Neutral Citation No: [2020] NICA 60 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC11364** ***ICOS No:*** ***Delivered:*** **11/12/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

v

CHAD ALFRED FERRIS

_____

Before Morgan LCJ, McCloskey LJ and Scoffield J

_____

Representation

Appellant: Ms Rachael McCormick, of counsel (instructed by Reavey Solicitors)

Respondent: Mr Philip Henry, of counsel (instructed by the Public Prosecution Service)

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McCLOSKEY LJ (delivering the judgment of the court**)**

Introduction

[1] Chad Alfred Ferris ("*the Appellant*") appeals to this court, with the leave of the single judge, against a determinate sentence of 20 months imprisonment divided equally between custody and licensed release imposed as punishment for his admitted commission of two offences of possession of a controlled drug (class A and class B), two offences of being concerned in the supply of a controlled drug (class A and class B) and possession of an extreme pornographic image. In granting leave to appeal the single judge reasoned:

> "*… the applicant can construct a credible case based on the focus on the rehabilitative process undertaken by him in the period since his arrest and the impact of an immediate custodial sentence on him and his family. This argument is strengthened when one considers the admitted and obvious delay in the prosecution of this case. The fact that the applicant has taken*

> *steps in the intervening period between arrest and conviction adds weight to the submission that having regard to the importance of rehabilitation a court could take an exceptional course in this case."*
>
> (Per Colton J)

[2] In substantive terms the central issue raised by this appeal is whether, having regard to the decision of this court in *R v Dunlop* [2019] NICA 72, the impugned sentence is manifestly excessive and/or erroneous in principle on the ground that, exceptionally, a disposal not involving immediate imprisonment was warranted. The court's determination of this central issue requires it to determine two further issues, namely whether it should admit new evidence or information which pre-dates the sentencing of the Appellant but was adduced for the first time at the appeal stage and, if admitted, the approach which this court should apply in resolving the central issue.

Factual Matrix

[3] The Appellant is aged 29 years. In May 2016 his home was searched by police. Small quantities of cannabis and cocaine were found. These, respectively, had estimated values of £55/£110 and £12/£18. Interrogation of the Appellant's mobile phone revealed messages evidencing the supply of drugs to others during a period of some years. This exercise also revealed eight clips of video material of an extreme pornographic nature, including one involving a dog and a male person.

[4] When interviewed the Appellant admitted possession, but not supply, of the drugs. He claimed that the video material had been sent to him by another person and that his sole interest in it was as a source of humour.

[5] The Appellant has a criminal record consisting of essentially minor offences. All were committed during the period 2011 – 2013 when he was aged 20 – 22 years. There are 8 public order offences, 3 of assaulting police, 2 of criminal damage and 1 of indecent behaviour. All of these offences were committed on a single date in 2012. The final entry in the Appellant's criminal record is a conviction in respect of obstructing a search for drugs, committed one year later. All of his previous convictions were punished by non-custodial mechanisms.

Prosecution and trial

[6] The Crown Court machinery did not get going until over four years following the discovery of the Appellant's offending. Upon arraignment on 27 July 2020 he pleaded not guilty to everything in the indictment, which then comprised a total of seven counts. Re-arraignment followed less than two weeks later, on 06 August 2020,

when the Appellant pleaded guilty to five of the counts, as noted in [1] above, while the remaining two were "left on the books". His sentencing was completed on 10 September 2020.

Sentencing

[7] The sentencing judge had available to him the customary PBNI pre-sentence report. This discloses the following information. The Appellant and his partner have had an apparently stable relationship of some 4 years vintage. They are the parents of two children, aged three years and one year respectively. He attributed the beginning of this relationship and his ensuing fatherhood as the triggers for "*changing his behaviour and lifestyle*". By reason of his partner's working arrangements he is their children's sole carer at weekends.

[8] The Appellant recounted that his consumption of drugs began when he was aged 18 years and coincided with his departure from the family home. An aimless existence followed thereafter. The report continues:

> "*He states that following his arrest on the current matters and the start of his relationship he realised that he needed to change his behaviour and reports that he has been employed as a labourer for 2 ½ years …*
>
> *He has been abstinent from illegal drugs for over 3 years …*
>
> *He asked for assistance from his GP to wean off the medication and decided to stop the other drugs without assistance …*
>
> *He has outlined a structured lifestyle centred on his family, employment and attending the gym regularly.*"

The probation report noted that the Appellant had completed all of the community based disposals noted above. It further recorded the police indication that the pornographic material on his mobile phone had been sent to him (by associates, he asserted) rather than having been procured by him. He described the material as "*disgusting*" and the Probation Officer assessed this discrete offending as "*uncharacteristic*".

[9] The assessment of the Probation Officer was that the Appellant presented a medium likelihood of reoffending. He did not pose a significant risk of serious harm to the public. The positive alterations in his lifestyle and conduct were clearly considered credible by the author, who further noted the Appellant's "*… motivation to maintain this and the stability employment provides*". The author invited the court to consider the imposition of a suspended sentence of imprisonment or, alternatively, the non-custodial disposals of either probation *simpliciter* or a combination of

probation and community service. The author stated unequivocally that the Appellant was considered a suitable candidate for both measures. The author clearly contemplated the possibility of specific "*programmes of work*" and "*other offences focused work*", albeit in unparticularised terms.

[10] Two other items of documentary material were available to the judge. The first was a letter from a construction company intimating that the Appellant had been in its employment for some two years as a general labourer and assessing him as a "*punctual, hardworking and reliable employee*" who had assured continued work with the firm. The second was a statement/letter from the Appellant's partner describing him as a "*loving, caring father*" who "*provides physical and mental support to me and our two young children*". The mother indicated a heavy family dependence on the Appellant and a real threat to her ability to continue working in the event of his incarceration.

[11] The sentencing path devised by the judge and the outcome thereof are expressed in clear and concise terms. The judge identified a single aggravating factor, namely the period of time during which the Appellant had been involved in the sale of drugs. He considered that there were three specific mitigating factors: the delayed prosecution, the Appellant's good employment record and his family responsibilities. He then identified a starting point of 42 months imprisonment. This, he reasoned, warranted a downward adjustment to 36 months to reflect the factor of delay. In the next ensuing passage he referred to the Appellant's plea of guilty and the *"prison COVID"* factor. This was followed by the conclusion that the omnibus sentence should be one of 20 months imprisonment, equally divided between incarceration and licensed custody.

