

(1995) 5(2) ICLJ 220 Article: Drugs and Crime — Making the Connection: A Discussion Paper : PETER CHARLETON*

PETER CHARLETON*

THE NATURE OF THE PROBLEM

We are now into the second generation of drug users in Dublin. With the abuse has come the scourge of transmitted illness including Hepatitis C and AIDS. The problem is now spreading through every class in society. Social behaviour is a question of acceptability. Behaviour is mirrored in the response of others towards it. Shooting up heroin, or 'chasing the dragon' are not yet tolerated practices among young people in the suburbs of Dublin. Over 15 years we have been unable or to stem the tide of softer drugs which almost invariably, in my experience, act as a dress rehearsal to the use of Cocaine and Heroin. The entire youth of this country is now at risk from drug use. It is acceptable to dance away the entire night. A small and innocuous looking white pill nicknamed 'Ecstasy' apparently allows the body to do what would otherwise be an impossible athletic feat. The use of this drug in our society is growing. It is only a matter of time before the recent observation by a Liverpool consultant in emergency medicine is paralleled in our own society:

We admit steady stream of young people to our observation ward every weekend following their ingestion of Ecstasy (as many as 8 in a night when there is a big local rave on)... it is Ecstasy that these patients have taken ... identified in their urine ... that has caused their panic, first ever seizure, heat illness, muscle dissolution or, albeit rarely, their fatal liver failure or stroke. [1] [*Letter by Doctor L.C. Luke to the Independent, 9 September 1995.*]

Anecdotal evidence points to the widespread use of this drug among people under 25 in this city. The frightening way in which a problem like this can mushroom is indicated by figures from the Forensic Science Laboratory which show a jump in seizures over a period of two years from 10,000 tablets to a current level of 100,000 tablets. [2] [*Evidence given at the Inquest into the death of Stephen McMillan, reported in the Irish Independent, 29 September 1995.*] The idea of the all-night dance and the 'medicine' needed to support these 'events' has spread to smaller communities around the country. It is no longer just inner-city youths who are at risk. Drugs are being actively promoted in the youth culture and the ultimate consequences will be disaster for many in the coming generation.

THE CONNECTION WITH CRIME

80% of serious street level crime is caused by drug addiction. [3] [*Judge Michael Moriarty SC, personal communication. This fact has been publicly stated and reported many times over the five years during which he has been the main criminal judge in Dublin. See also the report of the Lord Mayor's Commission on Crime (December 1994) 28.*] Dublin is worst afflicted by the drug problem and criminal activity in the city runs at a level about three times greater than that for the rest of the country. [4] [*P. O'Mahony: Crime and Punishment in Ireland (Dublin 1993) 70.*] The drug Heroin, a derivative of Opium, slowly crept into this city through the 1970s. The nature of the problem and its consequences were beyond the comprehension of all but the most foresighted. In 1979 an epidemic of Heroin abuse occurred which spilled beyond the confines of the illegal activity of drug taking itself into an explosion of street level crime. [5] [*P. Yeats and S. Flynn, Smack, The Criminal Drugs Racket in Ireland (Dublin 1985) chapter 1.*] We have been able to do nothing to fight off the wave of criminality which has resulted. In 1978, 703 robberies were recorded in the Garda statistics. This compared unfavourably with 550 in 1975. By 1983 the figure had shot to 2,178 and that is the level at which it remains. Burglaries are running at over 30,000, compared to 13,000 in 1975. The era of a high level of crime is with us. [6] [*See the tables in O'Mahony, op. cit. . 50.*] Indictable crime has increased by 56,000 reported acts between 1973 and 1991, the vast majority of which can be put down to an increase in theft Stealing, as an overall category of crime, has doubled over 18 years. The: nature of the particular increases points to the addict as the cause. From 1973 over a period of 18 years robbery has increased in levels of commission by more than four times and burglary by almost six times. [7] [*O'Mahony, op. cit. , 70.*] The cause of this is drug abuse. This phenomenon is

beyond doubt Superintendent John McGroarty has written:

The scrutiny of drug crime statistics as contained in the annual Garda Crime Reports for 1979/80 reveal... a dramatic increase in the arrival of Heroin as shown by seizures and a sudden upward spiral in the crimes statistics ... I am convinced that all persons addicted to illicit drugs are criminogenic but the extent to which this is true depends ... upon the substance being abused.... One survey in the USA shows that the amount of crime against property committed by Heroin addicts can be set between 25% and 50% of all property offences. A further finding in the Inciardi Report in the USA in 1978 demonstrated that the deterrent effect on Heroin addicts by arrest and conviction was minimal. Another study carried out in Baltimore has revealed that Heroin addicts commit crime on an average of 360 days per year in order to get money to feed their habit ... one will have little difficulty in understanding why Heroin is regarded internationally as being the drug which causes the most damage to the fabric of society. Heroin has been known to wreck havoc in whole communities because it has, after all, a capacity to enslave people beyond any other known power.... [8] [*Paper presented to the Forensic Science Symposium on Drugs and Crime, 14 June 1986 cited in P. Charleton, Criminal Law: Cases and Materials (Dublin 1992) 225.*]

