SENTENCING POLICY AND THE MISUSE OF DRUGS ACT 1971

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TEXT CUT OFF IN THE ORIGINAL

Sentencing Policy and the Misuse of Drugs Act 1971

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Declaration

I declare that this study embodies the results of my own research into sentencing policy and the Misuse of Drugs Act 1971. Generally, the information in the study is derived from statutes, case law and academic writings.

Summary

Until recently sentencing was not considered to be a separate subject within the discipline of law. It was thought to be a matter essentially for judges. Sentencing was not taught as such. Rather, on ascending to the bench lawyers took with them their experience of the law in practice and their knowledge of their powers as limited by statute. Thereafter there was little in the way of guidance. In the last quarter century sentencing has developed in a number of ways. Parliament has passed an increasing number of laws creating and limiting new powers. Academic commentators have analysed judgements and they have sought to establish a scheme of things to do with sentencing. Judges themselves have tended increasingly to explain their decisions and to develop an order of priorities. This work is a study of the sentencing policy laid down in judicial decisions in cases of contraventions of The Misuse of Drugs Act 1971. By studying the sentencing decisions in reported cases of drugs offences, a legal model of the drugs trade is established. Such a model in broad terms follows the nature and terms of the offences contained in the Misuse of Drugs Act 1971. But it is clear that there are certain aspects that cut across the conventional order of offences. In particular, the sentencing of drug addicts has posed difficult questions for the courts to consider. It is uncertain as to whether lawyers have grasped fully the implications of drug abuse on the scale practiced by most addicts. This particular study has been completed in the context of the present literature relating to sentencing offenders. The law is predominantly that of England and Wales because that is the jurisdiction with the greatest number of reported cases. Consideration is given to both Northern Ireland and Scotland. The Law is stated as at 31st December 1986.

Preface and Acknowledgement

In 1983 I was awarded the degree of Master of Laws by the University of Glasgow. The thesis submitted for that degree was entitled "Criminal Responsibility and the Misuse of Drugs Act 1971". The work in essence was a study of the principles of criminal responsibility as applied to offences involving controlled drugs. In carrying out my research for that study I came across many cases on controlled drugs and sentencing. My interest in this topical subject was sustained and coincided with a rapid increase in case law. This thesis complements the earlier one and represents a continuation of studies. In completing the second thesis I am happy to record my thanks to my supervisor Mr Iain Dyer of the Department of Private Law in the University of Glasgow. I was helped also by Mr Roger Hickman of the University Library Staff, particularly in mastering the Lexis trawl. I record with regret my failure to obtain interviews with the two senior judges whom I approached. The library staffs at the Universities of Glasgow, Strathclyde, Dundee, Edinburgh, Belfast (Queen's) and London (Institue of Advanced Legal Studies) were a great help. I was also able to make use of the Mitchell Library at Glasgow, the library of the Society of Solicitors in the Supreme Court at Parliament House and the National Library of Scotland. I alone am culpable for the finished work.

Tables of Reference

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A. Legislation

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(ii) Matrimonial Proceedings (Magistrates Courts) Act 1960 (8&9 Eliz 2 (1959-60) c.48)
(iii) Misuse of Drugs Act 1971 (c38)
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(xvi) Drug Trafficking Offences Act 1986 (c32)

(b) Statutory Instruments

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(iv) The Drug Trafficking Offences Act 1986 (Commencement Order Number 1) Order 1986
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B Case Law

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(e) Reference

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(Appellant's counsel) "has understood very well that the first quality of any submission is brevity."

per Lord Salmon in
R v Taonis (1974) 59 Cr.App.R 160 at p161.

PART TWO: BACKGROUND

Chapter 1 HISTORY AND LITERATURE

1.1 This work purports to be a study of judicial attitudes and decisions on sentencing drug offenders with a view to determining judicial policy. Judges do not live or work in an intellectual or social vacuum. Their thoughts on drug offenders are frequently reflected with the legal principles discussed in their judgements. The growth of a sentencing policy for drug offenders is paralleled by the development of the subject of sentencing, the literature of the latter having grown considerably in recent years.

1.2 But what is meant exactly by "decisions on sentencing"? There are in Scotland, England, Wales and Northern Ireland few reported decisions at the first level or the trial stage. The vast majority of reported cases studied here are appeals against sentence. This is not a study of appeals involving a question of law or a question of fact or on any other ground which may appear to be a sufficient ground of appeal.

1.3 Many, but not all, of the considerations relevant to the types of appeal specified above apply equally to appeal against sentence. It has been observed (1) that two significant exceptions arise from the nature of the appeals against sentence. In such an appeal:

> "a. the High Court do not need a transcription of the trial judge's charge (if any);
> b. there are only two possible issues, competency and severity."

At its simplist the reported cases considered in this work are all appeals against sentences imposed by trial judges and which are thought to be too severe.

1.4 Matters are more complex than might be assumed from the simple assertion above. In the first place sentencing policy, in England and Wales especially, is very much a question of relativities with each case being considered in relation to what is or might be the worst case of the same criminality. Secondly, the most recent developments from how the executive's expressed intention of "doing something" about the profit made from selling controlled drugs. The law in this regard, although being concerned with sentencing, will almost certainly involve appeals unrelated to severity but possibly related to competency. Thirdly, relativity exists within the range of offences of controlled drugs but also in relation to other crimes but in R v Hunt(2) a Lord of Appeal in Ordinary in the House of Lords observed that offences involving controlled drugs are "amongst the most serious in the criminal calendar."

1.5 Perhaps it is best now to declare an interest. The justification for this is found in an observation of Professor Hall Williams that:

> "The study of crime is carried out by many scholars from the point of view of their different disciplines and sometimes (though rarely and with difficulty) through interdisciplinary studies. The most common approach to the study of crime is to start from the point of view and follow the interests and emphasis of one's own particular discipline. Indeed any other approach is fraught with danger." (3)

In short, the discipline sets the approach and the approach the result. The interest declared then is that this work has been written by a Solicitor in Scotland who either prosecutes in the courts in Glasgow regularly or is involved in the preparation of cases for prosecution. (4)

1.6 Within the Procurator Fiscal Service The Book of Regulations provides the general rules governing the policy and practice of prosecuting crime in Scotland. In relation to sentencing it is said that:

> "Sentence is a matter for the court. The Procurator Fiscal must not suggest a sentence but he should draw the court's attention to any mandatory sentence.
>
> The Procurator Fiscal must be aware of the court's power of sentence both in general and in relation to particular offences. This is especially important in Indictment cases where there is no notice of pently." (5)

But it must be emphasised that this work is not restricted to Scotland and that the bulk of the convictions occur in England and Wales. There have been a few reported decisions in Northern Ireland.

1.7 The aims of this work are as follows:-

(1) To consider the framework of the legislation and common law for the disposal of any drug-related case before the courts;

(2) To analyse subsiduary or supporting legislation which appears in drug-related cases to be of considerable importance;

(3) To consider the development of the legislation and also judicial attitudes as a means of assessing drug-related activities;

(4) To decide whether existing legislation can be shown to be ineffective to meet drug-related criminal activities.

It may assist to have these aims explained to some extent. The framework of the law of controlled drugs represents Parliament's view of the problem. The case law shows how that law is developed. It has been suggested above that different disciplines may have varying views of the same problem. However, in defence of lawyers, the words of Professor Blondel may be cited for he said, admittedly in a different context, that;

> "Lawyers are unquestionably over concerned with formal institutions; the criticisms levelled against them have much justification. But it is important to see why legal studies have played a large part in political analysis; reality, though not wholly governed by formal rules, is moulded by them to a large extent. Formal rules often contain and therefore influence behaviour." (emphasis added).(6)

1.8 In explaining the aims stated it may assist to consider a theoretical tool which has for some time been used to advantage by sociologist and criminologists. That tool is the "model" and it has been described as

> "... an artificial accentration of reality to elucidate the conflict and tension which exists in any particular legal system between essentially opposing values."(7)

Models have been used widely for various studies and that includes sentencing. Professor Nigel Walker's influential book Sentencing in a Rational Society contains an important sentencing model (8) and this approach has been adopted by others (9). One of the most recent examples of models is contained in James Bakalar and Lester Gunspoons' Drug Control in a Free Society. The authors' aim is to review the peculiar medical, legal and social status of drugs by examining the formal and informal controls used in modern industrial societies and comparing them with other methods that have been or might have been used. In pursing their aim the authors postriate a number of "models" of drug control. The essence of these models:-

(1) the "vice" model of drug control which consists of putting the burden of criminal sanctions entirely on the grower, manufacturer and distributor rather than the user. This model seeks to cut off the drug supply where it is concentrated in the fewest hands. (10).

(2) the "consumer or medical" model of drug control also dictates that users are left alone since they are "at most the victims." (11)
(3)the "disease-crime" model seeks to arrest drug-users as criminals and then impose on them as sick people. This raises various philosophical questions (12).

An earlier use of the model in the drugs context was that of Dr Martin Plant in his important book Drug Takers in an English Town:

> "The 'medical model' of drug taking as intrinsically and invariably harmful has been generally accepted. This model is consistent with the legal proscription of certain types of drugs." (13).

The author criticises the model as ignoring the possibility that drug-takers may regard their behaviour differently, and that they might view drug-taking as valuable within their own terms of reference. Dr Plant's study then is of the subjective attitudes of the users to the durgs, to each other and to the law. This sustained sociological analysis draws heavily on the concept of anomie to produce in essence "a users model". (14).

1.9 The aggregate of the aims of this work is to produce a legal model of drug control - based firmly on the 1971 Act - by means of "standardised, systematic procedures" (15). The hypothesis is that there is a strategy behind the sentencing policy, that strategy being rooted in the 1971 Act but going beyond it. If this matter is tackled with a little less than full confidence or if there are any other uncertainties then it is encouraging to be reminded by Dr Keith Bottomley that:

> "Neither the study of crime rates nor the analysis of individual criminal behaviour need necessarily be aimed at the discovery of casual relationships of any king. Provided that the precise nature and objects of the exercise are made clear, useful purposes may be

> served by research which is aimed at the discovery of facts and associations which improve the identification, prediction or other manipulation of crime at the societal or individual level." (16).

It is hoped that the research in this study amounts to "useful purposes" but now a review of the relevant literature must be attempted.

1.10 Sentencing Literature

Dr Andrew Ashworth has said that:

> "The principal sources of English sentencing law are two fold: Legislation and judicial decisions. Academic writings might also be said to be a source, in a broad sence." (17).

Much the same - but not exactly the same - can be said about Scotland. (18). Regretably, in practice many legal text books dealing with English law of sentencing either make no reference to Scotland or Northern Ireland or only make passing mention.

Scotland

Any intellectual approach to Scots criminal law must be with a heavy heart for, as Sheriff Gordon says, echoing Hume:

> "The dearth of literature and authority in Scotland is not due only to the fact that a small country offers fewer examples of criminal activity than does a large one. Criminal law has long been neglected by Scots lawyers." (19)

But for sentencing the general approach of Parliament has been similar in the three home countries: Statutes passed establish the legal framework of the sentencing powers of the courts and supplement existing common law powers. These statutes establish the upper level for the exercise of the powers of the Court but within that restriction judges have a very broad discretion. The result of the exercise of judicial discretion is judicial decisions.

But, again, as Sheriff Gordon tells us:

> "The position is not very much better with regard to case law. Since 1913 there has been very few reports of criminal trials, so that it is difficult to know what actually goes on in the criminal courts, especially the summary ones."

And later:

> "There has also been a tendency for judges to deliver very short opinions in criminal appeals and to avoid detailed discussion of principle or authority." (20)

It is clear that this judicial reluctance to opine at any length applies equally to appeals on matters of law and of sentnece. Futher, in Scotland the central role of the Crown Office is such that while the task of that establishment is directed at obtaining balance and consistency in the prosecution of crime, the decisions there are essentially administrative and therefore are not subject to judicial review. (21)

1.11 Thus, in Scotland the modern statutes affecting sentencing have not been illuminated by judicial decisions or other legal commentary to any great extent. Indeed, it would be an incorrect proposition to state that legislation is the only source of sentencing policy in Scotland but it might reasonably be argued that of the two sources referred to by Dr Ashworth, judicial decisions are the far weaker source. There remains, of course, academic writings: in an earlier age Hume in his Commentaries on the Law of Scotland Respecting Crime analysed the then criminal law. The learned author considered, generally speaking, the common law and the statutory provisions of criminal law and procedure but many of the cases cited include the sentence simply as a means of indicating for the sake of completeness how the trial ended. Still, Hume does define a sentence as:

> "the act of the Court pronounced in pursuance of the verdict, and applying the law to the fact, as found by the assize." (22)

The analysis continues to divide sentences into either of the categories of a sentence absolvitor or sentence condemnator (23). The latter is "such as passes on a verdict which affixes some strain of guilt to the pannel." (24). These matters are to be found in Chapter XVII of Commentaries and the great work concludes (25) with brief notes of the "several sorts of punishment" being a general description of the powers then available to the Court.

1.12 Later works on Scots criminal law tend not to be as analytical as Hume but more descriptive so that Alison's Principles and Practice of the Criminal Law of Scotland, Anderson's The Criminal Law of Scotland and Macdonald's A Practical Treatise on the Criminal Law of Scotland contribute little to sentencing. The modern exposition of the criminal law by Sheriff Gordon is substantial but neither of the two editions considers sentencing except to state statutory maxima. Renton and Brown on Scots criminal procedure does consider sentencing but in terms of what Scots judges and justices may do. There is no explanation of what the bench ought to consider doing or why they have done whatever it is that they have done. It contains some reference to what few authorities there are (26) but Renton and Brown itself does not consider the principles.

1.13 Perhaps now is the correct point at which to indicate the distinction that exists between the law of sentencing and the principles of sentencing. The former is concerned with what powers a bench has and what the authority is for that power and the extent of it. The latter is concerned with the rules that are applied or ought generally to be applied when deciding what power is to be used and the extent to which that power is

applied: or so it is submitted. In summary, the Scots texts seem to have dealt adequately with the former through various editions but with a virtually complete neglect of the latter. Sheriff Nicholson's The Law and Practice of Sentencing in Scotland is the first of our texts to deal with both aspects of the distinction, as the title would suggest. The aim of the book is put in context:

> "From the earliest days the sentencing of convicted offenders has played a major part in our criminal justice system, but despite the increasing complexity of the law and procedural rules relating to it, despite its growing social and economic consequences, and despite the enhanced public interest that now surrounds it, there has been no textbook in Scotland which has treated sentencing as a subject in itself, separate from other aspects of general criminal law and procedure. This book is an attempt to repair that ommission." (27)

It was only four years after that statement that a supplement was published indicating the speed of change. In a review of that supplement Lord Hunter, then a Senator of the College of Justice, opined that:

> "It is thought that the time is approaching when a much more comprehensive and detailed treatment of the sentencing process in relation to particular crimes and offences should find its way into a Scottish textbook. Such treatment by an author, who has himself had practical experience, would be of much greater value to both the judiciary and practitioners than any number of disconnected articles and programmes by academic researchers, who sometimes lack the objectivity which such a study requires." (28)

These observations raise a number of difficult questions: not all judges in England have been happy with the academic analysis of their judgements. But who else is to do such a job as is suggested? The entire subject is such now that few practitioners can master the topic and write about it. And when in Scotland did academic researchers ever lack "objectivity" or, to put the

matter another way, what is the "objectivity" that is required?

1.14 England and Wales

Parliament has been especially active for England and Wales in the field of criminal justice with a complete restructuring of sentencing options to include new and wider powers, for example youth custody and detention centre training and also part-suspended imprisonment. Academic writings and commentaries have spread accordingly. It is interesting to note that for Engligh law there seems to be no established meaning of the term 'sentence'. The nearest that there is to a definition is that included in Section 50 of the Criminal Appeal Act 1968 which provides for the purposes of that Act, that:

> "Sentence .... includes any order made by a court when dealing with an offender including a hospital order .... and a recommendation for deportation ...."

Futher, while Scots law is sometimes said to be a system based on principle, rather than precedent (29), English law proceeds on precedent. There is in England and Wales a far greater tendency for judicial comment, analysis and explanation and this is apparent especially in durgs cases. Accordingly, there is an extensive literature on all aspects of the sentences of the English courts and the enormous business has a tendency to generate its own momentum.

1.15 One of the most recent of English writers on sentencing has said that:

> "The sentencing of offenders is a subject which maybe considered from many different points of view. There is the high philosophical approach, which seeks to explain and provide a moral justification for the infliction of punishment by society upon offenders. There is the criminological and sociological approach, which describes what the various forms of sentence entail

> as far as the person undergoing the sentence is concerned, and may also suggest what sentences are the most effective in deterring and/or reforming criminals. There is the approach which concentrates upon the decisions of the Court of Appeal, seeking to extract from those decisions an approved sentencing pattern for common types of crime." (30)

It is submitted that elements of that description are revealed in the article of the academic writings that follows, an article that does not purport to be wholly comprehensive but rather highlights the more important contribution. The different approaches suggest various early works but for present purposes a start may be made with Leo Page's The Sentence of the Court published in 1948. This small book is essentially a monograph on the philosophy behind the sentencing powers of the English courts at that date. The findings in the book are based on the author's own observation as, for example, chairman of the committee of management of a Remand Home. In comparison with modern texts Mr Page's approach is highly subjective and many of the statements result from an argument from the particular to the general. It is worth noting that the author felt that the novelty of his study was such that he had to apologise for his:

> "boldness is criticizing old-established legal practice and convention." (31)

and also:

> "It is with diffidence that one discusses the right aim of legal punishment since there is necessarily implied a criticism of preset-day practice even in the higher courts." (32)

1.16 The paralled development of the discipline of criminology in the universities clearly affected the literature of sentencing. Professor Herman Mannheim of the London School or Economics and Political Science is an important figure in that development as he was responsible for two influential articles in 1958 (33). The subtle influence of a good teacher is reflected in the

achievements of a pupil. A graduate of LSE, Roger Hood, produced a small but important study in 1962: Sentencing in Magistrates Courts: A Study in Variations of Policy owed its origins to the simple observation that the use of prison sentences by different magistrates courts in England shows considerable variations. Again the novelty of such a work is shown by Dr Hood's statement in discussing the value of explanatory research that:

> "The material will be presented so that the facts can be primarily seen as possile explanatory factors accounting for local differences in practice. There is no intention of criticising the decisions taken in any of the courts. It will be critical only in the sense that various readers might see these factors as invalid criteria for administering justice." (34)

Dr Hood's study was not concerned with individual judges (35) but rather with how magistrates in different areas dealt with broadly comparable offences and offenders. Notwithstanding Dr Hood's apology cited above, the result of his study was to show some disturbing features for by means of objective criteria and statistical evidence he indicated disparities in sentencing policies. The study appeared at a time when the idea of a separate law of sentencing was beginning to gel. The highly influential Streatfeld Committee (36) had alerted the legal profession and other interested parties to the fact of increasing complexities in this area of law. The Report of the Committee is now a fundamental document in the literature of sentencing and not least was its considerations of the philosophy or theories of sentencing. The Committee recognised five objects of sentencing:

(1) The retribution or denunciatory theory of punishment which sought to make the punishment fit the crime;
(2) The general deterrence theory of punishment which sought to deter potential offenders by example from committing the same offence;

(3) The specific deterrence theory of punishment which sought to deter the particular offender from offending again;
(4) The preventive theory of punishment which sought to prevent the particular offender from trying society again by incarcerating him for a long period;
(5) The rehabilitative theory of punishment which sought to enable the offender to fake his place as a responsible and law-abiding member of society;

Mr Keith Devlin referred to these at the "commonly identified aims" and added that:

> "The practical outcome of these theories can be observed in the reports of the judgements of the higher criminal courts....." (37)

About four years after these words were written Lord Justice Lawton took advantage of a fairly unexceptionable appeal against sentence to expand on the justifications of punishment and he stated the "classic principles" at considerable length (38).

1.17 It was a discussion of the five theories that marked the arrival of Dr D A Thomas when in an article in 1964 (39) he analysed the part these theories play in the sentencing policy of the Court of Criminal Appeal as revealed in the decisions of that Court in appeals against sentence. Dr Thomas used these theories to clarify the examination of the cases and it is this analysis of reported and unreported that emphasises the importance of his work. A further important atricle was published (40) in 1967 and the two parts of this article read with that of 1964 provide the skeleton of Dr Thomas' important work Principles of Sentencing (41). The essential thrust of this book is a sustained study of the sentencing policy of the Court of Appeal (Criminal Division) for England and Wales. The shaping of that policy is entrusted

substantially to the judiciary and within the judicial hierarchy the Court of Appeal has appellate jurisdiction over almost all sentences passed in the Crown Court. By studying the cases before the court Thomas sought to adduce the general principles being applied. This pioneering work has assisted in our understanding of the sentencing process especially in setting down and clarifying (42) to find a mental concept, the primary decision and the tariff. Dr Thomas had argued in his 1967 article that the courts had increasingly come to consider the offender as an individual, whose needs, rather then whose guilt, would form the basis of a sentence passed. This movement was said to reflect the growth of a number of individulized measures made available to the courts. This 'individulisation' of sentences was used by Dr Thomas as a term which included preventive as well as rehabilitative measures. The older order was based primarily on the concepts of retribution and general deterrence and it was known as "the tariff". These two concepts came to exist together. The primary decision then was described in this way;

> "The sentencer is presented with a choice: he may impose, usually in the name of general deterrence, a sentence intended to reflect the offender's culpability, or he may seek to influence his future behaviour by subjecting him to an appropriate measure of suspension, treatment or preventive confinement." (43)

It is interesting that Dr Thomas appears between 1964 and 1970 to have used the word "primary" in slightly different senses. In the 1967 article he refers to the primary decision as being followed by a secondary decision, the latter being the question

> "... where on the tariff the sentence is to be located, or precisely what individualised measure is to be used." (44)

The use of the terms primary and secondary here implying, it is

submitted, that the secondary decision is the less important or less difficult perhaps. In the textbooks, and certainly by the second edition in 1979, there is no suggestion of a "secondary" decision in the sense suggested although there is a description of this as being a "secondary process". (45)

1.18 In Principles of Sentencing the learned author considers at great length the process by which the length of sentence of imprisonment is determined once that opinion is considered necessary. The application of the tariff involves relating the gravity of the offence to the established pattern of sentences for offences of that kind, and then making allowance for such imitigating factors as may be present which tend to reduce the offender's apparent culpablility (46). For the individualized sentence the sentencer must 'search among' the measures available for the one most suited to the particular offender. The choice of individualized measure is made empirically in each case, on the basis of an assessment of the individual offender's needs (47) Dr Thomas' critical assessment of the cases and of the statutory provisions provided a theoretical basis for much of the work of the Court of Appeal as well as rationalising what had gone on before.

1.19 In 1970 Dr Roger Hood reappeared, with Richard Sparks, as authors of Key Issues in Criminology. About that time a commentator wrote that:

> "Until recently there has been little analystical enquiry into and exposition of the art of sentencing. Sentencing has been regarded as a matter of experience, transmitted folk love and commonsense. Now a more informed and scientific approach is coming in .....". (48)

The result of Dr Thomas and also Dr Hood and Mr Sparks endeavours

certainly marked the 'new approach'. The importance of Hood and Sparks lies in Chapter 5 which deals with the decision-making process in sentencing. They argued that it was then a subject that had received comparatively little attention from criminologists, partly because the then existing model for research was inadequate. The authors sought to take into account all the factors which might influence the judicial activity of sentencing. For Hood and Sparks, it seems, the questions of research design and techniques of investigation loomed as large as the essential questions of sentencing. The value of their work lies in their provision of a model of the sentencing process which represents the structure of the whole system.