[12] It is convenient to interpose at this juncture an observation. The long-established sentencing practice in this jurisdiction is that in cases where full credit for a plea of guilty is warranted the period of imprisonment (where relevant) deemed appropriate by the court is reduced by approximately one third. In the wake of the outbreak of the Covid-19 pandemic, the senior presiding county court judge broadcast in clear terms that to reflect the resulting harshness of prison conditions a higher degree of discount would be available for offenders choosing to plead guilty. See *R v Beggs* [2020] NICC 9. This approach, mirroring broadly that in England and Wales (see *R v Manning* [2020] EWCA Crim 592 at [41] & [42]), is clearly identifiable in the final step in the judge's sentencing exercise in the present case.

Appeal

[13] We have in [2] above adverted to the terms in which leave to appeal against sentence was granted. Ms Rachael McCormick, of counsel, as confirmed by her skeleton argument, responded to the grant of leave to appeal by acknowledging that as the single judge had rejected the contention that the sentencing judge's selected

starting point of 3½ years' imprisonment was "*too high*", this ground would no longer be pursued. Her central submission was that having regard to the combination of the mitigating features identified by the sentencing judge, the Appellant's rehabilitation and recovery from drugs dependence, the delay in his prosecution and the imprisonment pandemic factor the Appellant should have been punished by a mechanism not entailing immediate imprisonment.

[14] The appeal process before this court developed a single, stand-out feature. During the case management phase the court noted that, as not infrequently occurs, the bundle of appeal might not contain all of the evidence assembled at first instance and enquired in particular about (a) medical evidence corroborating the Appellant's claim of recovery from drug dependency noted in the pre-sentence report and (b) employer's evidence confirming the continuing availability of his job. This precipitated the following response. Within less than 24 hours the Appellant's solicitors provided a substantial quantity of computerised medical records emanating from their client's general medical practitioner and two further letters from his employer. These letters, each couched in persuasive terms, fortified the single letter available to the sentencing judge noted above. In short, they effectively laid to rest any reservations or scepticism about the immediate availability of the Appellant's previous job at the remunerated rate of £400 per week in the event of his release from custody.

[15] The more significant item of the new materials was, by some measure, the medical records. These document the following, in summary. Just over one year following the exposure of the Appellant's offending, in July 2017, he contacted his general practitioner requesting "*help to get off* [blow]". He secured an appointment two days later. This gave rise to a "*contract*" being executed between the Appellant and his doctor. The essence of this was that he would have to adhere strictly to the withdrawal programme devised for him. The central element of this evidently was the prescription and consumption of a specified quantity of Diazepam. The Appellant's progress on this programme is documented in impressively extensive detail in the medical records. These record *inter alia* multiple engagements with his doctor, all entirely positive from his perspective. Note is made of withdrawal symptoms, including at least one seizure, during the ensuing two year period. On 02 October 2019 it was noted that the Appellant had "*… been off all drugs since seizure* ....". This is the last material entry in the records.

[16] When one juxtaposes this new material with the other information noted above relating to the Appellant's employment and his newly acquired family responsibilities dating from *circa* 2017, a clear and coherent picture of a progressive and continuing graph, entirely positive from his perspective, emerges. We shall revisit this *infra*.

The Main Issues

[17] As noted in [2] above, the emergence of this new material at this stage gives rise to the following questions. First, is this court empowered to receive them? Second, if "yes", should it do so? Third, if "yes" to each of the foregoing questions, what approach should this court apply in its determination of the appeal?

Receive New Evidence and Information on Appeal

[18] The *lex specialis* governing appeals to the Northern Ireland Court of Appeal in criminal cases is contained in The Criminal Appeal (NI) Act 1980 (the "*1980 Act*"). As regards appeals against sentence this contains the following material provisions:

Section 8

> *"A person convicted on indictment may appeal to the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."*

Section 10

> *"(1) An appeal against sentence, whether under section 8 or section 9 of this Act, lies only with the leave of the Court of Appeal.*
>
> *(2) Where the Crown Court has passed on an offender two or more sentences in the same proceedings, being sentences against which an appeal lies under section 8 or 9 of this Act, an appeal or application for leave to appeal against any one of those sentences shall be treated as an application in respect of both or all of them; and for the purpose of this subsection two or more sentences shall be treated as passed in the same proceedings if-*
>
> *(a) they are passed on the same day, or*
>
> *(b) they are passed on different days, but the court in passing any one of them states that it is treating that one together with the other or others as substantially one sentence.*
>
> *(3) On an appeal to the Court against sentence under section 8 or 9 of this Act the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution*

therefore as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the Crown Court.

(3A) Where the Court of Appeal exercises its power under subsection (3) to quash a confiscation order, the Court may, instead of passing a sentence in substitution for that order, direct the Crown Court to proceed afresh under the relevant enactment. [includes appeals pending on 1 Feb 2010]

(3B) When proceeding afresh pursuant to subsection (3A), the Crown Court shall comply with any directions the Court of Appeal may make.

(3C) For the purposes of this section –

'confiscation order' means a confiscation order made under –

(a) Article 4 or 5 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990,

(b) Article 8 of the Proceeds of Crime (Northern Ireland) Order 1996, or

(c) section 156 of the Proceeds of Crime Act 2002;

'relevant enactment', in relation to a confiscation order quashed under subsection (3), means the enactment under which the order was made.

(4) The power of the Court under section 4(2) of this Act or subsection (3) above to pass a sentence which the Crown Court has power to pass for an offence shall, notwithstanding that the Crown Court made no order under section 19(1) of the Treatment of Offenders Act (Northern Ireland) 1968 in respect of a suspended sentence or order for detention previously passed or made on or in relation to the appellant for another offence, include power to deal with the appellant in respect of that sentence or order for detention where the Crown Court made no order in respect of it.

(5) The fact that an appeal is pending against an interim hospital order under Article 45 of the Mental Health Order shall not affect the power of the Crown Court to renew or terminate the order or to deal with the appellant on its termination; and where the Court of Appeal quashes such an order but does not pass any sentence or make any other order in its place the Court may direct the appellant to be kept in

custody or admitted to bail pending his being dealt with by the Crown Court.

[(6) rep]"

Section 25

"(1) For the purposes an appeal, or an application for leave to appeal, under of this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice -

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;

(b) order any witness to attend and be examined before the Court (whether or not he was called at the trial); and

[from 14 July 2008 not confined to a witness who was compellable at the trial, so that the Court can compel testimony from persons such as jurors or lawyers]

(c) receive any evidence which was not adduced at the trial.

(1A) [added 14 July 2008] The power conferred by subsection (1)(a) may be exercised so as to require the production of any document, exhibit or other thing mentioned in that subsection to –

(a) the Court;

(b) the appellant;

(c) the respondent.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to-

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial.

(3) Subsection (1)(c) above applies to any evidence of a witness (including the appellant) who is competent but not compellable.

(4) [duplicate:-added 2 Feb 2009] A live link direction under section 24(2A) does not apply to the giving of oral evidence by the appellant at any hearing unless that direction, or any subsequent direction of the court, provides expressly for the giving of such evidence through a live link.