It is worth reminding ourselves that a burglary involves the invasion of someone's business premises or home and that a robbery is a theft which is accompanied by violence or the threat of violence, usually in the form of an uplifted knife or a pointed firearm or imitation. Those that are hit are business people such as pharmacists, shops, hairdressers and banks. A 1981 survey indicated a vast involvement by drug abusers with crime due to a reported requirement on a daily basis of between 100 and £200 at then current values to feed drug habits. [9] [*P.O'Mahony and T. Guilmore, Drug Abusers in the Dublin Committal Prisons (Dublin 1983), cited in O'Mahony, op. cit. , 66-68.*]

Drug abuse is criminogenic in two ways. Firstly, it is illegal to use Ecstasy, Cannabis, Cocaine, Heroin, LSD and amphetamines. The only use of these drugs is to remove us from reality. The fundamental test of health in a person is the degree to which they relate to themselves and others by seeing the world as it is. These drugs induce states of unreality and ill-health and, through reinforcement, demand the repetition of that experience. Cannabis is a serious drug and, apart from the case of persons suffering exquisite pain, it is of no use save in altering the mind. [10] [*See the attack found in Corberton, Drugs and Young People (Dublin 1982), chapter 2.*] Drugs destroy people. It is right to record that many persons who use Cannabis do not move on to the abuse of other drugs. It is also right that persons who abuse cannabis can develop the amotivational syndrome that leads to the neglect of work and of children. Nor is it to be ignored that those experienced in interviewing and in sentencing drug offenders note that the first step to harder drug abuse is often, but not invariably, Cannabis abuse. [11] [*This is part of the reasoning of Judge Frank Martin SC in the case of People (DPP) v Preston where a sentence of 14 years was imposed on a plea of guilty for the possession of a large quantity of Cannabis for the purpose of supply. The sentence was later reduced to six years by the Court of Criminal Appeal; unreported 15 October 1984. For a recent example of this see the interview with Eamon Doherty in The Independent , 13 September 1995.*] We have no notion how the widespread use of our illegal drug may affect a community. Nothing sounds less innocuous than a sleeping pill. In Glasgow, Tamazepam, or 'jellies', have accounted for 97 addict deaths in 1994 and there have been 10 murders in drug related conflicts. [12] [*The Independent, 13 September 1995.*] Mixed with Heroin the sleeping pill gives a bigger 'buzz'. The easy temptation of legalisation puts the children of everyone at greater risk. Those who would suffer most from such a course would be those who, in the inner city, have already suffered from bearing the brunt of this problem. [13] [*The Swiss are currently experimenting with Cannabis legalisation as are other European states. See The Independent , 16 September 1995 and The Independent on Sunday , 24 September 1995.*]

Secondly, we have seen entire communities in the inner city devastated by drug abuse to the extent that for a time they publicly challenged the legal order by causing the eviction of abusers from their neighbourhood. Drug abuse has caused a vast upsurge in violent and invasive theft. What had been the experience of our inner city in Dublin is now capable of striking at every community through an increasingly lazy and tolerant acceptance of drugs abuse among the rising generations. The current Minister for Justice is correct in characterising this as a national emergency.

LEGISLATIVE FRAMEWORK

The basic legislative framework is set out in the *Misuse of Drugs Acts, 1977 and 1984* and the *Misuse of Drugs Regulations, 1988*. These define relatively simple offences of possession of drugs, importation of drugs, and possession of drugs for the purposes of supply. Other forms of charge are rarely used. These are the relevant sections (slightly edited):

Misuse of Drugs Act, 1977

1(1) 'supply' includes giving without payment...

(2) For the purpose of this Act any controlled drug of which a person has control and which is in the custody of another who is either under the person's control or, though not under the person's control, acts on his behalf, whether as agent or otherwise, shall be regarded as being in the possession of the person ...

3(1)... a person shall not have a controlled drug in his possession. (Penalty: on indictment 7 years imprisonment and fine; summary — fine for cannabis for first two offences, otherwise 1 year and fine.)

(3) The Minister may by order declare that subsection (1) of this section shall not apply to a controlled drug specified ...

15(1) Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence. (Penalty: on indictment life imprisonment and fine; summary — 1 year and fine.)

(2) Subject to section 29(3) of this Act, in any proceedings for an offence under subsection (1) of this section, where it is proved that a person was in possession of a controlled drug and the court having regard to the quantity of the controlled drug which the person possessed or to such matter as the court considers relevant is satisfied that it is reasonable to assume that the controlled drug was not intended for the immediate personal use of the person, he shall be presumed, until the court is satisfied to the contrary, to have been in possession of the controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 or this Act.

21(2) Any person who ... contravenes or fails to comply with regulations under this Act shall be guilty of an offence (Penalty: on indictment 14 years and fine; summary — 1 year and fine.)

29(1) In any proceedings for an offence under this Act in which it is proved that the defendant had in his possession or supplied a controlled drug, the defendant shall not be acquitted of the offence charged by reason only of proving only that he neither knew nor suspected nor had reason to suspect that the substance, product or preparation in question was the particular controlled drug alleged.

(2) In any such proceedings in which it is proved that the defendant had in his possession or supplied 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 or such a prescription, as may be appropriate, or

(b) he believed the substance, product or preparation to be a controlled drug, or a controlled drug of a

particular class or description, and that, if the substance, product or preparation had in fact been that controlled drug or a controlled drug of that class or description, he would not at the material time have been committing an offence under this Act.