1.20 Various writers have emphasised that criminology may be approached from many angles. Professor Nigel Walker has produced several major studies of sentencing, generally within the context of penology. In his book Crime and Punishment in Britain the professor describes objectively the aims, assumptions, and the techniques of current penal measures and he outlines the existing ways of defining, accounting for, and disposing of offenders. Part Four of the book is concerned with sentencing and in essence the considerations which govern sentences and the practical effect of sentences (by assessing their efficacy in obtaining their aims) are discussed. It is interesting now to see how Professor Walker broke down the factors which seem to influence the court's actual choice of penal measure into legal and semi-legal categories (49), the former being employed by the law itself, the latter by 'judicial convention'. Whereas the professor was content to support his individual considerations with individual examples or authorities, a similar approach was not taken by Dr Thomas because of his extensive study of unreported cases (50). But the importance of Professor Walker's book was really to assist in establishing sentencing as a

separate subject within penology or rather criminlogy in general. In the course of this process the author offered an intellectual description of the penal system as being in fact a system and not simply a collection of rules.

1.21 In a later book Sentencing in a Rational Society Professor Walker described (51) the law of sentencing as Cinderella's "illegitimate baby". If that metaphor accurately reflected the then hostility to the suject of sentencing, it may now be said fairly that the endeavours of the professor have brought the subject maturity and respectability. In the book last mentioned Professor Walker continued his analysis of penal philosophies but he was not satisfied simply with criticism. The book contained several new ideas which may in the event prove to have been well ahead of their time. In broad terms it is argued that while the courts should retain their present powers short of ordering imprisonment, their powers with regard to that sentence should be curtailed vigorously. On the first occasion on which a court thought it necessary to commit an offender, all that a court would be able to do would be to impose a sentence of imprisonment of two years of which six months would certainly be spent in custody. For the remainder of the period the offender might be released at the discretion of the executive. But the courts would have power further to impose a sentence of five years imprisonment on an offender who had already served two years as described previously. The minimun period of custody during the sentence would be six months longer than that for which the offender was actually in custody during his previous sentence. What has been set out are essentially the very general proposals of a thoughtful work which is intended for society which is "peaceful, affluent and (penolgically) ignorant, but aspires to rationality". Professor Walker also pays considerable attention to other penological aspects such as general deterrence

and that was outlined further in his James Seth Memorial Lecture given at Edinburgh in 1966 (52), which may now been seen as a precursor of his 1969 book.

1.22 Professor Walker's most recent book is Sentencing: Theory, Law and Practice which is a synthesis of the great volume of work done earlier by him. He describes the system in terms of its law, underlying theories and effects in practice. While he seeks in the Preface to exclude the book as a comprehensive work of reference, the professor's exposition of matters give the book an important status. In comparative terms this new text now over shadows The English Sentencing System by Sir Rupert Con and Dr Andrew Ashworth. The former of the joint authors had written and revised three editions and the latter took over for the fourth edition following Sir Rupert's death. This small volume was influential for its pioneering approach, enhanced by Sir Rupert's scholarship, of combining succinctly a broad statement of the law with a study of the theoretical reasoning behind it. Dr Ashworth had been active in the area of sentencing and in 1983 he had published his Sentencing and Penal Policy. This too was a most thorough study but is different from others in that it was concerned more with the legal aspects of sentencing in England rather than philisophical justifications and that it more topically placed the subject of sentencing against the background of criminal justice policy. Close attention is paid by the author to the formation and implementation of penal policy since the 1970's. In round terms, Dr Ashworth concludes on the practical point that those who have formulated penal policy have until recently had too little regard for sentencing and that a means must be found to achieve greater co-ordination of policy.

1.23 Mr Neil Morgan, in reviewing Professor Walker's Sentencing: Theory, Law and Practice, noted that there were "some astonishing absences from the text and from the list of references" (53). The most obvious ommissions were said to be Dr Ashworth's Sentencing and Penal Policy and Judge V.G. Hines' Judicial Discretion in Sentencing by Judges and Magistrates. It certainly seems odd that the professor should not refer to Dr Ashworth's contribution given the latter's varying approach. Equally, with three years separating the works the professor ought to have had time to consider Judge Hines' book. The latter was said by Mr Morgan in his review to be "excellent but academically neglected." Judge Hines has produced a work blending research and practice, research of reported cases and much of what practice he has had at the Bar and on the Bench. There is a valuable historical introduction which places many English sentencing matters properly in context but there is a lack of a philosophical or theoretical background. The substantial volume is no doubt an excellent reference book for practicing lawyers but the learned author lays great stress on the decisions of the Court of Appeal giving an appearance, it is submitted, of laying down authorities to be followed as precedents rather than guidlines.

1.24 This necessarily superficial review of the English authorities indicates the large and growing body of literature in English law dealing with sentencing. It follows, it is submitted, that the larger base of researchers and cases means in turn that the apex is higher. This is not to concede that standards or the sense that the literature makes is of a different order in England, but rather simply that there is more to study. Much of the content of the literature in England can be ignored by Scots lawyers especially descriptive studies of powers and legal developments. The same cannot be recommended of the theoretical or philosophical works.

1.25 Northern Ireland

By way of a simple historical introduction, a recent commentator on the law of Northern Ireland has said that:

> "After the reconquest of Ireland in the sixteenth and seventeenth centuries the law in Ireland and England developed along much the same lines for about 300 years. The countries were administered differently, but the actual content of the law was almost identical." (54)

The continuing closeness of legal links between England and Northern Ireland has meant that English precedents have in Northern Ireland been accorded the greatest respect and will be followed unless there are very strong reasons for not doing so (55). Similar considerations apply to English legal text books although there are a number of Northern Irish textbooks including one on sentencing: Professor Kevin Boyle and Mr Michael Allen in Sentencing Law and Practice in Northern Ireland purpots to give an account of the subject matters and also of those aspects of penal administration which relate to the implementation of sentencing decisions. The authors seek to provide a text that offers a systematic treatment of the various options, their purposes and the principles to be considering when deciding on their application. The greater emphasis is on the legal aspects of sentencing. The book is an exposition of the general (English) princilpes of sentencing adapted to Northern Ireland given the variations of statutory authorities. It is perhaps an implied comment on the nature of things in Northern Ireland that as late as 1983 there was a special section for the sentencing of road traffic offenders but not drug offenders (56). Still, the authors locate a few drugs cases, discussed later in this work, in the general scheme of things and their book is of use for that purpose.

1.26 Methodology

Professor Mannheim has posed an important question that represents, it is submitted, the dilema in the methodology of research in general:

> "It is preferable in research to have a worthwile subject for investigation, even if it can be studied only by second-rate methods, or to be able to apply first-rate methods to a subject of doubt for significance to the progress of criminology." (57)

Some description of the methodology used in trying to establish the sentencing policy, if any, in relation to the Misuse of Drugs Act 1971 is now necessary. A conventional approach is to start with a definition of the word "methodology": viz,

> ".... the system of methods and principles used in a particular discipline." (58)

Definitions, we are told (59), provide a boundary and shape to the subject but Professor Nigel Walker dismisses this:

> "If - as so often happens - someone opens his discussion of a concept by reciting a dictionary definition, this suggests to me that he himself is unsure of what he is talking about. In any case, if the concept is sufficiently controversial to merit discussion, the dictionary is probably misleading. Dictionaries are after all compiled by people in backrooms, consulting publications rather than listening to contemporary conversations. Even when they look at the printed word they seldom think of legal usage." (60)

This is perhaps a little harsh for philosophers of punishment who might, on another view, be considered to be people in backrooms and just as most people get through life without requiring to consult a dictionary, so many people who participate in the criminal justice system never need to know why things are done in a certain way or ought to be done in another. Further,

reciting a dictionary definition does not necessarily mean that one accepts it or that one is unsure about one's subject but, on a more mundane level, it may simply be that the definition is a convenient starting point. If the latter point is so then the defence to the charge by Professor Walker might simply be one of necessity.

1.27 The methodology of this work is generally similar to that of any extended discussion on a legal topic. The starting point is the law - statutory and common. For the former, reference is made to the statutory provisions in the form of the principal statutes and statutory instruments. For the latter, one must look to the cases decided by the judges. This study will consider a large number of reported cases. In doing so the circumstances of the crime or offence are narrated and occasionally these are outlined in much detail with the judgement for, as Lady Warnock has said:

> "Conclusions are valueless and positively misleading without some at least of the reasoning which led up to them being set out." (61)

It is notable that a feature of all aspects of controlled drugs now - including legislation and case law - is the rapid development in a short time. Perhaps in 1956 Arthur Koestler might have spent a single afternoon's comfortable reading - having disposed earlier that day of diminished responsibility - in mastering the then law of dangerous drugs. Now the volume of sources is large and continues to grow so that the aim of the study is to set the sentencing decisions in a rational order to best reach meaningful conclusions.

1.28 Heavy emphasis in this work is placed on reported cases. But what is the value of case law in the decision-making process of sentencing? In Scotland the tendency has been not to rely as heavily on precedents as in England, and the smaller appellate

'pose' means that the case law is less important in Scotland. On the surface the development of the case law would appear in England to reflect their tradition of a steady building of case upon case. Dr Ashworth, however, has indicated (62) three differences. First, the value of sentencing cases appears to be less than in cases involving the substantive law and sentencing cases are used less. The tradition is, it appears, that speeches in mitigation do not refer to appellate decisions and the Court of Appeal is reluctant to cite its own previous decisions. Second, the scope of appeals is limited in that only the convicted person may appeal and, in England but not in Scotland, the appellate court cannot increase a sentence. Third, the sentencing rules settled in the Court of Appeal are at variance with the needs and practices of the courts below. In short, judicial decisions on sentencing have not developed as a source of law to the same extent as the appellate courts' decisions on other matters.

1.29 Thus, if the statutory provisions form the skeleton of the sentencing policy on controlled drugs then the case law, however limited, provides some of the flesh. The methodology of the present work is to consider the criminal offences of the Misuse of Drugs Act 1971 and the reported cases of sentencing decisions for those offences. Now might be a suitable point to consider a distinction that goes to the heart of this work and which limits the terms of study. Dr Ashworth has written that:

> "... under existing conventions, penal policy is for the Government and sentencing policy is for the courts. This has been made possible by the high maximum penalties provided by the criminal law, and the separation has gained strength from the principle of judicial independence. There is now some evidence that the separation is being challenged. Government ministers have with increasing frequency addressed remarks to sentencers, and the judges have declared that they are taking account of the gross overcrowding in the prisons." (63)

This work is concerned only with sentencing policy; with trying to discover what it is that the courts do with drug offenders. The challenge referred to above affects, as we shall see, drug offenders and an aspect of penal policy must be considered.

1.30 The essence of this work is the study of the reported cases of sentencing decisions. The Hungarian criminologist M Vermes has said that:

> "Analystical activity implies that the interrelations hidden in the phenomenon under study will be explored by dividing them into parts. With synthesis as a method we acquire the knowledge of a phenomenon by summing up the movements of the part elements. In this phenomenon then the interrelations of the component factors and their sum total of movements will become reality." (64)

The drugs trade is a hidden complex of trades and relationships and understanding the relationship in these prescribed activities is essential, it is submitted, for improving the legislation and for dealing most suitably with individual offenders. Vermes has also observed:

> "Incriminality observation extends in two directions; viz, in those of objective and subjective observations. In objective observation the external process of the criminal offence, its form of manifestation, the method and means of its perpetration, any other circumstances, and its consequences are drawn into the sphere of observation. The knowledge of the external circumstances of the offence permits the drawing of conclusions as to the abilities, character and attitude of the offender ie to his personality as a whole, and so this knowledge, will be underlying the observation in a subjective sense, or more precisely, the personality study." (65)

Of all the disciplines that contribute to criminology it may be that law promotes most an objective study, in contrast say to psychology (66). This work is an objective study of the drug-offenders with not real attempt at assessing a personality study:

with perhaps a short study of sentencing drug addicts as an exception.

1.31 Finally, the case law studied is solely that of reported cases. These cases appear in a wide variety of journals and full reference is made to circumstances of the offence and to judgements where given. It was entirely a personal decision to limit the study in this way and to exclude the unreported cases of which there is an unknown but substantial number. The reasons for imposing such a limitation are ones of finance and time, given that this is self-supporting and part-time research. There is a risk that lurking amongst the unreported cases there are important and influential decisions but given the close attention that is paid to the courts and their work it seems to be a not unreasonble assumption that if something has been crucial it would have been seized upon. However, the term 'reported case' has been taken in its widest sense. Edward Smithies in his readable book Crime in Wartime: A Social History of World War II deals with reported cases in a study of war on patterns of crime. He considers reports of cases in the legal journals and also in newspapers, books and magazines and that is what has been done here. It may be that the latter are more sensational and less correct technically but they frequently report the comments of the judiciary and thus give an indication of the reasoning behind decisions.

1.32 Controlled Drug Literature

Two books, falling more within the province of the sociology of law, have been most influential in the literature of controlled drugs. Mr Philip Bean's book The Social Control of Drugs purpots to show how the control system, as he describes it, developed mainly as a response to the social composition and values of the drug takers rather than to the addictive qualities of the drugs. The emphasis is on the legal system as a control

agent. In elucidating the changes in the law within this social setting Mr Bean provides an important analysis that explains how existing legislation came to be what it is. Harvey Teff's Drugs, Society and the Law had a different emphasis from Mr Bean's sociological perspective of drug abuse. Mr Teff was more concerned with the legal view and his study of drugs pursued jurisprudential concepts such as possession. Both of these books contribute to our understanding of what has happened in the past. Practising lawyers, in court, would cite a different type of book.

1.33 P.W.H. Lydiate was the author of The Law Relating to the Misuse of Drugs in 1977. This text set out the ingredients of each offence with penalties and case law. The extensive nature of Mr Lydiate's research were shown in the large numbers of reported cases cited and the detailed subsiduary legislation quoted. Regretably much information was repeated and the net result is a tedious book to read. The author did not include any discussion of sentencing policy but he simply stated the maximum penalties. In 1984 W.T. West's Drugs Law appeared. This singularly unexciting and, truthfully, insignificant work at best brought some of the case law to the notice of the legal public. The book was superficial, and over priced, and did not consider the sentencing of drug offenders at any point.

1.34 Two years later Mr Richard Lord brought out Controlled Drugs: Law and Practice which commenced with a short but balanced historical introduction and helpful description of the nature and effects of controlled drugs. The case law is discussed and set in context and the work is altogether a suitable legal text book. In Part IV of the book the matter of sentencing the drug offender is taken up perhaps for the first time in print. Mr Lord's treatment of the topic is considered later as is that of Messrs Bucknell and Ghodse. Their book Misuse of Drugs is a most

substantial work which with regular supplements promises to be the leading textbook for sometime. As the latter co-author is medically qualified the book has a strong medical/pharmacological aspect but this is balanced by Mr Buchnell's legal contribution. Finally in 1986 Mr Keith Bovey's Misuse of Drugs appeared. This workman like study is the result of the author's experience as the leading Glasgow practitioner specialising in controlled drugs. The book is helpful for the practitioner but it is unlikely to stand the test of time as compared to the two works preceeding it. Regretably the author has nothing to say on sentencing drug offenders.

References

(1) Thomson Report. Chapter 3. para 3.01 at p19. In Scotland appeals against sentence in solemn procedure proceed in terms of Section 228(a) of the 1975 Act with the power of the High Court to alter the sentence if thought necessary in terms of Section 254(4) of the same Act. Appeals against sentence in summary procedure may be by bill of suspension or by stated case under Sections 442-445 of the 1975 Act.

(2) The Times Law Report 13th December 1986.

(3) Hall Williams p1, and e.g. see J Gunn A Psychiatrist's View of Sentencing (1971) 11 Med., Sci. of Law 95.

(4) This implies a strong legal approach. Perhaps the foremost proponent of a non-legal definition approach is Professor Thorsten Sellin. He emphasises that non-scientists should not be permitted to define the subject matter for scientists - lawyers and legislators should not be permitted to tell social scientists how crime must be defined. He does not claim that there is no place for the legal definition in criminologist. What he does claim:

> "... is that if a science of human conduct is to develop, the investigator in this field of research must rid himself of shackles which have been forged by the criminal law." see: Reid p17.

The criticism of this is that a variety of subjective definitions of individual or common human behaviour may be described as crime. The individual criminologist is left with broad areas of discretion and this uncertainty may in the end be counter-productive. Philip Bean speaks of:

> "... formal criminology, concerned with the law, its application and the justification for punishment, and sociological/psychological criminology, which is wider and more generous in its definition and subject matter." see: Bean (1981) p54.

(5) para 9.01. This work is written in a personal capacity only. Traditionally in Scotland, as elsewhere in the United Kingdom, the prosecutor plays no part in actual sentencing. In practice it is very rare for counsel or an agent to cite sentencing authorities in addressing the court in mitigation for the accused although in theory there appears to be no reason why this should not be done. Prosecutors and sentencing have been studied by Professor Graham Zellick in The Role of Prosecuting Counsel in Sentencing [1979] Crim. L.R.493 and there he

concludes that in certain circumstances the prosecutor's role might be extended although this idea was met with instant rebuff: see Michael King [1979] Crim. L.R.775.

(6) Blondell p20.

(7) Farrier p139 et seq.

(8) Walker (1969): Appendix A p203.

(9) Farrier ibid discusses various examples and see also D.H.S.S book Treatment and Rehabilitation para. 514 at p34 and Kaplan p39.

(10) Bakalar and Gunspoon p116.

(11) ibid p116.

(12) ibid p117.

(13) Plant p4.

(14) ibid p221.

(15) Manheim p71.

(16) Bottomley p56.

(17) Ashwork p34.

(18) The reason for the difference in assertions can best be explained by citing Hume who described England as

> "... a country, where, owing to the much greater number of dissolute and profligate people, and to the greater progress of every refinement and of every sort of corruption, crimes are both more frequent, and far more various in their nature than among ourselves; so that though the greater number of trials, and the repeated application to every sort of offence, their law forms a more complete system, and extends its rules, drawn from actual decisions, to a greater number of questions." (p4).

and Hume describes English law, for Scots lawyers as:

> "... a great body of written and practical reason, and recommended by the example of a free and enlightened people, it has everywhere, and certainly in our country more than elsewhere

(because the form of our Government, and the general spirit of our jurispurdence are the same with those of England) a strong claim to defence and regard." (p13).

(19) Gordon p3.

(20) ibid p4.

(21) Moody and Toombs p30.

(22) Hume p463.

(23) ibid p464 et seq.

(24) ibid p470.

(25) ibid p481.

(26) Eg: in the 4th ed. at para 17-10 (p326) the then punishment of corrective training is explained and H M Advocate v McErlane 1953 J.C.12 is cited. There the Lord Justice Clerk took the opportunity "of making some very general observations" about what was a new power.

(27) Nicholson pvii

(28) 1985 S.L.T. 368.

(29) See Gave and Stoddard at pv. where this is strongly doubted.

(30) Emmins pxxv.

(31) Page p13.

(32) ibid p36.

(33) (i) Comparative Sentencing Practise in a symposium on sentencing: Law and Contemporary Problems 23, 557.
(ii) Some aspects of Judicial Sentencing Policy Yale Law J. 67, 961.

(34) Hood (1962) p20.

(35) Professor John Hogarth of Toronto University dealt with that aspect in Sentencing as a Human Process (1971) and earlier papers.

(36) Cmnd. 1289 (1961).

(37) Devlin p3-4.

(38) R v Sergeant (1974) 60 Cr.App.R.74. Lord Lane C.J. continued the matter in R v Hitchcock (1982) 4 Cr.App.R.(S)160.

(39) Theories of Punishment in the Court of Criminal Appeal (1964) 27 M.L.R.546.

(40) Sentencing - The Basic Principles [1967] Crim.L.R.455 and 503.

(41) 1st edition 1970: 2nd edition 1979.

(42) Professor Nigel Walker has argued that Dr Thomas by his researches and the publication of his book had attributed a good deal more sense and consistency to the appellate court than the latter deserved: Sociology (1971) Vol. V No2. p278-279.

(43) Thomas p8.

(44) [1967] Crim.L.R.455.

(45) Thomas p223.

(46) ibid p29-222. The tariff for drugs is at p182-193.

(47) ibid p225-361.

(48) A Samuels (1971) 121 New L.J.719.

(49) Walker (1965) p214.

(50) Professor Walker, for example, discusses the offenders 'penal history' in two paragraphs (at p217) whereas Dr Thomas covers the same topic in five pages (at p265-271) citing some 30 or so cases.

(51) Walker (1969) p1.

(52) For an extended study of that lecture see A J Fitzgerald The Aims of a Penal System [1967] Crim.L.R.621.

(53) [1986] Crim.L.R p763.

(54) Brice Dickinson The Legal System of Northern Ireland p2.

(55) ibid p44.

(56) In fairness it must be conceded that two years earlier in 1981 Sheriff Nicholson had no special section for drug offenders in Scotland although he cited several unreported drug cases in his supplement at 1985.

(57) Mannheim (1965) p88.

(58) Collin's English Dictionary (1979).

(59) Bean (1981) p8.

(60) Walker (1980) p88.

(61) Mary Warnock Ethnics since 1900 (3rd ed. 1978) pix.

(62) Ashworth (1983) p36-42.

(63) ibid p98.

(64) Vermes p161.

(65) ibid p170.

(66) See Wells particularly.

PART THREE: OFFENCES

Chapter 2 OFFENCES AND SENTENCES

2.1 Introduction

In seeking to establish the sentencing policy with regard to the 1971 Act, close attention must be paid to a small number of cases which reveal explicitly and in detail part of that policy, for England and Wales at least. It is rare to have in sentencing matters such open statements of policy as these cases reveal. The cases are not binding in the manner that reported cases in point of substantive law are although they are perhaps more than highly persuasive: in R v Bibi (1) Lord Lane C.J. said that:

> "We are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach." (2)

This weakening of what might otherwise be a binding effect of precedent was confirmed in R v Tanner (3) where the same court observed that:

> "Reports on sentencing have a limited value; sentencing is an art that must be flexible and adaptable to the circumstances of the case, including those of the offence, the accused and the victims."

Part of the reason for this is explained, it is submitted, by Professor Fitzgerald when he wrote that:

> "... in sentencing an offender the court is attempting at least in part a measure of Social control. Whether such control will be achieved can only be calculated by reference to existing evidence as to the effects of different sorts of punishments both on the offender himself and on the rest of the community. A court passing sentence, therefore, should have its eye to the future, as

> compared with the advocate in the trial, who is concerned not with what will happen but with what did happen." (4).

Perhaps one of the succinct statements of the value of reported cases in sentencing cases comes from Dr Thomas in his commentary on R v Guiney (5):

> "While the doctrine of precedent in the strict sense cannot apply in this context, previous decisions do provide an essential framework of reference." (6)

As will be shown in this chapter there are now many reported cases on sentencing but these must be read critically for as Mr Christopher Emmins cautions:

> "The great bulk of them cannot be regarded as precedents in the full sense of the word. They are merely rulings, turning upon the unique facts of an individual appellant's case, that the sentence passed by the Crown Court either was or was not wrong in principle or manifestly excessive. When comparing the facts of an earlier case with the facts of the case presently before the Court, it will almost certainly be possible for their Lordships to point to some significant differences which ought to have a bearing on sentence." (7).

2.2 Notwithstanding that, there have now been sufficient cases through the appeal courts for a clear classification of sentencing decisions to be attempted. Mr Emmins has divided the decisions into four separate categories:-

(a) Binding Precedents

A tiny minority of cases decide a point of sentencing law and, as to that point, the case is a binding precedent.

(b) Cases of general application

Although binding precedents are few, a rather larger number of sentencing cases contain general statements as to sentencing

practice which are obviously applicable beyond the particular circumstances which give rise to the appeal. No doubt, it is said, such statements are strictly speaking obiter dicta but both Crown Court judges and the Court of Appeal in subsequent cases are likely to treat them as authoritative. (8)

(c) Guidlines cases

These cases are described by Mr Emmins as:

> "... a peg on which to hang general guidance about sentencing levels." (9)

These are contrasted with general statements on sentencing practice in that in a guideline case the Court spends most of its time setting out the guidelines which it thinks will assist Courts and only incidentally perhaps at the end of the judgement deals with the merits of the particular appellant's case. In cases of general application the statement on sentencing practice arises, it is said, naturally out of the subject matter of the appeal.

