Neutral Citation No. [2005] NICA 18 | *Ref:* KERC5251

Judgment: approved by the Court for handing down | *Delivered:* 15/04/05
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND
ATTORNEY GENERAL'S REFERENCE (Number 8 of 2004)

DAVID CYRIL DAWSON, JEROME CAMPBELL and DARREN MARTIN
(AG Ref 11,12 & 13 of 2004)

Before Kerr LCJ, Gillen J and Morgan J

KERR LCJ

Introduction

[1] The offenders each pleaded guilty to drugs offences committed on 18 October 2002 and were sentenced by Weatherup J at Antrim Crown Court on 23 April 2004. In the case of Dawson the offence was one of being concerned in supplying to another a class B controlled drug (cannabis resin), contrary to section 4 (3) (b) of the Misuse of Drugs Act 1971. He had pleaded not guilty to conspiracy to import and on 19 April 2004 the Crown accepted a plea to the lesser count. He was sentenced to two years' imprisonment suspended for two years. In Martin's case there were two offences involved, the first of these being possession of a class B controlled drug (cannabis resin) with intent to supply, contrary to section 5(3) of the 1971 Act; the second offence was possession of a class A controlled drug (cocaine) with intent to supply, contrary to section 5(3) of the 1971 Act. A probation order was made in respect of each of these offences. The duration of the order in each case was 2 years and each order was made concurrent with the other. Campbell had been charged with unlawful supply of a class B controlled drug (cannabis resin), contrary to section 4 (3) (a) of the 1971 Act and with unlawful possession of a class B controlled drug (cannabis resin), contrary to section 5(1) of the Act. He was sentenced to 2 years' imprisonment, suspended for 2 years in respect of the first of those offences and to 12 months' imprisonment, suspended for 2 years in respect of the second.

[2] Two co-defendants, James John McCashin and Paul Dunlop, had pleaded guilty at an early stage to conspiracy to evade prohibition on the importation of cannabis resin and were sentenced on 23 April 2004 to custody probation orders comprising respectively 5 years' imprisonment and 12 months' probation and 2 years' imprisonment and 12 months' probation for their roles in the enterprise. Dawson and Martin had other counts left on the books on the usual terms. It should be noted that in Dawson's case this related to the conspiracy to import drugs. It is his firm contention that he had at all times signalled his clear intention to contest this charge and it was only when the Crown indicated that they would accept a plea to a charge that confined his role to the events of 18 October 2002 that he was prepared to plead guilty and even then that he did so because he believed that he would not receive a custodial sentence.

[3] A hearing of these references began on 15 October 2004. It was adjourned, primarily to obtain a pre-sentence report concerning the offender Dawson. On 12 November 2004 this court gave leave to the Attorney General to discontinue the reference in the case of Campbell because of his ill health. On 17 December 2004 the hearing was resumed. This court gave leave to the Attorney General to apply under section 36 of the Criminal Justice Act 1988 to have the sentences imposed on Dawson and Martin quashed on the ground that they were unduly lenient and the applications in relation to those two offenders proceeded.

Background facts

[4] In 2002 the drugs squad of the Police Service of Northern Ireland (PSNI) put in place a complex undercover operation to deal with a gang involved in the importation of drugs into Northern Ireland. The gang made use of long distance lorry drivers to import the drugs. Two of the officers posed as a lorry driver and his girlfriend. Over a period of time these undercover officers struck up a relationship with the suspects and, in due course, the male officer was asked to use his lorry to import drugs from Holland into Northern Ireland. The officer went to Holland and met a person there from whom he took delivery of the drugs consignment. The consignment consisted of two boxes containing some 35 kilograms of cannabis resin with a street value of about £175,000. He drove his lorry back to Northern Ireland and awaited instructions on how he was to hand over the drugs.

[5] After he received these instructions, on 18th October 2002 the officer drove to the Boucher area of Belfast and parked behind the fruit market in Balmoral Link. He then telephoned the offender McCashin on a mobile telephone that had been provided by the gang and told McCashin that he was in place. At 10.15 am a silver Audi car was seen to drive into Balmoral Link. This vehicle had to perform a U turn as it found its way blocked by another large lorry that was reversing. Dawson was the owner of the car and he was driving it

with McCashin as a passenger. Because the road was blocked, the collection plan was changed and McCashin rang the officer to say that he should expect to be approached by a man driving a blue Ford Escort and that the consignment should be handed to him.

