

# The Criminal Justice System and Drug Related Offending: Some Thoughts on Procedural Reforms

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For some years public attention has been focused on the question of drug-related offending, whether on persons who engage in misuse of drugs offences, or drug addicts who engage in offences such as larceny, robbery and burglary. This has resulted in a considerable volume of new legislation and a number of proposed measures which may shortly become law. Without taking on board broader issues such as the decriminalisation of certain classes of drugs, the relative merits of treatment programmes for addicts or broader sentencing issues, this article seeks to highlight a number of points in this area relating primarily to procedural issues which have remained, in the main, obscured by matters of greater topicality. The areas touched on include problems relating to search warrants in drugs cases; seven day detention; delays at the pre-trial stage; proof of possession in drug dealing cases; and some aspects of sentencing, including the proposals to introduce a mandatory minimum sentence for drug dealing and to establish a new Drugs Court. The intention is not to offer definitive conclusions but rather to flag areas which might merit further discussion in both the judicial and political arenas.<sup>1</sup>

## Search Warrants

A number of issues relating to the use of search warrants have arisen in practice in recent times which, arguably, require either superior court clarification or legislative intervention in order to make the law and practice in this area clear and settled. Although

these issues are not solely relevant to drugs cases as search warrants play a role in many other criminal prosecutions, it is frequently the case that drugs seized on foot of a search warrant relating to an accused person's dwelling will constitute the cornerstone of the prosecution, and therefore these issues can become highly relevant in prosecutions in respect of drugs offences.

### (a) Confidentiality of Source

It has been clear at least since the decision in *Byrne v. Grey*<sup>1</sup> that a Peace Commissioner or District Judge who has been requested to issue a search warrant must have before him sufficient evidence to be satisfied that there are reasonable grounds to suspect that the person is in possession of drugs before the warrant is granted. This objective test appears to require that some factual substratum must be laid before the issuing authority to enable him to exercise his judgment and precludes him from acting merely as a rubber-stamping authority.

In many cases, the Garda applying for the warrant claims that the basis for his suspicion is information from a previously reliable but confidential source. The Garda will claim privilege both at the time of the application for the warrant and at the subsequent trial in respect of both the identity of the informant and the actual information received from the informant. The usual practice at present appears to be for the issuing authority merely to question the Garda as to whether he believes the informant, and whether the informant

has proved reliable in the past, without probing further matters such as the nature of the information supplied or the nature or extent of the risk to the informant if his identity were revealed. In practical terms, therefore, it becomes impossible for the defence to ascertain whether the objective test laid down in *Byrne v. Grey* has been honoured.

There are, of course, at least two reasons why the confidentiality of informants should be protected. First, from a public policy point of view, there is a general need to encourage co-operation with the police, which might be significantly hampered were the identity of informants revealed on a regular basis. Secondly, in particular cases, there may well be a risk to the safety of the informant if his identity were to be revealed. On the other hand, the constitutional guarantees of the protection of the dwelling house and of the right to fair procedures suggest that the balance should not be tilted in one direction only. Without offering conclusions here, what is suggested is that achieving an appropriate balance between these conflicting considerations might be given further consideration by the courts, particularly in light of certain analogous authorities.

Of particular interest is the Irish case law in the area of executive privilege in discovery applications on the civil side including *Murphy v. Dublin Corporation*,<sup>2</sup> *Geraghty v. Minister for Local Government*,<sup>3</sup> and *Ambiorix v. Minister for the Environment (No. 1)*.<sup>5</sup> These cases suggest that a claim for executive privilege should be tested by the judicial authority before being granted. Moreover, they might suggest that the

burden would lie on the prosecution in a criminal case to justify, why the privilege should be upheld, rather than on the defence to show why it should be lifted.