Misuse of Drugs Regulations, 1988

- (1) Subject to the provisions of these Regulations a person shall not —
- (a) produce a controlled drug,
 - (b) supply or offer to supply a controlled drug, or
 - (c) import or export a controlled drug. (Penalty as in section 21).

In common with the strange way Ireland has of legislating on criminal problems these carefully thought out pieces of legislation fail to define what is fundamental to the entire scheme of criminalising drugs. Possession is nowhere defined. Similarly, when it comes to other serious criminal offences, such as rape and murder, fundamental words denoting criminal responsibility are used and left undefined. Irish criminal law is, unlike Canadian, Indian, United States and Australian criminal law, based upon decisions made by judges often going back hundreds of years. That situation should be addressed by the implementation of the first stage of a simple criminal code defining criminal liability by relating it to fundamental principles accessible in a statute. By way of example I quote the definition of possession from the Canadian Criminal Code:

4(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly (i) has it in the actual possession or custody of another person, or (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and (b) where one or two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

This lack of definition causes enormous problems in attempting to gather the relevant precedent and argue a situation as being within it or attempting to define a principle which incorporates a set of facts. That needs to be changed.

The second problem arises in connection with joint possession. Two or more people found in a flat or car in which drugs are concealed are each entitled to an acquittal, unless one or all are seen handling the drugs or a later admission of possession is made to the garda. [14] [*R. v Whelan* [1972] NI153 .] In the early 1980s one of the most notorious members of a well-known criminal family was acquitted on just this point. [15] [*No name is given to avoid a libel suit.*] It is difficult to find any evidence or criticism of the solution imposed in Northern Ireland by way of the *Northern Ireland (Emergency Provisions) Act of 1973* . This simply requires those in apparent possession to disprove that fact:

7(1) Where a person is charged with possessing an article in such circumstances as to constitute an offence to which this section applies and it is proved that at the time of the alleged offence —

(a) he and that article were both present in any premises or

(b) the article was in premises of which he was the occupier or which he habitually used otherwise than as a member of the public (or in the case of a vehicle, he owned or habitually used as a personal conveyance); the court may accept the fact proved as sufficient evidence of his possessing (and, if relevant, knowingly possessing) that article at that time unless it is further proved that he did not at that time know of its presence in the premises in question, or if he did know, that he had no control over it.

(2) This section applies to vessels, aircraft and vehicles as it applies to premises.

(4) This section applies to scheduled offences under the following

enactments, that is to say—

(*Section 3 of the Misuse of Drugs Act, 1977* , as amended.

Section 15 of the Misuse of Drugs Act, 1977 , as amended.

Section 21 of the Misuse of Drugs Act, 1977 , as amended.)

It is an obvious principle that we should be against unjust conviction. Acquittals based upon a technicality that does not relate to justice and, by that definition does not relate either to commonsense, should however be avoided.

TOOLS FOR INVESTIGATION

In any society a police force must have the power to enter property to search for illegal drugs, or evidence thereof, to search suspected offenders and to take temporary custody of vehicles for the purpose of search. In addition, a suspected offender has in our jurisdiction since 1984 been subject to a regime whereby if he is lawfully arrested, for an offence which carries a potential penalty of five years or more on conviction, he may be detained for a period of 12 hours (excluding sleep and interruptions such as illness) for the purpose of questioning him.

The relevant arrest powers are granted by *s. 25 of the Misuse of Drugs Act, 1977* which I quote (slightly edited):

25(1) Where with reasonable cause a member of the Garda Síochána suspects that an offence under section 15 of this Act has been committed and so suspects a person of having committed the offence, he may arrest the person without warrant.

(2) Where with reasonable cause a member of the Garda Síochána,

(a) suspects that an offence under this Act other than an offence under section 15 of this Act has been committed or attempted, and

(b) suspects a person of having committed the offence or having made the attempt, then if the member,

(c) with reasonable cause suspects that the person unless he is arrested either will abscond for the purposes of evading justice or will obstruct the course of justice, or

(d) having enquired of the person, has reasonable doubts as to the person's identity or place of abode, or

(e) having enquired of the person, knows that the person does not ordinarily reside in the State, or has reasonable doubts as to whether the person so resides,

he may arrest the person without warrant.

This section has caused no difficulty. An offence under *s. 15* is the offence of drug pushing; possession of drugs for the purpose of supply. Where any other offence, such as for example the simple possession of drugs, or the growing of cannabis, is suspected then an arrest is effected only, basically, where a garda has enquired and finds that there is a risk of the suspected offender absconding.

Search warrants are granted under s. 26 of the 1977 Act as amended by s. 13 of the 1984 Act. I quote (slightly edited):

26(1) If a Justice of the District Court or a Peace Commissioner is satisfied by information on oath of a member of the Garda Síochána, that there is reasonable ground for suspecting that —

(a) [Amd. s. 13] a person is in possession in contravention of this Act or any premises [or other land] of a controlled drug,... and that such drug ... is on a particular premises, or

[Amd. s.13] [(aa) opium poppy, a plant of the genus *Cannabis* or a plant of the genus *Erythroxylon* is being cultivated contrary to section 17 of this Act on or in any premises or other land, or]

(b) a document directly or indirectly relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would if carried out be, an offence under this Act, or in the case of a transaction or dealing carried out or intended to be carried out in a place outside the State, an offence against a provision of a corresponding law within the meaning of section 20 of this Act and in force in that place, is in the possession of a person on any premises, such Justice or Commissioner may issue a search warrant mentioned in subsection (2) of this section.

