



THE COURT OF APPEAL

[277/2018]

**Birmingham P.
McCarthy J.
Ní Raifeartaigh J.**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MARTIN AYLMER

RESPONDENT

JUDGMENT of the Court delivered on the 10th day of March, 2020 by Ms. Justice Ní Raifeartaigh

1. This is an appeal brought by the DPP in respect of a sentence imposed on the accused person in which it is claimed that the sentence was unduly lenient. The offence in question was that of participating in the activities of a criminal organisation, contrary to s.72(1)(b)(ii) and s.72(2) of the Criminal Justice Act, 2006 as substituted by s.6 of the Criminal Justice Amendment Act, 2009. This was the first time a sentence had been imposed for this offence, which carries a maximum penalty of fifteen years. The sentence imposed by the Special Criminal Court (Hunt J., Ní Chúlacháin J., Dunne J) was a sentence of imprisonment of three years and nine months, with the final twelve months suspended on condition that the accused be under the supervision of the Probation and Welfare Service.

The facts as established by the evidence adduced at the sentencing hearing

2. The accused pleaded guilty to the offence at an early stage and the evidence in the case put forward at a sentencing hearing before the Special Criminal Court was as follows.
3. The evidence for the offence for which the accused man was sentenced was uncovered during the Garda investigation into the murder of Michael Barr in the Sunset Public House on 25th April, 2016. After that murder, those responsible for it abandoned a getaway vehicle (an Audi) in Drumcondra. There was an attempt to destroy the vehicle by fire, but timely intervention by An Gardaí Síochána preserved the vehicle and its contents for the purpose of investigation. A mobile phone was found in a grass area near the vehicle and it was observed that a number of calls were made to that phone after the arrival of Gardaí at the scene. Investigations revealed that the phone had been purchased two days previously at an outlet in the Ilac Shopping Centre in Dublin city centre. Gardaí obtained CCTV footage from that store and it showed that the purchaser had bought two other phones there at the same time. They were all prepaid unregistered mobile phones. The CCTV footage showed the man purchasing the phones as wearing a distinctive jacket and

baseball cap. His movements were traced to another mobile phone store at Moore Street in the city centre, where he purchased three more mobile phones on the same day, also all prepaid and unregistered. The Gardaí were able to work back from the CCTV footage to establish that he had arrived at the shopping centre that morning in a Toyota Corolla with a particular registration plate. The driver was not wearing a baseball cap at the time he took the ticket from the machine at the carpark barrier but put on the baseball cap upon entering the Ilac Centre. The Gardaí were able to establish that the Toyota Corolla was registered to the accused man and they were also satisfied that the accused man was the person shown in the CCTV footage.

4. The examination of other CCTV footage in the investigation tracked the movement of the Audi getaway vehicle back from the Sunset Public House to lockup premises on the North Circular Road. When the lockup was searched, a number of firearms were found as well as a number of cleaning products. A finger mark lifted from a bottle of bleach was subsequently identified as belonging to the accused. In addition, CCTV footage of the entrance to the lockup showed Mr Aylmer visiting the premises on three occasions on the morning of the day before the murder, all of his visits being within a period of about an hour and a half.
5. The accused was arrested on 17th June, 2016 at his home address and was subsequently detained and interviewed. Initially, he exercised his right to silence but, after the Gardaí invoked statutory inference provisions, he said he believed the phones would be used for drug trafficking. He also said that he may have moved the bottle of bleach while in the lockup. There was no paraphernalia relating to drug trafficking at the location.
6. Mr Aylmer honoured the stringent conditions of bail granted to him by the Court on the 9th April, 2018. His plea of guilty was entered as soon as the preliminary legal discussions had concluded. His previous convictions consisted solely of two minor public order matters back in 2015.
7. The accused man was born in November 1986; he was therefore aged approximately 32 years of age. His father had passed away in 2013 and he lived with his mother who was a retired cleaner. Both of them were responsible for the care of his brother who had become disabled as a result of an accident a number of years ago.
8. In the course of the sentencing hearing, it was accepted by counsel for the DPP that there was insufficient evidence to charge the accused man with murder and that there was no evidence that he had foreseen that his acts of assistance would be used in preparation for a murder or that he had the necessary intent for assisting in a murder before the commission of that crime. In those circumstances, it is a curious feature of the indictment that the particulars of the offence were that Martin Aylmer between 23rd April, 2016 and 25th April, 2016 (both dates inclusive) in the State "with knowledge of the existence of a criminal organisation did participate in or contribute to activity intending to facilitate the commission by the said criminal organisation or any of its members of a serious offence to wit the murder of Michael Barr at the Sunset House, Summerhill Parade on the 25th April 2016."