In a similar vein, but on the criminal side, is the recent decision of *Camey J. in DPP v. The Special Criminal Court and Ward*<sup>6</sup> in judicial review proceedings in respect of an order of the Special Criminal Court. It will be recalled that the prosecution in this case<sup>7</sup> had in its possession a number of documents generated in the course of the investigation into the murder of Veronica Guerin, which it did not wish to disclose to the defence on the basis that to do so would jeopardise the safety of certain persons interviewed by the Gardai. The defence objected that it was necessary for them to view these documents in order to assess whether they contained any information relevant to the defence. The Special Criminal Court ruled that some of the documents should be shown to the defence lawyers but not to the accused himself. In the High Court, *Camey J.* quashed this ruling and held that the appropriate procedure was for the trial judge (or judges as in this case) to view the documents and decide whether disclosure was appropriate. This seems to be a suitable way to deal with claims of privilege in that the ultimate decision is in the hands of a judicial authority rather than the prosecution. *Camey J.* relied, inter alia, on the English Court of Appeal decision in *Davis*<sup>8</sup> concerning issues of disclosure and police informants. By analogy, it is arguable that in applications for search warrants in drugs cases, the District Judge or Peace Commissioner should be told in full the reasons for not wishing to disclose the source, should be informed of the source's identity and the facts grounding the suspicion as given by the source, and should make his assessment on the basis of that information.

Also of relevance in the area are superior court pronouncements regarding the hierarchy of constitutional rights and the respective roles of different rights within that hierarchy. It has been stated, for example, that the right of the accused to fair procedures is higher in the hierarchy of rights than that of the public interest in the prosecution of crime, although it would also appear that the right to life (and therefore, perhaps, the protection of the safety of an informant) takes priority over other rights.<sup>8</sup> Such cases may also be of relevance in considering a claim of confidentiality in a search warrant case.

### **(b) Use of Peace Commissioners**

Another area which might require some further scrutiny is the widespread use of Peace Commissioners to obtain drugs and other search warrants. Peace Commissioners are of course not judicial authorities in any sense, nor have they necessarily any legal training of any kind. This alone might raise concerns as to the appropriateness of using such arbiters of whether a person's dwelling house should be entered without consent, but there are also other problems which have arisen in practice.

At time of writing, the prosecution practice is not to call the Peace Commissioner as a witness in the subsequent trial unless there is some obvious defect on the warrant relating to the Peace Commissioner's jurisdiction. The information grounding the search warrant and the search warrant itself are exhibits in the case, but the defence are usually, therefore, precluded from cross-examining the Peace Commissioner as to how he exercised his power to issue a warrant. A number of questions have arisen:

- (i) Is the evidence of the Peace Commissioner required in order to show what his state of mind was when issuing the warrant?
- (ii) Is the evidence of the Peace Commissioner required in order to prove his own signature on the warrant in order to render the document admissible? Also, frequently, the form of warrant used by Peace Commissioners for the search warrant merely records the fact that he is a Peace Commissioner but fails to record for what area he acts as Peace Commissioner. This leads to the related questions;
- (iii) Is a warrant valid where it fails to show the jurisdiction of the Peace Commissioner on its face?
- (iv) If invalid, can this invalidity be cured by evidence at the trial by the Peace Commissioner to the effect that he does in fact have jurisdiction in the area in which the warrant was issued? There have been various rulings in relation to some of these issues by the trial courts, but definitive judgments by the superior courts will be required before the position is clarified.

### **(c) Use of Printed Forms and Inadvertent Errors**

In passing, it is also worth mentioning

the difficulties that arise when printed forms relating to search warrants are filled out carelessly. In this respect, the judgments in the High Court *Dunne*<sup>9</sup> case and the Court of Criminal Appeal decision in *Baife*<sup>10</sup> are not easy to reconcile. In *Dunne*, the importance of the dwelling was stressed as a reason for requiring total accuracy on the face of warrants, whereas in *Baife* it was held that a warrant which did not fully correspond with the grounding information and did not specify the stolen goods to be seized was valid. Also, notwithstanding the decision in *Kenny*<sup>11</sup> which clarifies the concept of deliberate and conscious breaches of constitutional rights, there are still some lingering doubts about how to reconcile *Kenny* with *O'Brien*<sup>12</sup> when errors on the face of a search warrant are the result of inadvertence or a slip.