[(2) A search warrant issued under this section shall be expressed and [sbs. s.13] operate to authorise a named member of the Garda Síochána, accompanied by such other members of the Garda Síochána and such other persons as may be necessary, at any time or times within one month of the date of issue of the warrant to enter (if need be by force) the premises or other land named in the warrant, to search such premises or other land and any persons found therein, to examine any substance, article or other thing found thereon or therein, to inspect any book, record or other document found thereon and, if there is reasonable ground for suspecting that an offence is being or has been committed under this Act in relation to a substance, article or other thing found on such premises or other land or that a document so found is a document mentioned in subsection (1)(b) of this section or is a record or other document which the member has reasonable cause to believe to be a document which may be required as evidence in proceedings for an offence under this Act, to seize and detain the substance, article, document or other thing, as the case may be.

(3) Where any premises or other land is entered pursuant to a warrant issued under this section, the member of the Garda Síochána named in the warrant may do either or both of the following:

(a) arrest without warrant any person or persons found on such premises or other land for the purpose of searching him or them,

(b) so arrest any such person or persons and keep him or them, as may be appropriate, under arrest until such time as such of the powers of search or examination as he wishes to exercise pursuant to the warrant have been exercised by him...]

There are two main problems with this section. The first is the difficulty, in circumstances of emergency, of obtaining a peace commissioner or a judge. Secondly, the question of when the requirement that a judge is satisfied 'that there is reasonable ground for suspecting that' drugs are on premises has caused immense difficulty. After a series of cases [16] [*Byrne v Grey* [1988] IR 31 and *Berkley v Grey* [1988] IR 46 .] it has been now decided that unless there is sufficient information which would satisfy the judge himself of the reasonable basis for a suspicion that drugs are on a premises, that the warrant is thereby invalid and, notwithstanding the good faith of the officers in seeking to search on this basis, or the success of the search in finding drugs, the evidence thereby obtained is inadmissible invariably disposing of the prosecution's case on that ruling. [17] [*People (DPP) v Kenny* [1990] ILRM 569 SC .]

Furthermore, the depth of detail required on the written information seeking a search can be seen from the decision in *People (DPP) v Elisabeth Yamanoah*. [18] [[1994] 1 IR 565 .] The prosecution said that she brought half a million pounds worth of cocaine through Dublin Airport and into a room in Jury's Hotel. Gardaí followed two individuals to that room and they were arrested within about 10 minutes in possession of the cocaine. The gardaí then applied for a warrant and gave the following, as detail of their grounds for suspicion:

... I have reasonable grounds for suspecting that a person is in possession in contravention of the *Misuse of Drugs Acts, 1977 and 1984* of... Heroin, Cocaine and Diamorphine ... at room (deleted) of Jury's Hotel... this is as a result of confidential information and surveillance over a number of hours by members of the Garda Síochána. I hereby apply for a warrant to search the said premises....

One might have thought this to be sufficient especially as upon a later search the tape forensically linked to the cocaine packets, which had been used to attach the drugs to her body was found in a bin in her hotel room. The Court of Criminal Appeal ordered her acquittal on the basis that the information was insufficient.

A move to a search model based on *s. 29 of the Offences Against the State Act, 1939* is a good idea. I quote it to show why:

Where a member of the Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence of or relating to the commission or intended commission of an offence under this Act or the *Criminal Law Act, 1976*, or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act, or evidence relating to the commission or intended commission of treason, is to be found in any building or part of a building or part of a vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he may issue a member of the Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place.

The practical advantages are that a superintendent is assigned to each district and is therefore readily available. There is an existing jurisprudence in relation to the standard of information which the superintendent must have before issuing the warrant. This is well known to the gardaí, and that the superintendent must justify his action in issuing the warrant in the witness box. An officer of this rank is unlikely to make a mistake.

QUESTIONING A SUSPECT

Where a person is validly arrested, *s. 4 of the Criminal Justice Act, 1984* allows his detention for six hours. That period may be extended, and often is, on the authorisation of a superintendent, for a further six hours. One removes from that the ordinary period of sleep (usually eight hours) and one sees that the detention can continue for about 20 hours. Overnight stays are therefore frequent. This system replaced the confused jurisprudence as to when and in what circumstances Gardaí might question a suspect. [19] [Essentially that boiled down to the fact that one had to arrest for the purpose of initiating criminal proceedings (which remains the situation notwithstanding section 4) but that one could legitimately use a period between arrest and the first appearance of an accused in a District Court, to question him. *People (DPP) v Kelly (No. 2)* [1983] IR 1, [1983] ILRM 271 CCA and SC .] Arrest for the purpose of questioning was never permitted except in the extremely broad and very widely used exception of *s. 30 of the Offences Against the State Act, 1939*. Arrest powers themselves are complex and are in need of reform. [20] [See the proposals put forward by the writer on arrest and questioning in *Dlí*, 1993.] The *Offences Against the State Act 1939* allowed a period of detention of twenty-four hours and an arrest under it could be made merely on the basis of a garda suspecting that the person was in possession of information in relation to the commission or intended commission of certain specified offences. The specified offences were contained in a schedule and since these used to include the old offence of malicious damage, under the *Malicious Damage Act, 1861*, it was widely used. In the case of murder, for example, the murderers would often break through and damage a door. Since the *Criminal Damage Act, 1991* is not scheduled under the Act we have now moved to a situation where the ordinary 12 hour detention, instead of 48 hour detention, is