(4) In this section, "respondent" includes a person who will be a respondent if leave to appeal is granted."

[19] The statutory predecessor of s 10(3) of the 1980 Act is section 15 of the Criminal Appeal (NI) Act 1968 (the "*1968 Act*"). The criterion for allowing an appeal against sentence and substituting a different sentence – "*if they think that a different sentence should have been passed*" – is formulated in identical terms. The predecessor statute, repealed in whole by the 1968 Act, was the Criminal Appeal (NI) Act 1930. This specified, at s 3(3), an identically worded test.

[20] The statutory predecessor of s 25 of the 1980 Act is s 29 of the 1968 Act. This replicates the overarching criterion of "*… thinks it necessary or expedient in the interests of justice",* in s 29(1). The analogue of s 25(2) of the 1980 Act is s 29(2) and (3) of the 1968 Act. As regards the factors to be taken into account in the application of the dominant statutory test these provisions are in substance the same. However, the important distinction between them is that s 29(2) and (3) did not expressly empower the court to have regard to factors other than those specified. The 1930 Act contained, at s 9, a comparable, though less elaborate, provision.

[21] The power of the Northern Ireland Court of Appeal to receive fresh evidence is exercisable in appeals against both conviction and sentence, including applications for leave to appeal. The power is formulated in unmistakably broad terms. It is expressly fettered only by what the court considers necessary or expedient in the interests of justice. Notably, the factors listed in section 25(2) do not constitute an exhaustive checklist. Thus the court is at liberty to weigh other factors which it considers relevant. No procedural formalities are prescribed. The court is empowered to admit new evidence either upon application or acting of its motion.

[22] In one of its few pronouncements on this topic, this court has emphasised the overarching test of whether the interests of justice demand that the new evidence be received*: R v Walsh* [2007] NI 154 at [25]:

> "*In R v Rafferty [1999] 8 BNIL 8 this court considered this provision and concluded that the power of the court to admit fresh evidence was fettered only by what is necessary or expedient in the interests of justice. The factors listed in section 25(2) are merely factors which are to be taken particularly into account. It is clear, however, that not only must the court consider these factors but* ***it must also address the question of what the interests of justice require in relation to possible fresh evidence****. We consider that this is an obligation which arises when the court is aware of material that might qualify for admission in evidence under subsection (2) or whose receipt might be considered to be necessary or expedient in the interests of justice under subsection (1)*".
>
> [Emphasis added.]

In an earlier decision, *R v Winchester* [1979] 3 NIJB this court, considering the question of whether to extend time for appealing, observed (per Lowry LCJ, p 2) that "*… justice should not be sacrificed to procedure and convenience.*" The court also considered whether it should receive an expert psychologist's report detailing the appellant's rehabilitative progress in prison. Declining to do so, and without reference to any statutory provision or rule of court, the Lord Chief Justice adopted with approval the approach espoused in Archbold (39th ed), para 890:

> "*…as a rule evidence cannot be given on appeal about matters occurring after conviction, though they may be made the subject of an application under the prerogative.*"

Adding:

> "*This principle applies at least equally to sentence as to conviction.*"

[23] The issue of the reception of new evidence on appeal was also considered by this court in *R v Gary McDonald, John Keith McDonald and Stephen Gary Maternaghan (AG Ref 11-13 of 2005)* [2006] NICA 4, in particular, from paragraphs [31]ff under the heading 'Events since the sentence'. At paragraph [34] this court stated:

> **"***The question arises as to whether this court should take into account material that was not before the sentencing court. We are satisfied that we should. We have determined that the sentence imposed was unduly lenient. That sentence in our judgement should not have been passed. We must now address the question as to what the proper disposal should be. It would be illogical and contrary to justice to ignore material relevant*

to that sentencing exercise simply because it came into existence subsequent to the passing of sentence in the Crown Court. This subject is dealt with in the latest edition of Archbold on Criminal Pleading, Evidence and Practice at paragraph 7-140 as follows: -

> *'The Court of Appeal is entitled to have regard to material which was not available at the time sentence was passed and also to have regard to what has happened since sentence was passed. Whereas the Criminal Appeal Act 1907 provided for the quashing of a sentence where it was thought that a different sentence should "have been" passed, section 11 of the 1968 Act (ante, §7-125) provides for a sentence to be quashed where the Court of Appeal considers that the appellant "should be" sentenced differently. … It is impossible to be precise about the circumstances in which the Court of Appeal will have regard to fresh material or to events occurring subsequent to the passing of sentence. However, cases occur in which the Court of Appeal says that, having regard to a certain report, usually a prison governor's report, the court now feels able to take a lenient course, e.g. R v Plows, 5 Cr App R (S) 20, and R v Thomas [1983] Crim L R 493, where the court said of a sentence of nine months' imprisonment that it was neither wrong in principle, nor excessive in length, but because of the impact of the sentence on the appellant and as an act of mercy it could be reduced so as to permit immediate release."*

A similar approach was applied by this Court when considering progress made during probation ordered by the Crown Court. In *Attorney General's Reference (No 5 of 2003)* [2003] NICA 38 and *R v Dawson & others (AG Ref 11 to 13 of 2004*) [2005] NICA 18, this Court felt that while probation was too lenient a sentence in principle, it would not interfere because of the demonstrable progress made by the offender. The Court added at [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 fulfilment of the probation order. In the exercise of our discretion, therefore, we refuse the application in Martin's case also."*

[24] The generation of the new evidence which this court determined to receive in *McDonald and Others* post-dated the hearing at first instance. We draw attention to this for the purpose of highlighting that this circumstance is not a pre-requisite to the exercise of this court's power under section 25(1)(c). The only statutory requirement is that the evidence was not adduced at the trial. Notably, the court's decision to receive new evidence not considered at first instance was made without reference to its powers under s 25. Notwithstanding this, the analysis that the court in substance applied – the overarching test of the interests of justice – seems appropriate. The materiality of the new evidence admitted on appeal is clear particularly from [41] of the judgment. An illustration of this court's willingness to consider new evidence in a sentence appeal in an appropriate case is provided by *R v Stalford and O'Neill* [JSB *Sentencing Guidelines Compendium* – Drugs Offences, unreported, at p [5] where post-sentencing evidence of the appellant's rehabilitation from drugs addiction was considered.

[25] Accordingly, the first part of the answer to the first of the three questions formulated in [17] above is that in appeals against both conviction and sentence the Northern Ireland Court of Appeal is empowered, by statute, to receive any evidence which was not adduced at the trial. The availability of this course is framed in the terms of a broad discretionary power.