9. In an exchange with counsel during the hearing, Hunt J. commented that the accused man was not “in the premiership” of the possible range of those who lent their assistance to criminal organisations.

The sentencing remarks of the Special Criminal Court

10. The Court started by referring expressly to the two-stage sentencing analysis repeatedly prescribed as best practice by the Court of Appeal, which involved assessing the gravity of the offence with reference to culpability, including aggravating factors tending to increase culpability, and identifying a “headline sentence”; and then moving to mitigating factors tending to reduce culpability and the harm done and determining where on the scale of available penalties the offence should be located.
11. The Court said that the provision of any assistance to a serious criminal organisation was a grave matter, but that within that overall context it appeared to the Court that the actual assistance rendered by Mr Aylmer was not at the higher end of the scale of possible assistance that might be provided by an individual to such an organisation.
12. The Court said that Mr Aylmer did not approach the provision of the assistance in question in a “covert or disguised manner”, noting that he bought the phones openly and used his own car, and commented:-

“His unsophisticated approach left him open to ready identification by the investigators demonstrating perhaps an absence of calculation and guile on his part.”
13. The Court noted that the DPP had conceded that on the evidence, it could not have been established beyond a reasonable doubt that Mr Aylmer specifically knew he was actually making a contribution to the crime of murder. The Court said this would not have been the case if he had assisted in the provision or movement of firearms, but said that there was no evidence of anything of that type in this case. The Court did say that it must have been apparent to him that he was assisting in some serious criminal activities, without necessarily knowing that he was contributing to the crime actually committed shortly afterwards.
14. Having regard to the maximum sentence for the offence under consideration of fifteen years’ imprisonment, the Court noted that the general approach was to divide offences in to lower, middle and top end of the range. It located the gravity of the particular offence under consideration in this case “at the junction between the top of the lower end and the bottom of the middle range of the relevant scale”. Having done so, it considered that the “headline sentence” was one of five years’ imprisonment.
15. The Court then went on to consider the second stage of the analysis. It noted that there were significant mitigating factors in this case; the first being the early plea of guilty. The Court pointed out that in cases such as this, putting the prosecution on proof of guilt could be a “lengthy, complicated and expensive procedure, tying up scarce court, prosecution and garda resources which could be better used elsewhere”. The Court also

noted that in light of the wide range of legal issues that typically arise in such trials, a plea of guilty provided certainty for the prosecution "in a sometimes uncertain legal world". For this reason, the Court gave Mr. Aylmer a discount of 25% from the headline sentence identified earlier in relation to his plea of guilty. This resulted in an initial reduction of sentence from five years to a sentence of three years and nine months.

16. The Court then proceeded to suspend a portion of that sentence in view of the other mitigating factors, those being his lack of previous or subsequent offending, his personal history and family background. It was noted that he was a relatively young man without a serious criminal record, who seemed to have become involved in matters well outside the ambit outside of his previous criminal conduct and that future rehabilitation remained a live issue in the case.
17. In addition, the Court noted that where a person is sentenced to custody for the first time, the sentence should be no longer than is necessary to serve the aims of punishment and deterrence. The Court suspended the last year of the sentence of three years and nine months for a period of twelve months on condition that he enter a bond of €300; that he keep the peace and be of good behaviour for a period of one-year post-release; and that he place himself under the supervision of the Probation Services.