available in cases of murder. The 48 hours, by the way, could not be interrupted or suspended by sleep. Once arrested under this section a person may be questioned for any offence to which the scheduled offence is linked. [21] [*People (DPP) v Quilligan & O'Reilly (No. 2)* [1987] ILRM 606 SC .] This need not be the dominant concern of the questioning officers although they must be genuinely concerned with investigating a scheduled offence. The section could not be used as a device to arrest someone on a more serious charge. [22] [*People (DPP) v Howley* [1989] ILRM 629 SC .] I now quote s. 30 (somewhat edited):

30(1) A member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may without warrant stop, search, interrogate and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or subsection of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.

(2) Any member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding subsection of this section, stop and search (if necessary by force) any vehicle or any ship, boat or other vessel which he suspects to contain a person whom he is empowered by the said subsection to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a Garda Síochána station, a prison, or some other convenient place for a period of twenty four hours from the time of his arrest and may, if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours. ...

The proposal now put forward is to extend the ordinary period of 12 hour detention (perhaps extended up to 20 hours because of sleep) to detention for 2 days with a possible judicial extension for a further 5 days. Section 30 of the Offences Against the State Act, with its absolute period of 48 hours detention, was extremely useful to the gardaí in investigations. It is possible to have an admissible confession within 48 hours of arrest. [23] [See *People (DPP) v Quilligan & O'Reilly (No. 3)* [1993] 2 IR 305 SC .] It is incomprehensible why s. 27 of the *Criminal Justice Act, 1984* has never been brought into operation. If interviews are tape-recorded then experience has shown, in other jurisdictions, that this removes from a trial process lengthy enquiries into their admissibility. A person who confesses on tape, really confesses and pleas of guilty are thereby increased. [24] [*John McKechnie QC, Director of Public Prosecutions for Western Australia, personal communication.*] Using legitimate methods of questioning pressure one comes to a point where juries are reluctant to convict if a confession has resulted from the end of a 48 hour period. It is also possible to examine the chronology of some cases on a basis which indicates why this reluctance exists. [25] [For further comment see an article by the writer in the *Irish Criminal Law Journal 1982* which analyses, among other cases, the *Peter Pringle* case.]

The Minister for Justice proposes an application to court to justify a further 5 day detention after the initial 48 hours. Unless there is tape recording I cannot see any admissible confessions resulting. What can be foreseen is that information that could be of real help in police work might result.

RESPONSE BY THE COURTS

The material quoted in paragraph 2 of this paper indicate that drug addicts are a menace to society. Virtually every person who has an addiction problem is a potential source of supply of drugs to others. The vast majority of heroin addicts in our city feed their habit by doing petty selling of drugs. Since London developed a similar drugs problem in the mid 80s, medium scale importation and selling is one of the main prevalent patterns. The other is robbery and burglary.

Persons accused of drug offences are entitled to the same presumption of innocence as persons accused of any other offence. They are therefore entitled to bail unless the conditions indicating that they will probably abscond or interfere with witnesses, as set down by the Supreme Court in *O'Callaghan's* case, are met. [26] [*People (AG) v O'Callaghan* [1966] IR 501 .] You can take it therefore that 95% of people on drug charges, or people who are a menace by reason of their manic commission of robberies due to a drug habit, are allowed out on bail. All of these offences are serious and must therefore be tried by the Circuit Criminal Court sitting with a jury. All of them are also subject to the *Criminal Procedure Act, 1967* . This gives the District Court a jurisdiction whereby all serious offences must commence before it. A book of documents is prepared with the statements of the proposed witnesses. These are then examined and submissions are made as to whether there is a sufficient case to put the accused through the trauma of appearing before a judge and jury in the Circuit Court. Sometimes individual charges are knocked out. [27] [*We operate on the basis of complete disclosure.*] All of the witness statements taken by the gardaí, whether these are later called in evidence or not, are handed to the accused. Once the Garda file is prepared, the case is ready for trial. The District Court procedure does nothing to assist in upholding the rights of the accused and it should be abolished. What it does is to add an extra element of time in waiting for trial that is utterly undesirable where drug addicts are concerned. They cannot stop themselves committing crime while on bail and a speedy disposal of their case is called for. If an accused feels aggrieved by a charge he would have the right to apply on motion to the Circuit Court that a particular charge be struck out prior to his trial. This saves time.