(d) Other cases

The great bulk of sentencing appeals do not raise a point of law or even provide an opportunity for the Court to set out guidelines or to make statements of general applicability. They are simply decisions turning on the unique facts of the appellant's case.

2.3 It is submitted that the distinction between the second and third categories is not as clear as Mr Emmins appears to suggest. On one view the distinction might be regarded as one without merit for the main difference on Mr Emmins' definitions appears to be how far the Court goes from the facts of the case. In any event the analysis of the important cases, however described, that follows covers the whole judgement in each case. Each judgement covers a wide variety of variables that are considered separately

in the remainder of the thesis but the influence of these judgements lies in the comprehensive nature of what the Courts held.

2.4 (a) R v McCay (10)

The judgement in McCay's case is that of the Court of Criminal Appeal in Northern Ireland on 11th December 1974. McCay and seven others were convicted of offences relating to possession, supply and incitement to use certain drugs. One case was an appeal against sentence with the leave of a single judge, while the other seven were applications for leave. After argument had been heard the court dismissed the appeal and refused the applications. Regretably, the report of the case gives little of the facts of the case but in the course of the hearing Lord Lowry, Lord Chief Justice of Northern Ireland, made certain important observations on drug offenders. The general approach by the trial judge to the problem of sentencing the drug offender had been to condemn the practice of taking drugs otherwise than on a doctor's order. Lord Lowry held that this was the correct approach because of the "social evil" that results from the crime. The trial judge was also held to have properly condemned the "heinous practice" of supplying drugs or providing a setting condusive to their use:

> "... practices which are more sordid and worthy of punishment where the offender profits financially." (11)

The trial judge had envirenated three principles:

> "1. Possession of a drug is less serious than supplying it to another.
>
> 2. Introducing drugs to someone with no previous experience is more serious than supplying drugs to someone who is already using them.
>
> 3. Possessing or supplying LSD or heroin is

worse than possessing or supplying cannabis." (12)

No authorities were cited in support of these principles, nor did the trial judge purport to found on his own experience of these matters coming before him. Certainly the terms of the offences in the 1971 Act taken with the maximum penalties provided for in the Schedule to the Act would support the first and third principles. There are, as we shall see, some authorities to support the second principle but it has been stated in such wide terms that it is simple to postulate theoretical circumstances - that are not improbable - can put doubt on the sense of the principle: for example, supplying drugs to an individual who is known to be addicted but is attempting to end his or her dependency is arguably worse than supplying a very small quantity of cannabis to a beginner for his first 'puff.'

2.5 By inference the Court of Criminal Appeal upheld these three principles and added:

> "As to the third point there is, no doubt, a further distinction to be made between heroin and LSD; but the latter is said to be so unpredictable as to constitute a grave danger to its users. We agree with the learned judge that it would be wrong to encourage the impression that the so-called "soft" drugs are not dangerous and destructive. Point is added to the learned judge's remarks by the emergence of liquid cannabis in concentrated form."

The Court then proceeded to frame futher principles:

> "4. In connection with the offences of supplying and permitting premises to be used, a previous conviction for a similar offence should weigh heavily against the accused.
>
> 5. A previous clear record in connection with drug offences is relevant but is not by itself a clear indication against a custodial sentence.
>
> 6. In possession cases, and to a lesser extent in

cases of supply and permitting premises to be used, a previous criminal record unconnected with drugs is of minor importance.

7. Severe sentences, including custodial sentences of any kind, are of assistance in signifying the community's rejection of drug-taking and its hostility to traffickers in drugs and even to those who supply them free of charge.

8. The importation of drugs, especially when done for gain, ought to be very severely punished.

9. One who runs an establishment or organises parties or groups to encourage drug-taking sould normally receive a heavy prison sentence.

10. The same principle applies strongly to those who in relation to drugs corrupt young people in this fashion or otherwise.

11. The fact that the offence involves a group or "cell" of people may constitute a circumstance calling for heavier punishment than would be appropriate in purely individual cases." (13)

As stated earlier, there were then, and with developments there are now, several authorities to support the principles. The judgement is notable for the way in which the court in Northern Ireland anticipated how sentencing policy would develop. Further, such a detailed statement of policy covering various aspects would have come as welcome assistance to those members of the judiciary who were faced with drugs cases for the first time. McCay's case is an example of a guidlines case but the judgement itself is flawed for failing to give any meaningful details or facts of the appellant's actions and also for failing to give any justification, explanation or authority for the principles stated.

2.6 The Court of Criminal Appeal took these matters further in R v Magee (14). There the convictions consisted of supplying cannabis, mainly in the form of cannabis resin, of possession of

cannabis, of permitting premises to be used for the supply of cannabis and of permitting cannabis to be smoked on premises. The trial judge passed a variety of sentences on these charges in what was a most complicated series of Indicements. In sentencing all but three of the eleven defendants to prison sentences of varying degrees of severity the trial judge was clearly disturbed by the great hardship which would be caused to the individulas, most of whom were students. But his Lordship felt compelled to take a stern line because of the serious public policy issues at stake and because of the view taken by the Court of Criminal Appeal in R v McCay. Although five of the accused applied for leave to appeal against their sentences and three of them had their effective sentences reduced, the appeal court approved of Mr Justice Kelly's analysis of drugs sentencing policy. He said that:

> "Sentencing offenders for drug offences is not always easy. It is recognised that drug taking and drug dependence and complex phenomena, and offenders are invariably young people, usually of good character. Frequently, they are students, showing ability and well set on course to professional or technical achievement. Deterrent custodial sentences imposed in such cases mean the interruption and sometimes the end of a career of promise.
>
> While these considerations above may point to an individualised sentence, and in many cases to a non-custodial one, there are clearly other matters to be weighed and given effect to in sentencing."

And later:

> "Undoubtedly there is a community rejection of drug-taking and a public will that it should be firmly discouraged. This is reflected in the continuance of misuse of drug legislation and underlined by the maximum penalties a court can impose ... These factors - the antagonism of the community to drug-taking and the increase of prevalence of drug-abuse in a particular community will generally outweigh, in my opinion, the personal considerations of the

> individual offender which I have mentioned and invariably lead to custodial sentences not only for the unlawful supply of drugs but for the possession of cannabis." (15)

The trial judge also indicated that there were exceptions to the rules of policy indicated:

> "Of course there will be cases where a non-custodial sentence may achieve the near certainty of permanent abandonment of drug-taking by a drug dependent and other cases where the personal claims of the individual offender are so outstanding that a non-custodial sentence is justified but these will be exceptional cases although I have encountered some." (emphasis added)(16).

2.7 On appeal, the Court of Criminal Appeal approved R v McCay but observed that the decision in that case:

> "... did not purport to lay down what the appropriate term of years should be in any other cases not purports to fix any rigid guide-lines to rule other cases. That is, of course, as it should be because each case must be considered on its own merits, and on its own merits in the light of the particular circumstances, and in cases of this kind, the background history of the individual concerned in relation to such offences. No court could do more than suggest a bracket term as being appropriate to a specific class of offence, while leaving it to the Court dealing with the individual case to determine where within that bracket the case before it falls; or whether there are factors peculiar to the case which require a less severe or a more grave view to be taken than the harm would suggest. The importance of R v McCay is, therefore, that it sets out the relevant factors to be considered by the Court dealing with the individual case and it is for that Court then to decide with those factors in mind and having regard to the circumstances of the individual, what the appropriate sentence in each case would be." (17)

Both dicta from these two cases are important for the broad principles set down by the Court. It seems a reasonable inference that the spectre of drug-abuse must have loomed large then for the Court to have dealt in such extensive detail. These

cases were considered by Mr Desmond Marrinan in a lengthy article along with many other unreported cases from the courts in Northern Ireland (18). His conclusion was that the principles in R v McCay were clear and broadly in line with the English position although the Northern Irish court seemed to prefer a harder line towards the first offender possessing cannabis and similar drugs but not concerned with supplying them for gain. Both courts have advocated and imposed severe deterrent sentences on suppliers.

2.8 (b) R v Aramah (19)

Aramah's case attained importance of the first rank on judgement being given on 17th December 1982 and it has retained that position since then. The facts of the case - as with many fundamental cases - are simple. John Uzu Aramah was convicted of being concerned in the importation of 59 kilogrammes of herbal cannabis. He had previous convictions of offences involving cannabis, and he had served previously a sentence of three years imprisonment. He was then sentenced to six years imprisonment and he appealed but it was held that his sentence was entirely appropriate. The judgement sets out the facts of the case and the appellant's personal circumstances as these were both matters which the court had to take into consideration before disposing of the appeal. Then the court made some general observations about the level of sentences for drug offences as these were thought by the court to be of some assistance. The Court noted that the list of appeals for that day was "entirely composed of such crimes."

2.9 The judgement in Aramah's case has been divided and numbered in this work to assist with the analysis although the Court did not necessarily follow the same order. It will also be seen that the judgement is by no means a fully comprehensive statement of a

whole sentencing policy for all controlled drugs. On the contrary it is highly selective and this can be seen from the two principal categories concerned. (20).

A. Class "A" Drugs and particularly Heroin and Morphine.

The judgement commences with the assertion that it is common knowledge that Class A drugs and particularly heroin and morphine are the "... most dangerous of all addictive drugs," and there are said to be a number of reasons for this. Before considering these reasons it is submitted that they will reveal that the danger referred to by the Court does not seem to relate solely to the welfare of the consumer. The reasons given are:-

(i) these drugs are easy to handle. Small parcels can be made up into huge numbers of doses;

(ii) the profits are so enormous that they attract the worst type of criminal;

(iii) the huge profits produced ought to be considered when bail is applied for;

(iv) the heroin addict frequently resorts to crime to pay for the habit and this may result in dealing and thereby disemminating the drug further;

(v) "... the most horrifying aspect...", the degredation and suffering and not infrequently death which the drug brings to the addict:

> "Consequently, anything which the courts of this country can do by way of deterrent sentence on those found guilty of crimes involving these class 'A' drugs should be done."

2.10 The Court then turned to what in the broadest of terms may be said to be essence of the crimes contained in the 1971 Act. Again, each of these is described with particular reference to heroin and morphine.

(a) Importation

The Court held that large scale importation was where the street value of the consignment was in the order of £100,000 or more and for this, sentences of seven years and upwards was appropriate. There will be cases where the values are of the order of £1 million or more, in which circumstances the offence should be visited by sentences of 12 to 14 years. It will seldom be that an importer of any appreciable amount of the drug will deserve less than four years. But it was at this point that the Court gave a sizeable limit to those who found themselves in custody:

> "This, however, is one area in which it is particularly important that offenders should be encouraged to give information to the police, and a confession of guilt, coupled with considerable assistance to the police can properly be marked by a substantial reduction in what would otherwise be the proper sentence." (21)

(b) Supplying

The Court emphasised that in this aspect as in any Criminal enterprise the sentence will largely depend on the degree of involvement, the amount of trafficking and the value of the drug being handled. But, more explicitly:

> "It is seldom that a sentence of less than three years will be justified and the nearer the source of supply the defendant is shown to be, the heavier will be the sentence."

The Court warned that there may well be cases where sentences similar to those appropriate to large scale importers maybe necessary and observed that it is unhappily all too seldom that "those big fish" amongst the suppliers get caught.

(c) Possession

The Court made it clear that simple possession was being considered at this point:

> "It is at this level that the circumstances of the individual offender become of much greater importance. Indeed the possible variety of considerations is so wide, include often those of a medical nature, that we feel it impossible to lay down any practical guidelines. On the other hand, the maximum penalty for simple possession of Class "A" drugs is seven years imprisonment and/or a fine, and there will be many cases where deprivation of liberty is both porper and expedient."

2.11 B. Class "B" Drugs, particularly Cannabis

The Court selected from amongst the Class B Drugs that which was most likely to be exercising the minds of the court; viz Cannabis

(a) Importation

The judgement starts this section with what may, it is submitted, almost be regarded as a concession: importation of very small amounts of cannabis use can be dealt with as if it were simple possesion.

> "Otherwise, importation of amounts up to about 20 kilogrammes of herbal cannabis, or the equivalent in cannabis or cannabis oil, will, save in the most exceptional cases, attract sentences of between 18 months and three years, with the lowest ranges reserved for pleas of guilty in cases where there has been small profit to the offender."

The Court then set down principles relating to couriers, a subject which has been fraught with hard decisions for the Bench:

> "The good character of the courier (as he usually is) is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known, that the large scale operator looks for couriers of good characters and for people of a sort which is likely to exercise

> the sympathy of the court if they are detected and arrested. Consequently one will frequently find students and sick and elderly people are used as couriers for two reasons: first of all they are vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly, it is felt that the courts may be moved to misplace sympathy in their case. There are few, if any, occasions when anything other than an immediate custodial sentence is proper in this type of importation."

The Court continued later:

> "Medium quantities over 30 kilogrammes will attract sentences of three to six years imprisonment, depending upon the amount involved, and all the other circumstances of the case.
>
> Large scale or wholescale importation of massive quantities will justify sentences in the region of 10 years imprisonment for those playing other than a subordinate role."

(b) Supplying

The supply of "massive quantities" will justify sentences in the region of 10 years for those playing anything more than a subordinate role. Otherwise, the Court held, the bracket should be between one to four years imprisonment, depending on the scale of the operation. Sentences within the bracket could be distinguished on the following basis: wholesaling, or supplying a number of small sellers, comes at the top of the bracket. Retailing a small amount to a consumer will come at the lower end of the bracket. In concluding this aspect the Court held, by implication, it is submitted, that the commercial element is not necessarily the sole deciding factor for even where there is no commercial motive (for example, where cannabis is supplied at a party), the offence may well be serious enough to justify a custodial sentence.

(c) Possession

> "When only small amounts are involved being for personal use, the offence can often be met by a fine. If the history shows, however, a persisting flouting of the law, imprisonment may be necessary."

Aramah's appeal was dismissed because of his involvement in the importation of "a very large quantity of cannabis, 59 kilogrammes." As the value of this quantity was put between £100,000 and £135,000 the case fell to be considered at the top of the range. Further, there was no feature of the case which amounted to a mitigating aspect. Aramah contested the case so that no discount could be given for a guilty plea and he had a previous conviction for a very similar offence for which he had been imprisoned. The Court considered that the six years imprisonment in the present case was entirely appropriate.

2.12 Dr Thomas' initial view of Aramah's case was that it constituted a restatement of existing sentencing policy, and a convenient source of reference, rather than a change of direction. (22) The Court of Appeal had in a number of earlier cases laid down guidlines but this case was the most comprehensive judgement. This was considered by the learned commentator as "a welcome development." But that judgement does not cover all the offences in the 1971 Act not all the controlled drugs in the schedule to that Act. Later, Dr Thomas came to describe this case a guideline case:

> "... which seem likely to become the most important vehicle for the formulation and dissemination of judicial sentencing policy." (23)

That view was also expressed in the commentary to R v de Havilland (24) which is itself of importance in sentencing matters. De Havilland was convicted on two charges of rape both involving substantial violence. He was sentenced to life

imprisonment. On appeal against that sentence it was argued by the appellant's counsel that it was wrong in principle to impose a sentence of life imprisonment in the absence of any medical evidence supporting the judge's view that the appellant was a danger to the public. The Court of Appeal held that a judge, who takes the reponsibility for sentencing, ought to be satisfied on all the evidence, including any medical evidence, that an indefinite sentence was the correct one. A medical report was then before the court and, on considering it, the Court of Appeal held that the trial judge had been correct in forming the view that he did and the sentence was upheld. But the case is important for the view that the Court expressed, viz, that apart from statutory restrictions the appropriate sentence is a matter for the discretion of the sentencing judge.

> "It follows that decisions on sentencing are not binding authorities in the sense that decisions of the Court on points of substantive law are binding on the Court itself and lower courts; decision on sentencing are no more than examples of how the Court has dealt with a particular offender in relation to a particular offence. As such they may be useful as an aid to uniformity of sentence for a particular category of crime, but they are not authoritative in the strict sense. Occasionally, the Court suggests guidelines for sentences dealing with a particular category of offence or offender, but the sentencer retains his discretion within the guidelines, or even to depart from them if the particular circumstances of the case justily departure." (24)

2.13 Uniformity of approach is essential for, as Dr Thomas points out, with over 1000 judges of different kinds sitting in the Crown Court in England and Wales it is necessary for some such harmonizing force at work (25). Accordingly, to assess the importance of Aramah's case one must look for a case where the guidelines have been considered and accepted or rejected. There have been a substantial number of these cases with at least, it is thought, nine cases in the year following the judgement.

There appears as yet to be no case in which the guidelines in R v Aramah have been departed from so that the details of these individual cases have been left to be considered within the other cases for the relevant offence (26). Perhaps the single case to be considered here ought to be R v Gilmore (27). Where the appellant had been convicted of possessing cannabis resin with intent to supply. The report cited does not give further details of the facts and circumstances except to say that Gilmore was sentenced to seven years imprisonment. On the face of it, that sentence was well in excess of the bracket of one to four years as suggested in R v Aramah and it was presumably on that basis that an appeal against sentence was taken. However, the Court of Appeal held that:

> "The time had come when clearly it was necessary to move up the level of sentencing for serious drug offences. The number of such offences was on the increase, and had been on the increase since sentencing guidelines were given in R v Aramah."

Accordingly, as the sentence passed was entirely justified the appeal was dismissed. Gilmore's case then is an example of how sentencing guidelines may be exceeded by a trial judge and yet subsequently receive sanction from the higher court. The report of Gilmore's case does not, it is to be regretted, reveal any statistical authority that may have been relied on by the Court as indicating the increase in the number of relevant offences. It may be inferred therefore that the Court was relying on its own subjective experience.

2.14 (c) R v Martinez (28)

The explicit judgement in Aramah's case contains a number of principles which were broadened and explained in R v Martinez. Martinez was a citizen of Columbia who had lived in England since 1974. He was convicted of importing cocain with a street value of about £3000 by receiving a letter addressed to him

containing 23.7 grams of the drug. He was of previous good character and he was sentenced to four years imprisonment and he appealed. Lord Lane C.J. delivered the judgement of the Court and in doing so produce a more explicit and detailed policy statement that would be difficult if not impossible to equal. The judgement commenced with what is the ratio of the case; viz:

> "No distinction is to be drawn between the various types of class A drugs. The same considerations as applied to heroin applied equally to other class A drugs. Any idea that those who imported or otherwise dealt in cocaine or LSD should be treated more leniently was wrong."

The judgement continued to explain that the reason why particular mention was made in Aramah's case was that at that time heroin in terms of availability presented "the greatest threat to the community." Thereafter, the Court appeared to take judicial notice, although not stating so overtly, that:

> "The illicit importation of cocaine hydrochloride and its abuse was on the increase. It was time to draw attention to that increasing use of cocaine and the dangers of its abuse and to dispel the myth that cocaine was merely some sort of social aid and was non-addictive."

2.15 Thereafter, the Court gave a full explanation of the dangers of cocaine and its place in the international drug trade with reasons for the growth in the supply of and demand for that drug. Statistics were cited in explanation of these matters as they existed in November 1984. The Court also displayed an appreciation of the adverse effects of the drug on addicts through habitual use and indicated strong disapproval of the perpetuation of the "false elitism" that accompanied the use of the drug particularly by "the wealthy, the influential and the intellectual." The Court held that so far as Martinez was

concerned an "appreciable amount" was involved. It was accepted that the amount was small in comparison with some of the amounts illicitly imported but the trial judge had been correct to put the case in the bracket which in Aramah's case suggested that it merited four years imprisonment. The sentence could not be faulted and the appeal was dismissed. (29)

References

(1) [1980] I W.L.R.1193.

(2) ibid at p1195. Similarly in R v Nicholas The Times Law Report 23rd April 1986 it was held that cases in which sentencing guidelines are laid down are 'for assistance only', and are not to be used as rules never to be departed from.

(3) [1983] Crim.L.R.753.

(4) Fitzgerald p197.

(5) [1985] Crim.L.R.751.

(6) ibid p752.

(7) Emmins p91.

(8) A good and recent example of this is R v Boswell The Times Law Report 20th June 1984 where Lord Lane C.J. stated that:

> "Courts were regarding the offence of causing death by driving recklessly as less serious than in fact it was - less serious than Parliament intended it to be and less serious than the public in general regarded it."

In dismissing a number of appeals against custodial sentences, the Court outlined nine factors that aggravated the offence and six factors that mitigated it.

Further in R v Billam [1986] I W.L.R.349 the Court of Appeal laid down guidelines for sentences for rape, attempted rape and associated offences. The Court when considering sentences in 17 cases of these offences said that statistics revealed that sentences were too low, and set down guidelines. Interestingly, The Times in a leading article of 4th February 1987 described these guidelines as being:

> "... of so abstract and complex a character as to make any application of them to a particular case highly disputable."

These comments arose in the context of the public controversy over sentences given for convicted burglars and rapists: R v McCall unreported.

(9) Emmins p92. Guidelines cases were discussed further in A Ashworth Techniques of Guidance on Sentencing [1984] Crim.L.R.519 but see a reply M J Faraway [1985] Crim.L.R.170.

(10) [1975] N.I.5.

(11) ibid p5

(12) ibid p6

(13) ibid p6

(14) [1975] 6 N.I.J.B and on appeal [1976] 3 N.I.J.B.

(15) [1975] 6 N.I.J.B. at p7-8 of judgement.

(16) ibid p7-8

(17) [1976] 3 N.I.J.B. at p2-3 of judgement.

(18) (1977) 28 N.I.L.Q.21. It would seem that most if not all of the other cases cited in the article were ones in which Mr Marrinan, as counsel, had been instructed to appear. Extensive inquiries by me to try to obtain transcripts were fruitless.

(19) (1982) A Cr.App.R.(S)407.

(20) All the parts of the judgement cited fall within pages 408 to 410 inclusive and to avoid an excessive number of footnotes note every part is given a reference.

(21) On the point of discounts for guilty pleas see my article (1983) 94 S.C.O.L.A.G. Bul. 140.

(22) [1983] Crim.L.R.273

(23) [1983] Crim.L.R.491

(24) ibid p490

(25) ibid p490

(26) The complete list, so fat as can be ascertained, of cases where the guidelines have been applies is :-

1. R v Patel (1983) Halsbury's Monthly Review (May) para B979f.
2. R v Macdonald (1983) 5 Cr.App.R.(S)22.
3. R v Aliu [1983] Crim.L.R.487.
4. R v Virgin (1983) 5 Cr.App.R.(S) 148.

5. R v Chatfield (1983) 5 Cr.App.R.(S) 289.

6. R v Hyam (1983) 5 Cr.App.R.(S) 312.

7. R v Aldred (1983) 5 Cr.App.R.(S) 393.

8. R v Delgado [1984] Crim.L.R. 170.

9. R v Mansoor (1983) 5 Cr.App.R.(S) 404.

10. R v Gharni (1984) Halsbury's Monthly Review (July) para D1419g.

11. R v Rollings (1984) Halsbury's Monthly Review (July) para D1419f.

12. R v Patel (1985) Halsbury's Monthly Review (March) para G701g.

13. R v Mason (1985) Halsbury's Monthly Review (August) para G1440e.

(27) The Times Law Report 21st May 1986.

(28) The Times Law Report 24th November 1984.

(29) The judgement in R v Martinez was soon applied by the English courts: c.f. R v Keach [1985] Crim.L.R.329.

2.16 Section 3: Restriction of Importation and Exportation of Controlled Drugs

Section 3(1)

> "... (a) the importation of a controlled drug ... (is) hereby prohibited."