The submissions of the prosecution on the appeal

18. It was submitted on behalf of the prosecution that the sentencing court had made an error in principle, and that in fixing the headline sentence at five years, the Court had insufficient regard to a number of factors including: the intention of the Oireachtas; the gravity of the offence actually committed; the devastating impact of the offence on others; the level of involvement and/or seriousness of the acts of assistance rendered by the accused man; and his *mens rea*.
19. Regarding the intention of the Oireachtas, the prosecution observed that s.72 of the Criminal Justice Act, 2006 was amended by the Criminal Justice (Amendment) Act, 2009 ("the Act of 2009"); the long title of which stated that its aim was to provide for additional measures with respect to combating organised crime and, in particular, with respect to countering the increased levels of violence towards, and intimidation of, members of the public perpetrated by criminal organisations. The Act of 2009 increased the penalty for this particular offence from five years to fifteen years. It also added recklessness as a potential *mens rea* for the offence (in addition to "knowingly") and broadened the *actus reus* ingredients. The Act of 2009 had been introduced to fulfil the State's obligations arising under Article 3(2) of the Council Framework Decision 2008/841/JHA of 24th October, 2008 on the fight against organised crime, and by reason of its ratification of the UN Convention on Transnational Organised Crime on 17th June, 2010. The increase in maximum penalty from five to fifteen years was, it was submitted, indicative of the desire of the Oireachtas that penalties with a serious deterrence component be imposed for this offence.
20. The prosecution laid emphasis on the seriousness of the crime actually committed here, albeit that the accused man was not aware that this was where his acts of assistance

would lead. It also laid emphasis on Council Directive 2012/29/EU of 25th October, 2012 establishing minimum standards on the rights, support and protection of victims of crime (otherwise known as the Victims Directive) and the Criminal Justice (Victims of Crime) Act, 2017 in submitting that the Court should have given more consideration to the victim impact aspects of the case.

21. The prosecution submitted that the actual assistance rendered by the accused was neither at the lowest end of the scale nor was it at the highest. It emphasised the importance of logistical support to criminal gangs and submitted that the provision of mobile phones to modern criminal gangs is intrinsic to their activities because it enables them to plan serious offences such as murder and the escape from the scene without detection.
22. As regards the *mens rea* of the accused, the prosecution submitted that he had the more serious of the two forms of culpability envisaged by s.72, namely, knowledge rather than recklessness; this, the prosecution said, was indicated by his purchase of the six prepaid phones and his three trips to the lockup. They therefore submitted that his involvement was in the top end of the middle range and possibly in the higher range.
23. It was also submitted that the Court placed too much emphasis on the apparent lack of sophistication on the part of the accused, almost suggesting that he was an “innocent abroad”, which was disputed by the prosecution on the basis of the totality of the evidence.

The submissions of the respondent on the appeal

24. Counsel on behalf of the accused vigorously submitted that the fact that a murder was committed should not be laid at the door of her client. She submitted that the offence did not require proof of any knowledge or intention in connection with the murder, and therefore her client should not be punished simply because another party had carried out a murder using the phones that he had purchased, in circumstances where he had not foreseen that this is where his acts of assistance would lead. She submitted that his culpability should be held to relate to his state of mind at the time of the furnishing of the act of assistance which (as the prosecution had expressly conceded) did not encompass foresight on his part that a murder would or might be committed.
25. It was also submitted that the prosecution were raising issues in the appeal which had not been argued before the sentencing courts, such as considerations of public policy and general deterrence. It was submitted that, in any event, the sentencing court was clearly alive to considerations of deterrence and public policy, and that it had struck an appropriate balance between those considerations and all of the other factors in the case.