### **(d) District Court Applications for Warrants**

A final issue relating to search warrants is the fact that the proceedings in which the warrant is obtained, even in the District Court, are not recorded by a stenographer. Accordingly, if, as frequently happens, a Garda states in evidence at the trial that he, in addition to his sworn written information, gave additional oral evidence to the District Court (or Peace Commissioner), there is no way in which the defence can test the veracity of this allegation with reference to a written record. As in the *Yamanoha*<sup>13</sup> case, the issue may have to be resolved by comparing the oral evidence of the Peace Commissioner with that of the Garda. It seems unsatisfactory that such an important stage of the proceedings should go unrecorded.

## **Seven Day Detention**

The Criminal Justice (Drug Trafficking) Act, 1996 confers on the Gardai the third major power of detention for investigation under Irish law, the other two being detention under Section 30 of the Offences Against the State Act, 1939 and Section 4 of the Criminal Justice Act, 1984. The power relates to persons suspected of involvement in drug-trafficking offences, which is defined in Section 3(1) of the Criminal Justice Act, 1994. As is well known, the powers exercised in full permit an appropriate suspect to be

detained for investigation for a full seven days.

Section 7 of the Drug Trafficking Act, 1996 also significantly affects the right to silence of a suspect in this situation. It makes provision for the drawing of inferences from the failure of an accused charged with a drug trafficking offence to mention a particular fact when questioned. This particular fact is one which the accused subsequently relies on in his defence and which he could reasonably have been expected to mention when being questioned by the Gardai. The Gardai must of course tell the accused in ordinary language what the effect of failure to mention such a fact might be. The effect of the section is that the trial court may draw such inferences from the accused's failure to mention the fact as appear proper in the proceedings. The failure may be treated as corroborative of any evidence in relation to which the failure is material, although a person cannot be convicted of an offence solely on the basis of an inference drawn from the failure.

Although restrictions on the right to silence are not unprecedented in Irish law, and the above provision is somewhat similar to the 'inference' provisions in the Criminal Justice Act, 1984, which were upheld in *Rock v. Ireland*,<sup>4</sup> Section 7 of the Drug Trafficking Act, 1996 goes much further. Sections 18 and 19 of the 1984 Act are confined to inferences which can be drawn from the failure to answer specific questions put in specific circumstances. However, Section 7 of the 1996 Act deals with a much more open-ended situation. The accused will have to anticipate what facts he is going to rely on in the event of being charged and then decide whether it is in his best interest to volunteer those facts at that stage to the Gardai. This provision is modelled on English legislation, but it is worth bearing in mind that the legal framework in that jurisdiction is quite different given the absence of a written constitution and it is questionable whether this 'inference' provision is necessarily constitutionally valid. Moreover, questions might be raised about the compatibility of these provisions with the European Convention on Human Rights.

Perhaps most importantly, the restriction of the right to silence combined with seven day detention must also be seen in the context of our system in which tape-recording or audio-visual recording of interviews with suspects is not mandated. Although the legal provisions are in

place to support such recordings,<sup>15</sup> in fact such recording of interviews is only available in a very limited number of Garda stations. Of course it would be naive to think that recording of interviews will solve all disputes arising out of interviews with suspects, as incidents taking place outside the recorded interview will remain potential areas of dispute. However, it is an important safeguard which would address at least one area of potential dispute, namely the interview itself. Given the far-reaching nature of the provisions of the 1996 Act, it is alarming that the immediate introduction of the relevant technology on a widespread basis was not thought necessary. Here, significant inroads into an accused's rights have not been matched by safeguards to prevent miscarriages of justice.