It may be said that there are generally two types of smuggling; that is to say, smuggling goods of an innocent nature to avoid paying government duties and smuggling goods which by virtue of the nature of the item involved attract the heavier penalties of the criminal law. Hume referred to the former type saying:

> "When discoursing of the offence which have relation to trade, we cannot pass over that of smuggling, or importing goods from abroad without payment of duties laid thereon, by national authority, towards the aid of the public service. This sort of trespass, which, in all its shapes, exposes the offender to pecuniary penalties and forfeiture of the goods, has, in the more ardacious modes of it, been found necessary to be repressed with chastisement of a higher kind. And in this respect the law is marked with progressive severity, both as to the punishment and the description of the offence, in proportion to the growing temptation and frequency of such transactions, occasioned by the increase of duties on importation, and the consequent higher profit of evading them."(1)

It is a tribute to the brilliance of our institutional writers that such a clear exposition is still as valid today as it was when written and, futhermore, that the generalisations apply equally to the two types of smuggling. What follows in this work is essentially a study of smuggled goods of the second type. Controlled drugs can be and are imported lawfully but the frequency of such transactions is probably now out numbered by illegal importations or attemptes at such illegal importation.

2.17 In this work the term 'importation' is taken in its broadest, its popular context in order to try to find the sentencing policy.

As a matter law the offences relating to the importation of controlled drugs are to be found in the Customs and Excise Management Act 1979. That act provides as follows:-

(i) Penalty for improper importation of goods.

Section 50(3):

> "If any person imports or is concerned in importing any goods contrary to any prohibition or restriction for the time being in force under or by virtue of any enactment with respect to those goods, whether or not the goods are unloaded, and does so with intent to evade the prohibition or restriction, he shall be guilty of an offence under this subsection and may be arrested."

In MacNeil v H M Advocate (2) a number of men were convicted of importing, and others of being concerned in the importing, of cannabis into an anchorage within the appointed Port of Strathclyde. The first and second appellants were sentenced to twelve years imprisonment on charges of importing about 2/3rds of a ton of cannabis and possession of cannabis. The third appellant was convicted of being concerned in the importation and he was sentenced to ten years imprisonment. In their appeals against sentece the first appellant agrued that the sentence was excessive, and the third appellant that the sentences failed to distinguish adequately between importing and being concerned in importing. On appeal, the High Court was of the opinion, delivered by the Lord Justice Clerk (Ross) that counsel for the first appellant had recognised that:

> "... importing prohibited drugs and possession of large quantities of controlled drugs with intent to supply them to another on a large scale are very serious matters calling for severe sentences." (3)

In all the circumstances, the Court was in no doubt that the sentences imposed could not possibly be described as excessive. On the third appellant's additional ground of appeal the Court held that:

> "In our opinion there is no reason for the view that the offence libelled in the second alternative version of the charge is any less serious than the offence in the first alternative." (4)

In short, importing and being concerned in importing ranked equally in principle.

2.18 (ii) Penalty for fraudulent evasion of duty.

Section 170

(1) "... if any person - (a) knowingly acquires possession of any of the following goods, that is to say ...
(iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or
(b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods, and does so ... to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be arrested."

(2) "... if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt of evasion - (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment he shall be guilty of an offence under this section and may be arrested."

By Section 170(4) and Schedule 1 to the 1979 Act there are variations of punishment for certain offences relating to controlled drugs under the Act mentioned.

CLASS A

2.19 (1) Cocaine

In R v Ribas (5) there was an appeal against a sentence of 8 years imprisonment imposed for the fraudulent evasion of the prohibition on the importation of 161.49 grammes of cocaine. The substance was of a very high degree of concentration and indeed most of it was almost 100 per cent pure cocaine. After dilution for resale there would be about 300 grammes or 10 ounces available, possibly more. The defence mitigation was that Ribas passed through London to purchase photographic equipment required in his professional life. He was carrying that quantity of cocaine for personal use over the next few months. On appeal this submission was expanded and it was further stated that this instance of smuggling was analogous to simple possession. It was for the point that it was argued that the sentence was too severe. The first point, about personal use, was disbelieved at trial and on appeal. The second point was rejected at appeal because simple possession of a class A drug in the 1971 Act then had a maximum of seven years imprisonment and for possession with intent to supply a maximum of 14 years. For smuggling the drug the maximum penalty was 14 years irrespective of intent. Lord Justice Bridge said that:

> "The view which this Court takes is that Parliament has provided for the smuggling of prohibited drugs to be treated as a category of offence on its own which is seperate and distinct from the categories of possessing a drug once it has got into this country, which may be either simple possession or possession with intent. Up to the maximum penalty of 14 years imprisonment, it seems to us that the gravity of the smuggling offence depends primarily on the quantity smuggled and secondarily on all other relevant circumstances. But if a large quantity, and a quantity certainly capable of providing a substantial commercial supply is brought into this country in

> contravention of the statutory prohibition on the importation then, irrespective of any specific intent to put that quantity into circulation, Parliament has provided for it to be treated as a grave offence. Importation, whatever the specific intent of the importer, as was pointed out by Lord Justice Shaw in the course of the argument, involves at the very least the risk that the quantity imported will find its way on to the home market and the object of the prohibition is to protect the home market, and to secure that supplies of these virulent drugs will not be made available there."(6)

It followed then that the Court would examine critically any mitigation. While the Court of Appeal disbelieved the story from Ribas, it held that the offence was of considerable gravity but that the sentence passed was wrong in principle and one of five years imprisonment was substituted.

2.20 But, only a month later in R v Bayona (7) about 8½ ounces of cocaine was smuggled into England by a manager of a pop group, and perhaps by inference for that group. He was sentenced to two years imprisonment and recommended for deportation. He appealed and then it was held that although the drug was not supplied for the market at large it was still "a very dangerous drug." Appeal dismissed. In R v Kence (8) an Australian was passing through London and he was found to have 914 grammes of cocaine. He pleaded guilty and was sentenced to three years imprisonment. On application for leave to appeal it was held that the fact that the cocaine was not to be used, sold or distributed in the United Kingdom, if not wholly irrelevant, was of little importance. Three years was a moderate sentence even taking into account all the facts. Application refused. An appeal against sentence also arose in R v Rospigliosi (9) where the appellant had imported about half a gramme of cocaine. This was said to be, and it was apparently not contradicted that it was, for his own use. The sentence was not open to criticism as he was an intelligent young man who knew perfectly well that it was wrong to import such a drug into this country. But, in the circumstances the

sentence of eight years was varied to six years.

2.21 In R v Ford (10) the appellants were convicted, or pleaded guilty to, a variety of charges including importing cocaine, The quantity of cocaine was said to be worth more than £200,000 on the market. They were sentenced to terms of imprisonment ranging from 10 years imprisonment to five years, according to the parts played by each. On appeal it was held that the sentence of 10 years imprisonment on one appellant who has played an important role was the proper term, as were the sentences of eight years on an appellant who had acted as courier and six years on one who acted as distributor. The sentences on the two other appellants who had played less significant parts were reduced to four years, partly in view of personal circumstances. Lord Lane C.J. held that:

> "It scarcely needs emphasis that the smuggling of cocaine on this scale (the market value of this consignment was put at more than £200,000) must be sharply discouraged. At the moment cocaine is not in widespread use illegally in this country; but we are told that there has been something of a cocaine explosion in the United States; and, unhappily, what happens on that side of the Atlantic tends to travel across to England almost inevitably. It must be made absolutely plain that, whether cocaine is as dangerous as heroin or L.S.D., it is a Class A drug, and that those who provide or try to provide distributors with that sort of drug will find themselves in prison for a very long time." (11).

2.22 In R v Suermondt (12) a sentence of 10 years imprisonment was upheld for importing a total of about 10 kilogrammes of cocaine in three consignments. A few days later the same court, but with a different combination of judges, had occasion to consider the appeal against sentence in R v Taan (13). There Tann had been convicted to being concerned in the fraudulent importation of a quantity of cocaine. Strangely, given the importance of the matter, no weight for the cocaine is given in

the report cited but the value was said to be £2½ million. The appeal court was informed that the quantity was the biggest haul of cocaine ever brought in or detected in this country. The cocaine was clearly intended for onward transit, probably to Damasws. The cocaine was actually found to be in the possession of two others but Taan's part in all this was essentially to organise their travel and to provide funds for the courier's costs. The trial judge in sentencing Tann said that he was satisfied that his part was in the organisation and that this called for severe punitive and deterrent sentence. The Court of Appeal held that this approach was correct and that the sentence of 12 years imprisonment could not be the subject of any valid criticism. Lower down the scale, in R v Parada and Rodriguez (14) the appellants were sentenced on the basis that they were "underlings" (15). Each received six years imprisonment for smuggling cocaine to the value of about £1/2 million. Cocaine was put firmly in its place in R v Martinez (16) where it was observed by the court that the illicit importation and abuse of cocaine was on the increase, and that it was then time to draw attention to the dangers of its abuse and to destroy the myth that cocaine was some sort of social aid and was not addictive. Martinez had smuggled in 23.7 grammes of cocaine valued at just over £3000. This the Court said was an appreciable amount, it was more than a trivial amount. Accordingly, the sentence of four years was correct in principle and in length.

2.23 R v Keach (17) became an instant cause celebre because of the involvement of an American film and television actor and his secretary. Keach pleaded guilty to smuggling 36.7 grammes of cocaine, said to have a street value of £4500, through Heathrow. The drug was hidden in an aerosol and in a bag. A small amount of the drug was found in a hankerchief in the secretary's pocket. The plea was put forward on the basis that

the drug found was in Keach's possession solely for his own use. He was sentenced to nine month's imprisonment and ordered to pay £500 prosecution costs. Appeal against sentence was heard a mere eleven days after the trial, (18). The Court of Appeal held (19) that importation of cocaine is prohibited irrespective of the intention of the importer with regard to the disposal of the drug. The appellant was clearly aware of the risks that he ran. An immediate custodial sentence was necessary for importations of such a large quantity of cocaine and the sentence could not be faulted as being too long. The second appellant, the secretary, was involved in the offence in a minimal way and it was due to her association with Keach. Her sentence would be varied to two months imprisonment, suspended for two years. Keach's case indicates the determination of the courts to pursue the drug problem with some vigour. The case also emphasises how the Courts are influenced by the intention of the smuggler as to the ultimate disposal of the drug.(20).

2.24 In R v Fraser (21) the accused had been convicted of smuggling 8.6 kilogrammes of cocaine worth £1 million and also possessing cocaine with intent to supply. He and two others were said to be involved in a worldwide drugs distribution network. The trial judge in passing sentence observed that there had been many:

> "... attempted invasions of the UK since 1066. They have all failed - and the invasion by drug-pushers will also fail."

Fraser was sentenced to 12 years imprisonment on each charge and the judge made the periods of imprisonment consecutive producing the longest prison term ever in Britain for drug offences. The trial judge took the view that Fraser played a leading role as "organiser and paymaster" (22). Even allowing for Fraser's position as a drug smuggler of the first rank, it is submitted

that the sentence was harsh. It is perhaps indicative of the lack of public sympathy for those convicted of this type of drug offence that there was no public reaction or interest in Fraser's fate. One would have thought that an appeal against sentence was inevitable but as yet no report of such an appeal has appeared.

2.25 Finally, in R v Darby (23) the appellant pleaded guilty to being concerned in evading the prohibition on the importation of cocaine. He had been detected at an airport with 2.95 kilogrammes in various packets which were strapped to the back of his body and to his shins. The report narrates that the cocaine was in fact cocaine hydrochloride of 80 per cent purity. The drug was valued at £472,000. He was sentenced to 10 years imprisonment and he was refused leave to appeal against sentence. The Court of Appeal held that the sentence fell within the limit suggested for large scale importation of Class A drugs in R v Aramah. The sentence was right.

2.26 (2) Diamorphine

In R v Li (24) the appellant was convicted of importing 7 kilogrammes of heroin valued at £200,000. Li was actively engaged in the early planning, in the smuggling and in the resale of the drug. He was sentence to nine years imprisonment. He appealed and it seems to have been part of the mitigation that the sentence was too harsh because Li had not financed the purchase of the heroin. The Court of Appeal held that this factor was not of great materiality. It was Li's organisation that had led to its import in the course of a commercial enterprise. The sentence was a proper one. Li's case involved a very large quantity of a drug that was then uncommon. A much smaller quantity was involved in R v Po (25). The appellant, another Chinaman, attempted to smuggle in 167 grammes of heroin with a retail value of £24,000 to £45,000. Po was sentenced to

six years imprisonment and he was fined £5000 or 12 months imprisonment consecutive in default. The trail judge had indicated that the proper sentence was seven years imprisonment that that he, the judge, wanted the deterrent effect of the sentence to operate also against future carriers. He observed that nearly all carriers belonged to an organisation, the funds of which were available to its member. He proposed to regard the means of the organisation as Po's means. On appeal it was said that on one view Po was not prejudiced by the order as no complaint could have been made against a seven year sentence. However, the actual sentence did offend against the principle that a fine should not be imposed on a person who had not the means to pay it. There was no reason to suppose that an organisation, of which Po might or might not be a member, would pay the fine and it would be quashed.

2.27 In R v Dom (26) three individuals were caught smuggling heroin from Singapore to London. Dom, a Malaysian police inspector, was found in a search of his suitcase by customs to have 2735 grammes of heroin. He admitted an earlier smuggling trip. His two accomplices had got through customs on both occasions but they were arrested later at a hotel. The total value of both trips was said to be about £1 million. Dom was sentence to 10 years imprisonment, the ringleader to 12 years imprisonment and the third accomplice to 10 years also. On appeal against sentence it was held that:

> "...it was idle for persons who allow themselves to become involved as carriers in drugs cases to complain. Sentences must be deterrent. Those who succumb to pressure, even if their resistance is weakened by drug addiction, must realise that there can be no mitigation."

Dom and the ringleader had their sentences confirmed but the third accomplice, being less involved, had her sentence varied

to seven years.

2.28 A further example of the degree of participation in the venture as a material variable is R v Jusoh (27). Jusoh was a member of the crew of a ship which arrived in Cardiff from Bang Kok. Customs officers found 27 pounds (about 12.2 kilogrammes) of heroin with an estimated street value in excess of £1 million. Jusoh's participation had been to assist the 'primary comspirators' to secret the heroin aboard the ship in return for a quantity of cannabis. He was sentence to 12 years imprisonment. The view of the Court of Appeal was that:

> "Heroin was a permicious drug whose effects were destruction of human life, and severe sentences were to be expected. However, it was not correct to impose an extremely long sentence on a minor participant in a conspiracy to import, in order to indicate what the major participants might expect if brought to justice. Without minimising the gravity of the offence, the court would reduce the sentence on the appellant to eight years imprisonment, on the basis that he was not one of the 'big fish'." (28)

The same view of heroin as a 'permicious' drug was expressed in R v Echteld (29) where an appeal against a sentence of six years imprisonment was dismissed. Echteld had tried to smuggle 281.1 grammes of heroin valued at between £125,000 and £200,000.

2.29 The appeals in R v Poh (30) were against the sentences imposed on Poh and another following conviction of smuggling heroin. The appellants, aged 64 and 58 years respectively, were involved in an attempt to import two cars in which a total of 32 kilogrammes of heroin were concealed. Each was sentenced to 14 years imprisonment. In the Court of Appeal, Lord Roskill emphasised that the court had been told that this was the largest heroin haul that had been made in this country. It was said that the drug was destined for France but the Court took the view that

such a point was wholly irrelevant. He held that:

> "The death and destruction which the distribution of this quantity of heroin could have caused in any country anywhere in the world is all too easy to visualise." (31)

The defence submissions on appeal were that, firstly, these men were not principles but merely engaged in the transit of the drugs and, secondly, given the ages of the appellants the then maximum sentences ought not to be passes, on humanitarian grounds. The Court said that it simply could not accept the former proposition and so for the latter:

> "... these men have forfeited all rights to have any humanitarian considerations to be taken into account at this stage. They were prepared to hazard the lives of literally hundreds, if not thousands, of people of all ages up and down the Continent of Europe. Why we in this Court are now being asked to extend mercy to them merely because of their ages is something which this Court finds difficult to understand ... It could be too clearly realised that if persons engage in this type of trade the penalties must be as heavy as the law allows them to be."

In dismissing these appeals the Court thought it relevant to state that in their own country these men would be facing the death penalty and in the event of conviction

> "... there would be little doubt what their fate would have been."

2.30 Again in R v Inglesias (32) the appellant and three others were convicted of smuggling heroin. Inglesias was sentenced to eight years imprisonment and the others were sentenced similarly. Applications for leave to appeal against sentence were refused. Stephen Brown J. Delivered the judgement of the court, presided over by Lord Lane C.J., and said that the smuggling of heroine into this country from Pakistan was a matter of the gravest

nature. Further

> "It dealt in death, for it only took a very few doses of heroin to give rise to addiction which could not be resisted - a physical addiction which involved a craving for more. In that condition those who suffered were vulnerable to the pressures of the unscrupulous operators who required assistance in the further dissemination of the drug." (33)

But the Court of Appeal clearly seeks to maintain a sense of relativities in dealing with heroin cases for in R v Monazah (34) the appellant was sentenced to five years imprisonment for smuggling 29.9 grammes of heroin. This was said to be valued at £3000. He had pleaded guilty. On appeal, it was held that taking into account the comparatively small amount of heroin involved and the plea of guilty the sentence was excessive and it was varied to three years imprisonment. In Scotland there have been fewer opportunities to develop these distinctions: in H M Advocate v Nazir (35) the panel smuggled three kilogrammes of heroin into this country. It was said by a Customs and Excise officer that the drug in that quantity had a street value of £4½ million (sic). Nazir was sentenced to seven years imprisonment and Lord McCluskey warned that:

> "The public interest demands that the trafficking in enormous quantities of such a highly dangerous drug must be severely dealt with."

2.31 (3) Lysergamide

In a recent book reveiw Piers Brandon observed laconically that:

> "Drug abuse was invented in 1965, a couple of years after sexual intercourse." (36)

At the commencement of the drug problem as a major social matter in the 1960's, Lysergamide, or LSD as it was more commonly known, featured very prominently. But, so far as can be ascertained,

the earliest reported case on smuggling LSD into the United Kingdom was as late as 1971. In R v Owens and Weinberger (37) two American students came to England with LSD tablets. The report cited indicates 100 of these tablets were discovered by the police but there is no specifications of the weight or potential use of them. Owens was sentenced to six years imprisonment and Weinberger to five years. On appeal it was submitted that they were not professional dealers and the scale of their transactions was not great. In upholding the sentences the Court was of the view that the drugs were not simply for the appellant's own use, their value was substantial (although unspecified in the report) and it was evident that they were at least hoping to make sufficient profit to pay for their trip to England. Further, the profits available from this kind of traffic were so substantial that the courts would not be doing their duty if they failed to impose such sentences as would make it clear that this kind of crime would not be allowed to pay.

2.32 In R v Humphrey (38) a sentence of three years imprisonment for smuggling LSD was upheld notwithstanding the previous good character of Humphrey. The aggravating factors were held by the court to be the planning that went into the venture and the deliberate commission of the offence for profit. The smuggling of a very small quantity of LSD for personal use resulted only in a fine of £100 in R v Perkins (39). And, in H M Advocate v Jones (40) the panel had smuggled in LSD by way of impregnated paper sent in a letter. The quantity of the drug was said to be sufficient for 250 doses. It is difficult to know from the newspaper report whether the drug was intended for the use of the panel and a co-accused only or whether it was for resale or partially both. In any event the principle panel appears to have been sentenced on the basis that it was the middle option of the three stated. He was sentenced to five years imprisonment.

2.33 (4) Opium

In R v Quadir (41) the appellant smuggled 3703 grammes of opium into this country by means of a false bottom in his suitcase. He was sentenced to three years imprisonment. But, on appeal, the Court took the view that such importation of a large amount of a prohibited drug "had to be severely dealt with" although the sentence may on another view be considered to be lenient. In R v Nazari (42) a young Iranian was sentenced to four years imprisonment for smuggling 1.95 kilogrammes of opium. He appealed on the matter of deportation but he did not appeal against imprisonment. The sentence of imprisonment was held by the appeal court (43) to be in line with the kind of sentence which are passed on those who try to smuggle drugs into the country.

2.34 A substantially higher quantity was involved in R v Gerani (44), namely, 8.87 kilogrammes of prepared opium in the form of cigarettes concealed in tins ostensibly containing sweets. Gerani and a co-defendant were sentenced to a total of eight years imprisonment each. On appeal against sentence it was held by Tudor Evans J. that:

> "... for this offence the sentence of eight years passed on Gerani for the fraudulent importation of a large quantity of opium was fully justified. Evidence before the court of trial from a police inspector was that the demand in England for opium out strips the supply, and that it did not used to be a locally abused drug, but it is becoming one." (45)

Appeal dismissed. By way of contrast in R v Tennant (46) the accused was fined £200 for smuggling 7.4 grammes, a very small quantity, of opium with a street value of £37. The defendant was a drug addict and it was accepted that this quantity of drug was for his own use.

2.35 (5) Morphine

Perhaps the earliest reported case dealing with the sentencing of a drug offender is R v Miyagawa (47) involving an appeal against conviction and an appplication for leave to appeal against a sentence of three years imprisonment. In considering this 1924 case Lord Hewart C.J. simply observed that the sentence was not too severe (48). Of greater contemporary interest is R v Ahmad (49) where the appellant was an employee of an airline. He was caught attempting to carry 991 grammes of morphine through customs in a bag with a false bottom. He was sentenced, notwithstanding his previous good conduct, to seven years imprisonment. On appeal against sentence Lord Lane C.J. recorded that the Court had been told that the quantity of morphine had a street value of £250,000 and noted the appellant's personal circumstances:

> "He has a wife and three children who will suffer severely if the prison sentence is to be served.
>
> Of course, one feels for the wife and children in this case, as one feels for the millions of people whose lives are made miserable by the trafficking in these drugs. It is very important that those who act as couriers should be dealt with seriously when they are caught because if the couriers can be discouraged the trade will suffer a grave blow." (50)

In these circumstances the defendant in R v Johnson (51) may consider himself lucky to receive only six months imprisonment for smuggling 110 grammes of morphine. The newspaper report is unclear as to the evidence, if any, of the defendant's intended disposal of the drug. But the trial judge is quoted as saying that:

> "The importing of drugs into this country is steadily rising. The effect on people into whose hands they fall is totally devastating and not infrequently fatal."

CLASS B

2.36 (1) Cannabis

The English appeal court has stressed that smuggling Class B drugs involves penalties that are less heavy than those for Class A drugs. Such a principle has authority in the maximum penalties contained in Schedule 4 to the 1971 Act, but there relevant cases : R v Murbank (52) is the first reported case on the point and it was considered again in more detail in R v Williams (53). In the latter the appellant was sentenced to five years imprisonment for smuggling 14½ pounds of cannabis resin. The ground of appeal was that the sentence was too long when compared with sentences imposed for much larger quantities of Class A drugs, such as cocaine. The appeal court held that it was not possible to be lenient with carriers and that the sentence was not excessive.

> "It was the stated policy of Parliament that trade in cannabis should be stopped and of necessity that meant passing severe sentences."

In R v Taroh (54) the appellant assisted in smuggling 4½ kilogrammes of cannabis into England by collecting a parcel from Manchester Airport. He hoped to earn some £3000. He was sentenced to three years imprisonment. On appeal it was held that although this was a serious offence, it was less serious than importing a 'hard' drug. As it was also his first offence and he had pleaded guilty, the sentence was varied to two years imprisonment.

2.37 To try to elucidate the policy on smuggling cannabis it is necessary to return to 1962 when the Court gave an early indication of its views: in R v Hussain (55) the appellant arrived at London airport from Pakistan in possession of three tins of cannabis which he tried to take through customs. The

report of 1962 does not indicate the quantity of drug involved. Hussain had been convicted to two offences, namely unloading prohibited goods from an aircraft and possessing a dangerous drug. The Court of Criminal Appeal, with Lord Parker presiding, held that generally the appropriate way to deal with two offences arising out of the same transaction was by giving concurrent sentences. However, as Hussain had commited a serious offence and to deter others the sentences of two and three years imprisonment consecutive were varied to two and five years concurrent!