Relevant legal authority

26. As noted earlier, this appears to be the first occasion on which an accused person has been sentenced for this particular offence, i.e. the offence contrary to s.72 of the Criminal Justice Act, 2006 (as amended). It follows that there is no direct authority on sentencing for this particular offence. Naturally, the general principles concerning undue leniency appeals apply in the normal fashion. These were set out in *DPP v. Byrne* [1995] 1 ILRM 279:-

- 1) The onus of proof clearly rests on the DPP to show that the sentence is unduly lenient.
 - 2) The Court should afford great weight to the trial judge's reasons for imposing the challenged sentence, as it is he or she who has received the evidence at first hand. In particular, if the trial judge has kept a balance between the particular circumstances of the offence and the offender, in other words if he has observed the principle of proportionality, the sentence should not be disturbed.
 - 3) It is unlikely to be of help for the Court of Criminal Appeal to ask if it would have imposed a more severe sentence itself. The inquiry must always be if the sentence was unduly lenient.
 - 4) Since a finding of undue leniency is required, *nothing but a substantial departure from what would be regarded as the appropriate sentence justifies intervention by the Court.*
27. In *DPP v. Stronge* [2011] IECCA 79, the principles were again summarised by McKechnie J. who said that the onus was on the DPP to prove that the sentence imposed constituted a "substantial or gross departure from what would be the appropriate sentence in the circumstances" and that there must be "a clear divergence and discernible difference between the latter and the former such that it can be stated that the divergence amounts to an error of principle". He said that deference must be afforded to the trial judge's reason for the imposition of sentence, given that the trial judge received, evaluated and considered at first-hand the evidence and submissions made by the party. The fact that the appellate court might have imposed a more severe sentence is not sufficient to justify interventions.
28. More recent decisions in relation to undue leniency applications include *DPP v. D.O.F.* [2019] IECA 307 (Edwards J.), *DPP v. O'Mahony* [2019] IECA 311 (Kennedy J.), *DPP v. Delacey* [2019] IECA 262 (Kennedy J.), and *DPP v. Parkes* [2019] IECA 199 (Irvine J.). However, the basic principles as articulated in *Byrne* and *Stronge* have not been altered.

The Court's view

29. It may be helpful to start by examining the precise ingredients for the offence in question, for which a maximum penalty of fifteen years is provided, in order to ascertain the range of behaviour which it encompasses.
30. Section 70 of the Act of 2006 as amended by the Act of 2009 sets out certain definitions. It provides that "criminal organisation" means a "structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence". It provides that "structured group" means a group of 3 or more persons, which is not randomly formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert". It also provides that "for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following: (a) formal rules or formal

membership, or any formal roles for those involved in the group; (b) any hierarchical or leadership structure; (c) continuity of involvement by persons in the group.”

31. The phrase “serious offence” means an offence for which a person may be punished by imprisonment for a term of four years or more.
32. The ingredients of the offence provided for in s.72 (as amended) may be summarised as follows:
 - a) Knowledge of the existence of a criminal organisation;
 - b) Participation in or contribution to any activity (whether an offence or not);
 - c) With either an *intention* to enhance the ability of the criminal organisation or any of its members to commit, or facilitate the commission by a criminal organisation or any of its members of, a serious offence *or being reckless* as to whether such participation or contribution could either enhance the ability of a criminal organisation or any of its members to commit, or facilitate the commission by a criminal organisation or any of its members of, a serious offence.
33. It is specifically provided in subsection (4)(c) of s. 72 that in proceedings for the offence, it shall not be necessary for the prosecution to prove knowledge on the part of the defendant of the specific nature of the serious offence.
34. A number of comments may be made about the offence, following from the above outline of its ingredients. First, because of subsection (4)(c), a person can be prosecuted for this offence for giving acts of assistance to a criminal organisation in circumstances where they could not be prosecuted for a substantive offence such as murder or robbery carried out by the criminal organisation because the evidence falls short of establishing the *mens rea* for that offence. Indeed, one could potentially prosecute the offence where no link is made between *any* identifiable serious offence committed by the organisation but where the person’s activity nonetheless satisfied the ingredients of the offence; for example, the evidence might establish that a person regularly engaged in procuring firearms for a particular criminal organisation without establishing that any particular firearm was used for any particular murder. It might be said that the offence was introduced precisely in order to enable the prosecution and conviction of a person where the evidence establishes that he assisted a criminal organisation but falls short of showing that he assisted with regard to a particular crime.
35. Secondly, the definition of criminal organisation is such that a broad range of ‘gangs’ could be encompassed, ranging from a local group of juvenile car thieves to a nationwide or even international drugs importer and distributor. This is because of the definition of ‘serious offence’ as an offence carrying a maximum four-year penalty and the fact that a vast number of criminal law offences carry this level of maximum penalty. Therefore, a reasonably wide spectrum of criminal organisations is envisaged by the Act of 2006 (as