[6] A few minutes later, a car pulled up in front of the officer's lorry and the driver got out and approached the officer. The driver was the offender Campbell. Campbell took possession of the consignment and drove off. He drove to Kells Snooker Club on the outskirts of Antrim where he met the offender Martin and handed over the consignment. Martin took it to his home where he hid it. He then left home to collect his daughter. His car was stopped by the police and he was arrested. His home was searched and the police found the consignment of cannabis and bags containing white powder. Subsequently this was found to be cocaine with a street value of approximately £25,000. Martin made admissions to the police as to his role. He claimed that he was holding the cocaine for a person whom he declined to name. He said that he was to return the cocaine to this person when requested. He was to receive £200 in payment for holding the cannabis and an ounce of cannabis as payment for holding the cocaine. The offender Campbell was arrested and a search of his home found a small amount of cannabis for personal use. Campbell also made admissions to the police about his role and said that he too was to be paid £200. The offenders Dawson and McCashin were arrested in Dawson's Audi car as they were driving back into the Stiles Estate. £2000 in notes was removed from Dawson's trouser pocket. Dawson told police he had the money to buy a car. A further £3000 was found in the car.

[7] This was clearly a well organised police operation. Undercover officers assumed false identities and lived at Loughview Apartments in the Stiles Estate, Antrim from the end of May 2002, establishing a relationship with the defendants James John McCashin and Paul Dunlop. The first invitation to become involved in drug smuggling emanated from Dunlop on 15 September 2002. He introduced the undercover officers to McCashin on 1 October 2002 and it was after this that the plan was hatched for the officer to travel to Holland and obtain the cannabis. He was to be paid £5000 for bringing it back to Northern Ireland which was the total sum of money that was found in Dawson's trouser pocket and his car.

[8] The involvement of each of the offenders in respect of whom the reference was made may be described as follows. The Crown case was that Dawson telephoned Campbell to spark his involvement in the venture. Forensic evidence linked him to a mobile telephone found in the car. He drove McCashin to the planned pick up point and they had sufficient money on Dawson's person and in the car to make the payment promised to the undercover police officer. In police interview Dawson consistently denied any involvement in the enterprise.

[9] Campbell, who had taken possession of the cannabis from the undercover police officer at Boucher Road and delivered it to Martin in Antrim, was arrested in Larne at around 3.30pm on 18 October 2002. In police interview the offender immediately admitted that he had delivered the drugs. He said that he had been telephoned on the morning of 18 October 2002 and asked to make the pick up and delivery. He said that he did not know what the packages contained but that he appreciated he was involved in illegal activity. He was to receive payment of £200 later that evening. He admitted to possession of a small quantity of cannabis for personal use found in his home.

[10] Martin, after taking delivery of the cannabis from Campbell, transported it to his home in Antrim and hid it there. He was arrested when police stopped his car in Dunadry at 12.25pm on 18 October 2002. He told the probation officer who prepared the pre-sentence report that he had opened one of the packages in his home in order to take some cannabis for personal use, whereupon he discovered a tracking device. When his car was stopped, police found a tracking device in the car, but the offender said that it had been picked up on the road earlier by his 4 year old daughter, who was also present in the vehicle. His house was searched and the cannabis was found together with 185.6 grams of cocaine (which had a percentage purity of 32). This was not part of the drugs discovered in the principal operation.

[11] Martin made admissions without prevarication. During police interview he said that he had been approached by a man two days prior to the offence. He declined to name the man concerned. He was told that he was to pick up a small amount of cannabis for which he would be paid £200 and receive an ounce of cannabis. He told police that he would be under threat if he did not agree. The unnamed man told him where to pick up the consignment and said that he would be telephoned with further details. The call came on the morning of 18 October 2002 and the offender proceeded to the given location. Martin told police that he had been in possession of the cocaine since the previous Monday. He believed it to be "speed". At trial the Crown effectively accepted the explanation put forward by the offender at interview that he was holding the drugs for money and a small quantity of cannabis.

The references

[12] In each case the Attorney General submits that, "having regard to the substantial quantity of drugs involved, the nature of the overall operation, the indispensable role of the offender therein, the extent of the offender's culpability, the need for deterrence, public concern relating to offences of this kind and the governing principles and guidelines, the sentence imposed is unduly lenient."

Antecedents

Dawson

[13] This offender has a record consisting of seven appearances before the Magistrates' Court between 1988 and 1997. He has convictions for a variety of offences, including theft, disorderly behaviour, assault on police, intimidation and common assault, but he has no previous drug related convictions. The offender has previously been dealt with by way of suspended sentence.