2.38 In R v Daher (56) the appellant had pleaded guilty to two charges concerned with his importation of 9½ pounds of cannabis resin. He was sentenced to three years imprisonment. In dismissing the appeal Salmon L.J. said that:

> "... this trade of smuggling drugs into the country and peddling them to people is a terrible and dangerous trade, and it is the duty of the Courts to do all that it can to stamp it out. It is impossible in those circumstances for us to hold that the (trial judge) was wrong in principle when he imposed this sentence which was clearly intended to be a deterrent sentence." (57)

The same appeal court judge made trenchant remarks in DPP v Dott (58). Doot and four others pleaded guilty to importing cannabis and were sentenced. On appeal the Court quashed the convictions on legal grounds but certified a point of law of general importance. The House of Lords allowed the Crown appeal and restored the convictions. In the course of his speech Lord Salmon, as he had then become, narrated (59) how the appellants had imported a total of 129 kilogrammes of cannabis resin in two consignments valued then at not less than £60,000 in total.

> "This was not a case of merely being in possession of a small quantity of dangerous drugs for one's own use and that of one's friends. It was a case of trading on a vast scale in dangerous drugs for gain. The minimum sentence normally imposed for unlawfully importing £30,000 worth of cannabis alone is certainly worth not less than four years imprisonment for a defendant with a clean record. Indeed, I have known the Court of Appeal, on more than one occasion, to refuse leave to appeal against a sentence of six years for such an offence. These were carefully planned crimes ... (Certain of the defendants were sentenced respectively to) twelve months and eighteen months imprisonment on the conspiracy count and concurrently to nine months imprisonment each on the counts for unlawfully importing the vast quantities of cannabis. Doot, who master minded the whole operation, was sentenced to thirty-three months imprisonment and (another defendant), his chief lieutenant, to twenty-seven months in all. So far as I am concerned, these sentences pass all understanding. No factor mentioned when the sentences were pronounced in anyway explains them ... I think it right and indeed necessary to take the exceptional course of commenting on these sentences lest silence might lead courts, in the future, into the belief that such sentences could be appropriated for crimes of this extreme gravity."

2.39 Later, in R v Hancock (6) 17.2 kilogrammes of cannabis were involved. Hancock was recruited by a man called Holdgate and between them they continued to smuggle the drug from Sri Lanka to Canada via England and America. They were caught when Holdgate was detained in London. He was sentenced later to five years imprisonment and Hancock to four years. The court considered that it was a special consideration that both men were on the "bottom rung of a ladder" involving drug smuggling. On appeal it was held that the sentences were right in principle, not excessive and correctly reflected the lesser involvement of Hancock. Dr D A Thomas' commentary on the case included his view that:

> "In the majority of cases of importing cannabis which have been before the courts in recent years, the court has upheld sentences within the bracket of three to five years, inside that bracket the sentence upheld depends on the quantity of cannabis imported, the degree of sophistication and organisation involved in the attempt, and the role of the individual offender." (61)

The continuous flow of drugs cases through the courts and thereafter through the appeal courts led to the types of distinctions enumerated by Dr Thomas in his commentary cited. In R v Williams (62) the appellant arrived at London Airport carrying suitcases containing 5.15 kilogrammes of cannabis. The Court accepted that the appellant intended to use the cannabis for his own consumption, and to sell some to his fellow members of the Rastafarian sect. The Court, therefore, was not faced with the usual example of commercial importation by a professional smuggler. Cantley J. referred to these special circumstances of the appellant:

> "He belongs to a sect in Jamaica called Rastafarians. There are persons in this country who profess whatever beliefs Rastafarians have. The Court was informed, and accepted, that Rastafarians make an extensive, and indeed spectacular use of cannabis. The Court was informed by counsel that this appellant would probably consume a pound or two of cannabis in a week, smoking some of it and using the rest of it in some concoction such as tea, and this was not only a pleasure, but a form of religious rite. The Court was informed, and accepted, that the intention of the appellant was to sell the cannabis, or some of it, and was confined to selling to Rastafarians in this country." (63)

But the Court wished to make it clear that the appellant was to be treated as a smuggler, but not as a professional one as he had a good job in Jamaica. On those grounds the sentence of three years imprisonment was reduced by the appeal court to two years. The Court's policy was stated clearly and succinctly in

the penultimate and ultimate sentences of the judgement:

> "Anyone who does what he did must except to be imprisoned as he has been. The only question is for how long." (64)

2.40 In R v McLurkin (65) the accused was convicted of smuggling cannabis said to be worth about £18,000. His part seemed to be restricted to the removal from London Airport of certain items in which the drug was concealed. On appeal against sentence of three years imprisonment it was held that knowingly to take part in an international plan to import cannabis into the United Kingdom by the sophisticated means used was a very serious offence and that sentence was by no means severe. Alternatively, in R v Forsythe (66) the accused was sentenced to ten years imprisonment. He was convicted of three offences of smuggling about 160 kilogrammes estimated to be worth £200,000 at retail and £78,000 to the importer. The accused was to receive about one quarter of the proceeds of sale. On appeal it was sumbitted that the total sentence was out of accord with sentences passed in comparable cases. The Court of Appeal held that the sentence of imprisonment was excessive and instead imposed five years imprisonment. The trial judge had ordered the forfeiture of £2700 found in the possession of the appellant as part of the proceeds of sale. This part of the sentence was upheld by the appeal court.

2.41 The 1980 case of R v Bibi (67) has become a classic in its own right as it contained an explicit statement of general policy. In the judgement on appeal Lord Lane C.J. pointed out that it was no secret that our prisons were dangerously overcrowded. This was so much so that sentencing courts must be particularly careful to examine each case to ensure if an immediate custodial sentence is necessary, that the sentence is as short as possible,

consistent only with the duty to protect the interests of the public and to punish and deter the criminal (68). This unusual step was taken to advise the courts of the general appellate Court in England. That view was that many offenders could be dealt with as justly and effectively by a sentence of six or nine months imprisonment as by a sentence of eighteen months or three years. A number of categories of individuals to whom this might apply were set out including fringe participants in more serious crimes. However, it stated explicitly that medium or longer term sentences would continue to be appropriate in a number of other categories of crime, including planned crime for wholesale profit, and large scale trafficking in drugs.

2.42 Mrs Bibi was a 49 year old widow and she was convicted of smuggling cannabis into this country but there was no question of her being an organiser or a carrier. The whole plan was conceived by her brother in law in whose house she lived and to whom she was subservient. Her sole act was to unpack cannabis from a parcel that had been sent to the house through the post from Kenya. She had been sentenced to three years imprisonment but, on appeal, applying the new principle and since she was a first offender only on the fringes of the enterprise and any prison sentence would be traumatic for her that sentence was quashed. In turn, a sentence of six months' imprisonment was substituted. On the same principle the appellant in R v Stafford (69) had participated as a principle in smuggling 18 kilogrammes of cannabis into this country and his appeal was, on that basis, refused. Again, in R v Chisti (70) the appellant pleaded guilty to being concerned in smuggling one third of a ton of cannabis in a wooden crate. He was sentenced to nine years imprisonment and recommended for deportation. On appeal Sheldon J. held:

> "This was a very serious offence, in which the appellant played a leading and important part. Anyone involved in any such activity must expect a substantial sentence of immediate imprisonment. This Court agrees more over with the learned trial judge that it was necessary to pass a deterrent sentence. On the other hand, however important the appellant was to the success of the venture, this Court accepts that he was not the principle in the transaction, for whom such a sentence as that now under review would have been appropriate." (71)

Accordingly, the appellant's sentence was reduced to six years imprisonment with the recommendation for deportation upheld.

2.43 The principle of immediate imprisonment of a medium term was emphasised further in R v Abdul (72) where the appellant had attempted to obtain delivery of three crates which had arrived by air from Ghana. The crates contained 43.65 kilogrammes of cannabis with a street value of £65,000. He was sentenced to five years imprisonment and recommended for deportation. On appeal Balcome J. held that:

> "... this was an offence - the large scale importation of drugs - for which the Court has said on many previous occasions that a prison sentence of a substantial amount is necessary." (73)

But, said the Court, having regard to the fact that the drug involved was Class B rather than Class A and that the appellant was aged 43 years and of previous good character, that a sentence of three years would be appropriate and in accordance "with the general principles on which the Court acts." Appeal allowed and varied as stated.

2.44 In R v Nesbitt (74) the appellants were convicted of smuggling 17 kilogrammes by sea from Kenya and into this country by means of a corrupt dock worker. After a lengthy trial the appellants were sentenced to six years, four and a half years and two and a

half years respectively. The main ground of appeal was that the sentences imposed were outside the bracket of sentences which is clearly regarded as appropriate for a single act of smuggling a consignment of cannabis. In the judgement of the Court three distinct points arose: firstly, one the the appellants denied that he was the ringleader or the organiser of the venture. The trial judge having heard all the evidence formed the view that this particular appellant was the "managing director". The other appellants had been sentenced in relation to that alleged director so that much turned on his status. The Court of Appeal observed that:

> "... it would be most reluctant, after a trial of that length (in fact, 29 working days), to substitute its own view as to the relative criminality of these men for the view of the learned judge. If the matter had been dealt with by a plea, or dealt with on documents, different considerations might apply. But where, after a long trial, a judge has formed a view that one man is the ringleader, then, in the view of (the Court of Appeal), unless there is strong evidence to indicate that he was not, this Court should not interfere." (75)

Thus it is that the appellate court will not extend its jurisdiction to include those matters that are properly for a trial judge.

2.45 The second point arising is the attention that the appellate court in England pays to the views of academic writers. Counsel for one of the appellants drew the attention of the Court to the case of R v Forsythe and the commentary on that case by Dr Thomas in his book on the Principles of Sentencing (76). There the learned author summarises matters by saying that sentences upheld for the importation of cannabis are:

> "... usually in the bracker of three to five years."

The Court of Appeal observed in R v Nessbitt that :

> "... the limits of brackets are not sancrosanct, and the circumstances of particular cases may be such that the judge is justified in imposing a sentence which is longer than the normal limits accepted as being appropriate for the offence." (77)

It is interesting that the Court did not mention that the judge in a case may pass a sentece lower than the lower limit of the brackets but perhaps that was so obvious as to be unworthy of mention. In any event the dictum indicates perhaps one of the central difficulties of this study. Just as attempts are made to synthesise the views of the Bench on any topic and to consider limits so these limits are said to be for guidance only.

2.46 The third point arising is that, notwithstanding the first and second points, the Court held that the sentence imposed on the principal participant, the "managing director", was outside the normal range of sentences which are considered appropriate for offences of this kind! There were no aggravating circumstances to justify a longer sentence. Accordingly, the six years was reduced to four years imprisonment and there was an appropriate adjustment in the sentences of the "lieutenants" to reflect the differential culpability. And a further example of a sentence being held to be out of the usual run for similar cases is R v Omisore (78). The appellant had been sentenced to five years imprisonment for smuggling 4 kilogrammes of cannabis. On appeal the sentence was reduced to three years imprisonment, partly for the reasons stated, but also for the adverse effect that prison was having on the appellant's health. His family was in Nigeria and he was unable to eat the food in prison. (79).

References

(1) Hume p488.

(2) 1986 S.C.C.R. 288.

(3) ibid p315.

(4) ibid p316.

(5) (1976) 63 Cr.App.R. 147.

(6) ibid p150.

(7) (1976) Halsbury's Abridgment para 2320.

(8) (1978) Halsbury's Abridgment para 2524.

(9) [1980] Crim.L.R.664.

(10) (1981) 3 Cr.App.R.(S) 70

(11) ibid p73.

(12) (1982) 4 Cr.App.R.(S) 5.

(13) (1982) 4 Cr.App.R.(S) 17

(14) [1984] Crim.L.R.631.

(15) a phrase used by Milmo J. in Taan, ibid p19.

(16) [1984] Crim.L.R. 109 and see para 2.14.

(17) The Times 8th December 1984.

(18) But in that time 'Taki' of The Spectator was sentenced to four month's imprisonment for smuggling in 24.1 grammes of cocaine: R v Theodoracopulous The Times 15th December 1985.

(19) [1985] Crim.L.R. 329.

(20) Keach served six months imprisonment and he was released with remission on 7th June 1985. He served his sentence at Reading Jail in the cell next to the one occupied formerly by Oscar Wilde. On release Keach said the he would write a book about his experience but, so far as I have been able to ascertian, that book, if written, has not been published. Its title was expected to have been Christmas with Her Majesty: The Daily Mail 8th June 1985.

(21) The Daily Mail 15th June 1985.

(22) The Times 15th June 1985: this report of the trial put the value of the drugs at £800,000.

(23) (1986) 8 Cr.App.R.(S) 33.

(24) [1973] Crim.L.R.454.

(25) [1974] Crim.L.R.557.

(26) (1978) Halsbury's Abridgment para 2523.

(27) [1979] Crim.L.R.191.

(28) ibid

(29) (1980) Halsbury's Monthly Review para S.763 (March)

(30) (1981) 3 Cr.App.R.(S) 304.

(31) ibid p305. Subsequent quotes from this case are also at p305.

(32) The Times Law Report 15th November 1982.

(33) ibid Similar sentences were passed in similar cases involving heroin from Pakistan and India shortly thereafter: R v Gir The Times 5th January 1983; R v Khan The Times 8th and 11th both February 1983; R v Aziz The Times 4th June 1983; R v Sood The Times 2nd August 1984. In the last case the trial judge threatened drug dealers who "peddle death and destruction" with long prison sentences. In R v Sadiq The Irish Times 2nd February 1985 the trial judge in a Manchester court said to the accused, "You are the bigger fish we do not see very often in these courts."

(34) (1984) Halsbury's Monthly Review para G99g (Nov).

(35) The Glasgow Herald 19th December 1985.

(36) The Observer 7th October 1984.

(37) [1971] Crim.L.R. 295.

(38) 145 J.P.N. 277.

(39) The Daily Telegraphs 3rd February 1984. Perkins is an actor and the star of Alfred Hitchcock's film 'Psycho'.

(40) The Daily Record 1st March 1985.

(41) (1979) Halsbury's Monthly Review para P503i (feb).

(42) (1980) 2 Cr. App.R.(S) 84.

(43) ibid p86.

(44) (1980) 2 Cr.App.R.(S) 291.

(45) ibid p293.

(46) The Times 21st March 1985.

(47) (1924) 18 Cr.APP.R. 4.

(48) ibid p6.

(49) (1980) 2 Cr.App.R.(S) 19.

(50) ibid p20.

(51) The Daily Mail 21st January 1983.

(52) [1970] Crim.L.R. 541.

(53) (1977) Halsbury's Abridgment para 2494.

(54) (1982) Halsbury's Monthly Review para 71359f.

(55) [1962] Crim.L.R. 712.

(56) (1969) 53 Cr.App.R. 490.

(57) ibid p492.

(58) (1972) 57 Cr.App.R. 600.

(59) ibid p624.

(60) [1978] Crim.L.R. 174.

(61) ibid p175.

(62) (1979) 1 Cr.App.R.(S) 5.

(63) ibid p6.

(64) ibid p6.

(65) (1979) Halsbury's Abridgement para 2465.

(66) [1980] Crim.L.R. 314.

(67) [1980] 1 W.L.R. 1193.

(68) ibid p1195.

(69) [1980] Crim.L.R. 799.

(70) (1981) 3 Cr.App.R.(S) 99.

(71) ibid p100.

(72) (1981) 3 Cr,App.R.(S) 160.

(73) ibid p161.

(74) (1981) 3 Cr.App.R.(S) 221.

(75) ibid p224.

(76) Thomas p184.

(77) ibid p223.

(78) (1983) Halsbury's Monthly Review para B669e (March).

(79) There is a large number of other reported cases concerning the importation unlawfully of cannabis which appear, it is submitted, to be merely illustrative of the principles already set down. The cases are as follow, although the list is not necessarily exhaustive:

(1) R v Grainger [1972] Crim.L.R. 578.

(2) R v Antypas [1973] Crim.L.R. 130.

(3) R v Mehagian (1973) 57 Cr.App.R. 488.

(4) R v Taonis (1974) 59 Cr.App.R. 160.

(5) R v Palmer [1974] Crim.L.R. 375.

(6) R v Anwar 1974 Halsbury's Abridgment para 753.

(7) R v Shakleton 1974 Halsbury's Abridgment para 764.

(8) R v Shakespeare 1975 Halsbury's Abridgment para 821.

(9) R v Mitchell [1977] Crim.L.R. 626.

(10) R v Pirovano 1977 Halsbury's Abridgment 2493.

(11) R v Syed 1978 Halsbury's Abridgment 2525.

(12) R v Thompstone 1978 Halsbury's Abridgment 2526.

(13) R v Durrani 1979 Halsbury's Abridgment 276.

(14) R v Egwrato 144 J.P.N. 207.

(15) R v Anderson [1980] Crim.L.R. 390.

(16) R v Mbelu (1981) 3 Cr.App.R.(S) 157.

(17) R v Otjen (1981) 3 Cr.App.R.(S) 186.

(18) R v Beddoes 1982 Halsbury's Abridgment para 570.

(19) R v Lightwalla 1982 Halsbury's Abridgment 846.

(20) R v Stadler 1982 Halsbury's Abridgment 846.

(21) R v Jarvis 1982 Halsbury's Abridgment 1763.

(22) R v Dawson [1983] Crim.L.R. 195.

(23) R v Styles 1983 Halsbury's Abridgment 817.

(24) R v Patel 1983 Halsbury's Abridgment 979.

(25) R v Ogurundo 1983 Halsbury's Abridgment 979.

(26) R v Redding The Times 10th August 1983.

(27) R v Chakulya The Times 24th July 1984.

(28) R v Stevens The Times 6th August 1985.

2.47 Section 3(1)

> "... (b) the exportation of a controlled drug is hereby prohibited."

The Customs and Excise Management Act 1979 provides by Section 68:

> "(2) Any person knowlingly concerned in the exportation ... or in the attempted exportation ... of any goods with intent to evade any such prohibition or restriction ... shall be guilty of an offence under this subsection and may be arrested."

The punishment is in terms of Section 68(4) and Schedule 1 to the 1979 Act. It seems clear that exportation is a comparatively rare offence to come before the Courts. But as drug traffickers can be seen as participants in the economic process of meeting the demand for goods by supplying what is sought then exportation may occur not infrequently. With exportation the controlled drugs are being removed from the home jurisdiction to another elsewhere. In Director of Public Prosecutions v Doot (1) an appeal was taken by prosecuting authorities against a decision of the Court of Appeal to quash certain convictions. The House of Lords allowed the appeal and restored the convictions. Lord Salmon held:

> "It is surely no mitigation that the defendants intended to commit further crimes by exporting the prohibited drugs from this country... it hardly seems in accordance with the rules of international comity that our courts should treat the defendants with special leniency because their crimes were more likely to ruin young lives in the United States of America than in this country." (2)

The same principle was upheld in R v Dhingra (3) where the Court said that the fact that a controlled drug is intended for re-export and consumption outside the United Kingdom is not

a relevant consideration.

2.48 The rarity of the offence of exportation means that there is a dearth of case law and little indication of detailed policy. The following two cases contain something of the policy view but the offences of which the accused where convicted were not those of exportation. Nevertheless, it is submitted, the circumstances of each case amounts in effect to an exportation of the drug concerned. In R v Yont (4) the appellant was an American citizen who was engaged in smuggling 77 pounds of herbal cannabis into the United States. He was arrested en route in England and he pleaded guilty to possessing the drugs. He was sentenced to three years imprisonment and recommended for deportation. The Court of Appeal held that as the appellant was very ill and there was no reason why he should be supported and cared for in England, his sentence was varied so as to allow his release in thirty days and to enable arrangements to be made for his deportation. The Court took note especially that the offence was directed by the appellant against his own country rather than this one. The view of the Court in Yont's case was expressed in 1967 and in Doot's case in 1972. In the former the Court seemed happy in the circumstances to 'move on' the appellant whereas in the latter the Court would not. Perhaps the distinction is that Yont was taking the drugs to his own country whereas Dott was not. This distinction, it is submitted, was confirmed in effect in R v Otjen (5) where the appellant was a Nigerian national travelling by air from Nigeria to Amsterdan. He was required to disembark at Heathrow only because the aircraft was withdrawn form service. When his hand luggage was inspected as he was about to board the replacement aircraft, he was found to be in possession of 3.84 kilogrammes of herbal cannabis. He had previously served a sentence of imprisonment in England for importing cannabis. He was sentenced to 30 months imprisonment and recommended for deportation. On appeal, counsel

argued for the appellant that this was a "technical importation" because goods are imported into this country the moment the aircraft lands. Secondly, it was never intended that these drugs should be distributed in this country as they were always destined for Amsterdam. Lord Justice Griffiths held that:

> "... this is a case which has to be viewed against the undoubted fact that the drug trade is an international business carried on to the detriment of citizens in all civilised countries, and this country owes a duty to other civilised countries to do all in its power to deter this trade, whether or not the drugs are intended for consumption in this country or some other country. It would be quite wrong for this country to say, having apprehended a courier carrying a very large quantity of drugs, "well, we will have nothing to do with it, because the drugs were destined for another country." If we were to take that attitude, it would be inviting all the couriers to use our airports for the purpose of distributing illegal drugs." (6)

In dismissing the appeal it was observed that as the appellant had been given credit for his guilty plea and had a similar previous conviction there were no grounds on which it would be right for the Court to interfere with the sentence.

References

(1) (1972) 57 Cr.App.R.600.

(2) ibid p625.

(3) Appeal Court case number 3184/B/72, referred to at [1978] Crim.L.R.175.

(4) [1967] Crim.L.R. 547.

(5) (1981) 3 Cr.App.R.(S) 186.

(6) ibid p188.

2.49 Section 4: Restriction of production and supply of controlled drugs

The offences in section 4 of the 1971 Act strike at the most commercial aspects of the drugs trade. Professor John Kaplan has said in his important book The Hardest Drug: Heroin and Public Policy that:

> "The effects of the criminal law upon the heroin problem arise mainly from two categories of governmental actions - those aimed at the supplier and those aimed at the user of the drug. Law enforcement efforts of the former type attempt to lessen the availability of heroin; those of the latter kind try to prevent or reduce the use of heroin by people who manage to gain access." (1)

It is submitted that the policy aim of section 4 is to try to lessen the availability of all controlled drugs, such availability as there is by way of production and supply.

2.50 Production

Section 4

> (1) "... it shall not be lawful for a person ... (b) to produce a controlled drug;
> (2) "... it is an offence for a person - (a) to produce a controlled drug in contravention of sub-section (1) above:"

It is worth noting that by section 37(1) of the 1971 Act it is provided that "produce" where the reference is to producing a controlled drug, means producing it by manufacture, cultivation or any other method, and "production" has a corresponding meaning. Accordingly, if the whole of the drugs trade is seen as a continuum then the offence of production represents one extreme of the line. The overt acts which Parliament seeks to punish are best illustrated by the case which has come to the known by its

police title, Operation Julie (1). The reported cases dealing with that operation are strictly concerned with the crime of conspiracy to contravene Section 4 of the 1971 Act. Thus the cases of R v Kemp and R v Cuthbertson are considered elsewhere in this work.

2.51 To be concerned in the production

Section 4

> (1) "... it shall not be lawful for a person -
> (a) to produce a controlled drug;"
> (2) "... it is an offence for a person ...
> (b) to be concerned in the production of such a drug in contravention of that sub-section by another."

This part of the offence has been widely drafted to involve persons who may be involved only on the periphery of any production but who nevertheless contribute something to the whole process. There are no relevant reported cases to be considered here.

2.52 Supply

This part of the whole offence contained in Section 4 comprises four separate offences namely:

Section 4

> (1) "... it shall not be lawful for a person -
> (b) to supply or offer to supply a controlled drug to another;"
> (3) "... it is an offence for a person - (a) to supply or offer to supply a controlled drug to another in contravention of sub-section (1) above; or (b) to be concerned in the supplying of such a drug to another in contravention of that sub-section; or (c) to be concerned in the making to another in contravention of that sub-section of an offer to supply such a drug."

Each of these offences is considered in turn below.

