submitted that, in deciding upon the appropriate sentence following conviction the Court should have taken into account the nature, value and quantity of the drug found in the possession of the accused. It was argued that the controlled drug in question was cannabis and that this is less harmful than other controlled drugs. Murphy J in upholding the sentence of 5 years, but suspending the final two years noted that in the Misuse of Drugs Acts 1977-1984 the Oireachtas had drawn a distinction, for some purposes, between cannabis or cannabis resin on the one hand and other controlled drugs on the other. He stated: "In that context it may be said that offences relating to cannabis might be treated less severely than those relating to other drugs. It is, however, an argument of very limited value. However, it is a factor to which a sentencing judge in his or her discretion might attach some limited significance."

In *DPP v D.* (CCA, 21/12/01, Keane CJ, O'Higgins and Butler JJ) the Court of Criminal Appeal appeared to suggest, at least implicitly, that the court can take into account the quantity of drugs seized. In that case a quantity of cannabis resin was seized. The trial judge had indicted that, before hearing submissions in mitigation, he had initially viewed the appropriate sentence as being one of 20 years. On appeal the Court noted "While the consignment of cannabis resin found in the boot of the car was clearly of a quantity sufficient to attract the statutory minimum sentence, absent any countervailing considerations, a sentence of 20 years would have been not far off

the longest sentences which have been imposed by the courts in recent years for offences in relation to the sale and supply of drugs, although in some at least of those cases the quantity of the controlled drugs in question was far higher than in this case. The court is satisfied that that would have been a disproportionate sentence, even in the absence of any mitigating factors."

It may be however that as this matter comes before the Court of Criminal Appeal more often that this is a matter which will be clarified in due course.

Range of sentences imposed by Circuit Court

Where the courts have decided not to impose the mandatory minimum sentence the average sentence has fallen in a range of 6-7 years imprisonment. Out of 49[2] cases, a sentence of 6-7 years has been imposed in 28 of the cases (approximately 57% of the cases). In only 9 cases was a sentence of *less* than 5 years imposed. In 40 cases a sentence of 5 years or more was imposed. The breakdown is as follows (in 5 of the cases some part of the sentence was suspended):

0-2 years imprisonment:	2 cases[3]
3 years imprisonment:	4 cases
4 years imprisonment:	2 cases[4]
4.5 years imprisonment:	1 case
5 years imprisonment:	6 cases[5]
6 years imprisonment:	16 cases[6]
6.5 years imprisonment:	3 cases
7 years imprisonment:	9 cases
7.5 years imprisonment:	1 case
8 years imprisonment:	4 cases[7]
9 years imprisonment:	1 case

[2] I have omitted those cases where there was no transcript of sentence, as where for example sentencing was adjourned for a period of time. I have also omitted *DPP v K.B.* and *DPP v R.* as in both those cases the sentence was overturned by the Court of Criminal Appeal.
[3] Includes one suspended sentence of eighteen months: *DPP v. H.H.* (Judge Groarke)
[4] Includes one case where last 3.5 years of sentence were suspended: *DPP v A.* (Judge Murphy)
[5] Includes one case where entirety of sentence suspended: *DPP v. G.* (Judge Dunne)
[6] Includes one case where last 2 years of sentence suspended, and one case where one year of sentence suspended: *DPP v. P.O'D.* and *DPP v. J.N.*
[7] Includes one case where review imposed after 5 years: *DPP v D.S.* (Judge Dunne)

Conclusion

The Courts have evinced a marked reluctance to impose the mandatory minimum sentence. However where they have applied the exception contained in subsection 3(C), it has largely been by reference to factors set out in the legislation itself, namely (i) a plea of guilty on behalf of the accused and (ii) material assistance in the investigation of the offence.

Notwithstanding the reluctance of the courts to impose the minimum sentence however the provision would appear to have been reasonably successful in its operation in practice. One of the factors taken into account by the court in declining to impose the minimum sentence is a plea of guilty and it is noticeable that there has been a very high rate of pleas. In all but one of the 55 cases the accused pleaded guilty. Because one of the probable effects of conviction on a plea of 'not guilty' is the imposition of the minimum sentence it would seem that accused persons and their advisers think long and hard before deciding to fight a particular case. This has resulted in savings of court time, public funds, and freed up gardai to carry out their investigative functions, rather than having to attend court for potentially lengthy trials. It may also have resulted in a higher rate of conviction than might have otherwise resulted. As a result of s. 15A there is a positive disincentive on accused persons to 'test' the prosecution case in a criminal trial. In a criminal trial anything can go wrong; difficulties can arise with warrants, witnesses may be unavailable for a variety of reasons, there can be a flaw in the chain of evidence, technical errors may be made and so forth. However the consequences of unsuccessfully testing the prosecution case in a s. 15A charge are so severe, it would seem that one of the practical effects of the section has been to discourage the vast majority of accused persons from proceeding to trial unless the case against them appears to be obviously flawed.

A second factor to bear in mind in assessing the efficacy of the section has been the extent to which its provisions have encouraged assistance from accused persons in the investigation of the offence. It is noticeable that in the vast majority of cases assistance was offered by accused persons to prosecuting gardai in the investigation of the offence generally. Again it may be that the punitive provisions of the Act have served to encourage offenders to provide useful intelligence information to the gardai and to co-operate generally in the investigation of the offence.

The reluctance of the courts to impose the minimum sentence would appear to stem from a fear that in many cases it would result in a disproportionate sentence to an individual accused. In terms of general sentencing principle, a sentence must be proportionate both to the offence and to the personal circumstances of the offender. In a number of cases the courts have taken the view that a 10 year sentence would be excessive, and hence unjust to impose, having regard to the circumstances of the case and in particular to the circumstances of the offender. That view may have been shaped by the fact that a great number of offenders were 'low level' operators, frequently little more than couriers, getting little in the way of financial gain for themselves and in many cases without previous convictions and engaged in a 'once off' run only. It does not follow from this however that the 10 year minimum sentence is entirely irrelevant. The courts have regard to the fact that the offence in question is an extremely serious one, and that the legislature has seen fit to introduce a

minimum sentence. In *DPP v R.* (CCA, 23/11/01, Murphy, Lavan and Budd JJ) the Court of Criminal Appeal observed as follows:

> "Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored. Perhaps the most important single factor in determining an appropriate sentence is the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the seriousness of the offence may be obtained from the maximum penalty imposed for its commission. … What is even more instructive is legislation which, as in the present case, fixes a mandatory minimum sentence. Even though that sentence may not be applicable in a particular case the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission… If the Court is satisfied that factors exist which would render the mandatory minimum sentence unjust then the Court is not required to impose it but the existence of such matters or circumstances does not reduce the inherent seriousness of the offence. It remains the task of the Court to impose a sentence which is appropriate having regard to the relevant circumstances and also the fundamental gravity of the offence as determined by the Oireachtas and reflected in the sentences which it has prescribed."

It follows therefore that even where the court decides not to impose the minimum sentence it remains relevant as a background consideration in measuring the overall seriousness of the offence.

In conclusion therefore it is suggested that s. 15A has been reasonably successful in its operation. This is borne out by (i) the high rate of pleas (ii) evidence of considerable co-operation by accused persons with gardai in the investigation of the offence and (iii) the fact that even where the mandatory minimum sentence has not been imposed, the resulting sentence has often been quite severe, with the bulk of the sentences falling in a range of 6-8 years.