Martin

[14] This offender has a record consisting of eight appearances before the Magistrates' Courts between 1988 and 1998. His record is dominated by road traffic and driving offences, but also includes convictions for burglary, handling, common assault and disorderly behaviour. He has no previous drug related convictions. He has previously been dealt with by way of fine.

Pre-sentence reports

Dawson

[15] Weatherup J had decided that a pre-sentence probation report was not necessary before sentencing the offender. When the hearing of this reference began it became clear that such a report might be of benefit and the application was adjourned so that it might be obtained. After some difficulty on the part of the probation officer, an arrangement was made to interview Mr Dawson in order that the report might be prepared. When eventually it became available, Mr Treacy QC (who appeared on Dawson's behalf) objected to its production on the basis that it contained a number of inaccuracies. By the time this objection was received, one member of this court had already read the report. We have decided, in light of Mr Treacy's objections, that the other members of the court should not read it and that it should be left entirely out of account in our decision as to the outcome of the reference.

Martin

[16] A pre-sentence report was prepared on this offender by Miss E McClintock, probation officer. It is dated 8 December 2003. The offender is a single, unemployed man from Antrim. He has a young daughter from a former relationship. He began using cannabis and drinking when working on building sites in London as a youth, and continued this after he returned home. The offender has not been able to work since a road traffic accident in late 2001 and lives on incapacity benefit and disability living allowance. He has had contact with a Community Addictions Counsellor with a view to reducing his cannabis usage, but his motivation to change was thought likely to remain low until his legal situation resolved.

[17] As to the present offences, the offender told the probation officer that he had been approached by third parties to collect and keep the drugs, and had done so in the hope of easy financial gain. A package was left in his garden,

which he thought contained "speed" but later turned out to be cocaine. He hid the package in his settee until police discovered it. He collected two large packages of cannabis from his co-defendant Campbell, whom he did not know. The size of the packages surprised him and added to his anxiety. When he opened the packages at home to retrieve cannabis for personal use he discovered a tracking device and was later arrested.

[18] The offender is said to be unlikely to pose a risk of harm to the public, but the likelihood of re-offending depends on his ability and commitment to manage his addiction and his ability to distance himself from the drug culture. The report concludes that a number of the offender's issues with addiction, rehabilitation, risk, decision making and employment could be addressed through supervision in a probation order.

Medical reports

[19] A psychiatric report on Martin from Dr Graeme McDonald, consultant psychiatrist, dated 30 January 2004 was available to this court and the sentencing judge. The offender told the psychiatrist that he looked after the drugs for £200, but that he felt under pressure because he owed the man who had asked him to do so a substantial amount of money and felt at risk from him. He said that he thought it would defray some of his debt. He was then asked to pick up the consignment of cannabis. The offender told Dr McDonald: "I thought this would give me the chance just to disappear."

[20] The report records that Martin had a brief psychiatric history consisting of a stay in Holywell Psychiatric Hospital in February 2003, and symptoms of depression, anxiety and paranoia, for which he received medication, after a road traffic accident in 2001. He told Dr McDonald of several episodes of self harm. Dr McDonald expressed his conclusions thus:-

> "It is clear that at the time of the offences he was suffering from substantial emotional distress as a result of feeling under threat from paramilitary organisations.[1] He was suffering adverse mental health consequences of chronic drug and alcohol abuse. His ability to care for himself and to live independently was impaired. As a result of this impairment he was vulnerable to exploitation and abuse by others…If he continues to drink and to smoke as he has done in the past, then there is a substantial risk of serious physical harm to himself through physical or psychiatric illness and also a substantial risk of re-offending…If he were to

[1] In her plea in mitigation the offender's counsel sought to link the offender being allowed to return to his community with pressure to become involved in the index offences.

> abstain from alcohol and drugs then he is likely to have the resources to enjoy a successful rehabilitation."

[21] A report from Dr M T Davies, clinical psychologist, dated 12 December 2003, provides details about Martin's drug abuse and "chaotic existence." The offender told Dr Davies that he felt depressed and he attained a score typical of somebody who might be described as "severely depressed" on the Beck Depression Inventory. The offender still smoked cannabis daily and regarded himself as addicted. He considered himself to be a binge drinker. The report concluded:-

> "Based on the report that he passed his 11+, I conclude that Mr Martin is a man of above average cognitive ability. There were no reports of sexual or physical abuse in childhood, or of parental neglect. Since early adolescence Mr Martin has used and abused psychoactive substances. His lifestyle has been chaotic, and he has never established a career or successful long-term relationships. Mr Martin has experienced a number of events, associated with his lifestyle that might be described as traumatic. It would appear that many of these experiences have served to intensify his drug use, and to reinforce a sense of paranoia. He has lost his sense of safety in the world, and his trust in other people. In the last 2 years his General Practitioner has referred him to mental health services in Antrim. He is currently being treated for clinically significant depression and paranoia."