### Delays in the pre-trial period

From a public interest point of view, one of the concerns in the area of drugs is that accused persons may continue to offend even after they have been charged during the period awaiting return for trial and trial itself. These concerns relate to (a) drug dealers (whether addicts or not) continuing to deal, and (b) addicts continuing to steal and rob in order to maintain their habit. Until the new bail legislation comes into force, the apprehension that an accused person may continue to commit serious offences is not a valid basis on which to refuse bail. Unless there is an apprehension of flight or interference with witnesses or evidence, which is relatively rare, the person will be on bail in the pre-trial period. This in turn raises the question of delay in the pre-trial stage of proceedings. Quite simply, the longer the time between charge and trial, the greater the opportunity to continue to offend. The question of delay also has importance from the point of view of the accused's rights in that he has a constitutional right to a speedy trial. Thus it is in everybody's interest to subject the question of pre-trial delay to some scrutiny.

In recent times, delays in the Dublin Circuit Criminal Court, i.e. between the first arraignment date and the trial date, have been reduced, and at present an accused who seeks a trial date at the arraignment stage can expect a trial date usually within three working months. However, it is perhaps worth noting that

although there have been numerous judicial appointments in the last three years, at most one extra Circuit Court judge has been diverted to deal with criminal cases in the Dublin area. There are usually two trial judges available to take trials on any given day. This in turn may not, however, be a problem relating to lack of available judges, but rather due to the lack of available courtrooms. Criminal courts of course require special facilities and there are sometimes more judges than courts available.

In any event, the substantial delays appear to be not in the Circuit Court but at the earlier stage between charging and returning for trial. In this context, the proposed bill to abolish the preliminary examination procedure is relevant in that its intended effect is to reduce delays at the District Court stage.<sup>16</sup> In practical terms however, one can only wonder whether this will simply transfer a bottleneck from the District Court to the Circuit Court, or indeed transfer the delay backwards to the pre-charging stage, with the effect that persons will not be charged until the Book of Evidence is complete. The answer to this depends on the underlying reason for the delays in the District Court.

It is sometimes said that depositions are the reason for delays in the District Court, but in reality depositions are called for in relatively few cases, and almost never in drug related cases. In any event, the Bill proposes to maintain the deposition procedure in the District Court. Moreover, it seems more likely that the numerous adjournments in the District Court are merely to facilitate the preparation of the Book of Evidence, the delays being caused by overwork and understaffing in the Chief State Solicitor's office. Another factor in drugs cases which may also contribute to delay in preparing Books of Evidence, is delay in obtaining the relevant report from the forensic science laboratory. Again, this is due to inadequate resources, this time in the forensic laboratory. It is difficult to resist the conclusion that the proposed tampering with the preliminary examination procedure will be inadequate to tackle the root causes of pre-trial delay, and that either increased resources or more radical proposals relating to the preparation of Books of Evidence would be required.

Meanwhile there is another dimension to the resource problem, namely the relative scarcity of treatment programmes for drug addicts, both in the community and within the prisons. One

would have thought that a better way to prevent addicts from re-offending after charge would be to encourage them to tackle their addiction. Ironically, many offenders who ultimately plead guilty and then become eligible for and engage in treatment are deprived of the opportunity to do so at the pre-trial stage. In sum, delays in the pre-trial period have built up over the years and stem from a number of sources. A commitment to sensible proposals and a serious injection of resources on a number of fronts is necessary if substantial changes in the system are to be made.

## The Burden of Proof in the Criminal Trial

Turning momentarily from questions of resources and procedure to the substantive law relating to drugs offences, a recent decision on the burden of proof for the offence of possession for supply (commonly known as 'drug dealing') is worthy of note. For the offence under Section 15 of the Misuse of Drugs Act, 1977 to be proved, the prosecution must prove that the person was in possession of a controlled drug and that he was so for the purpose of supply. The prosecution are assisted in the latter matter by the presumption in Section 15(2). The possession element is particularly problematic, particularly in the so-called 'container' or 'package' cases. Must the prosecution prove that the person knew that what was in the container was a controlled drug of some kind? Or must they merely prove that he knew he was in possession of a container which in fact contained a controlled drug, with the onus shifting to the accused to establish that although he knew he had the container, he did not know that what was in it was a controlled drug?