Time is of the essence. Drug addicts are not cured simply because they are caught during a robbery or are charged with a drug offence. They remain criminogenic. [28] [*Note the remarks by Superintendent McGroarty in paragraph 2.*] The current waiting period on a serious criminal charge between arrest and trial is, in the Dublin Circuit Court, between 12 and 15 months. Cases in the District Court now receive, instead of a summary trial, which is the whole object of such a jurisdiction, a trial date six months after first appearance. [29] [*Garrett Sheehan, personal communication.*] The *Courts Act, 1995* has allowed for an increase in judges but this has been too slow in becoming law. Prioritising active drug offenders is an obvious answer. A threat of what may happen in over a year's time is little incentive to seek reform in a drug centre or elsewhere. The garda file can take two to three months to prepare in a difficult case. The defence are entitled to a reasonable time in which to prepare their case. It therefore seems difficult to bring waiting times down beyond 5 months. For summary trials in the District Court it is very hard to see any reason why resources could not be either marshalled or provided to give a summary trial within four weeks of first appearance. That period would be a vast improvement on our current situation. Even if it were a question of giving priority of resources to that task within the court system and requiring other serious offences to wait somewhat, it is worthwhile. Removing the most criminogenic element from our society and directing all our resources to the disposal of their cases indicates a level of high seriousness in relation to this kind of offence. This is already shown by individual judges but not by the system of the operation of courts as a whole. Of course, the legislature cannot interfere with the courts but it can by negotiation and the allocation of resources greatly improve the situation.

There are some who take the view that the physephtone maintenance programmes and detoxification programmes of the Eastern Health Board are one of the main responses in keeping this situation from becoming even more intolerable. Of course, such programmes can be exploited with the offender remaining active. People do not get put on such a programme without having what is already a serious problem. The allocation of resources whereby even on a first appearance, and prior to conviction, there can be a voluntary agreement for referral to an officer of the Eastern Health Board who would be available in the main criminal courts in Dublin. This could constitute an improvement. Linking up these services and acknowledging the depth of the problem which causes criminal behaviour in the first instance would be exemplified by the availability of help in the District Court well prior to the lengthy period now required for the disposal of a case.

There are two other comments I wish to make related to criminal procedure. *Section 21 of the Criminal Justice Act, 1984* was designed to speed up trials. People unfamiliar with the courts would be amazed at the number of witnesses who merely handle an exhibit, who merely check on the accused in custody or who are formally concerned with the preservation of a scene of crime or an exhibit, but who must be called in evidence. They can be kept waiting for hours or

days. Badly needed resources are therefore channelled from police work into something that is unnecessary. Section 21 allowed the service of a sworn written statement to be read out in place of a witness's attendance. The defence was however given an absolute veto. Requests to dispense with witnesses are almost always refused. This section has not worked. It should be replaced by a section indicating that the prosecution may, on the service of a witness statement, also indicate that they will dispense with that witness and allowing, proof by the production of a written statement.

Secondly, it is very difficult to see why every witness who guards the scene of a drug seizure, until all forensic examinations have been concluded, should be called in evidence. A presumption should be introduced in law that the scene of a crime was properly preserved until all technical forensic examinations had been completed and that all exhibits produced at trial were those originally identified and marked by an identifying number at the place where it was found and have not been altered. The defence, must have the right to contest those issues but only if it is sensible. The burden should be on the defence to show there is a legitimate issue by bringing a motion before a judge showing a need to call such witnesses.

CUSTODIAL INSTITUTIONS

It was central to the scheme of the *1977 Act* that drug offenders were a category apart from other criminals. Except in the case of persons importing drugs, those convicted of the common offences of possession and drug pushing had to be remanded so that probation and medical reports could be prepared in respect of their case. The *1984 Act* made this discretionary. The medical report was to consider what treatment was appropriate for the individual convict's drug dependency. The Vocational and Educational Report was directed to rehabilitation. Having been given that report the court had two options. The first was a simple prison sentence under s. 27 and the second was an order under s. 28. The order under s. 28 could contemplate release subject to conditions, such as attending some form of medical or treatment centre or, the court itself could sentence an offender to a drug treatment centre. I quote the relevant portions of the section (slightly edited):

28(1)(a) Where a person is convicted of an offence under section 3 of this Act... or an offence under section 15 or 16 of this Act, or of attempting to commit any such offence [Amd. s. 14] [if, having regard to the circumstances of the case, the court considers it appropriate so to do, the court may] remand the person for such period as it considers necessary for the purposes of this section (being a period not exceeding eight days in the case of a remand in custody), and request a health board [Amd. s.14] [probation and welfare] officer or other body or person, considered by the court to be appropriate, to

(i) cause to be furnished to the court a medical report ... with such recommendations (if any) as to medical treatment... appropriate to the needs [Amd. s.14] [arising because of his being dependent on drugs] of the convicted person, and

(ii) furnish to the court a report in writing as to the vocational and educational circumstances and social background of the convicted person together with such recommendations (if any) as to care....

(2) Having considered the reports furnished pursuant to subsection (1) of this section, the court shall, if in its opinion the welfare of the convicted person warrants its so doing, instead of imposing a penalty under section 27 of this Act, but subject to subsection (8) of this section either —

(a) permit the person concerned to enter into a recognisance containing such 'of the following conditions as the court considers appropriate having regard to the circumstances of the case and the welfare of the person,... (involving)

(i) supervision of a health board ...

[(ia) to receive visits and permit visits by... the supervision of a body, an officer of that body

...]

(ii) medical treatment or other treatment recommended in the report,

(iii)... to attend or remain in a hospital clinic or other place specified ... for a period so specified,

(iv)... attend a specified course of education, instruction, or training, ...

(b) order that the person be detained in custody in a designated custodial treatment centre for a period not exceeding the maximum period of imprisonment which the court may impose in respect of the offence to which the conviction relates, or one year, whichever is the shorter.