1. Supply

Section 4(3)(a) can be subdivided into supplying and offering to supply controlled drugs although it would seem that there is only one reported case concerened with the latter offence. This section is itself nevertheless divided into sub-categories, as the court in R v Anderson observed:

> "... while all dealing with unlawful substances was serious, dealing in Class A drugs was more serious than dealing with Class B drugs such as cannabis. Parliament had placed LSD in Class A and it was the duty of the courts to accept that categorisation." (3).

It is on that authority that the various controlled drugs are categorised in this work. It has been said before that in many cases the facts and the offences are complicated and not made especially explicit in the report. For example in R v Rollings (4) the accused was convicted and sentenced on the following charges:

'1. unlawful supply of cannabis resin: 4 years imprisonment.
2. possession of heroin with intent to supply: 6 years imprisonment.
3. unlawful possession of heroin: 5 years imprisonment.
4. possession of cannabis resin with intent to supply: 4 years imprisonment.'

The sentences were ordered to run concurrently making a sentence in effect of 6 years imprisonment. The appeal against sentence was dismissed on the basis that there was nothing wrong in principle with these sentences. The report does reveal something of the background to these offences but, it is submitted, these are insufficient to explain fully how the sentences were arrived at. Further, it is difficult to decide where to place Rollings in the scheme of things because of his varied involvement with different controlled drugs.

2.53 Class A

(a) Amphetamine Sulphate

In R v Emson (5) the appellant supplied a drug taker with between 8 and 10 packets of amphetamine sulphate. She was a 22 year old woman with a two year old son. It appears that the appellant had told the police that she knew she would be caught one day but she treated the matter as a game. She committed two similar offences a month later when she sold further quantities of the drug. She was sentenced to concurrent terms of four years. On appeal it was held that as prison reports had shown that the appellant had learnt her lesson and medical reports indicated that both she and her son would benefit if her sentence was reduced to one or two years imprisonment. The sentences of four years were too severe.

2.54 (b) Cocaine

The only reported cases concerning the supply of cocaine are newspaper articles. The considerable detail in the first article is attributable to the involvement of a journalist in revealing the offence and the fact that the defendant is the daughter of a Member of Parliament. In R v Freud (6) the defendant had sold journalists three grammes of cocaine on two separate occasions. The matter was reported to the police and Miss Freud was charged and appeared in Croydon Crown Court. She pleaded guilty. She was of previous good character and she was expecting a child. She alleged that she had been 'pestered' by a friend into supplying the drug. In sentencing, Judge Clay observed that:

> "Those who supply drugs to others must expect lengthy sentences of imprisonment, but in this case, in my view, the circumstances where unusual, certainly most unusual, and I trust they will never be repeated."

The sentence was one of 15 months imprisonment suspended, £500 fine and prosecution costs estimated at £3000. The aim of

counsel's mitigation was to move the judge to impose a suspended sentence rather than immediate imprisonment and to that extent was successful. The remainder of the judge's comments were taken up with the criticism of the nature of the involvement of the journalists, (7) for present purposes however it is clear that the supply of cocaine attracts a term of imprisonment. That was certainly borne out in H M Advocate v Clayton (8) where the panel was convicted of supplying inter alia cocaine. The trial judge, Lord Mayfield, made no comment on the principle we are now considering but a sentence of eight years imprisonment was passed. A total of £62,000 in bank notes and a quantity of cocaine said to be worth £400 was forfeited by the Court. However, the judge did say that:

> "The Courts have made it clear that people like you will be severely dealt with to try and eliminate this terrible epidemic of drug addiction which affects the lives of many people, particularly the young."

2.55 (c) Diamorphine

As a matter of drafting it is perhaps worth noting that in 1967 Lord Edmund Davies L.J. indicated that:

> "For future guidance it might perhaps be desirable to state that, since heroin is a word which does not appear to be included in any of the schedules to which we have been referred, it would be preferable that the term employed in the Schedule - namely, diamorphine - should also be employed in the indictment, followed in parenthesis by some such words as "commonly known as heroin". In that way, any dubiety which might otherwise exist would be demolished very rapidly." (9)

Much of the notoriety of diamorphine or heroin follows from its popular status as a 'hard' Drug. Professor Kaplan has questioned this status, and he may well have been the first to do so, in print at least:

> "It is not at all clear why heroin should be the 'hardest' drug. It is, after all, a white powder indistinguishable to the eye from cocain, mescaline, various amphetamines and barbiturates, nicotine and caffeine - some of which are 'soft' and others not popularly considered drugs at all. It is true that heroin is addicting, but this complex property ... is shaved by many other drugs we do not consider 'hard' at all."

The professor continues later to provide some sort of answer:

> "In all probability, the hardness of heroin, in the public view, stems from a combination of factors - the condition of those users who come to our attention; the public attitude towards the kinds of people who use the drug; the serious criminal penalties for its sale or use; the strong social disapproval it evokes; and the enormous social cost to the nation attributed to its use." (10)

As an indication of the strong <u>legal</u> disapproval that heroin evokes one cannot do better than cite Henry Brinton's view that:

> "Murder is perhaps a lesser sin than trading in heroin, and it is difficult to envisage a penatly severe enough to punish one who makes a profit out of the degredation and destruction of human lives." (11)

2.56 It is submitted that some of these factors outlined by Professor Kaplan will be noted in the judgements of the appeal cases involving heroin. Indeed, of several reported sentencing cases predating the 1971 Act perhaps the most interesting is <u>R v Macauley</u> (12) where the appellant had been convicted of supplying six heroin tablets to a boy who was fifteen years old. The report does not indicate whether these tablets were for the boy's own use or for onward transmission, but perhaps the former can be inferred from a fair reading of the judgement. At any rate, Macauley received the then statutory maximum of ten years imprisonment and the court said that:

> "Ten years was the maximum sentence, and that fact of itself causes the Court to pause and ask itself anxiously whether that was the right sentence to impose. Holy Writ has in dread terms declared what in the fitting fate of those who place a stumbling block in the path of the young. And Parliament has rightly had regard to the growing menace of drug addiction. Anyone supplying a mere child, a boy of fifteen, a hard drug is doing a most terrible deed which calls for grave punishment." (13)

The appeal was dismissed. There can be no doubting the seriousness of Macauley's actions and, it is submitted, that the Court was correct in forming the view that an exemplary sentence was required. It is perhaps an indication, however, of the state of knowledge or experience of drug offences that Macauley should be placed at the top of the supplier's scale. He seems not to have made a profit or much of a profit and the quantities involved were not great, although it is conceded that by the standards of 1967 six heroin tablets might have been substantial. The principle aggravation in the case would seem to be the recipient's age.

2.57 Seven years later the Court had developed a more subtle approach to the drugs trade. In R v Owens (14) the appellant was convicted of supplying and possessing heroin. 8.5 grammes of heroin, done up in 120 twists and valued then at £1000, was found at her home. She was alleged to have admitted that it was hers and that she had been selling heroin obtained from Chinese sources. A sentence of five years imprisonment was appealed. The special considerations were that she was a registered heroin addict but that she was weaning herself from her addiction. It was said that she had been drawn into a chain of suppliers and she did not make large profits. The sentence was passed as a punishment for taking part in an offence which caused much suffering and as a deterrent to others. A probation officer expressed the view that the sentence could have a detrimental effect on her personality. On appeal it was held that it was an

"... anxious and unhappy case" and that the sentence was severe but not so severe as to warrant interfering with it. Thus it is that notwithstanding the drug addiction of an acccued person medium terms of imprisonment were passed for supplying heroin.

2.58 R v Chatwood (15) is essentially an authority for a point in the law of evidence but one of the accused had appealed against sentence. He had pleaded guilty to possessing controlled drugs and also to supplying heroin. He was sentenced to three years imprisonment on the supply charge and six months imprisonment concurrent on each of the possession charges, it was said, was excessibe. Forbes J held that:

> "A sentence of three years for supplying heroin cannot, in the view of this court, be regarded as excessive or wrong in principle." (16)

The appeal was dismissed. Again, in R v Ashraf (17) the accused pleaded guilty to possessing heroin and to supplying heroin and he admitted supplying heroin on one occasion. He was sentenced to seven years impriosnment. The second accused in the same case, a man called Huq, pleaded guilty to possessing heroin and offering to supply heroin. He had been arrested for having an offensive weapon, and he was found to be in possession of two packets containing 52 grammes of heroin, estimated to have a street value of £5200. He was sentenced to 10 years imprisonment. On sentencing these two men the trail judge said:

> "Every person who has any knowledge of drugs whatsoever knows that heroin is one of the most addictive drugs known to man. It is a drug which has the power to destroy a man both physically and morally and those who deal in it are merchants of total misery to its recipients."

The Court of Appeals indicated that it agreed with that entirely and found that the trial judge could not be criticised in any

way. The appellate court held that:

> "Beginners or not, any one who trades in dangerous drugs, particularly heroin, must expect, when caught, very severe sentences. Those who deal are caught perhaps more frequently than those who supply to them, and it may be that if those who deal and those who are minded to deal realise the courts will pass severe sentences, they will be less inclined to indulge in this dangerous and miserable trade." (18)

2.59 In R v Gee (19) the appellant was convicted of selling heroin and methadone to obtain money to purchase heroin for himself. He pleaded guilty to a number of offences, some of which were committed while on bail for others. He was sentenced to six years imprisonment. On appeal it was held that while the case merited an immediate and substantial sentence of imprisonment. Mustill J. observed that it was:

> "... essential to realise that there are gradations in the gravity of offences of this type, and it is essential in each case for the Court to do its best to place the particular offences at the correct part of the scale of seriousness.
>
> Where do the present offences lie on the scale? At the bottom of the scale is the small social supplier, the man who does supply drugs, but only within the limited circle of friends and not for gain. Markedly higher up the scale, though substantially below the top of it, is the small professional middle man who supplies drugs in order to make a profit. It seems to us that this appellant lies between the two points on the scale which we have identified ..." (20)

2.60 This was considered in R v Guiney (21) where the appellant pleaded guilty to two charges of supplying heroin and possessing 534 milligrammes of heroin with intent to supply. He had been arrested in possession of the quantity of heroin stated which was in 20 paper wraps and £375 in cash. He admitted that he had bought the heroin the previous day and had sold some to

customers. He claimed that he sold only to friends and to existing addicts. He was sentenced to six years imprisonment. On appeal, counsel argued, firstly, that no discount had been given for the guilty plea and, secondly, that the sentence was excessive in the light of the decision in Gee's case. The Court of Appeal said that:

> "... the appellant in Gee had come somewhere between the small scale social supplier supplying friends without profit, and the small scale professional middleman supplying drugs for profit." (22)

2.61 The scale description would fit Guiney and on the basis that the appellate court has an important function of trying to achieve consistency, the Court of Appeal felt compelled to reduce the sentence to four years. But the Court added the observation that if in the future the menace of heroin continued to increase in the way in which it had then the scale of penalties as reflected in the authorities would have to rise. If that was so then others in the position of Gee and Guiney might have to be sentenced to terms in excess of those particular appellants. Further, in the wider context Dr Thomas saw R v Guiney as providing an illustration of both the value and acceptability of the citing of previous decisions of the Court in comparable cases as a basis for argument in appeals dealing simply with length of sentence. He argued also (23) that the decision of the Court to follow R v Gee indicates a recognition of the fact that consistency, said to be one of the major reasons for the Court's existance, can be achieved only if previous decisions are considered in deciding whether a particular sentence is excessive or not. On a lower level the decision in R v Guiney confirms the Court's views on the sentence for a small scale heroin dealer.

2.62 (d) Lysergamide

In R v Vickery (24) there was a plea of guilty to supplying LSD. It seems that Vickery had bought a motor cycle from another for 200 LSD tablets, a fur coat and £25. He then assisted the other to find buyers for the tablets. Vickery was sentenced to three years imprisonment. He had two previous convictions relating to drugs. In dismissing his appeal against sentence, the appellant was told that:

> "... LSD tablets were a very dangerous form of drugs and three years imprisonment could be regarded as the minimum sentence for supplying them, in the absence of extenuating circumstances. In the present case there was an element of aggravation because Vickery had helped the other man to sell the tablets. Those who supplied drugs should be treated much more severely than those who possessed them, as had been recognised by Parliament. The sooner it was appreciated that those who supplied drugs would get severe sentences the better it would be." (25)

This approach was repeated almost seven years later in R v Musgrove (26) where the presiding judge in the Appeal Court was Lord Lawton L.J. Musgrove pleaded guilty to supplying and possessing LSD. He was a first year undergraduate university student. He bought drugs and resold them to other students at cost price. His position was that he did not make a profit but he was rendering a service. He was sentenced to three years imprisonment. The Court said that it was desperately sad when a young man got himself into this situation but there was a duty to say in unmistakeable and unambiguous terms that this kind of law breaking, using prohibited drugs and dealing in them among students would not be tolerated and would be dealt with by severe sentences. The appeal against sentence would be dismissed as the sentence imposed was a proper one.

2.63 In R v Virgin (27) there were guilty pleas to supplying LSD, possessing LSD with intent to supply and possessing LSD, amphetamines and cannabis resin. Virgin had sold five LSD tablets to a young man for £10 and he had also been found to be in possession of enough LSD to provide about 48 doses. He was sentenced to three and a half years imprisonment concurrent on the two counts relating to the supply of LSD with concurrent sentences for the other offences. He appealed against sentence and his plea in mitigation was that he only supplied drugs in a small way to enable him to buy others for his own consumption. In short, Virgin contended that he was the last link in the chain of supply. On appeal Sheldon J. held that:

> "The extreme dangers of LSD are, or should be, common knowledge and need no emphasis. They are such that, bearing in mind the relative ease with which the drug can be distributed by any who might wish to do so, those who are convicted of supplying it must anticipate a substantial prison sentence."

Later, after further consideration, the Court continued that:

> "In a recent social inquiry report ..., the reporting officer said that the appellant was "shocked by the length of prison sentence he received" and that it was to be anticipated that it would have a salutory effect on any future involvement by him with drugs. So it is to be hoped - such indeed is one purpose of a sentence such as this." (28)

2.64 Class B

(1) Cannabis

The availability of cannabis and its various forms is such that convictions relating to it are common place and so too are appeals. Of the many cases that are reported, only a handful have exceptional facts and circumstances or meaningful statements of principle on sentencing. There is clearly an historical

aspect to this part of the study: the first two cases indicate the hard line taken by the English appeal court in the 1960's. In R v Williams (29) a sentence of five years imprisonment was upheld for a 38 year old man who invited a 14 year old girl into his house. There he gave her a cigarette containing cannabis which she smoked and was later sick. He told her various things about drugs. His defence was complete denial. Again, in R v Sang (30) police officers had kept Sang under observation for some time before approaching him. They asked him if he had any cannabis for sale and he replied "you'll get a good deal from me. I'm the best pusher round here." He then offered them twenty-two deals of cannabis for £10. According to the report, he pleaded guilty to possessing cannabis although he was certainly sentenced as a supplier. He had previous convictions for possessing cannabis. The appeal court held that having regard to Sang's previous convictions and his description of himself (which he had denied in evidence) the sentence of six years imprisonment was not excessive.

2.65 Dr Thomas said in his commentary of Sang's case that the sentence did seem excessive or, as he put it, "rather more than usual". (31). But if these earlier cases represent a fierce resistence to this new menace the courts in England with experience soon came to temper their views. In R v Marchesi and Wakeford (32) the first appellant was found in a car in which there was 2 kilogrammes of cannabis resin with a street value of £1900. The second appellant admitted selling cannabis to another man for £40 but he said that the first appellant had arranged it. The mitigation appeared to be that the first appellant was doing well at college and that the second appellant traded in drugs to pay for his heroin addiction. Both were addicted but had tried to rid themselves of the addiction. On appeal, it was held that, taking into consideration the mitigating factors which the trial judge had ignored, the court would vary each sentence

of three years imprisonment to 18 months imprisonment. In R v McAuley (33) the appellant pleaded guilty to a number of charges concerning cannabis, especially to supplying it. It is an important aspect of this case that McAuley was frank with the police when he was arrested. He admitted supplying cannabis but that, he said and it was accepted by the prosecution, was only to a circle of friends. But the appeal court held that:

> "... the danger is that such circles are apt to widden as the news gets round and as more and more people become addicted or take up the habit, learning no doubt from one another." (34)

There were considerable personal mitigating factors but the main ground of appeal was that although the supply was for profit it was to a closed circle of friends. The court observed (35) that had that circle not been closed then the sentence would have been considerably longer. In all the circumstances the original sentence of 18 months imprisonment was upheld as "perfectly correct".

2.66 In R v Platt (36) the appellant pleaded guilty to several charges of supplying cannabis. He was sentenced to 15 months imprisonment concurrently for each charge. He had bought eight ounces of cannabis in Reading and resold it in parcels of one or one half ounce in Cornwall. The purchase price was £180 and the resale price about £256 making a profit of £76. An appeal against sentence was dismissed, the approach to sentence being correct in principle and the sentence not excessive. Boreham J said that:

> "This was a substantial amount of cannabis. The profit, though not vast, was by no means negligible. He was deliberately distributing amongst a substantial number of people, and in these circumstances, he had no ground for complaining about the result." (37)

But trial judges have to be cautious not to infer too much from the known circumstances: in R v Rogers (38) a guilty plea was tendered to one transaction of supplying 10.53 grammes of cannabis to another. The trial judge sentenced Rogers to 18 months imprisonment which seemed to be in line with prevailing policy. However, the same judge indicated his view that this one transaction was probably only the "tip of the iceberg." In quashing the sentence, the Court of Appeal seemed influenced by the fact that there was only one transaction and by the existence of a dependent girlfriend and child. A sentence of six months imprisonment was substituted. As other appellants have had similar dependents it is submitted that not much turned on that factor. It seems then that the appeal court placed greater emphasis on the trial judge erroneously expressing a view unwanted by the facts. Nevertheless, Rogers may be said fairly to have been a lucky appellant.

2.67 In McNab v H M Advocate (39) the appellant pleaded guilty to offering to supply cannabis resin with a street value of £40 to two policement in a public house. The Sheriff took the view that the appellant had acted in the knowledge of the attitude of the courts to such offences, and imposed a sentence of nine months imprisonment. An appeal against sentence was refused as the High Court held that the Sheriff was entitled to take the view he did, and that the sentence could not possibly be regarded as excessive. (40)

2.68 2. Concerned in Supply

In R v Gharni (41) the accused was a Pakistani who came to England and was then concerned with two others in supplying heroin with a street value of £40,000 but he was not involved in a conspiracy, as others were. The report of the case states that there was no suggestion that Ghani was a dealer in the

drug. In sentencing him to six years imprisonment the trial judge stated that he believed that Ghani had brought the drug with him from Holland. On appeal against sentence it was held that the appellant had been sentenced on the basis that the trial judge suspected him of being the importer of the drug, whereas there was no evidence that this was so. The sentence was varied to four years imprisonment with a recommendation for deportation. In McIntosh v H M Advocate (42) the panel was convicted of being concerned in the supply of cannabis resin and amphetamine. He was sentenced to seven years imprisonment. The High Court held in a brief opinion that such a sentence could not be regarded as excessive as the appellant was seriously concerned in the supply.

2.69 In Beattie v H M Advocate (43) the panel pleaded guilty to being concerned in the supplying of Class A and Class B controlled drugs and to 15 related ("sub-charges") under the 1971 Act. The Indictment was framed in such a way that the sub-charges were relied on as specification of the manner in which the panel was alleged to have been concerned in the supplying of controlled drugs, subject to the principle charge. The trial judge passed sentences, some consecutively and some concurrent, totalling 16 years for the 15 sub-charges. Although the maximum which could then be imposed in respect of the principal charge was 14 years, the trial judge considered it competent, having regard to the manner in which the pleas were tendered, to treat each offence separately. The appeal against sentence was on the issue inter alia of whether it was competent to pass sentence in such a way as to exceed the maximum which could have been imported for the principal charge. It was held by the High Court, allowing the appeal, that the nature of the charge and not the manner in which pleas of guilty were tendered determine the sentence which could be imposed. Although it was competent to impose a sentence for each sub-charge, because of the way the Crown had chosen to frame the Indictment it was incompetent to

sentence cumulatively to more than 14 years. Further, where the appellant had for a number of years organised and financed a substantial drug ring an exemplary and primitive sentence was appropriate. Accordingly, a sentence of 14 years was substituted. Finally, in Dowell v H M Advocate (44) a sentence of ten years imprisonment for being concerned in the supply of heroin was held, on appeal, not to be excessive.

2.70 3. Concerned in Making of an Offer to Supply

R v Ng and Dhalai (45) is perhaps of greater interest as an example of the quantum of discount on sentence following a guilty plea. But, Ng did plead guilty to being concerned in making an offer to supply heroin and the part played by him in the saga was one of setting up the deal. The heroin involved had a sale price of £4000, although the report does not indicate weight or purity. Ng was sentenced to five years imprisonment. On appeal against sentence it was held that more credit should have been given to Ng for pleading guilty and for assisting the Crown by giving evidence. There should be, it was said, "a visible difference" between his sentence and those passed on the others involved in the scheme. Ng's sentence was reduced to four years imprisonment. Dhalai had been convicted after trial of supplying heroin and he was sentenced to eight years imprisonment and of his appeal against sentence it was said that the sentence was not wrong.

References

(1) Kaplan p59.

(2) See Lee and Pratt. It is relevant here to consider the origins of LSD. Albert Hofmann repeated in April 1943 an earlier synthesis of LSD-25 but he was forced to go home from his laboratory because of the effects of the drug. These effects were described as "... a not unpleasant intoxicated condition, characterized by an extremely stimulated imagination." A few days later he took another doze: Leary p331. It is this 'production' in a laboratory allowing relatively easy access to the drug that, it is submitted, the section is aimed at.

(3) [1980] Crim.L.R. 390. The point was emphasised again in R v Kemp.

(4) (1984) Halsbury's Monthly Review para. D1419f (July).

(5) (1975) Halbury's Abridgment para 864.

(6) The Daily Mail 3rd September 1983.

(7) Also, in R v Finnegan [1968] Crim.L.R. 279 a journalist was researching an article on the evils of drug taking and she pointed out how easy it was for young people to obtain them. In order to acquire material for the article she went to a flat where drugs were on sale and she bought 106 grammes of cannabis. She was charged and pleaded guilty to possession and she was sentenced to nine months imprisonment. She had no previous convictions. On appeal it was held that the sentence was wrong and it was varied to one of absolute discharge.

(8) The Glasgow Herald 19th October 1985.

(9) R v Macauley (1968) 52 Cr.App.R. 230.

(10) Kaplan p1.

(11) H Brinton Drugs: Penalties in Perspective (1972) J.P.N. 654 at p655.

(12) ibid

(13) ibid p232

(14) [1973] Crim,L,R, 455.

(15) [1980] 1 AIIE.R. 467.

(16) ibid p472.

(17) (1981) 3 Cr.App.R.(S) 287.

(18) ibid p288.

(19) (1984) 6 Cr.App.R.(S) 86.

(20) ibid p20.

(21) [1985] Crim.L.R. 751.

(22) ibid

(23) [1985] Crim.L.R. 752.

(24) [1976] Crim.L.R. 143.

(25) ibid

(26) (1982) 146 J.P.N. 406.

(27) (1983) 5 Cr.App.R.(S) 148.

(28) ibid p150.

(29) [1969] Crim.L.R. 497.

(30) [1971] Crim.L.R. 428.

(31) ibid p429.

(32) (1975) Halsbury's Abridgment para 812.

(33) (1979) 1 Cr.App.R.(S) 71.

(34) ibid p72.

(35) ibid p73.

(36) (1980) 2 Cr.App.R.(S) 307.

(37) ibid p309.

(38) (1982) Halsbury's Monthly Review para 71657g (September).

(39) 1986 S.C.C.R. 230.

(40) Other reported cases concerned with supplying cannabis but not necessarily of importance to this study include:-

(1) R v Ampleford [1975] Crim.L.R. 593
(2) R v Morgan [1981] Crim.L.R. 56

(41) (1984) Halsbury's Monthly Review para D1419g (July).

(42) 1986 S.C.C.R. 496.

(43) 1986 G.W.D.4. This is a very brief report.