[26] The power to receive any evidence not adduced at the trial conferred on this court by s 25 is broadly similar to its civil appeals counterpart (contained in Order 59 Rule 10(2) of the Rules of the Court of Judicature) which requires compliance with the conditions prescribed by the *Ladd v Marshall* [1954] 1 WLR 1489 principles, namely that the new evidence (a) could not with reasonable diligence have been obtained from the trial, (b) would have probably had an important influence on the outcome and (c) appears credible. The most notable distinction is that the statutory

test of "*necessary or expedient in the interests of justice*" does not form part of the civil appeals regime.

[27] In England & Wales the statutory analogue of section 25 of the 1980 Act is framed in identical terms: see s 23 of the Criminal Appeal Act 1968 (as amended by the Criminal Appeal Act 1995). Thus it is appropriate to consider some of the relevant English cases. *R v Caines* [2007] 1 WLR 1109 involved an appeal of the sentence to be imposed after a change in the legislation relating to murder tariffs. One specific issue raised was a change in the appellant's conduct between the date of sentencing in the Crown Court and the date of appeal. The Court of Appeal mentioned instances where, exceptionally, and particularly in youth cases, it was prepared to consider new material relevant to sentence without the formality of admitting it as fresh evidence. Sir Igor Judge P said at [44]:

> "*This leads us directly to reflect on the process in relation to appeals against sentence to this court. From time to time, the court will be provided with updated information about the offender. This sometimes takes the form of prison reports, sometimes confidential information from the police. The sources vary. The information may serve to show, for example, that the prisoner has provided considerable assistance to the police; sometimes aspects of the mitigation are significantly underlined in a way which may not have been as clear or emphatic in the Crown Court; sometimes the information may indicate that the offender has made significant progress since the sentence began, a feature particularly relevant in cases involving young offenders. The formal procedures for the admission of fresh evidence are not followed. This court simply considers the evidence before it. So, for example, if a young offender has responded positively to his custodial sentence, and his progress is such that it may be counter-productive for him to serve the sentence actually imposed, it may be reduced on appeal, or changed to a non-custodial disposal, without any implied criticism of the decision of the Crown Court. In short, post-sentence information may impact on and produce a reduction in sentence (for a recent example of post-sentence evidence bearing on and explaining aspects of mitigation, with a consequent reduction in the minimum term following conviction for murder, see R v Sampson [2006] EWCA Crim 2669).*"

In this passage the court is evidently suggesting that new material (to employ a neutral term) is mere "information" and not "fresh evidence" if the appellate court considers it informally, without applying the statutory mechanism; and that there are certain categories of material, although not precisely defined, which are suitable for consideration in this way in the exercise of the court's discretion.

[28] In *R v Malook* [2011] EWCA Crim 254, the Court of Appeal considered the effect of fresh evidence in a sentence appeal concerned with a Newton hearing. Information came to light after the Crown Court which it was felt might have made a difference to the outcome of the Newton hearing in the Court below. Although ultimately the Court felt the information would not have made a difference, it said at [60]:

> *"60. The question for us therefore is whether, in the light of that, we should uphold the findings that the judge made in the Newton hearing. The test in* ***R v Pendleton*** *[2002] 1 WLR 72 is inapplicable; we can assess the reasoning of the judge and the difference it would have made. If we were to conclude that the judge would not have made the findings he made, if the transcripts of the interviews of Dewey before us had been before the judge, we would ourselves have to hear the Newton hearing afresh, as there is no power for this court to remit the matter to the Crown Court. The position is the same as it was in relation to confiscation hearings before the amendments to the Criminal Appeal Act by section 140(2) of the Coroners and Justice Act 2009 which inserted subsections 3(A) to 3(D) into section 11 of the Criminal Appeal Act 1968."*

At [58] the court noted the informal practice acknowledged in *Caines* (*supra*).

> *" In sentence appeals, the court often considers fresh evidence without formality: see the observations of Sir Igor Judge P in In Re Caines (Practice Note) [2007] 1 WLR 1109 , para 44. There is no doubt, however, that a court has power under section 23 to hear fresh evidence formally in a sentence appeal."*

(And see also *Rogers,* infra, at [4])

[29] As the decisions in *McDonald and Others* and *Dawson and Others* (*ante*) illustrate, in appeals against sentence the practice of receiving fresh material without formality and without strictly applying the framework of s 25 of the 1980 Act has had a certain prevalence in this court also. Duly analysed, this practice draws attention to a distinction between the receipt of new evidence and the receipt of new information. This distinction has emerged with particular clarity in the decisions of the English Court of Appeal, operating within an identical statutory framework, noted above. Insofar as necessary, we take this opportunity to formally endorse this practice.

[30] The legitimacy and rationale of the practice may be explained in the following way. First, by long established practice, the Crown Court in sentencing

exercises receives materials – reports, letters, testimonials, employment and medical records *et al* – without resort to formality and without applying the rules of evidence. These materials are more correctly characterised *information* rather than *evidence*. Second, in appeals against sentence, in cases where this court is disposed to consider materials not considered by the sentencing court, it has done so replicating the same informal approach. Third, experience shows that the informal mechanism works well in practice in this court. Fourth, there is no identifiable need to subject the receipt of such information in this court to a strict procedural process. Finally, through the prism of legal principle, in those cases where this court determines to apply the informal mechanism, it does so with a view to promoting the interests of justice.

[31] It comes as no surprise that none of the members of this judicial panel can bring to mind any *sentencing* appeal in which there has been an application to this court under s 25 or the court has of its own motion exercised its powers under this provision. The same observation applies to both parties. This tends to support the court's view that the machinery of s 25 in sentencing appeals is reserved to a small minority of cases. Without purporting to pronounce exhaustively on the matter, by way of illustration s 25 is likely to be the more appropriate route in the context of the framework of the *Malook* appeal (see [28] *ante*), where fresh evidence, in the form of interview transcripts, emerged for the first time following a sentencing exercise which had involved a Newton hearing. The *Malook* example contrasts with the more typical Crown Court sentencing scenario addressed in [30] above. Broadly, s 25 seems mainly applicable to appeals against conviction, as illustrated most recently in *R v Porch* [2020] EWCA Crim 1633, at [24] ff. To summarise, this court is empowered to receive new information outwith the s 25 regime. This is the second part of the answer to the first question posed at [17] above.

[32] The principled approach which this court applies in determining whether to receive new information via the informal extra-statutory route outlined above is broadly similar to the s. 25 mechanism. The overarching test is whether receipt of the new material is necessary or expedient in the interests of justice. In its application of this test this court will take into account *inter alia* the section 25(2) factors namely whether the information appears capable of belief, whether it may afford a ground for allowing the appeal and whether its belated emergence can be reasonably explained. A key distinction between the s. 25 mechanism and the informal mechanism is that within the latter the third of the statutory considerations specified in section 25(2), namely "*whether the evidence would have been admissible*" at first instance, does not fall to be applied.