amended) and the seriousness of a particular person's s.72 offence would be (partly) determined by what type of gang he or she was assisting.

36. Thirdly, the "activity" or act(s) of assistance engaged in by the person could take many forms. Examples that come to mind are acts of assistance such as providing firearms and other weapons, getaway vehicles, access to lockups or safe houses, or providing items such as mobile phones, cleaning products, and clothing.
37. Fourthly, there are two alternate forms of the *mens rea* for the offence: intention and recklessness, i.e. (a) *intention* to enhance the ability of the criminal organisation or any of its members to commit, or facilitate the commission by a criminal organisation or any of its members of, a serious offence; or (b) *being reckless* as to whether such participation or contribution could either enhance the ability of a criminal organisation or any of its members to commit, or facilitate the commission by a criminal organisation or any of its members of, a serious offence.
38. More difficult, however, and a key question in the present case is whether and, if so, to what degree the sentencing court should take into account the gravity of a particular offence actually committed by the gang if the prosecution establishes that the accused person's "activity" of assistance *in fact* facilitated that particular offence, even if the s.72 offender *did not foresee* that it would. In the present case, the question may be posed in the following way: is it entirely *irrelevant* that a murder was facilitated (at least in part) by reason of the acts of assistance rendered by the accused man, Mr Aylmer? This is one of the key issues in this appeal, although it was approached from a number of different angles in the prosecution submissions, including through the perspective of the impact on the victim's family.

The relevance, if any, of the murder which the accused man's acts of assistance in fact facilitated in the sentencing of the accused man for the s.72 offence

39. A useful starting point in considering this difficult issue is to draw a distinction between a matter which constitutes an aggravating circumstance and a matter which constitutes an ingredient of an offence. Simply because something is not *required* as part of the prosecution proofs for a particular offence does not mean that it is necessarily *irrelevant as an aggravating factor*. Counsel on behalf of the accused/respondent submitted that a murder committed by someone else should not be laid at his client's door in the absence of any foresight on his part that this murder would be committed using the phones he had supplied to the organisation. However, the criminal law contains within it numerous examples of a punishment (or indeed an offence) being greater by reason of a consequence of a person's conduct which the person did not foresee. A classic example of liability for unintended outcomes can be seen in the offence of what is colloquially known as assault-manslaughter; if a person assaults another person who falls and hits his head and dies, a prosecution for manslaughter rather than assault will ensue, with correspondingly greater penalties, even though the assailant's mental state was that of intending to inflict an assault only. The underlying logic for visiting manslaughter liability upon the accused person although he has the mental state for an assault (only) is probably that, objectively speaking, it is not unreasonable in general to say that more

serious and perhaps even fatal consequences may flow from an assault and that is, arguably, a risk one takes when one assaults another, namely that death may occur. There is always a tension in the criminal law in holding the balance between the individual's actual culpability or state of mind, on the one hand, and the consequences of his actions, on the other, of which assault-manslaughter is but one example. The criminal law is not so purist as to close its eyes entirely to consequences of an offender's actions even when they are not intended.