The question is in the first instance posed by reasons of the terms of the Misuse of Drugs legislation. Section 15 (1) provides that a person 'who has in his possession...a controlled drug for the purpose of selling or otherwise supplying it to another...shall be guilty of an offence'. It is clear that no *mens rea* is expressly set out, such as, for example, 'knowingly in his possession'. However, case law and in particular the *Murray* case;<sup>17</sup> supports the view that, at least in respect of a serious criminal offence, a guilty mind or *mens rea* is to be implied into the offence in relation to any material element of the offence. The position is

then slightly complicated by the provisions of Section 29(2) which provide that if it is proved 'that the defendant had in his possession...a controlled drug...it shall be a defence to prove that (a) he did not know and had no reasonable grounds for suspecting (i) that what he had in his possession was a controlled drug.. or (ii) that he was in possession of a controlled drug'. What is of concern here are two matters. First, it appears to be for the defence to prove these matters because of the reference to 'it shall be a defence'; presumably, the burden of proof is on the balance of probabilities. This is of course more onerous than merely raising a doubt which is the normal onus on an accused. Secondly, he must prove not only that he did not know the relevant matters but that 'he had no reasonable grounds for suspecting' i.e. a negligence standard. The net effect is apparently to place on an accused a burden of proving that he was not negligent about matters which are crucial to the case. Until a recent judgment, there was some doubt about the interaction between the terms of Section 15 and Section 29; given the matters that the defence has to prove under Section 29, what did the prosecution have to prove in the first instance to transfer the onus to him to prove that he was not negligent? In other words, construing the two provisions together, what was the *mens rea* that had to be proved by the prosecution?

The recent decision in *DPP v. Byrne, Healy and Kelleher*<sup>18</sup> sheds light on the matter. The facts concerned the retrieval by the accused of a number of packages on a beach at Ballyconneely, Connemara which were subsequently found by the Gardai to contain cannabis resin. The circumstances of retrieving the bulky packages were highly suspicious in that it appeared to be a co-ordinated operation under cover of darkness, but it was also the case that the bales were wrapped in opaque material. The trial judge directed the jury that they had to be satisfied beyond a reasonable doubt that the accused were 'knowingly in possession' in the sense that the accused knew that the bales contained a controlled drug of some kind. On appeal, it was argued on behalf of the accused that the trial should have acceded to an application for a directed acquittal in that there was insufficient evidence adduced by the prosecution to prove that the accused knew that what was in the packages was a controlled drug, as distinct from some other illegal material such as firearms or contraband. The prosecution argued that

as a result of Section 29(2), the only burden of proof on the prosecution was to show that the accused had reasonable grounds for suspecting that he was in possession of controlled drugs, but that they did not have to show actual knowledge. Indeed, they argued that the trial judge's direction was unduly favourable to the accused.

The Court of Criminal Appeal followed a decision of the English Court of Appeal in *McNamara*<sup>19</sup> and held as follows. The prosecution have an initial burden of proving three matters:

- (a) that the accused had the box/container/package in his control,
- (b) that the accused knew that he had the box/container/package in his control and
- (c) that he knew that the box/container/package contained something.

It is worth, noting that this statement of the prosecution burden is in fact less stringent than even that for which the prosecution counsel had argued in the case. It does not require the prosecution to show that the accused had reasonable grounds for suspecting that he was in possession of controlled drugs. The Court held that no injustice would be caused by this statement of the prosecution's burden of proof, because of the existence of the provisions of Section 29(2). The Court went on to hold that since there was evidence on which the jury could be satisfied beyond a reasonable doubt that each of the accused had, and knew he had, the bales in his control, and the bales did in fact contain a controlled drug, the trial judge was correct in not acceding to a direction.