This Case

[33] The new information which the Appellant seeks to place before this court is described in [14] – [16] above. There is no application that it be received under s. 25

of the 1980 Act. As appears from the foregoing we consider this approach to be correct. We take into account that the material is capable of belief. Furthermore, it would have been considered without question by the sentencing judge. Its materiality to the determination of this appeal is beyond plausible dispute. Finally, it bears on the public interest in the rehabilitation of offenders and the associated public interests of deterring further offending and protecting society. While no compelling explanation for failing to bring it to the attention of the sentencing judge has been provided, this consideration is comfortably outweighed by those just mentioned. Accordingly in the exercise of our discretion we shall consider the new information.

[34] As appears from our analysis and conclusion in [32] and [33], if the reception by this court of the new material had properly been the subject of an application under s. 25 of the 1980 Act it is likely that the outcome would have been the same. However, the main point emerging from the approach which the court has adopted in the present case is that s. 25 was not designed to cater for the reception of this kind of material.

[35] Having thus concluded, the immediate introduction of some cautionary words is both appropriate and necessary. It is highly undesirable that material evidence which can with reasonable diligence and endeavour be obtained at the sentencing stage should emerge for the first time at the appeal stage. This is antithetical to the efficient and expeditious operation of the criminal justice system. It is incompatible with the overriding objective enshrined in the Crown Court Rules and furthers no public interest. While this court is both empowered and equipped to evaluate and assess all kinds of evidence, the general rule must be that it should typically do so only when this exercise has already been conducted by the sentencing judge. The phenomenon of *de novo* sentence appeal hearings in this court, while jurisdictionally possible in certain contexts (see *infra*), is to be firmly discouraged. The volume of sentence appeals will be less if all reasonable, diligent and professional steps are taken in the assembly of all material evidence at first instance. While this court is empowered to take the course which it has adopted in the present case this should not be regarded as the norm, emphatically so. The factors which have prevailed in this case are the public interest in the promotion of the rehabilitation of offenders and the overarching public interest in providing a fair and just outcome to every offender in which, insofar as possible, the public can have confidence.

Deciding the appeal: the correct approach

[36] Having determined to receive the new material this court, mindful that it is an appellate court and not a court of first instance, must define and delimit its function. This exercise entails consideration of the governing statutory provisions and certain related legal principles.

[36] It was submitted by Ms McCormick that this court has a discretion to review a sentence imposed in light of new material if it is in the interests of justice to do so, relying on *R v Beatty [2006] EWCA Crim 2359* per Scott Baker LJ at [50]:

> *"[50] Section 11(3) of the Criminal Appeal Act 1968 provides that, inter alia, the Court of Appeal can quash a sentence if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below and in place of it pass such sentence or make such order as the court below had power to pass or make when dealing with him for the offence.*
>
> *[51] Plainly the subsection is sufficiently wide to permit the court to re-sentence the appellant on information placed before it which was not put before the sentencing judge. As Beldam LJ pointed out in* ***R v Sawyer*** *(16 December 1993, unreported), the subsection gives the court an opportunity to review the sentence, its effect on the appellant, and to consider whether having regard to the circumstances which were then before the court and which have happened since, it is necessary in the interests of justice for the court to confirm a sentence of the length imposed.*

He continued:

> *"Without regarding the judge's sentence as wrong we believe that in the interests of justice we can review the sentence in the light of the circumstances as they now are. Such an approach clearly allows the Court of Appeal to substitute a sentence on the basis of psychiatric and other evidence coming to light after the sentence was passed."*

[37] The starting point must be the statute. Section 10(3) of the 1980 Act, reproduced in [18] above, formulates the test of whether this court "*… thinks that a different sentence should have been passed …*" at first instance. In every case where this court concludes that the statutory test is satisfied it "*shall*" – notably, not "*may*" – quash the sentence of the Crown Court and impose "*… such other sentence authorised by law (whether more or less severe) in substitution there for as it thinks ought to have been passed …*"

[38] In the jurisdiction of England and Wales, the Criminal Appeal Act 1968 ("*the 1968 Act")* is the equivalent of the Northern Irish 1980 statute. S.11 (3) of the 1968 Act is the analogue of s.10(3) of the 1980 Act. It provides:

> *"(3) On an appeal against sentence the Court of Appeal, if they consider that the appellant* ***should be sentenced differently*** *for an offence for which he was dealt with by the court below may –*
>
> *(a) quash any sentence or order which is the subject of the appeal; and*
>
> *(b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;*
>
> *but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below."* [Emphasis added]

The most notable difference in the wording of the legislation operating in the two jurisdictions is that the Northern Irish provision empowers the appellate court to intervene "*… if it thinks that a different sentence should have been passed … "*, whereas the language of the English provision is "*… if they consider that the appellant should be sentenced differently …*". How significant is the difference in wording? In *McDonald and Others (ante)* Kerr LCJ observed at [35], that s 10(3) of the 1980 Act is "*in similar terms*" to s 11 of the 1968 Act. While the two provisions are not identically phrased, we need not explore any of the subtle or nuanced differences, beyond noting that the English statutory provision was considered to have brought about a "*significant change*": *R v Cleland* [2020] EWCA Crim 906 at [46] especially. We consider this to be of no moment in the context of this appeal.

[39] While s 10(3) is couched in superficially broad terms in practice it has been neither interpreted nor applied liberally by this court. The jurisprudence of this court has, rather, inclined in favour of a restrained approach. This is apparent in one of the leading pronouncements of this court, that of Carswell LCJ in *R v Molloy* [1997] NIJB 241 at 245C/D:

> "*Mr Lavery drew to our attention a number of cases involving sentences for sexual offences which, though substantial, were lower than those imposed in the present case. He did not attempt, however, to compare these in minute detail. We think that he was correct in this approach, since such comparisons are not a profitable exercise, for the reasons which we set out in* ***R v Williamson*** *(1995, unreported) at page 6 of the judgment. It is of rather more assistance first to examine the*

> *judge's reasons for deciding on the sentences, as expressed in his sentencing remarks, to see if there is any visible imbalance, and secondly, to stand back and consider whether the sentence is appropriate in all the circumstances of the case, when set against any trend discernible from other cases.*"

This observation was made in the context of an appeal against sentence advanced on the ground that it was manifestly excessive. The court refused leave to appeal. Notably, in passing, the two familiar sentencing principles of retribution and deterrence were highlighted, at 245I – 246E, a theme to which we shall revert *infra*.