40. Similarly, therefore, in the context of the offence under s.72 of the 2006 Act, it might be said that if a person assists a criminal organisation (defined as an organisation which has as its main purpose the commission of "serious offences"), it is not unreasonable to take into account in sentencing a consequence of his conduct which is the commission of a particular serious offence, even if the person did not foresee that specific consequence or crime being carried out with the help of his act of assistance. Thus, while proof that the accused person had the requisite mental element for murder is *not* an ingredient of the offence, it is not entirely irrelevant that murder was, in fact, facilitated by his acts of assistance. The subsequent murder becomes an aggravating feature for the purpose of sentencing.
41. The Court considers it important, however, for the sentencing court to have regard to the evidence concerning the particular criminal organisation that the accused man assisted. In this regard, as noted above, the spectrum of 'gangs' encompassed within s.72 of the Act of 2006 (as amended) is potentially quite broad-ranging, from small local gangs involved in petty crime to large international profit-making enterprises. While prosecution evidence as to the nature of the criminal organisation in question may be difficult to present within the parameters of admissible evidence, the Court is of the view that the prosecution should present what evidence it can in this regard (while remaining within the parameters of admissible evidence) and the sentencing court may draw appropriate inferences from the evidence before it.
42. In the present case, there was very little direct evidence at the sentence hearing as to the nature of the gang being assisted by the accused person. Indeed, it seems that the only direct evidence in that regard was the accused man's own comment during a Garda interview that he thought he was assisting with drug trafficking. In the Court's view, however, a sentencing court is entitled to take judicial notice of the fact that murder is one of the range of offences frequently committed by drug trafficking gangs; several decades of the investigation, prosecution and conviction of offences in the drug trafficking arena in this country have made this tragically clear. To put it another way, experience has shown that murder is one of the typical items on the repertoire of a drug trafficking gang such that it would not be unreasonable to consider that when a man gives specific acts of assistance to a criminal organisation of this nature, he is taking a risk that his assistance may be used to facilitate murder as well as the day-to-day activities of moving, packaging and selling drugs.

43. The position might be different if the evidence in a particular case were different. Suppose, for example, a young man ('A') regularly assisted a gang which typically engaged in petty theft or car stealing by supplying them with phones, but on one occasion a gang member ('B') engaged in a murder by stabbing someone with a knife, having lured his victim to a location by using one of the phones furnished by A. In those particular circumstances, it would not be appropriate to take the murder by B into account in the sentencing of A for the s.72 offence in respect of supplying the mobile phones to the gang. There would be a "disconnect" between the normal activities of the gang and the particular offence committed by B, which could therefore not validly be considered an aggravating factor in the sentencing of A.
44. In the present case, however, the Court is satisfied that the commission of the murder of Mr Barr is a relevant and aggravating factor in the sentencing of the accused man because he provided acts of assistance to a gang he believed to be one involved in drug trafficking. To say that it is an aggravating factor is, however, *not* to say that the full responsibility for murder, or anything like it, should be laid at the door of the accused man in the present case. There was no evidence to support his prosecution for murder and that must be clearly borne in mind. However, he is nonetheless in a different situation from the one which would have pertained if he had furnished precisely the same acts of assistance but the organisation used his acts of assistance towards an instance of supplying drugs rather than the carrying out of a murder. The fact that his assistance in fact facilitated a murder is an aggravating feature in the case rather than an entirely irrelevant feature, but its impact on the penalty should not be overstated.
45. If the murder of Mr Barr is (to the degree outlined above) relevant in the sentencing of this accused for the s.72 offence, it follows that the impact of the murder on others should also (to the same degree) be taken into account, as the two matters are intimately connected. In effect, they are part and parcel of the same point; the gravity of the offence actually committed by the criminal organisation on foot of the accused's act of assistance. The offence of murder is grave because it not only takes the life of another person, but because of the devastating impact it has upon the person's loved ones and the wider community.
46. What was the approach taken by the sentencing court to this matter? The Court is of the view that the sentencing court did not sufficiently factor into its sentence the fact that a murder had been committed with the (*factual rather than intended*) assistance of the accused man.