(44) 1986 G.W.D.96. This is a very brief report.

(45) [1978] Crim.L.R. 176.

2.71 Section 5: Restriction of Possession of Controlled Drugs

Section 5

(1) "... it shall not be lawful for a person to have a controlled drug in his possession."

(2) "... it is an offence for a person to have a controlled drug in his possession."

1. Class A

(1) Cocaine

It is perhaps surprising that it was as late as 1981 before there was any indication of the Bench's attitude to the simple possession of cocaine, and even then the matter was not absolutely clear. In R v Omashebi (1) a sentence of 12 months imprisonment was passed by a trial judge on a 40 year old man convicted of possessing 3.5 grammes of cocaine. Omashebi had been seen sitting in his car with a package in his hand; when challenged by a policeman he ran away into a building and after a struggle the package was found nearby. The appellant had a previous conviction for possessing drugs, including cocaine. The view of the Court of Appeal was (2) that if the appellant had been found guilty of possessing cocaine with intent to supply then the sentence of 12 months would have been "a very modest one". But he had not been so convicted and the Court said that they had to deal with a man who simply had possession of 3.5 grammes of cocaine, which was held to be not a very large amount, for his own consumption. As the drug was cocaine a sentence of imprisonment was deserved but the right way to deal with the appellant was said to be "a short, sharp sentence of imprisonment." On that basis the 12 months imprisonment was reduced to six months.

2.72 A different view was taken in R v Ball (3) where the defendant, an actor, pleaded guilty to possessing 9.05 grammes of cocaine. The newspaper report of the hearing stated the drug to be worth

about £60 a gramme making his quantity worth £543. He was fined £700. In the whole circumstances, especially as compared to Omashebi, the sentence could reasonably be described as lenient. Equaly in R v Capri (4) the defendant, an actress, was fined £200 for possessing 31 grammes of cocaine. The regretably brief newspaper report gives little of the surrounding circumstances of this case but on the face of it the sentence is extra-ordinary. Again, in R v Summers (5) the magistrates at Uxbridge fined the defendant, described as a top fashion designer, £1000 of possession of 2.98 grammes which seems harsh by the standard of the case immediately preceding it. The pendulum swung the other way in R v Diamond (6). The appellant was sentenced on the basis of the simple possession of 13.6 grammes of cocaine. He was described as a wealthy professional man, being a lawyer in the Isle of Man, with no previous convictions. He had been sentenced to 8 month's imprisonment (6 months of which was suspended) and he was fined £4000. On appeal, it was held by Lord Lane C.J. that the appellant was found in possession of "... a not insignificant amount of a Class A drug." He had led a successful life and he could not claim the have been driven to drugs through the misfortunes of life. The sentence imposed was said to be correct and the appeal was dismissed.

2.73 (2) Diamorphine

The leading English case in this regard is of course R v Aramah (7). There the view taken was that the simple possession of heroin might often be a problem more of a medical nature than a criminal one. Further, given the possible variations in the personal circumstances of each defendant the Court of Appeal felt constrained to limit its views. The sting in the tail, so to speak, was the observation that the sentence could still amount to seven years imprisonment and a fine so that there could still be cases in which deprivation of liberty was "both proper and expedient." That seems also to have been the view in Scotland for in Ramsey v H M Advocate (8) the panel

pleaded guilty at the High Court in Edinburgh to two charges of possessing heroin. The first quantity was described as minute and the second was 1.56 grammes. The trial judge sentenced the panel to four years imprisonment in respect of each of these charges to run concurrently. On appeal it was held that the learned trial judge in proceeding to sentence had exceeded the bounds of what would be an appropriate sentence for possession alone. As the evidence had shown that the appellant had barely more that one day's supply in his possession, the sentences passed were excessive. Accordingly, notwithstanding the previous convictions, the sentence was quashed and a period of two years imprisonment substituted. Again, by way of contrast, in R v Long and Smith the appellants had pleaded guitly to possessing heroin and it had been accepted that the drug was only for personal use. Each appellant had a previous conviction for possessing cannabis. On appeal, it was held that a custodial sentence was right, but nine months was unnecessarily long and three months would be more appropriate.

2.74 (3) Lysergamide

There are no authorities on this point except Lennon v Copeland (10) which is less than helpful. Lennon was convicted of possessing LSD. The judgement does not specify the quantity. The learned Sheriff then sentenced him to three months imprisonment. He presented a Bill of Suspension against the sentence of imprisonment but the High Court, in considering the Bill, held that:

> "The offence is clearly a serious one, the punishment imposed is within the limits laid down in the statutory provisions and no valid ground has been stated to us to show why we should disturb the sentence which the Sheriff decided to impose for this offence."

2.75 (4) Opium

In R v Helfrich (11) the appellant was found in possession of 22 grammes of opium and 5.9 grammes of cannabis resin. The opium was said to have been his first purchase which cost him 300 dollars. He was sentenced to six months imprisonment for the opium offence and three months imprisonment for the second offence. The trial judge had said that such an amount of opium "required a custodial sentence." On appeal, the appellant, an American airman who was well spoken of by the USAF, had appreciated the gravity of the offences and he had worked hard and conscientiously in prison. The Court of Appeal, therefore, substituted such a sentence as to result in his immediate release. This in effect was a sentence of three months imprisonment. It is interesting, it is submitted, that the report of the decision of the Court of Appeal contains nothing by way of a correction that simple possession of opium requires a custodial sentence.

2.76 (5) Dextramoramide

In R v Constantinou (12) there was a guilty plea of possession of five tablets containing dextramoramide tartrate. This substance is essentially a salt of dextramoramide which is a synthetic opiate and has the trade name of Palfium (13). The appellant was stopped in the street by a policeman just after he had left a house. He struggled with him. He pleaded guilty to unlawful possession, obstructing a policeman and assault occasioning actual bodily harm. He was sentenced to three months, six and six months imprisonment, all concurrent. On appeal, a submission that probation was the proper sentence was rejected. The Court said that Constantinou was an educated man, a teacher aged 29 who knew fully the difference between right and wrong. It could not be said in the circumstances that the sentences were wrong or excessive.

2.77 (6) Diconal

In R v Brewer (14) a woman pleaded guilty to unlawful possession of 15 diconal tablets. He had obtained them lawfully on prescription. They had been living together in temporary accommodation. There was no suitable place there in which the tablets could be locked up securely. She had taken the tablets out with her in her handbag to look after them. The report does not report the way in which she came to the notice of the police. She was sentenced to three months imprisonment, suspended. On appeal it was held that:

> "... as the case involved possession of a Class A drug, a prison sentence had been considered by the sentencer, and if the case had been one of possession for an unlawful use of the drug, there was no doubt that a sentence of imprisonment would have been appropriate, probably an immediate sentence even for an offender of previous good character. The hall mark of the mitigation in the present case was that no unlawful use of the tablets was intended."

The Court considered that a sentence of imprisonment was not, strictly speaking, appropriate in this case and a conditional discharge was substituted.

2.78 2. Class B

(1) Amphetamine

In R v Bramley (15) the appellant guilty along with nine other youths to possessing a total of 459 "pep" pills. He was sentenced to six months detention. He appealed as the other youths had all been fined and he felt that he had been unfairly treated. He had been in custody two months awaiting the appeal. The appeal court held that having regard to the prevalence of the offence, detention was a proper sentence but in the circumstances it would be varied to a fine of £50 with three months imprisonment in

default. It is to be presumed that the fine was imposed to avoid disparity as between accused. In R v March (16) the appellant was charged on Indictment with unlawful possession of 362 tablets and 461 capsules of amphetamine sulphate, 631 capsules containing amphetamine, 185 tablets and 88 capsules containing amphetamine sulphate, 102 capsules containing amphetamine. On the two charges based on these items, March was sentenced to six months and six months imprisonment consecutive. On appeal, as a matter of law the six months imprisonment could not have an identical period consecutive and so it would not be suspended. The Court held however that a proper sentence would have been 12 months imprisonment. These two cases were heard in 1967 and 1970 respectively. Although there is no suggestion of supply by the appellants in either case it would seem that that was something that may well have been considered by the Court. Such a consideration would not be unreasonable given that firstly the quantities involved were substantial and secondly that these were convictions under the old legislation which did not include the offence of possession with intent to supply.

2.79 In R v Withers (17) the appellant was 28 years old with no previous convictions and she was living with a man. She had lived with that man for eight years and they had two children. The drug squad went to her flat and found 9.8 grammes of cannabis and 4400 tablets of amphetamine hidden in various places. The drugs were said to have been in her possession for about three months and men were said to have threatened her and her children if she did not comply with their requests to dispense the drugs. She was sentenced to four years imprisonment and her boyfriend to three years. On appeal it was held that it was an aggravating factor that the flat was used as a sub-depot where the drugs were distributed. Although the drugs concerned were "soft" not "hard", the case called for an immediate custodial sentence such as would deter others. Appeals dismissed. Again, although the report cited is concerned with the

possession of the drugs it seems more likely than not that the element of supply loomed large in the mind of the Court.

2.80 It is submitted that while these authorities might seem to support a proposition that the simple possession of amphetamine attracts an immediate custodial sentence that is not necessarily so. These authorities all have very heavy overtones of commercial activities and little reliance ought to be placed on them. On the other hand, in R v Faithfull (18) the defendant there was, and still is, an ageing rock star who was found at Gatwick Airport in possession of 6 grammes of amphetamine. She pleaded guilty to unlawful possession and she was fined £200, this case is in all porbability a better reflection of prevailing attitudes.

2.81 (2) Cannabis

The first few cases to be considered now represent a wholly different approach from that adopted by the courts in the 1980's. In R v Welsh (19) a 42 year old man was arrested in a cafe when he was found with cannabis. He had six previous convictions involving firearms, drugs and prostitution with various sentences of up to 18 months imprisonment. Welsh was sentenced in the first instance to 3½ years imprisonment and on appeal this was held to be not wrong in principle. Similarly in R v Da Silva (20) the defendant was convicted of possessing a small quantity of cannabis and he was sentenced to five years imprisonment. He too had previous convictions. The report narrates that he had been sentenced "on the basis of trafficking in drugs" but that there was no evidence that he "dealt in large amounts." On appeal it was held that the sentence was out of scale in that it did not allow room within the maximum for a really bad offender. A sentence of three years imprisonment was substituted.

2.82 It is submitted that there is a fairly strong suggestion in both these cases on a fair reading that each defendant was sentenced

heavily for the previous convictions. Although Da Silva was only convicted of simple possession the court inferred the supply to others from the circumstances, this seems to have been accepted practice before the 1971 Act. Neither report gives quantities of the drug concerned. Accordingly, these reports are really of little assistance. But in the next relevant decision (21) in 1967, R v Hopkins, (22) a sentence of nine months imprisonment was imposed on the appellant who was convicted of possessing 74 grammes of cannabis. This was varied on appeal to four months imprisonment. The Court of Appeal also came to consider the implications of some of these hard sentences. In R v Perdu (23) the appellant pleaded guilty to possessing two grains of cannabis resin. He was sentenced to 12 months imprisonment. The appeal court held that the sentence was too severe having regard to the quantity involved and if he appeared before a court on a drugs charge again it would give a false impression. The sentence was varied for that reason to three months imprisonment.

2.83 The appellants in R v Robson and Molins (24) were both students and when their house was searched 300 grammes of cannabis, a pair of scales and cigarette ends and a pipe with traces of cannabis were found. Each was sentenced to 12 months imprisonment. Neither had any previous convictions. The special considerations were that both appellants had been in prison for a month before being released on bail. They had completed their studies and received their degrees. They had given an assurance that they had ceased smoking cannabis. On appeal the Court noted that it had been submitted on the appellant's behalf that this type of offence should only attract a financial penalty. The Court wished it to be known that this was not so for possession of this quantity of cannabis. The sentence could not be faulted in any way but having regard to the new circumstances the court felt able to take a more merciful course by suspending the sentences for two years. It may be that justice was obtained by this result but for present purposes there are two

unanswered questions: what quantity was the lower limit for custodial sentences? Would possession for example of 150 grammes merely attract a fine? Secondly, what aspect of the change in circumstances merited a suspended sentence? Was the attaining of graduate status the deciding factor or was it the assurance that the appellants had given up smoking the stuff or was it both?

2.84 The decision in the case of Robson and Mollins invites immediate comparison with that of R v Francis(25). Francis pleaded guilty to possessing 100 grammes of cannabis and this was made up into 22 lots marked with prices from £1 to £5. He said that he had bought the cannabis in London for £48 and that he hoped to sell it for £100. He was sentenced to 12 months imprisonment. Francis was given leave to appeal in the light of Robson and Mollins. In mitigation, if it was such, Francis said that he sold the cannabis to West Indians only and he himself had determined to give up smoking it. The Court observed the R v Robson and Mollins was a remarkable decision and

> "... did not establish any sort of principle. Every case must be dealt with on its own facts."

It was impossible to say that the sentence passed on Francis was wrong in principle. In the view of the Court a custodial sentence was the only proper way of dealing with Francis. In his commentary on Francis' case in the Criminal Law Review Dr Thomas sought to distinguish the cases on the basis that Robson and Mollins themselves were very much younger than Francis and there was no evidence in their case to suggest a persistent course of dealing in cannabis. It is not too much to say that Dr Thomas has not necessarily convinced himself of the validity of his own distiction.

2.85 In R v Winter (26) the appellant pleaded guilty to possession of 1.64 grammes of cannabis. He was sentenced to six months

imprisonment. He was then 31 years old and he had three previous convictions for possessing cannabis. He appealed on the grounds that the sentence was severe having regard to the amount of cannabis found in his possession and that in fact he was "only a consumer." (27). In the judgement of the Court the appellant, who was a chartered accountant, had been given many chances. Accordingly, the sentence imposed was not wrong in principle nor excessive. It would seem that the Court considered it to be an aggravation that Winter had been previously convicted for identical offences and that he had thereafter refused to co-operate with the courts. R v Paley (28), however, represents the simplest possible case for the Court of Appeal to consider. Miss Paley, a student aged 17 years, was convicted with her brother of possessing two cigarette ends containing cannabis. She was fined £75. She was of previous good character and her only income was a student grant of the now devisory sum of £90 per annum. On appeal it was held that the fine imposed was much too high, the offence not being a serious offence of its kind, and out of proportion to her financial position. Justice, it was said, would be done by reducing the fine to £25. (29)

2.86 But if it appeared to be a principle that a conviction for possession of a small quantity of cannabis involved only a fine then that could not be said to be the case invariably: in R v Minott (30) the appellant was convicted to two charges of possessing cannabis amounting to 2.32 grammes. He had previous convictions including several for taking motor vehicles and one for a minor drug offence. He was sentenced to three month's imprisonment. On appeal it was held that the sentencer was

> "... entitled to take the view that an immediate custodial sentence was required, and the sentence imposed was in no way excessive."

Dr Thomas' succinct commentary on the case was that:

> "The court did not indicate whether there were special reasons for adopting what appears to be an unusual course in this type of case."

The head-note to this case indicates, even if the report itself does not, that the possession of the cannabis was for personal consumption only. Even allowing for the previous convictions it is difficult to see why Minott should be singled out for this treatment. Certainly imprisonment for longer periods had been upheld about that time by the Court of Appeal but in each case the personal antecedents of the accused had been far more damning (31) or the quantity of the drug much greater (32).

2.87 A mere three months after Minott's case the Courts of Appeal came to consider R v Leaman (33). The appellant was convicted of possessing 2.1 grammes of cannabis resin and she was sentenced to four months imprisonment, suspended for 18 months. On appeal against sentence Lord Lane C.J. said that:

> "This is really the simplest case in the world. One cannot imagine how there could be any complications."

And later:

> "It is contended today that this is an exaggerated approach to a simple case and that no prison sentence, whether immediate or suspended, was appropriate. We think that is right. We think this is a case which could well have been dispensed of by a financial penalty without, in any way, reducing the importance of cannabis as a lead-in drug at the present time." (34)

The appeal was allowed, the sentence was quashed and a fine of £10 substitued, with one month's imprisonment in default. Leaman's case was described by Dr Thomas as the normal approach of the Court

of Appeal to cases of simple possession of small quantities of cannabis and the decision in Minott's case must be considered therefore as an "unexplained departure from the usual pattern." (35)

2.88 R v McLaren (36) left the Court of Appeal with the problem of how to punish a defendant who had been convicted repeatedly of offences of simple possession. McLaren was a confirmed smoker of cannabis. He had pleaded guilty to possessing 127 grammes of cannabis resin and 9.59 grammes of cannabis. He was then aged 56 years and he had six previous convictions for similar offences going back as far as 1950. McLaren had no other previous convictions and he had never served a term of imprisonment. He was sentenced to two years. On appeal, counsel for the appellant conceded that the trial judge was left with very little option but to impose a custodial sentence. He submitted that a more appropriate sentence would have been one of imprisonment for between six and nine months. The Court of Appeal agreed that a sentence of nine months would have been appropriate and varied the sentence. This prevailing policy was reaffirmed in R v Jones (37) where the appellant was convicted of possessing 3.2 grammes of cannabis resin. He had been convicted of cultivating and possessing cannabis about five years previously, and fined £30. In the present case he was sentenced to three months imprisonment, suspended, and fined £50. On appeal Glidewell J. held that:

> "The main point which he makes in his note of appeal is that a sentence of imprisonment of any sort, suspended or not, for an offence of possessing a small quantity of cannabis, when there is, as in this case, no suggestion that he was supplying or doing anything of that sort, because the possession was purely for his own use, is wrong, even though he has a previous conviction. In respect of that he points out that something like five years had elapsed between his earlier conviction and the offence which led to his conviction. The Court is disposed to agree with the point he makes." (38)

It was on those grounds that the suspended sentence was quashed.

2.89 In the appeal of R v Robertson - Coupar (39) the Court of Appeal took the opportunity to restate explicitly what their policy was and that has been expressed in the course of the decisions discussed above. There were two appellants in the case. The first appellant was convicted of possession of cannabis and the second of possession of cannabis and cultivating cannabis plants. The police had searched the house where the appellant lived and found various small parcels or packets containing cannabis (the total amount discovered being less than one ounce). Some small cannabis plants were found growing in the garden. Each appellant had previously been convicted, on the same occasion, of possessing about one eighth of an ounce of cannabis. The first appellant was sentenced to one month's imprisonment, suspended, and the second to six month's immediate imprisonment.

2.90 It is perhaps worth noting that at trial the appellants had not been legally represented. They presented their own defence which in essence was one of conscience. This was not a defence in law but rather a statement of the views of the appellants that the criminalization of the possession and the use of cannabis was wrong. It appears that the trial judge was offered by the behaviour of the two appellants and he stated that he did not accept their views which had been canvassed before the jury. On appeal it was held that:

> "Whatever the merits or demerits of the argument about cannabis, the fact remains that for the moment it is a criminal offence to smoke it. It cannot be smoked in this country with impunity. Those who do choose to smoke it and to cultivate it must expect to receive punishment for it. There is a bigger principle at stake here than the merits or not of cannabis and that is the fact that if you choose to live in our society you must obey the laws for the time being in force. If you want to go and smoke cannabis, it would appear from the material placed before us that there may be other places where you can go and live and do so."

In so far as sentencing policy is concerned the Court continued to say:

> "But in a series of decisions of this Court it has been said that where the offence is the possession of cannabis in very small quantities for one's own consumption, as a general rule it is not appropriate to impose a sentence of imprisonment. The proper penalty in the ordinary course of events is a financial one. But I would say this, that even for the possession of cannabis, if there is continuous and persistent defiance of the law there may come a time when the Courts will have no alternative but to impose a custodial sentence. The law cannot countenance a continual florting of the statute." (40)

The Court decided that in this case, it only being a second offence for both appellants, it was not appropriate to impose prison sentences. Accordingly, the first appellant had the suspended imprisonment quashed and a fine of £50 imposed. The second appellant had his sentence of imprisonment varied to allow his immediate release: this in effect was a three month sentence.

2.91 But, in R v Osborne (41) the general principles outlined were reconsidered in one respect. The appellant was convicted of possessing 3.83 grammes of cannabis. He had six previous convictions involving cannabis over a period of 15 years and he had previously been sentenced to imprisonment for possessing a large quantity of cannabis in 1968 and for supplying in 1972. He was sentenced for the present offence to six months imprisonment. On appeal the Court of Appeal restated the principle that in ordinary circumstances a very small quantity of cannabis, where it is apparently for the person's own use, would not result in a custodial sentence. However, the Court now said, with respect to R v Jones, that that case must not be taken "as a blanket decision that no cases of possession ever qualify for a custodial sentence." The Court outlined the previous convictions of Osborne, which were more serious and in greater number than Jones, and concluded that it was, on those facts,

not wrong in principle for the Court to consider a short custodial sentence. But, having regard to the delay between the commission of the offence and the trial, the three weeks he had served in prison was enough. The sentence would be varied to allow his immediate release. (42)

References

(1) (1981) 3 Cr.App.R.(S) 271.

(2) ibid p272.

(3) The Times 30th April 1983.

(4) The Times 24th December 1983.

(5) The Times 1st February 1985.

(6) (1985) 7 Cr.App.R.(S). 152.

(7) (1982) 4 Cr.App.R.(S) 407.

(8) 1984 S.C.C.R. 409.

(9) (1984) 6 Cr.App.R.(S). 115.

(10) unreported: Crown Office Circular A6/72.

(11) (1978) Halsbury's Abridgment para. 2527.

(12) 144 J.P.N. 529.

(13) Bucknell and Ghodse para. 3.10 at p36.

(14) [1983] Crim.L.R. 202.

(15) [1967] Crim.L.R. 487.

(16) [1970] 1 W.L.R. 998.

(17) (1974) Halsbury's Abridgment para. 774.

(18) The Daily Mail 8th June 1985.

(19) [1963] Crim.L.R. 790.

(20) [1964] Crim.L.R. 68.

(21) R v Tillman (1965) 49 Cr. App.R. 340 is actually the next relevant decision but there the decision involved quashing a sentence of imprisonment on a 21 year old girl of previous good character. She had come under the influence of persons experienced in smuggling drugs. It was held by the Court of Criminal Appeal to be significant that no probation of social inquiry report was available to the trial judge.

(22) [1967] Crim.L.R. 660.

(23) [1968] Crim.L.R. 686.

(24) [1973] Crim.L.R. 62.

(25) [1973] Crim.L.R. 319.

(26) Unreported: Number 165/A/74.

(27) ibid transcript page 2 E-F.

(28) (1974) Halsbury's Abridgment para. 773.

(29) An identical fine was imposed in (1975) Halsbury's Abridgment para. 860.

(30) [1979] Crim.L.R. 673.

(31) R v Gibbon (1978) Halsbury's Abridgment para 2528.

(32) R v Smith (1977) Halsbury's Abridgment para 2497.

(33) (1979) 1 Cr.App.R.(S) 256.

(34) ibid p257.

(35) [1980] Crim.L.R. at p55.

(36) (1979) 1 Cr.App.R.(S) 285.

(37) (1981) 3 Cr.App.R.(S) 51.

(38) ibid p52.

(39) (1982) 4 Cr.App.R.(S) 150. Dr Thomas discusses this case further in his article Sentencing Principle: Possession and Supply of Cannabis (1982) 38 The Magistrate 159 and 162.

(40) ibid p151.

(41) (1982) 4 Cr.App.R.(S) 262.

(42) There are a large number of other reported cases concerning the possession of cannabis which appear, it is submitted, to be merely illustrative of the principles set down. The cases are as follows:-

(1) R v Wilson 1974 Halsbury's Abridgment para. 772.
(2) R v Longman [1974] Crim.L.R. 374.
(3) R v Willis [1977] Crim.L.R. 304.
(4) R v Smith 1977 Halsbury's Abridgment para. 2497.
(5) R v Starzacher 1978 Halsbury's Abridgment para. 447.