[22] A letter dated 3 July 2003 from a mental health nurse described symptoms of the offender's mental health difficulties including depression, anxiety and paranoia and confirmed his history of inpatient care, self harm and lack of proper daily functioning.

Judge's sentencing remarks

[23] The judge accepted that the roles played by Dawson, Campbell and Martin were limited to 18 October 2002 and stated: "I will certainly treat the three other defendants as less culpable than Dunlop and McCashin." He considered McCashin to be the primary offender, although he noted that counsel had said he was not a wholesaler but had been paid a £1000 fee for organising the operation. The judge also concluded that Dunlop was in the top rank of the offenders.

[24] As to Dawson, the judge took account of his family circumstances, his support of an elderly father and his relatively clear record. He also took account of counsel's assertion that the offender had entered a "pragmatic" plea: he was advancing an abuse of process application and the prosecution were not able to proceed with the charge at the stipulated time because of difficulties with evidence.[2] The judge considered that 2 years' imprisonment was appropriate, and that the pragmatism of the plea made a suspended sentence appropriate.

[25] With regard to Martin the judge acknowledged counsel's submissions as to the offender's limited role, early plea and irrelevant record. The judge was particularly concerned with the offender's mental health difficulties. He felt that the offender's culpability was similar to that of Campbell, but that probation was warranted due to the offender's mental health problems. A suspended sentence would not have allowed the offender to avail of the supervisory services offered by probation.

Events preceding the plea by Dawson

[26] Dawson was due to be arraigned on 17 October 2003. His arraignment was adjourned when it became clear that he wished to make a 'no bill' application. This application was adjourned twice at the request of the prosecution and was eventually heard on 21 November 2003 when it was refused by McCollum LJ. The trial was due to proceed on 12 January 2004 but was adjourned from that date at the Crown's request. It was again the subject of an application to adjourn on 8 April 2004 because forensic evidence required by the prosecution was awaited. An abuse of process application was due to take place on 19 April 2004 grounded primarily on an argument that statements after caution prior to obtaining legal advice were not admissible. This did not proceed because, on that date, the Crown intimated that they were prepared to add another count to the indictment and, after discussion between counsel and with the judge, Dawson pleaded guilty to that charge.

[27] The trial of Dawson on the charge of conspiracy to import drugs could not have proceeded on 19 April 2004. That charge, if it had remained the basis of the prosecution against him, would have been contested by Dawson. In his skeleton argument and in his submissions to this court Mr Treacy stated that he and leading counsel for the prosecution, Mr Weir QC, went to see the judge in chambers on 19 April 2004 to inform him of the possibility that Dawson might plead guilty to the offence and (in Mr Treacy's case at least) to discover what sentence the judge might impose if that occurred. At the time that this approach to the learned trial judge was made, all other defendants

[2] Senior counsel for Dawson said: "A trial was still many months ahead so that is the context in which the plea took place."

had pleaded guilty. Mr Treacy therefore claimed that the judge was dealing with the request for an indication as to sentence against the background of a "long maintained resolve" on the part of Dawson to contest the charge and to pursue an abuse of process application. The choice for Dawson at this time was, Mr Treacy claimed, whether to wait for several further months for his trial on the original count or to explore the possibility of a non-custodial disposal. If he had faced the prospect of a custodial sentence, he would not have consented to the substitution of the charge to which he pleaded guilty. Mr Treacy asserted that this was known to prosecuting counsel. He submitted that it was highly relevant that Mr Weir accompanied him to see the judge in chambers in the knowledge that Dawson's objective was to secure a non-custodial sentence and that he would not plead guilty if that result had not been secured.