The Court of Criminal Appeal has in this judgment provided us with a definitive interpretation of the interaction between Section 15 and Section 29(2), and moreover the interpretation makes sense of those provisions and is undoubtedly what was intended by the framers of the legislation, who modelled it on English legislation. However, it may be that the legislation does not take into account constitutional imperatives in this jurisdiction concerning the burden of proof and is therefore constitutionally suspect. The net effect of the legislation, as interpreted in this judgment, is to transfer to the accused the burden of proof in relation to a significant matter (perhaps the most significant matter), namely whether the accused knew he was in possession of a controlled drug. It seems to involve a clear transfer of the legal burden of proof and not merely the evidential bur-

den of proof.

It has been held, in *Heaney v. Ireland*<sup>20</sup> and *O'Leary v. The Attorney General*<sup>21</sup> that the presumption of innocence is of constitutional pedigree, being encompassed within the guarantee of trial in due course of law under Article 38 of the Constitution. The presumption of innocence entails the corollary of proof beyond a reasonable doubt, which therefore must also be seen as having constitutional status. Accordingly, legislative provisions which shift the burden of proof to the accused must be carefully scrutinised to see whether they pass constitutional muster. In this respect, the Irish courts are in a similar position to the Canadian courts, where the presumption of innocence is explicitly recognised in the Canadian Charter, and, most importantly, in quite a different position to English law, where the presumption of innocence, although clearly a fundamental principle, may be altered by statute without reference to constitutional norms. It is worth noting that there is considerable Canadian case law on the question of when a legislative interference with the presumption of innocence is permissible, which might be of assistance to the Irish courts in this area. In particular, the foundation stone for this area of law was the decision in *Oakes*,<sup>11</sup> where the Supreme Court of Canada struck down a reverse onus provision in drugs legislation, on the basis that it infringed the presumption of innocence in a manner which could not be said to be necessary in a democratic society. If it were to fall to an Irish court to rule on the constitutionality of the drugs legislation, the appropriate question might be whether the casting of a legal burden of proof on an accused to establish that he was not negligent, is the least restrictive way of meeting the problems of proof of knowledge that undoubtedly beset the prosecution in these types of cases.

Anticipating a possible constitutional challenge to the drugs legislation, there is limited Irish authority on burden-shifting provisions. In *O'Leary*, both the High Court and Supreme Court upheld provisions in the Offences Against the State legislation but it is important to note that they did so on the basis of applying the presumption of constitutionality and that in so doing, they interpreted the statute to shift the evidential burden of proof only. This option may not be available in respect of the drugs legislation, because Section

29(2) is very explicit in its terms. However, in *Hardy v. Ireland*<sup>12</sup> the Supreme Court upheld what was interpreted to be a shift of the legal burden of proof as in accordance with the Constitution, which would tend to favour the current drugs provisions. It is to be hoped that a full consideration of the ramifications of the drugs legislation will eventually be undertaken in this jurisdiction in light of the constitutional position of the presumption of innocence. For once, it is not a question of resources but rather a judicial commitment to taking the accused's rights and our constitution, seriously.

## Sentencing

The area of sentencing offenders and sentencing drug-related offenders in particular is vast. Out of this larger picture certain features have been selected here by reason of their having been the subject of some public discussion in recent times.

### *(a) Mandatory Minimum Sentence for Drug Dealing*

In relation to sentences for drug dealing, it is worth noting at the outset that the Irish courts do not operate an explicit tariff system of sentencing. Thus there is no starting point or bench mark for any offence, let alone the offence of possession or importation for supply. It is also worth noting that the Supreme Court has made it clear that constitutional guarantees of trial in due course of law apply to sentencing, and these require not only that the sentencing court have regard to the public interest and questions of deterrence, but also to the personal circumstances of each individual offender and his prospects for rehabilitation.<sup>24</sup> It is in this context that the proposed mandatory minimum sentence of ten years imprisonment falls to be considered.