The idea of the custodial treatment centre, as an alternative to imprisonment, has been entirely abandoned. The *Misuse of Drugs (Custodial Treatment Centre) Order, 1980* [30] [SI No.30 of 1980 .] designated the Central Mental Hospital in Dundrum as the appropriate centre for custodial treatment. Up to 1989 the Centre was unable to receive patients. In that year a judicial review application was brought by a person convicted of drug pushing but suffering from the AIDS virus. She had about two years to live. The case was eventually compromised by the State agreeing to accept her in the Central Mental Hospital and to give her such treatment as they could for drug abuse. She spend a year there and was released and died some time later. [31] [*E.R. v Ireland and Attorney General. As far as I know only one other person has been similarly admitted to the Central Mental Hospital for a year's custodial treatment for drug abuse since that case.*]

Studies in the United States have shown that the idea of enforced treatment as an alternative to imprisonment works only to a limited extent but only with very costly input. Voluntarily seeking treatment is much more successful. [32] [*Inciardi, editor, Drug Treatment and Criminal Justice (New York, 1993).*] Most of us will be aware that there is a moment of realisation in the life of people with an addiction. This leads to a situation where he or she himself seeks treatment. Without the voluntary element involved in the person seeking to cure themselves enforced treatment is close to being useless. The moment of realisation could be, for example, that of an alcoholic realising in the course of his best man's speech at a friend's wedding that he is making vicious and derogatory comments about his friend's mother. We all probably have heard these stories.

The path of drug addiction and self-destruction can be so swift and, in the modern era, the exposure to deadly viruses is so imminent with the start of such unhygienic behaviour as sharing needles, that addicts need to be tackled swiftly both by the courts and all other institutions. I have not heard similar stories of 'the moment of realisation' told by heroin addicts. It may be that the drug is so powerful and the craving for it so overwhelming that the conscious mind is not left working to a degree as is the case, for example, even in an alcoholic. It is therefore essential to remove an addict from his or her situation of addiction to allow that realisation to creep in. Central to that, is the notion that persons who are sentenced or remanded to a prison should not be in contact with drugs. It is obvious that some of our prisons have a dreadful problem but it is equally obvious that others do not. Why one or two have that problem to a high degree and why others do not is an obvious fact which requires study. It is a dreadful indictment on our society that a person remanded by a judge for a report pending sentence can die of a drug overdose in a prison to which he is sent. In April 1993, Stefanos Sofroniou, a Greek national, died in those circumstances. Such also was the case for two other prisoners in 1985. One cynical, but highly intelligent senior officer in the Garcia Síochána has said to me on a number of occasions 'a drugged prison is a happy prison'. This situation has become worse. In a six year period from 1987 the number of serious drug abusers in the prison population increased by a multiple of six. [33] [*O'Mahony, op. cit. , 197.*] This places a huge strain on the prison staff. Is this impossible to bear? The Minister has announced an increased emphasis on detoxification, greater vigilance during visits and the creation of a drug free unit. [34] [*Irish Times , 7 September 1985.*] We seem to be beginning to realise that addicts have a problem. When an addict is sent to prison immediate steps should be taken to isolate him or her. Visits should be restricted to non-contact meetings. After three months the desire of the addict to assist in a rehabilitation programme may

be present. Integration with the drug free population may then be considered. The current situation is dreadful. Strong measures are required to break it down. How can we justify people going to jail coming out after two or three years with as bad a drug habit as on entry? We cannot. Any sensible measure, however tough, must be effected.

The way forward in terms of treatment is probably the continual funding of treatment programmes which are voluntary. [35] [*The Lord Mayor's Commission recommended better community services and an expansion of the Coolmine model with an integration into the prison system for planned release and follow up; op. cit. , 29, 40.*] Often persons going in there will do so as a result of being caught and charged before the court. Part of the reason why a speedy disposal of their case is necessary is that it requires the feeling of imminence in the disposal of their case before they would even think of seeking induction to a place such as Coolmine. It is not just legislation but energetic and intelligent and thought out responses that give us any chance of hoping to solve this problem.

THE DRUG CULTURE

Speaking in an interview with John Freeman for the BBC in March 1959, Carl Jung spoke of the nature of man. He said:

we are so full of apprehensions, fears, that one does not know exactly to what it points ... we need more understanding of human nature, because the only real danger that exists is man himself. He is the great danger, and we are pitifully unaware of it. We know nothing of man, far too little. His psyche should be studied, because we are the origin of all coming evil.... [36] [*Quoted in McGuire & Hull, editors, C.G. Jung Speaking (Princeton, 1977).*]

People have drug problems because of society, because of the penal system and above all because of what is in themselves and in others. An attack upon drug offenders and their stigmatisation as being evil is the kind of gross over-simplification that lets all of us off the hook. Certainly more stringent measures are needed. Equally, however, it is also foolish to simply blame social deprivation, the capitalist system or any other unthinking shibboleth.