[28] It is also material, Mr Treacy said, that the judge was informed by Mr Weir that the prosecution took the view that the count to which Dawson was to plead guilty was less serious than the charge which he had originally faced. The judge indicated that he was minded not to impose a custodial sentence. Mr Treacy has submitted that it is significant that Mr Weir did not register any objection to the course that the judge indicated. Indeed, according to Mr Treacy, there was a second visit to the judge's chambers some time later on 19 April when it was again made clear by the judge that he intended to impose a suspended prison sentence and this did not elicit any unfavourable response from Mr Weir nor did he (either then or during the hearing of the plea in mitigation) cite any authority to the judge to suggest that the selection of a non-custodial disposal was inappropriate. Unfortunately no record of the discussions in chambers was kept. This is contrary to the clear guidance provided by this court in *Attorney General's reference (No 3 of 2003) (Rogan)* [2001] NI 366 where Carswell LCJ said:-

> "A full and where possible verbatim note should be made of all discussions in chambers, preferably by a shorthand writer. Where this is not practicable, the judge should take a full note or ask counsel to take a note and furnish it for agreement."

[29] This court has been shown advices given by Mr Weir (who did not appear before us) to the Attorney General as a result of a request made by Dawson's solicitors that the application for a reference be withdrawn because of what had passed between the judge and counsel. He gave the following account of what happened in chambers:-

> "In chambers I informed the judge of my intentions concerning the charge and explained that the defence were consenting and that I had

> authority to accept a plea to that [being concerned in supplying to another a class B controlled drug] count. I also informed the judge that the count was some degrees less serious than the very serious conspiracy count, in the prosecution's view. The judge indicated that he would permit the addition [of the extra count].
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> At that point Mr Treacy raised the issue of sentence. I told both him and the judge in very clear and definitive terms that I would take no part in that discussion. They discussed the issues and I took no part in the conversation whatsoever. The judge indicated that he could see his way to a non-custodial sentence. I was not asked [for] neither did I volunteer any opinion on this matter."

[30] In a second report to the Attorney General Mr Weir said that he was unable to remember a second visit to the judge's chambers. He disputed a suggestion (made in correspondence by Dawson's solicitors) that, in advance of this meeting, he had proposed to Mr Treacy that a pre-sentence report should not be obtained lest it contain information that might put at risk the indication that the judge had already given of a non-custodial disposal.

[31] In neither report does Mr Weir assert that he did not know that Dawson would not have pleaded guilty unless he was to receive a non-custodial sentence. This is important for reasons that will appear presently. It seems at least possible that the judge linked the indication that he gave as to likely sentence with the fact that Dawson had made a pragmatic plea *i.e.* a plea which effectively abandoned a defence (abuse of process) that might well have succeeded if it had been advanced on his behalf. It is true that Mr Weir asserts in his advices to the Attorney General that he did not anticipate that the abuse of process defence would have availed the offender but he did not claim that this case had been made on behalf of the prosecution to the trial judge.

Sentencing in drugs cases

[32] In *Regina -v- Aramah* [1982] 4 CAR(S) 407 the Court of Appeal in England affirmed a sentence of six years imprisonment for being concerned in the importation of 59 kilograms of herbal cannabis. In a passage dealing with sentences for the importation and supply of cannabis the court said:-

> "*Class "B" Drugs, particularly Cannabis:*
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> We select this from amongst the class "B" drugs as

being the drug most likely to be exercising the minds of the courts.

Importation of cannabis: Importation of very small amounts for personal use can be dealt with as if it were simple possession, with which we will deal later. Otherwise importation of amounts up to about 20 kilogrammes of herbal cannabis, or the equivalent in cannabis resin or cannabis oil, will, save in the most exceptional cases, attract sentences of between 18 months and three years, with the lowest ranges reserved for pleas of guilty in cases where there has been small profit to the offender. The good character of the courier (as he usually is) is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known that the large scale operator looks for couriers of good character and for people of a sort which is likely to exercise the sympathy of the court if they are detected and arrested. Consequently one will frequently find students and sick and elderly people are used as couriers for two reasons: first of all they are vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly, it is felt that the courts may be moved to misplaced sympathy in their case. There are few, if any, occasions when anything other than an immediate custodial sentence is proper in this type of importation.

Medium quantities over 20 kilogrammes will attract sentences of three to six years' imprisonment, depending upon the amount involved, and all the other circumstances of the case.

Large scale or wholesale importation of massive quantities will justify sentences in the region of 10 years' imprisonment for those playing other than a subordinate role.

Supply of cannabis: Here again the supply of massive quantities will justify sentences in the region of 10 years for those playing anything more than a subordinate role. Otherwise the bracket should be between one to four years'

> imprisonment, depending upon the scale of the operation."