The precise acts of assistance rendered in the present case

47. On the issue of where on the scale of assistance the accused man's acts of assistance fall, it should be recalled that the evidence was that he had purchased six prepaid mobile phones and had visited the lockup three times on the day of the murder. His fingerprint was on a bottle of bleach which he said he may have moved.
48. When considering the kinds of acts of assistance that might be given by a person to a gang, it has to be borne in mind that if a person provides items such as firearms or

weapons, this is likely to propel a case over the line into substantive offence territory, such as murder, robbery or the like, because certain items such as firearms do not have innocent or non-violent uses. Therefore the typical acts of assistance encompassed by a s.72 prosecution are likely to be in the area of communications, clothing, vehicles, and so on. With that in mind, the Court is of the view that the acts of assistance here fall into the middle range of possible acts of assistance.

49. The Court would not disagree with the sentencing court's view that this was not at the upper end of possible acts of assistance, but that could not fairly be interpreted as the sentencing court consigning the accused's acts to the lower end of the range.

General deterrence

50. The prosecution urged upon the Court that considerations of public policy and general deterrence should be factored into the sentence. The Court agrees that this is a type of crime where considerations of general deterrence are appropriate, bearing in mind that acts of assistance given to criminal organisations will generally not be spur-of-the-moment or impulsive, in the way that certain other crimes might be. Given the widespread damage done to society by drug-trafficking activities, and the widespread use by organisations of people in the community to provide miscellaneous acts of assistance, sentences should contain a robust message that a person helping these organisations can expect a serious sentence when convicted. The Oireachtas increased the penalty in 2009 from five to fifteen years; that in itself is a significant indicator of the seriousness with which the Oireachtas viewed this type of offence and something which the courts should take into account. The sentencing court rightly took into account the accused man's background and reached the conclusion that there was a real possibility of rehabilitation, and this Court would not disagree with that. However, the mitigation must come in after the appropriate headline sentence has been calculated and the Court considers that general deterrence is relevant in calculating the headline sentence.

Conclusion

51. To summarise, the Court considers that the following factors are relevant in fixing the headline sentence for this offence:
- i. The nature of the acts of assistance given by the accused;
 - ii. The nature of the criminal organisation he was assisting;
 - iii. The consequence of his act(s) of assistance, which may include the commission of a crime which he did not himself specifically foresee; and
 - iv. Considerations of general deterrence.
52. The Court respectfully considers that the sentencing court fell into error in placing the case (before mitigation) at the intersection of the lower and middle end of the range and in fixing the headline sentence at five years. The Court considers that this amounted to a substantial departure from what would be regarded as the appropriate headline sentence and constituted an error of principle, within the meaning of the authorities on "undue

leniency" referred to earlier. The Court will therefore allow the appeal on the ground that the sentence was unduly lenient.

53. The Court is of the view that having regard to the acts of assistance given by the accused man to what he knew was a drug trafficking organisation, together with the fact that a murder was, in fact, committed and had, in fact, been facilitated by his acts of assistance, as well as considerations of general deterrence, the appropriate headline sentence in this case was eight years. The Court will apply the same 25% reduction as the sentencing court, resulting in the first instance in a reduced sentence of six years after this reduction. The Court will then apply a slightly increased reduction for mitigating factors (to take account of factors including accused's previous history and his family situation, as well as the fact that the sentence is being increased on this appeal) and will suspend the final fifteen months on the same conditions as those imposed by the sentencing court. Accordingly, the final sentence is six years with fifteen months suspended.