When I was fifteen years old a member of Alcoholics Anonymous was brought into our school and gave us a talk that lasted half an hour. Speaking from the heart, a person who was then fine man of about 40 gave us a personal and embarrassing history of his decline. He spoke of his moment of realisation, his attempts at helping himself, how he had wrecked his own life and the life of others and how he had slowly crawled back. This talk affected me as it must have affected all those who heard it. I have been extraordinarily wary of both alcohol and people who drink too much ever since. To be forewarned is to be forearmed. Clearly resources would be needed to adopt a similar programme in relation to drugs. The reality of the situation is, however, that with the social acceptability of Ecstasy, school children are now exposed to drug taking in many areas of the country. No one will stop them and few among their peers will stand up against what appears to be an increasingly accepted activity. The effect of the schools 'stay safe programme' has resulted in much more early reporting of child sexual abuse. Would it not be possible to engage former addicts, who have been rehabilitated in one form or another, to speak in our schools, to speak on the radio, to speak on television. Face-to-face encounters would be best. What is moving, and therefore has the capacity to change people and to ward off danger, is the manner in which members of Alcoholics Anonymous hold nothing back and give all of themselves and their experience to those to whom they talk.

Our culture is geared towards success and our education system towards the attainment of points and academic achievement. Children entering university today are not any more intelligent than they were in 1975. They are, however, under much more pressure. They are, as Jung said, full of anxieties and they are therefore vulnerable. The horrid thing about drugs is that encountered in one's weakest moment they can take over an entire life. One teacher of mine used to tell her students: 'If you develop yourself you won't need power or position or anything else. Develop yourself; that's the real challenge.' We have good people working in our schools as educators. People who themselves have achieved a great deal in personal development. Would it be possible for there to be some scheme whereby some portion of a school day were to be given over to notions of personal development through music, through art and sport, so that

people could be allowed to get in touch with the wiser side of themselves. This has to be taken as seriously as the points race.

One last matter which occurs to me is an action taken by the former Attorney General, Harry Whelehan, on Christmas Eve 1993. As guardian of the public good he sought in the High Court an injunction to prevent a 'rave' taking place. The facts disclosed consistent breaches of the *Public Dance halls Act, 1935*. Undercover gardaí had infiltrated a particular disco to be offered Ecstasy tablets after buying their entry tickets. The facts there were particularly strong and the remedies available in the days leading up to Christmas were limited to this kind of application. If there is a genuine threat by the advertisement of a 'rave' in circumstances where the Gardaí can make a strong case that drugs will be available then it might be worthwhile to bring civil law remedies to bear on those involved. [37] [See the RTE evening news reports of 24 December 1993.] The drafting of new legislation might especially allow for civil orders to be sought banning any dance or meeting, whether public or private, at which illegal drugs might be available. [38] [The main purpose of the 1935 Act was, apparently, to stop 'close dancing' in rural houses; see *The Joy of Sets* (RTE film, 1993).] A breach of such an order would be a contempt of court. If people are invited to gather for 'entertainment' it is a matter of public interest and the 1935 Act, all too easy to circumvent, should be replaced by a modern enactment. The Lord Mayor's Commission, chaired by Judge Moriarty, made a recommendation for 'a ruthless crackdown [on] bars and clubs which are... focal points of drug abuse and dealing'. [39] [Op. cit., 30.] Under the current legislation this is, to put it mildly, far too difficult.

PROPOSALS FOR REFORM

All of us are vulnerable at some stage in our lives. Adolescents and young people are particularly open through momentary foolishness or depression into allowing themselves to experiment with the drug culture. The social acceptability of rave discotheques has spread the menace of drug taking widely over this island. One has a terrible fear that once a person accepts that he or she can take a drug that will alter his or her mind, that the temptation in similar moments distress will grow more and more. I do not believe that it is foolish to say that one drug leads to another and that Ecstasy and Cannabis can lead to Cocaine and Heroin. LSD is again becoming widely available for the first time since the early 1980s. It is so easy to switch from what might be a mild drug to what is an immediately mind altering, and sometimes insanity inducing, drug. That problem is here. It is an awesome problem and since drugs remove from people their self-control, their restraint and their control of their destinies, it is neither authoritarian nor right-wing to seek, by strong measures, to reorient them.

Society demands of us that we take stern measures. Our city is plagued with robberies and muggings by those with 'habits'. Anyone can be sucked in and the extent of the current problem leaves us all suffering with a dreadful presentment that worse is to come.

Above all, swiftness of response is of the essence of a solution. Leaving addicts and drug pushers on bail for 15 months while the courts get around to trying them adds to the problem. The waiting time should be cut to a maximum of six months. The procedure of preliminary examination in the District Court is a waste of time and should be abolished. The calling of numerous gardaí to prove elements of possession of an exhibit or the guarding of a scene, which are already proved by way of a written statement, should be abolished. Personnel that are freed can be used in the fight on the street. We must look seriously at the nature of the drug problem and why so many going into jail come out with an equal addiction. We must be ready to examine our institutions and ourselves and we must be ready to be critical. The throwing of insults and blame unto others solves nothing. The rational examination of better ways of doing things can bring out the intelligence in others that is needed to solve these problems.

It is right that the threat to our society by the misuse of drugs should be treated on the same level as the threat which was posed by subversive activity until recently. The models therefore in place of the issue of search warrants and the availability of detention under the *Offences Against the State Act 1939* can legitimately be brought to bear against the drug problem. Overall, we must seek to build a society in which the individual is respected and his or her talents are developed. We turn to alternatives that may destroy our lives often because of an absence of anything else.

**The Honourable Mr Justice PETER CHARLETON is a judge of the High Court. This article was prepared for a National Conference on Drugs and Crime held in UCD by the Fine Gael party in October 1995.*

First published in the Irish Criminal Law Journal, Volume 5, Issue 2, pages 220–240, reproduced with kind permission of Thomson Round Hall