[40] The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus s 10(3) of the 1980 Act does not pave the way for a rehearing on the merits. This is expressed with particular clarity in the following passage from the judgment of McGonigal LJ in *R v Newell* [1975] 4 NIJB at p, referring to successful appeals against sentence:

> "*In most cases the court substitutes a less severe sentence ….the court does not substitute a sentence because the members of the court would have imposed a different sentence. It should only exercise its powers to substitute a lesser sentence if satisfied that the sentence imposed at the trial was manifestly excessive, or that the court imposing the sentence applied a wrong principle.*"

Pausing, this approach has withstood the passage of almost 50 years in this jurisdiction. The restraint principle is also evident in a range of post-1980 decisions of this court, including *R v Carroll* [unreported, 15 December 1992] and *R v Glennon and others* [unreported, 03 March 1995].

[41] The restraint principle operates in essentially the same way in both this jurisdiction and that of England and Wales, where it has perhaps been articulated more fully. In *R v Docherty* [2017] 1 WLR 181 Lord Hughes, delivering the unanimous judgment of the Supreme Court, stated at [44](e):

> "*Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-hearing* ***ab initio****, as is the rule in some other countries; on appeal a sentence is examined to see whether it erred in law or principle or was manifestly excessive …*"

In *R v Chin-Charles* [2019] EWCA Crim 1140, Lord Burnett CJ stated at [8]:

> "*The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would a public law decision. Its task is to determine whether the sentence imposed was manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored it, rarely prosper. Judges take into account all that has been placed before them and advanced in open court and, in many instances, have presided over a trial. The Court of Appeal is well aware of that.*"

This approach was reiterated more recently in *R v Cleland* [2020] EWCA Crim 906 at [49]. Also to like effect are *R v A* [1999] 1 Cr App (S) 52, at 56; and *Rogers* (*ante*) at [2]. To summarise, through the decided cases in both jurisdictions the function of the Court of Appeal in appeals against sentence has been described, in shorthand, as one more akin to **review,** rather than appeal, in the typical case. This is the essence of the restraint principle.

[42] It is also instructive to note the contrast provided by appeals against sentence from Magistrates' Courts to the County Court in this jurisdiction. By virtue of the applicable statutory provisions these take the form of full re-hearings: see Article 140 of the Magistrates' Courts (NI) Order 1981; Article 28 of The County Courts (Northern Ireland) Order 1980; and Order 32 Rule 1(2) of the County Court Rules (Northern Ireland) 1979.

[43] We consider that in a case where this court receives material new evidence, or information, the restraint principle still applies but must be modified. The present case is a paradigm illustration: by virtue of receiving the new evidence, this court finds itself better equipped than the sentencing judge to identify the sentence which is the best fit for this case.

[44] Notably, in the English decisions concerning the reception of new evidence in sentencing appeals considered above there is no suggestion of any restricted role for the appellate court. The strongest and most unambiguous statement to this effect is that of Scott Baker LJ in *Beatty* (see [38] *supra*). There is no suggestion in later cases that *Beatty* was wrongly decided. A notable feature of that decision is the court's invocation of the interests of justice. We consider that in principle this must be correct given that the promotion of the interests of justice overlies all criminal justice statutes, including the 1980 Act. Furthermore, we must take into account that the 1980 Act confers on this court no power of remittal to the Crown Court in sentencing appeals. This *per se* is supportive of a more expansive appellate jurisdiction in appropriate cases.

[45] We consider that it makes little sense to speak of deferring to the discretion of the sentencing judge in a context where the matrix of an appeal before this court includes newly admitted evidence which was not considered by the judge and this court has available everything considered at first instance. Precisely the same analysis applies to evidence which was available to the judge but evidently not considered by him. Onto this analysis one grafts the further consideration that the present appeal – in common with the vast majority of sentencing appeals – involves no element of sworn evidence and/or fact finding at either judicial level. As the *DB* principles demonstrate, in certain appellate litigation contexts there are constraints restricting what the appellate court can do. These principles operate to constrain the role of the Court of Appeal in civil appeals. They generally have no application to appeals against sentence. See *DB* v. *Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, at [48], (*per* Lord Kerr).

[46] The effect of our exposition of the governing statutory provisions and applicable legal principles set forth above is that in an appeal against sentence where this court exercises its discretion under s 25 of the 1980 Act to admit new evidence, or receives new information informally, it follows that having regard to the breadth of the formulation of this court's powers in s 10(3) it is empowered as a matter of law to review the impugned sentence and make its decision as if it were a sentencing court of first instance. No constraint on this power is discernible from either the applicable statutory provisions or any legal principle contained in any authority binding on this court. The alternative would entail some hybrid, intermediate species of approach lacking clarity and accessibility and running the risk of not taking fully into account all material evidence, with resulting injustice to the offender or victim, furthering no public interest. This court will, of course, pay close attention to the approach and reasoning of the sentencing judge, which will attract varying degrees of weight depending on the individual case.

[47] Accordingly, in the instant case the task of this court falls to be expressed in the following terms: taking into account the new evidence received on appeal, in the estimation of this court is the sentence under challenge either manifestly excessive or wrong in principle or a combination of both?

The broader framework of legal principle

[48] The search for the answer to the foregoing question leads firstly to consideration of some basic dogma. During the past two decades the sentencing of offenders in the United Kingdom has been marked by a combination of heavy statutory intervention and extra-statutory prescription, the more so in the jurisdiction of England and Wales than that of Northern Ireland. The landscape has altered dramatically since Lawton LJ stated in *R v Sargeant* [1974] 60 Cr App R 74 that the four main aims of sentencing were retribution, deterrence, prevention and

rehabilitation. In a publication belonging to the same era, Professor Thomas wrote in 1978:

> "*Criminal statutes generally authorise terms of imprisonment far longer than are normally imposed in practice and Parliament, in creating an increasing variety of non-custodial sentences, has generally been content to establish relatively broad conditions of eligibility without requiring sentencers to use particular measures in any specified class of case. With the exception of a few general indications of legislative preferences in the choice of sentences, statutes do not seek to influence the details of sentencing practice. The shaping of sentencing policy is entrusted substantially to the judiciary and within the judicial hierarchy the authoritative determination of principle and policy is the responsibility of the Court of Appeal …*
>
> *The Court has, over a period of 70 years, evolved a sophisticated body of principle.*"

(Principles of Sentencing, 2nd Ed)

[49] The author noted that this dominant judicial role in sentencing can be traced to the mid-19th century. In the discourse which follows at page 8ff the conflicts which may arise among the four main sentencing purposes identified by Lawton LJ and the difficulties of reconciliation are developed. The discretion available to the sentencing judge also features with some prominence in the text. Dr Thomas elaborates on the dichotomy of so-called "*tariff*" sentencing measures and "*individualised*" measures. In the former category the sentencing aims of retribution and deterrence predominate. In the second category there is a greater emphasis on rehabilitating the offender via the selection of a mechanism which will be less intrusive upon the offender's freedom from the perspective of imprisonment while subjecting him to "*a far greater degree of control and intervention than the alternative sentence*". It is striking that in his quest to identify a coherent framework of legal principle governing the sentencing of offenders Professor Thomas does not deploy the verb *to rehabilitate* or any of its derivatives.