[33] Mr Treacy made the point forcefully that Dawson had not pleaded guilty to importing the drugs and that prosecuting counsel had expressly accepted that this was a much less serious offence than the offence of conspiring to import but one may note that the importance of a distinction between the two types of offence is not accepted as a matter of general principle in the passage from *Aramah* quoted above nor is it reflected in decisions in this jurisdiction that have applied the *Aramah* guidelines. In *R v Hogg and others* [1994] NI 258, for instance, (which approved the approach taken in *Aramah*) this court said (at page 262):-

> "1. Importation of drugs on a large scale is the most serious offence in this area, and is invariably to be visited with a substantial custodial sentence. We respectfully agree with the guidelines set out by Lane CJ in *R v Aramah* (1982) 4 Cr App R (S) 407.
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> 2. Supplying drugs is the next in descending order of gravity, with possession with intent to supply a short distance behind. In many cases there may be little distinction between them, for the charge may depend on the stage of the proceedings at which the defendant was apprehended. In all but exceptional cases they will attract an immediate custodial sentence, which may range from one of some months in the case of a small quantity of Class B drugs to one of four or five years or more in the case of supply of appreciable commercial quantities of Class A drugs. We do not find it possible to narrow the range any more closely, for much will depend on the circumstances of the supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record, together with his or her individual circumstances."

[34] In *R v Hutton* [1998] NIJB 27, at 30E MacDermott LJ said:-

> "The attitude of the courts in this jurisdiction to the offence of supplying proscribed drugs is well known (see the observation of the Lord Chief Justice in *Haveron* and a series of subsequent cases). In short the courts in this jurisdiction view

> the supply or possession with intent to supply, of any controlled drug, whether of class A or class B, as a serious offence which will almost inevitably attract an immediate custodial sentence."

[35] In *R v McIlwaine* [1998] NI 136 an appeal against a sentence of four years imprisonment for possession of 9.88 kilos of cannabis resin with a street value of £100,000 was dismissed. MacDermott LJ said at page 141:-

> "So we return to the question—was this sentence manifestly excessive? We are satisfied that it was not. Even allowing for the early guilty plea we would not have interfered with a five-year sentence. This was a substantial quantity of cannabis, no assistance was given to the police by the appellant who already had a relevant conviction. We would repeat yet again—those who offend in this way will on conviction receive lengthy custodial sentences. The public is entitled to be protected from the evil of drug abuse and it is the duty of judges in this jurisdiction to make it clear that they will seek to discourage anyone from participating in that trade."

[36] In *Attorney General's reference (No 5 of 2003)* [2003] NICA 38, although this court did not interfere with the sentence imposed because of the exceptional nature of that case, Carswell LCJ emphasised that persons convicted of possession of drugs with intent to supply "must ordinarily expect a custodial sentence". In *Attorney General's reference (No 11 of 2003)* [2003] NICA 42 for an offence of possession of approximately 1.5 kilograms of a class A drug, cocaine, with intent to supply, this court increased a sentence of eighteen months to three and a half years, indicating that, but for the effect of double jeopardy, the sentence would have been five years.

[37] The effect of these decisions is inescapable. In all but the most exceptional cases those convicted, even on their plea of guilty, of offences of possession of drugs (be they class A or class B drugs) with intent to supply, should receive an immediate custodial sentence. In our judgment neither Dawson's case nor that of Martin was sufficiently exceptional to warrant a non-custodial sentence. Even if one allows that the offender Dawson may have had some prospect of success in an abuse of process application, we do not consider that this could justify so significant a departure from the established guidelines as was chosen by the judge in the present case. Indeed, we rather doubt that the judge would have been in a position to make a confident evaluation of the chances of the offender succeeding in that application. We consider, moreover, that great care is required in allowing

the possibility of the failure of the prosecution to influence the selection of a sentence. In Martin's case the consideration that seems to have most weighed with the judge was his mental health. While one may share the judge's concern about the offender's mental health problems, we do not consider that these were of sufficient moment to warrant a non-custodial sentence in light of the clear guidelines from the cases that we have discussed above. We are of the view that sentences of imprisonment of at least two years should have been imposed on these offenders and that the sentences passed by the judge were unduly lenient.

Discretion

[38] It is well settled that, even where the Court of Appeal concludes that a sentence is unduly lenient, it retains a discretion whether to quash the sentence imposed and substitute a more severe penalty. In *Attorney General's reference (No 4 of 1989)* [1990] 1 WLR 41, 46, Lord Lane CJ said:-

> "… even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned."