The only serious criminal offence for "which there is a mandatory sentence is murder, and indeed the Law Reform Commission have recommended the abolition of mandatory sentences for indictable offences and have urged that no further mandatory sentences for serious offences be introduced." Calls in other areas, notably sexual offences, for mandatory minimum sentences have been greeted with resistance on the ground of possible unconstitutionality. The net objection is that a mandatory

minimum sentence precludes the Court from doing what it is constitutionally required to do, namely to consider whether the personal circumstances of the offender warrant a reduction in sentence below the prescribed period of ten years. If the proposed mandatory sentence is, on the other hand, marked by a caveat which allows the court to go below the mandatory minimum for reasons personal to the accused, it is difficult to see what the provision achieves other than an endorsement of present judicial sentencing practice.<sup>26</sup> It appears that the proposed Bill deals with the sentence in its latter form and it may well, therefore, be of little or no practical effect. Of additional concern is the proposed linking of the mandatory sentence to the street value of the drugs. The Irish Court of Criminal Appeal recently, in the *Gannon* case,<sup>27</sup> refused again to countenance tariffs and particularly ones based on street value. One of the problems with street value is that it varies from time to time and location to location, depending on supply and demand. Is the value to be judged at the time of possession, charge, trial or sentence? Is it acceptable that the sentence might vary according to whether heroin is more or less expensive in Dublin than in Galway? And most importantly, how is the defence expected to test Garda evidence on the question of value? Value is also complicated by the fact that the purity of the drug is highly relevant in determining to what extent the drug can be cut with some other product and subdivided into deals, and again estimates vary, as do dealers in terms of what purity drug they tend to sell. In view of all these problems, it is suggested that evidence of the quantity, and to a lesser extent the purity, of the drug is \* much more reliable and constant than street value, and should be more influential than street value in the sentencing process, whether minimum sentences are to be introduced or not. Another concern in relation to mandatory minimum sentences, particularly when related to street value, is that they may tend to encourage covert pre-trial bargains which are unknown to the Court and therefore unreviewable for propriety and fairness.

### *(b) A New Drugs Court*

For some years the vast majority of offenders before the Dublin Circuit Criminal Court have been drug addicts

and that Court has substantial experience in dealing with them. The Court currently sentences in accordance with the Supreme Court's view that the personal circumstances of the offender must be fully taken into account, and has developed an extremely humane and constructive approach to addicts, giving great encouragement to addicts who genuinely attempt to rehabilitate themselves. It does so in the face of a frustrating and chronic lack of resources at many levels. Some of these have been mentioned above, but it is also worth highlighting at this point the resource problems facing the probation service. At present, a probation report can only be obtained four working months after a Court orders its preparation and many sentences are delayed for this period following a guilty plea. Moreover, because of the absence of any kind of parole board system in this jurisdiction, together with a chaotic temporary and early release system, that Court has taken it upon itself to structure sentences in such a way that offenders are encouraged to beat their addiction under the supervision of the Court. A flexible approach is used, incorporating sentence reviews and suspended sentences with conditions relating to attendance at treatment programmes.

In this context, one wonders what improvement would be represented by the establishment of a new Drugs Court. If the intention is to set up a Court with a special rehabilitative philosophy, it would appear that such a Court already exists, but that its attempts are being hampered by a lack of resources. If the intention is rather to introduce some kind of fast-track system for drugs cases to reduce delays, questions might be raised why drugs cases would necessarily be first in line for this special treatment. Other non-drugs cases subject to the 'ordinary' delays can create enormous stress for the victims of crime, such as sexual offence cases (particularly those involving children), dangerous driving causing death, and, of course, murder. (Indeed it is ironic that child sexual abuse cases encounter the greatest delays simply because there is only one video-link court serving the whole country). Moreover, cases where an accused is in custody have always been given as early a trial date as possible. Is a person accused of a drugs offence who is on bail entitled to a speedier trial than a person in custody awaiting trial for murder or rape? Furthermore, the channelling of offenders into a Drugs Court

as an alternative to the ordinary courts is surely bound to lead to problems of classification, for example as between addicts and non-addicts, with resultant problems of proof. It may indeed prove unworkable given that many dealers are also addicts and the reality is that these categories are not distinct. This writer is hampered by a lack of detailed knowledge of the proposals in respect of the new Drugs Court, and by a lack of knowledge as to whether such a Court might be a viable alternative to the District Court, but would urge that the above matters be considered when deciding whether such a new entity is warranted, at least if significant inroads are to be made into the Circuit Court sentencing jurisdiction.