[50] The modern trend in the realm of sentencing noted above can be traced to the Criminal Justice Acts 1991 and 1993. The White Paper preceding these measures, *Crime, Justice and Protecting the Public* (Cm 965, 1990) adopted, in substance, the primary criterion of <u>proportionality</u> while seeking to harmonise this with incapacitation. The paper stated at paragraph 2.9:

> "*The Government's proposals therefore emphasise the objectives which sentencing is most likely to meet successfully in whole or in part. The first objective for all sentences is denunciation of*

> *and retribution for the crime. Depending on the offence and the offender, the sentence may also aim to achieve public protection, reparation and reform of the offender, preferably in the community. This approach points to sentencing policies which are more firmly based on the seriousness of the offence and just deserts for the offender.*"

This sentencing philosophy espoused a hierarchy of aims, with retribution at the apex.

[51] Simultaneously there was a government recognition of the utility of community-based disposals and the limitations of imprisonment *per se*:

> "*Most crimes are not violent and for many of those who commit them, punishment in the community is likely to be better for the victim, the public and the offender than a custodial sentence. Imprisonment makes it more difficult for offenders to compensate their victims and allows them to evade their responsibilities …*
>
> *Nobody now regards imprisonment, in itself, as an effective means of reform for most offenders …*
>
> *For most offenders, imprisonment has to be justified in terms of public protection, denunciation and retribution. Otherwise it can be an expensive way of making bad people worse.*"
>
> [Paragraphs 1.11 and 2.7.]

[52] By this stage non-custodial sentencing measures such as community service and probation orders were available in both jurisdictions. In a paper published in 1993 the Northern Ireland Office ("*NIO*") stated:

> "*Probation orders and community service orders are sometimes referred to as 'alternatives to custody' in Northern Ireland. This may lead to them being seen as soft options by the offender, the courts and the public. They are in fact challenging sentences in their own right which are at least as effective as custody at preventing re-offending. They are also far less costly to the community …*
>
> *They are also capable of constituting significant restrictions on the liberty of the offenders …*"

Adding, notably:

> "*… despite the best endeavours of the Northern Ireland Prison Service to rehabilitate prisoners, there is little evidence to suggest that custody is effective in reducing reoffending. Indeed the reverse may often be true, particularly for young adults.*"

(*Crime and the Community: A discussion paper on Criminal Justice Policy in Northern Ireland,* HMSO 1993, paragraphs 7.11 – 7.13.)

[53] The legislative intervention which followed, the Criminal Justice (NI) Order 1996, introduced innovations such as the custody probation order, together with a heavier regulation of the judicial sentencing function. The evolving legislative sentencing philosophy was also reflected in the introduction of statutory pre-requisites to the imposition of a custodial sentence (see Article 19(2)) and the obligation imposed on the court to provide reasons for certain decisions, including the imposition of a custodial sentence (see variously Articles 19, 20, 21, 24 and 33).

[54] The adoption of the 1996 Order and subsequent statutory measures in Northern Ireland also illustrates the significance of historical and societal context in the sphere of sentencing law and practice. In *R v Cunningham and Devenney* [1989] NI 350 this court had stated:

> "*This leads us to emphasise that courts in Northern Ireland in sentencing for actual or inchoate crimes of violence by terrorists should, as a general rule, while the present campaign of terrorism continues, pass sentences to give effect primarily to the principles of deterrence (of the accused and also other potential offenders), retribution and prevention. Personal mitigating circumstances of the offender and considerations of rehabilitation must necessarily give way to the application of these principles, though some allowance to a minor degree may be made in respect of them.*"

By 1996 the environment in which the new legislation was introduced was changing. Of course, it is still open to a court to adopt the *Cunningham and Devenney* approach in a particular case and, indeed, courts continued to do so as the need to sentence for heinous terrorist crime did not suddenly evaporate. The recent decision of this court in *R v GT and HT (DPP's Reference)* [2020] NICA 51 illustrates how this approach can be appropriate in other sentencing contexts.

[55] The history and evolution outlined above belong to the following context of sentencing principle and practice. As already noted it is well settled that in an appeal against sentence this court will interfere only if of the opinion that the sentence under challenge is manifestly excessive or wrong in principle. Cases belonging to the latter category include, inexhaustively, those in which a sentencing court has

failed to give effect to a guidelines decision of this court or has acted in breach of a relevant statutory provision or has misinterpreted the law.

[56] Cases belonging to the former category frequently, but not invariably, raise issues relating to guideline decisions of this court. Such decisions do not prescribe a tariff to be applied mechanistically. Rather they establish an avenue along which the sentencing court should proceed, having regard to the infinite variety of circumstances in each case. Guideline decisions are not set in stone but are designed to achieve uniformity of approach in similar cases, particularly in determining the starting point to be adopted by the judge: *Attorney General's Reference (No 5 of 1996) (D)* [1997] NIJB 45. And, as previous decisions of this court make clear, there is scope for departing from appellate guidelines in an appropriate case: see *Attorney General's Reference No 8 of 2009, McCartney* [2009] NICA 52, at [13].

[57] A sentence which, in the opinion of the appellate court, is merely excessive and one which is manifestly excessive are not one and the same thing. This simple statement highlights the review (or restraint) principle considered above and simultaneously draws attention to the margin of appreciation of the sentencing court. Thus it has been frequently stated that an appeal against sentence will not succeed on this ground if the sentence under challenge falls within the range of disposals which the sentencing court could reasonably choose to adopt. The "manifestly excessive" ground of challenge applies most readily in those cases where the issue is essentially quantitative, i.e. where the imposition of a custodial sentence is indisputable in principle and the challenge focuses on the duration of the custodial term.

[58] Sentencing appeals which challenge an immediate custodial disposal do not belong quite as obviously to the manifestly excessive sentence "track". This observation, however, does not apply if "manifestly excessive" and "manifestly severe" are in reality indistinguishable. The severity of a custodial sentence of whatever duration is manifest if this court considers that a non-custodial disposal should have been imposed. Developing the analysis, in sentencing appeals where this court decides to substitute a non-custodial disposal for an immediate custodial disposal there is scope for the view that the disposal under challenge was wrong in principle. These brief reflections serve to highlight the potential for some overlap between these two firmly established grounds of appeal. They are not mutually exclusive. In practice an appellate court is unlikely to be overly concerned about precise taxonomy. Subject to more detailed argument in an appropriate future case, we are inclined to the view that the present case has elements of both grounds for appellate intervention.