[39] Mr Treacy invited us to refuse leave to the Attorney General to apply under section 36 because counsel for the prosecution had raised no objection to the indication by the sentencing judge. For reasons that we shall give in a moment, we refused that application but it is important first to recognise that to accede to such an application involves quite a different exercise from that contemplated by Lord Lane in the passage quoted above. To have refused leave on the basis suggested by Mr Treacy, this court would have had to be satisfied, as it seems to us, that it would be wrong to permit the Attorney General to proceed with his application because of the position taken by prosecuting counsel at trial. The exercise of the discretion, by contrast, arises where the application has been perfectly properly made but where supervening factors weigh sufficiently with the court to warrant its refusal.

[40] The question of the propriety of section 36 applications where an indication has been given by the judge of the likely sentence was discussed by this court in *Attorney General's reference (No 3 of 2000)* [2001] NICA 31. It has

also been considered by the Court of Appeal in England in *Attorney General's reference (No 19 of 2004) (Charlton)* [2004] EWCA Crim 1239. In that case the sentencing judge indicated, during a discussion in chambers with defence counsel, that he was minded not to impose a custodial sentence if a plea was entered to a mooted charge. Prosecuting counsel was present but did not contribute to the discussion although he said while leaving chambers, "Your Honour, it sounds, therefore, as if the matter can be resolved". On a reference by the Attorney General, counsel for the offender submitted that it would be an abuse for the Attorney General, who stands in the shoes of the original prosecution, to suggest that the course in which the prosecution had acquiesced was inappropriate on the basis that it would result in a sentence which was unduly lenient. In advancing this submission counsel had relied on the decision in *Attorney General's Reference (Nos 8, 9 and 10 of 2002) (Mohammed and others)* [2003] 1 Cr. App. R. (S) 272. In that case Kennedy LJ had said (at page 277):-

> "The problem of an Attorney General's Reference against the background of a judicial indication that there might be some non-custodial disposal is one which has troubled this Court on a number of occasions in the past. In *Attorney General's Reference Nos 86 and 87 of 1999* [2001] 1 Cr. App. R. (S) 141 (p505), this Court considered a number of authorities in relation to this area of the law and said at paragraph 31 on page 512:
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> > '... we consider that where an indication is given by a trial judge as to the level of sentencing and that indication is one which prosecuting counsel considers to be inappropriate, or would have considered to be inappropriate if he or she had applied his mind to it, prosecuting counsel should register dissent and should invite the attention of the Court to any relevant authorities as indicated by the Lord Chief Justice in the case of *Thompson and Rogers*, otherwise if the offender does act to his detriment on the indication which has been given this Court may well find it difficult to intervene in response to a reference made by the Attorney-General.'"

[41] The Court of Appeal in *Charlton* clearly thought that these comments should be approached circumspectly. At paragraph 21 Latham LJ said:-

> "It seems to us that the passage upon which Miss Munro relies is a passage which must be considered with some care. It clearly has to be read in conjunction with what Lord Bingham said in *Robinson* and what Rose LJ said in *Stokes*. It is undoubtedly right that if the prosecution has acted in ways in which it could be said that it had played a part in giving the offender the relevant expectation, then clearly it would not be appropriate for this court to permit the Attorney General to argue that the sentence which was imposed, partly as a result of what the prosecution had said or done, was unduly lenient. But we have, it seems to us, to look in the light of that principle at the facts of each particular case."

[42] The *Robinson* case referred to in this paragraph is *Attorney General's Reference No 4 of 1996 (Robinson)* [1997] 1 Cr. App. R. (S) 357. In that case Lord Bingham CJ said that when the judge has given an indication as to sentence, that does not preclude the Attorney General from bringing the matter before this court for it to consider whether or not the sentence was unduly lenient. Significantly, however, he also said that the indication given by the judge would be an important matter for the court to take into consideration when deciding how to dispose of the reference. This appears to us to be of considerable significance in the present case.

[43] The *Stokes* case that Latham LJ adverted to was *Attorney General's Reference No 17 of 1998 (Stokes)* [1999] 1 Cr. App. R. (S) 407. In that case Rose LJ said at page 411:-

> "... if it were the position that a legitimate expectation of a lenient sentence prior to a plea of guilty, was a sufficient reason for this Court not to exercise its powers under section 36 ... the whole purpose of those powers would, as it seems to us, be set at naught. Anyone who pleads guilty to an offence ... must ... be taken to do so in recognition of the risk that, if a lenient sentence is passed, that may give rise to an Attorney-General's Reference to this Court, on which this Court may increase the sentence passed..."