## Conclusion

Public outrage and anger at the drugs problem in our society has indirectly led to a number of legal developments in recent times. These have included increased Garda powers to investigate drug-related crime and measures to deal more severely with those accused of or convicted of such offences. Few structural changes have been introduced to deal with the sheer increase in volume of drug-related crime and its effect on the criminal justice system as a whole, and problems stemming from resource issues are being neglected. Moreover, in the current climate of opinion there is a real risk that long established protections for persons accused of crime will fall by the wayside. Neither the interests of efficiency nor justice are being served by this one-sided, reactionary approach to the drugs problem.

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1 This article is based on a paper given to a Conference of the Institute of Judicial Studies held at Dublin Castle on the 30th April, 1998. The views expressed are those of the author only and do not purport to represent the views of the Conference itself.  
 2 [1988] IR 31  
 3 [1972] IR 215  
 4 [1975] IR 300  
 5 [1992] 1 IR 277  
 6 High Court, Unreported, 13th March 1998  
 7 [1993] 1 WLR 613  
 8 *DPP v. D* [1994] 1 ILRM 435, *Z v. DPP* [1994] 2 ILRM 487, *Larkin v. O'Dea* [1995] 2 IR 485, *O'R v. DPP*, Keane J, 21 December 1995, *DPP v.*

*Shaw* [1982] IR 1, *Burke v. Centre Independent Television Plc* [1994] 2 IR 75 and *DPP v. Delaney* [1998] 1 ILRM 507  
 9 *Camey J*, 14th October 1994  
 10 Court of Criminal Appeal, 15th March 1997  
 11 [1990] 2 IR 110  
 12 [1965] IR 142  
 13 [1994] 1 IR 565  
 14 Unreported, Murphy J., 10th November 1995  
 15 See Section 27 Criminal Justice Act 1984, Criminal Justice Act 1984 (Electronic Recording of Interviews Regulations 1997)  
 16 The Criminal Justice (No. 2) Bill, 1997 provides that where an accused is before the District Court charged with an indictable offence, the court 'shall send the accused forward for trial to the court before (which he is to stand trial)', with certain exceptions. If the DPP refuses to consent to sending forward, the District Court 'shall' strike out the proceedings, although the DPP may bring proceedings against the accused at a future date. The Book of Evidence is to be served within 42 days of the accused being sent forward, although there is a provision for extensions of this period of time.  
 17 [1977] IR 360  
 18 Court of Criminal Appeal, Unreported, 17th December 1997  
 19 [1998] 87 Cr.App.R.246  
 20 [1994] 3 IR 593, [1996] 1 IR 580  
 21 [1993] 1 IR 102 (High Court); [1995] 1 IR 254 (Supreme Court)  
 22 [1986] 26 DLR (4th) 200  
 23 Unreported, 18th March 1993  
 24 *DPP v. M* [1994] 2 ILRM 541  
 25 See LRC Consultation Paper on Sentencing, March 1993, Chapter 10  
 26 See the Criminal Justice (no. 2) Bill, 1997, of which Section 4 inserts a new Section 15A into the Misuse of Drugs Act, 1977. Section 5 deals with the penalty for this new offence, providing that the minimum penalty is ten years imprisonment, although the minimum is not to apply if 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 ten years imprisonment unjust in all the circumstances.' Matters which the Court is entitled to take into account in this respect are listed, and if the person is an addict, the sentence may be listed for review at least five years later.  
 27 Unreported, Court of Criminal Appeal, **Ex tempore, 15th December 1997.**