Our Conclusions

[59] As emphasised in the submissions of Mr Henry, the starting point for this court must be its guidelines decision in *R v McKeown and Han Lin* [2013] NICA 28,

which decided that the offence of supplying drugs will "*… in all but exceptional cases … attract an immediate custodial sentence*". The passage continues, at [16]:

> "*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.*"

In *R v Dunlop* [2019] NICA 72, this court described *McKeown & Han Lin* as prescribing a "*strong general rule*" that an immediate custodial disposal will be appropriate for the offence of supplying drugs.

[60] It is convenient to add at this juncture, for the avoidance of any doubt, that *Dunlop* does not alter or dilute *McKeown & Han Lin* in any way. Rather, correctly analysed, *Dunlop* is a fact sensitive illustration of an exceptional case meriting a non-custodial disposal. At the more general level of sentencing principle the further contribution which *Dunlop* makes to this discrete sphere is found in [13] – [18], where the court embarked upon some elaboration of what might rank as an exceptional case. *Dunlop*, independently, contains an examination of the principles to be applied by sentencing judges in cases where there is a breach of the reasonable time requirement enshrined in Article 6 ECHR.

[61] The court is alert to the fact that the two most serious offences in the present case were those of *being concerned in the supply of* a class A and class B drug. It is true that neither *McKeown & Han Lin* nor the predecessor decision of this court *R v Hogg and Others* [1994] NI 258 addressed directly this discrete offence. However, taking into account that Parliament has made no distinction in the punishment for *supplying* and *being concerned in supplying* the court takes this opportunity to make clear that the general rule of an immediate custodial disposal applies to both offences.

[62] During the period of four years which elapsed between the exposure of the Appellant's offending and his sentencing there were three major developments in his life. First, he established a stable relationship which gave rise to the birth of two children. There is clear evidence of a strong and enduring family unit in which the Appellant discharges his fatherly responsibilities appropriately. Second, the Appellant secured employment resulting in a steady job for the same building firm for a period of almost three years, with wages of £400 per week. There is clear evidence that this employment remains available to him.

[63] The third, and most striking, development in the Appellant's life has been his recovery from drugs dependency. We have charted this in [14] – [15] above. His awareness of the commitment required to engage in these mechanisms was noted in the pre-sentence report and is clearly identifiable in the newly received medical records. This commitment is reflected in the Appellant's persistence in what was

evidently a difficult course of treatment which had a duration exceeding two years. He interacted frequently with his General Practitioner and voluntarily assumed the burdens of withdrawal symptoms and the effects, which included anxiety, sleep deprivation, sweats and at least one seizure, both probation and community service. The author of the report recommended inclusion of the following specific requirement:

> "*You must actively participate in any programmes of work recommended by your supervising Probation Officer designed to reduce any risk you may present and attend and co-operate in assessments by PBNI as to your suitability for programmes and other offences focused work.*"

In addition, this court takes note of the Appellant's completion of previous non-custodial disposals.

[64] In addition to the three major aspects of the Appellant's life noted above, the factor of a heavily delayed prosecution giving rise to a clear breach of Article 6 ECHR (as noted by the judge) must be both reckoned and analysed. In short, the Appellant's entitlement to have the criminal process against him completed within a reasonable time was denied. The purposes served by the reasonable time requirement enshrined in Article 6(1) ECHR include in particular the attenuation of the period during which the victim or victims of crime are subjected to the stresses and uncertainties of an uncompleted prosecution process. Article 6 is also designed to promote the public interest in the promotion of the efficient and expeditious disposal of criminal proceedings. Furthermore compliance with this requirement is capable of conferring benefits on accused persons. In cases where no breach of the Article 6 requirement of expedition occurs, the typical outcome is the imposition of a sentence which will normally have elements of retribution, deterrence and rehabilitation, in differing degrees and with differing emphases depending on the individual case.

[65] In the present case, there is an unmistakable nexus between the undisputed breach of the Article 6 reasonable time requirement and the Appellant's recovery from drugs addiction. This occurred during the period of excessive delay and was completed pre-sentence. Exceptionally, the Appellant chose to use this period of excessive delay in the most productive way imaginable by effectively self-rehabilitating during its currency. This would very likely not have been achieved if the reasonable time guarantee had not been breached by the prosecution. While the sentencing judge acknowledged the Article 6 delay, the detailed relevant information which this court has determined to receive was not available to him, with the result that this analysis was absent from the sentencing exercise which he conducted. In summary, he determined to impose the sentence under challenge without regard to certain highly material information.

[66] In *Dunlop* this court concluded at [39]:

> "*In the present case there was potent, compelling evidence favouring a constructive non-custodial disposal in order to give primacy to the public interests promoted by the rehabilitation of this offender* … (adding at [40]) ….
>
> *Our second main conclusion is that for the reasons given, both the approach adopted and the weight accorded by the sentencing judge to the factor of the appellant's rehabilitation were erroneous in law. When one grasps onto this our separate conclusion that the delay in prosecuting the Appellant was inordinate and disturbing the ground is firmly laid for the recognition of an exceptional case within the* ***McKeown and Han Lin*** *framework. We conclude that this is such a case.*"

We consider that these passages, with appropriate contextual adjustments, are applicable to the present case. Our overarching conclusion is that there is a sufficient foundation for the adoption of a sentencing course which, at a point where the Appellant has served just over one quarter of the custodial term imposed, will entail a non-custodial mechanism. The support and oversight available through probationary supervision will assist and fortify the Appellant in his efforts to maintain his recovery from drugs dependency. It will also entail participation in any programme deemed suitable by the supervising officer. In sentencing principle terms, this course will promote the public interests which underpin the rehabilitation of offenders, namely the prevention of re-offending and the protection of society. The group of beneficiaries extends well beyond the offender and his immediate family and social circles. Protection of the Article 8 ECHR rights of all four family members will also be furthered. Furthermore, this court takes into account the small quantities and low value of the drugs recovered: see [3] above.

Decision

[67] Exercising the powers of this court under section 10(3) of the 1980 Act, we allow the appeal by quashing the sentence of the Crown Court and substituting a probation order of two years duration to take effect three days hence, from 14 December 2020. The Appellant's consent to this course has been confirmed.

[68] Finally, as a matter of good practice, in every case where it is proposed to apply to have new evidence received via the formal mechanism of s 25 of the 1980 Act or to invite the court to receive new information through the alternative extra-statutory mechanism, this should be raised at the stage of applying for leave to appeal via an application in writing and, in Diplock cases, filing the notice of appeal or, where this is genuinely not feasible, as soon as possible thereafter.