[44] We strongly agree with the sentiment expressed in *Attorney General's Reference Nos 86 and 87 of 1999* that where an indication is given by a trial judge as to the level of sentencing and that indication is one which prosecuting counsel considers to be inappropriate, or would have considered

to be inappropriate if he had applied his mind to it, he should invite the attention of the Court to any relevant authorities. We believe that the attention of the trial judge in this case should have been directed by counsel for the prosecution to the well-known authorities that we have discussed above. We do not suggest that this should necessarily have been done in chambers. But counsel was aware that the intention of the judge was to pass a non-custodial sentence. When the plea in mitigation was made counsel for the prosecution had the opportunity to refer the judge to relevant authorities. We consider that he should have availed of that opportunity. This is not to suggest that this must take place on every occasion (although, as a matter of good practice, we think it is desirable that prosecuting counsel should bring relevant guideline cases to the attention of the judge.) There were particular features about this case, however, that strongly favoured that course. The judge had given an indication of his likely sentence. Prosecuting counsel should have been aware of decisions of this court that were plainly at odds with the sentence that the judge proposed to pass. In those particular circumstances we consider that the judge should have been referred to the relevant authorities.

[45] We do not consider, however, that the failure of the prosecution to inform the judge of those authorities or to make submissions as to their effect precludes the Attorney General from making application under section 36. The omission of counsel cannot be allowed to impede the proper functioning of that provision where justice demands that the sentence be reviewed. But, as Lord Bingham has said, where a judge has given an indication as to sentencing, this is an important matter to be taken into account – not as a matter that would preclude an application being made but as a factor that should influence the exercise of our discretion whether to accede to the application.

[46] In the present case the judge characterised the change in Dawson's stance as 'pragmatic'. We deduce from this that he had concluded that Dawson might well have had a viable defence to the charge but had elected not to pursue it on the basis that he would not be sent to prison if he pleaded guilty. As we have made clear, great care is required in allowing the possibility of a successful defence to influence the judge in indicating what sentence he is minded to pass if the defendant pleads guilty. But here it appears at least possible that prosecuting counsel knew that a plea of guilty to the lesser charge was being made solely on the basis that the offender would not receive a sentence involving immediate imprisonment. In those circumstances his silence when the judge indicated that a non-custodial sentence might be passed is much more significant than where there is a mere failure to draw to the attention of the judge relevant guideline cases. In the latter case silence on the part of a prosecutor does not contribute to the decision of the offender to plead guilty. By contrast, where, to the knowledge of the prosecutor, the basis of the plea of guilty is that the offender will not be sent to prison and the

judge indicates that this is the outcome that he has in mind, if prosecuting counsel remains silent, it may more readily be said that such silence contributes to the offender's decision to plead guilty.

[47] Although, on the facts as they have been presented to us, we consider that a custodial sentence was certainly merited in Dawson's case, we believe that the real possibility of his having been misled by the failure of the prosecution to intervene when the judge indicated that a non-custodial sentence would be passed, makes this an unsuitable case in which to quash the sentence imposed on him. We therefore refuse the Attorney General's application in his case. We emphasise that this decision reflects our consideration of a set of facts that are unique to this case. We do not seek to propound any different test as to the circumstances in which discussions with the sentencing judge will lead to a refusal of a reference from that set out in the cases referred to above. As the Court of Appeal in *Charlton* made clear, if the prosecution has acted in ways in which it could be said that it had played a part in giving the offender the relevant expectation, it would not be appropriate to accede to the Attorney's application. It is because we feel unable to dismiss the possibility that this is what happened in the present case that we feel obliged to dismiss the application in relation to Dawson.

[48] Different considerations arise in the case of Martin. He also should have been sent to prison immediately. But he had served 133 days in custody before being released on bail and he has benefited significantly from the courses that he has undertaken and the supervision that he has received since the judge made the probation order. We consider that this progress would be imperilled if we were to now impose a sentence of imprisonment. It is relevant that in *R v Duporte* (1980) 11 Cr App R (S) 116 it was held that a sentencer should not ordinarily intervene to upset the course of a probation order, unless there is reason to do so. That principle received endorsement from this court in *Attorney General's reference (No 5 of 2003)* [2003] NICA 38. While the decision in that case involved consideration of the propriety of interference with a probation order at first instance, we are of the opinion that there should be similar requisite reluctance on the part of this court to put in jeopardy the work that is being undertaken with the offender in fulfillment of the probation order. In the exercise of our discretion, therefore, we refuse the application in Martin's case also.