(6) R v Gibbon 1978 Halsbury's Abridgment para. 2528.
(7) R v Isteed 1980 Halsbury's Abridgment para. 2524.
(8) R v Leachman 1981 Halsbury's Abridgment para. 1085.
(9) R v Hall (1981) 3 Cr.App.R.(S) 228.
(10) R v Rossi 145 J.P.N. 701.
(11) R v Londgon 1982 Halsbury's Abridgment para. 1207.
(12) R v Joseph 1982 Halsbury's Abridgment para. 1769.
(13) R v Aldred (1983) 5 Cr.App.R.(S) 393.

2.92 Section 5

(1) "... it shall not be lawful for a person to have a controlled drug in his possession."

(2) "... it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of Section 4(1) of this Act."

1. Class A

(1) Cocaine

In R v Atkins (1) the appellant pleaded guilty to possessing cocaine hydrochloride with intent to supply. He had been arrested after being observed in a street, and he was found to be in possession of a package containing 17.9 grammes of the substance which had an estimated street value of between £1000 and £1500. He was sentenced to three years imprisonment. On appeal it was argued that there was no evidence that the appellant was engaged in dealing on a substantial scale. The Court held that taking the least serious view of the matter established by the evidence, the appellant was shown to have been part of a chain of distributors of hard drugs for illicit purposes. The sentence was a proper sentence and it was not excessive for such activities.

2.93 The view of the Court was further explained in R v Davies (2) which involved two men. The first pleaded guilty to possessing 6.5 grammes of cocaine with intent to supply, having purchased 10 grammes from the second for £180. The second was convicted of possessing 20 grammes of cocaine with intent to supply. They were sentenced to 15 months and four years imprisonment respectively. On appeal the Court dealt with the appellants separately. Davies had no previous conviction and he came from what was described as an excellent family. The prison report

showed that he was serving his sentence sensibly and that he was making a good effort at this work. But, in the view of the Court,

> "... there can be no doubt whatever that at the time of this offence he had chosen quite deliberately to trade in hard drugs. That is an exceedingly serious offence. The damaged done, mostly to young people, by hard drugs needs no further stressing to this Court, and it is a shameful way of life to seek to make money by exploiting their weakness."

While Counsel at the hearing of the appeal sought to stress the elements of the mitigation, the view of the Court was that all those factors were very fully reflected in "as short a sentence" as that of 15 months imprisonment. Further, it was:

> "... inevitable that people supplying hard drugs will be sent to prison and as a general rule the sentence of imprisonment is to be measured in terms of years and not months. It is one of the most serious offences in the criminal catalogue." (3)

In these circumstances the appeal by Davies was dismissed. The Court dismissed the appeal of the second appellant in as few as six written sentences in the judgement. A sentence of four years imprisonment was justified on two grounds: firstly, this man was in possession of a larger quantity of drugs than Davies. Secondly, the house in which the appellants and the drugs were found belonged to the second appellant and the Court placed emphasis on the aggravating factor that this house had quite clearly been fortified by means of steel lined doors and windows!

2.94 (2) Diamporphine

The earlier cases concerning heroin were, strictly speaking, concerned with the actual supplying of the drug or with simple possession. The possession of heroin with intent to supply has, in the twelve or so years that have passed since the 1971

Act came into force, been the subject of few cases. In R v Hyam (4) the appellant pleaded guilty to possessing heroin with intent to supply, unlawfully possessin heroin, unlawfully possessing cannabis and having an offensive weapon in a public place. Hyam had agreed to supply two plain clothes policemen with four ounces of heroin for £4600, when he met them to deliver the heroin, he was arrested and found to be in possession of a container of ammonia solution. Some £2,250 and small quantities of heroin and cannabis were subsequently found at his home. He was sentenced to six years imprisonment on the charge of possessing heroin with intent to supply, with concurrent terms of imprisonment on the other charges. On appeal it was held that the trial judge had sentenced Hyam on the basis that he was a professional supplier of drugs, in view of the sums of money found in his possession. In the view of the Court of Appeal there was insufficient evidence to show that this was so. Applying the principles in R v Aramah, discussed earlier, six years was 'rather too much'; a sentence of four years could be substituted on the principle charge.

2.95 (3) Lysergamide

R v Bennett (5) concerned the possession of 25 tables of LSD each valued at £150. Bennett admitted the possession and the intent but he claimed that he only intended to supply his friends. He also admitted possessing a small quantity of cannabis and supplying a small quantity of cannabis to a friend who helped him. He was sentenced to three years imprisonment on the LSD charges and three months imprisonment concurrent for the cannabis charge. He appealed on the ground that the sentence was too severe as he was only supplying drugs to friends. The appeal court held that sentences for drug offences must be severe because 'when someone starts taking drugs no one knows where it will end.' The Court observed that the "facilitation" of drug taking was a very serious offence

and the appeal would be dismissed.

2.96 In R v Bowman-Powell (6) the appellant pleaded guilty to possessing LSD with intent to supply and to possessing cannabis resin. He was found in possession of 92 doses of LSD and he admitted that he intended to sell about half of the LSD to a regular set of friends and customers. He had previous convictions for drug offences. He was sentenced to four years imprisonment. On appeal it was held, considering R v Aramah and R v Virgin, the Court could see nothing wrong with the sentence. Indeed Lawton L.J. said that:

> "A great deal has happended in the last few years with regard to drug cases. Their supply is becoming more and more common and the public are becoming more and more concerned about it. The time has come when it must be made clear to those who supply drugs and particularly those who supply Class A drugs like LSD, that they can expect to lose their liberty for a long time." (7)

Accordingly, the appeal was dismissed.

2.97 2. Class B

(1) Amphetamine

In R v Davies (8) the police searched Davies home and found two grammes of amphetamine divided into eleven packets. She and her husband lived on social security and for some time they had used that money to buy amphetamines for resale at a profit. Her husband bought and sold the drug and Davies kept the accounts. She had a previous conviction for possessing amphetamine. She was sentenced to nine months imprisonment. On appeal it was submitted that her marriage had broken down and she was no longer under the influence of her husband. Further, her young child was showing signs of distress at

being separated from her and it was a proper case for probation However the appeal court held that a trial judge had to decide between the public interest, calling for punishment, and Davies' personal circumstances. The decision that it was a case in which it was important to emphasize that those who possessed drugs with intent to supply should receive an immediate custodial sentence was one with which there was nothing to entitze the Court of interfere.

2.98 (2) Cannabis

It may be said of the early cannabis cases that the very brief reports indicate cases decided in wholly different prevailing attitudes than now. Certain of these cases have an historical interest but most would contribute little to this study. Nevertheless in R v Williams (9) the appellant Williams and another man were convicted of possessing 150 grains of cannabis which had been found in packets and at a bar in a public house. Each man had been employed there for a short time. Each was sentenced to two years imprisonment. Both had been convicted previously. It appeared that the trial judge had sentenced them on the basis that they had been heavily engaged in peddling drugs over a long period. On appeal the Court held that severe sentences for possessing large quantities of drugs for distribution are proper, and in cases of peddling it is only in quite exceptional cases that a custodial sentence could be avoided. In the present case, the Court held, the sentences were out of scale considering the quantity of drug involved and the short time they had worked at the public house and the sentences were varied to one year each. Dr Thomas, in his brief commentary on the case in the Criminal Law Review, saw it as a possible indication that the Court was then prepared to draw distinctions between different degrees or classes of distributors.

2.99 In R v Watkins (10) the appellant pleaded guilty to possessing and supplying cannabis. His house had been watched and a number of persons were seen to visit. He was found in possession of 140 grammes of cannabis. He admitted that he had recently bought 6 ounces of cannabis and that he had been supplying it to others in the form of reefer cigaretts. He had been sentenced to one and six years imprisonment consecutive; and a suspended sentence of six months passed in 1968 for possessing cannabis was ordered to take effect consecutively. The decision of the appellate judges was that "a stern sentence" was called for because he was a supplier. But, having regard to the quantity of the drug involved, the sentence was too severe and would be varied to one year and four years concurrent, with the suspended sentence taking effect consecutively. Dr Thomas expressed his view saying that:

> "While a custodial sentence is invariably upheld in cases involving the supply of cannabis, the Court generally distinguishes clearly between cases involving large amounts of the drug distributed on a commercial basis and those where only very small amounts are involved. This distinction is clearly reflected in this case, but even though the eventual sentence appears to be rather longer than has been considered appropriate in broadly comparable cases: R v Williams..."

The amounts of controlled drug involved in each case above, namely William's case and that of Watkins, are similar and of the same drug. The sentence of imprisonment for Williams was substantially shorter than that for Watkins. But both cases were concluded before the 1971 Act was passed and therefore both were not in a position to be tried on a charge of possession with intent to supply, an innovation in that Act. The accused in the Williams case were sentenced on the basis that they had in fact been involved in supplying. The accused Watkins was convicted of supplying. Dr Thomas may be

correct in saying that these two cases were 'broadly compatable' but the accused in Williams case were only convicted of simple possession in law and that may explain the lower sentences.

2.100 R v Bailey (11) appears to be the first reported case concerned with sentencing for possession with intent to supply. Bailey was in possession of 33.6 grammes of cannabis resin in a jar and four pieces of foil containing 452 milligrammes of amphetamine. He was sentenced to 12 months imprisonment concurrent on each charge. On appeal it was held that it was impossible to say that the sentence of imprisonment was wrong in principle for two charges of possessing drugs with intent to supply, even on a small scale. In R v Bebbington (12) the appellant was convicted of possessing 225 grammes of cannabis with intent to supply and of a further charge of possessing cannabis. He was sentenced to four years imprisonment on the first charge and to 18 months imprisonment concurrent on the second (13). On appeal against sentence the appeal court's view was expressed by Chapman J.:

> "The learned judge seemed to accept the view that the appellant did intend to smoke most of the cannabis himself, but at the same time indicated that a severe sentence was necessary, regarding him as a link in a chain. Indeed the scales (14) indicated that a severe sentence was necessary, regarding him as a link in a chain in which cannabis resin was supplied, but the quantity involved here was certainly small and if it was a fact, as the learned judge seemed to have said, that most of it was for his own consumption, it could not be regarded as a very serious case of intending to supply. If it had been a case of intending to supply on a substantial scale, a sentence of this order would not be questioned at all, because, as the judge said, people who supply other people and corrupt other people by supplying them with material of this kind have to be dealt with severely. That

view is certainly right." (15)

Accordingly, the sentence of four years imprisonment was quashed and a sentence of 30 months substituted as being more appropriate.

2.101 In R v Singh (16) the appellant was found in possession of cannabis resin in oil form estimated to be worth £16,000 at retail. A sentence of six years imprisonment was upheld. The interest in this case is that the appellant had been convicted of possession with intent to supply. Throughout the judgement, however, the Court refers to him as a courier. It is clear on the facts that there could be no possibility of the possession being for personal use only. But limitations have been sought by way of mitigation on the extent to which others use the controlled drugs: in R v Thorpe (17) the appellant was convicted of six charges of possessing controlled drugs with intent to supply, and pleaded guilty to two such charges and to ten charges of possessing a controlled drug. He lived in a university town. Five of the charges arose from a visit by the police to a house in search of drugs. Thorpe was smoking a cigarette containing cannabis and he had 18 grammes of cannabis, 16 grammes of cannabis resin and a capsule containing amphetamine in his possession. He said that some of the cannabis was for his own use and some for re-sale but he subsequently said that it was all for his own use. Three months later the police searched Thorpe's house and found about 42 grammes of cannabis and cannabis resin in various containers, a pair of scales and four capsules of amphetamine. He said that all the drugs were for his own use. He had a conviction for possessing cannabis in 1979 when he was fined. He was sentenced to four years imprisonment. On appeal it was submitted that the sentence was too long because he did not supply drugs to persons who were not already users, and he had no previous convictions for supplying drugs. The appeal court

held that the appellant was quite uninfluenced by what had happened to him earlier and was proposing to continue his ways in a university setting. The sentence was intended to be a deterrent one and in the circumstances it could not be said to be excessive.

2.102 Introducing new users to controlled drugs is clearly regarded by the courts as a serious aggravation of an offence of smuggling or possession with intent to supply. In R v Lawless (18) the appellant pleaded guilty to possessing 906 grammes of cannabis with intent to supply. He claimed that he had bought the cannabis on behalf of a group of friends who had contributed to the funds with which it was bought. It was said that there was no intention to peddle as a dealer. On appeal against a sentence of two years it was held there was nothing before the court to challenge the appellant's claim that he had bought the cannabis:

> "... as a member of a social syndicate of cannabis smokers." (19)

Further, where a member of such a syndicate who obtains its supplies is caught, a sentence of immediate imprisonment is certainly appropriate, but this case could not be treated as an ordinary case of possessing with intent to trade commercially in cannabis, and a sentence of nine months would have been adequate for this offence by this offender. The sentence of two years was thus reduced to allow the appellant's immediate release, he having served about six months imprisonment. Thus it is that courts take a more generous view of supplying or intending to supply to a restricted group. Again, in R v Daudi (20) Daudi himself and another man pleaded guilty to possessing cannabis with intent to supply and the latter pleaded guilty to a further charge of possessing a controlled drug. They had been stopped by the police while

driving on a motorway, and found to be in possession of a very large quantity of cannabis. The report does not state a weight for that quantity. It was accepted that they had purchased the cannabis on behalf of fellow members of the Rastafarian sect, and that they had no commercial motive in obtaining the cannabis. They were sentenced to three months detention and six month's imprisonment respectively. On appeal against sentence it was held that the appellants, whatever their motives, had deliberately committed a very serious offence, and their sentences could not be considered excessive or wrong in principle. The Court believed it to be a denial of justice to say that because the appellants were Rastafarians they were entitled to be treated entirely differently from other members of the community if they chose to break the law relating to the supply of cannabis. As the sentences were right at the lower end of the bracket for the offence the appeals would be dismissed. The judgement was not without sympathy for the sect but the Court could not discriminate amongst offenders on the basis of religious beliefs, even if those entailed the use of cannabis. The judgement concluded:

> "Sadly they must pay the price of consciously and knowingly breaking the law." (21)

2.103 The Scots case of Vavley v H M Advocate (22) illustrates the conventional sentencing policy here with regard to possessing cannabis intending to supply it to others. The appellant pleaded guilty to possessing 666.96 grammes of cannabis resin with a street value of £2500 with intent to supply it to others. He was a musician and he claimed that the cannabis, which was found concealed in a garden, was intended to be supplied only a limited circle of friends. He had two minor previous convictions for contraventions of the 1971 Act, one

for possessing and one for cultivating cannabis. He was sentenced to four years imprisonment and he appealed to the High Court. There the Court noted the mitigating circumstances which included the claim that as the appellant lived in the country he acquire the drug, not for general supply, but "merely as a stock" which would enable him to provide for himself and for certain friends. The Court's policy was stated:

> "It is well known that this Court is determined to pass severe sentences for possessing drugs, Class A or Class B with intent to supply others."

In the circumstances the Court held that the sentence:

> "... appears to us to have been restricted to four years by giving close attention to the good feature's in the appellant's history." (23)

The appeal was refused. On the authority of the cases cited it would seem that purely commercial motives warrant deterrent sentences although such sentences need not necessarily follow with supply to a restricted group. A comparison between England and Scotland is difficult with so few cases but in a broad sense the sentences in Scotland are heavier even although for the restricted group supply as outlined. (24)

References

(1) [1982] Crim.L.R. 128.

(2) (1982) 4 Cr.App.R.(S) 302.

(3) ibid p303.

(4) (1983) 5 Cr.App.R.(S) 312.

(5) (1981) Halsbury's Abridgment Monthly Review para. W912g (May)

(6) (1985) 7 Cr.App.R.(S) 85.

(7) ibid p87.

(8) 142 J.P.N. 388.

(9) [1968] Crim.L.R. 623.

(10) [1971] Crim.L.R. 49.

(11) (1977) Halsbury's Abridgment para. 2496.

(12) (1978) 67 Cr.App.R. 285.

(13) The two charges related to a single quantity of cannabis. The prosecution, in its wisdom, had preferred two charges but not, apparently, as alternatives. The Court of Appeal held on the point that the sentence for the lesser offence of simple possession would be set aside, but the plea of guilty on that charge would remain recorded.

(14) Courts have always made much of scales. The Court of Appeal stressed the presence of scales in R v Harnden (1978) Cr.App.R 281.

(15) ibid p286.

(16) (1979) 1 Cr.App.R.(S) 42.

(17) 145 J.P.N. 291.

(18) (1981) 3 Cr.App.R.(S) 241

(19) ibid p242.

(20) (1982) 4 Cr.App.R.(S) 306.

(21) ibid p307. That drugs were possessed with intent to supply to Rastafarian friends was also dismissed as irrelevant in R v Dallaway 148 J.P.N. 31.

(22) 1985 S.C.C.R. 55.

(23) ibid p56.

(24) There are a large number of other reported cases concerning the possession of controlled drugs with intent to supply to others. These other cases appear, it is submitted, to be merely illustrative of the principles already set down. The cases are as follows:

(1) R v Allen [1964] Crim.L.R. 484.
(2) R v Jagun [1964] Crim.L.R. 669.
(3) R v Dalas [1966] Crim.L.R. 692.
(4) R v Bhasin [1968] Crim.L.R. 399.
(5) R v Boggis 1975 Halsbury's Abridgment para 837.
(6) R v Dela Laye 1979 Halsbury's Abridgment para 503.
(7) R v Russen [1981] Crim.L.R. 573.
(8) R v Shead (1982) 4 Cr.App.R.(S) 217.
(9) R v Macdonald (1983) 5 Cr.App.R.(S) 22.
(10) R v Chatfield (1983) 5 Cr.App.R.(S) 289.
(11) R v Johnson [1984] Crim.L.R. 691.
(12) R v Okuya [1984] Crim.L.R. 76.

2.104 Section 6: Restriction of Cultivation of Cannabis Plant

Section 6:

> "(1) ... it shall not be lawful for a person to cultivate any plant of the genus Cannabis.
>
> (2) ... it is an offence to cultivate any such plant in contravention of subsection (1) above."

This section is derived from Section 6 of the 1985 Act except that the earlier statute provided for the offence of "Knowingly" cultivating such a plant. The offence in Section 6 of the 1971 Act is not one of strict liability for the same Act provides for statutory defences by Section 28. The first two reported cases on sentencing for cultivation pre-date the 1971 Act. In R v Landsowne (1) an appeal was taken against a sentence of 18 months imposed for growing cannabis for one's own consumption. It was held to be a special consideration that Landsowne was not a dealer, had not bought the drugs in the black market and was not in contact with other users of drugs. His dependence on drugs arose from a personality disorder. He had pleaded guilty and he had assisted the police. The Court, presided over by Lord Parker C.J., varied the sentence to one of six months imprisonment and stated that:

> "... growing cannabis for one's own use is a matter which will attract imprisonment."

2.105 Five years later the same Court, but with different judges, heard the appeal in R v Brown (2). The appellant pleaded guilty to cultivating cannabis plants and possessing cannabis. He was found to be growing 119 plants in the back garden of his house. He said that they were grown for the use of himself and his co-defendant who lived with him. A bag containing cannabis was found hidden in the garden. He said that he had received it from a dealer and hidden it because he no longer wished to deal

with such people. Although the appellant had no previous convictions he was sentenced to 18 months imprisonment and six months consecutive for possession. The Court of Appeal took the view that it would be right to approach the case as one of self-supply:

> "Although growing cannabis for one's own use was not necessarily such a serious matter as supplying drugs to others, the court agreed with what was said in R v Lawrence that those who did so were at risk of a prison sentence."

It was held that there was nothing wrong in principle with the sentence of 18 months imprisonment but that the total for the two offences was too high and accordingly the sentence of six months was made concurrent. Perhaps there is one distinction to be made immediately and that is that self supply in Lawrence's case is said to attract where as in Brown's case it was said to be "a risk".

2.106 The natural concomitant of self-supply is supply to others. Section 6 of the 1971 Act does not itself make a distinction between cultivation and cultivation with intent to supply another. It is submitted that such a distinction is certainly made in the judicial mind when sentencing. In R v Anderson (3) the appellant pleaded guilty to being in possession of cannabis resin and to cultivating cannabis. The police found 53 fairly well developed plants growing in his green house and 30 more growing in the open. Indoors they found a quantity of leaves being dried and several tins containing dried and crushed leaves. One eight inch high plant would produce about one pound of marketable leaf which, when dried and crushed, could be sold for £180 per pound. The appellant was sentened to 12 months imprisonment on each count concurrent. The trial court had reached the conclusion that Anderson's purposes in growing cannabis was to supply it to others as well as himself. The

Court of Appeal observed that it was difficult to see how the trial court could have come to any other sensible conclusion. It had been submitted by counsel that the appellant had not been charged with possession with intent to supply others so that aggravation could not be considered. However the appellant court held that it was open to it:

> "... to consider his purpose in growing such a large quantity, to infer that it was for the purpose of supplying it to the public, and to take that into account in fixing the sentence." (4)

The Court clearly regarded cultivation with an element of supply as a more serious matter than cultivation for one's own use. In justifying the refusal of leave to appeal the Court appears to have hinted strongly at the line that Parliament might wish to take later:

> "Had there been an offence of growing cannabis with intent to supply and the prosecution had elected not to charge it the argument would have been strong for not punishing him as if he had been charged with the graver offence."

2.107 But if the Court seemed to be clear in its view in Anderson's case then perhaps the contrary approach was adopted in R v Lawrence (5) where the appellant pleaded guilty to cultivating cannabis plants and possession of cannabis. A large number of cultivated cannabis plants were found growing in a wood and the appellant admitted that he had planted them and was looking after them. He was also found in possession of a number of packages of cannabis. He claimed that all the cannabis was for his own use and that he had no intention of selling it. The sentence was six months imprisonment, suspended, for the cultivation, with a fine of £200 and fines of £50 on each of the two counts of possession. The trial judge in passing sentence had observed that he could not get out of his mind the strong suspicion that Lawrence was growing

cannabis so that some of it might get into other people's hands. It is relevant to explain that the appellant had pleaded not guilty to possession of a controlled drug with intent to supply and that charge had been dropped in effect. The Court of Appeal considered that in all the circumstances the judge had not succeeded in banishing from his mind the allegation of possession with intent to supply, a matter which was not then relevant to sentence. It was held that the sentence of imprisonment, albeit suspended, was inappropriate, and the fine was excessive. The sentence of imprisonment would be quashed and the fine reduced to £100. The implications of this case are considered later in the light of the next case.

2.108 In R v Stearn (6) the appellant pleaded guilty to producing cannabis, possessing cannabis and supplying it. A total of 44 cannabis plants had been found growing in his house, garden and green house. The appellant admitted selling cannabis among friends at about £20 per ounce. He had earned about £1500 from his first season's crop. He was sentenced to a total of three and a half years imprisonment. On appeal it was held that:

> "It is perfectly plain that an immediate sentence of imprisonment was necessary. We find it quite impossible to say that there is any ground which would justify us releasing him at this stage. The displeasure of society at the distribution of this type of drug on this scale must not go unmarked. On the other hand, we take into account the good character which he had in the past and, moreover and especially, the fact that he co-operated fully with the police and had the good grace to plead guilty at his trail. Those are matters that we find we can give effect to, by making some reduction in the length of sentence, while still preserving enough of it to show that society will not tolerate this kind of behaviour." (7)

The appeal was allowed to the extent that the sentence of three and a half years imprisonment was quashed and two years substituted.

2.109 Before considering further the relevant sentencing policy, some remarks ought to be made about the law report for Stearn's appeal. Strictly, it seems that Stearn's main offence was that of producing cannabis rather than cultivating it: Section 4 rather than Section 6 of the 1971 Act. This distinction is not immediately clear from the report, for that does not state the precise offence to which the appellant pleaded guilty. The rubric of the report does refer to "producing a controlled drug" but the head note refers to "cultivation of cannabis with a view to sale." The point made here is that the whole relevance of the section may be called into doubt. The origins of Section 6 of the 1971 Act is clearly Section 6 of the 1965 Act but why it should have been continued is uncertain. There may be a reasonable argument that Section 6 of the 1971 Act is otiose. From a sentencing perspective the higher maximum penalties for production must persuade prosecuting authorities to consider Section 4 charges first.

2.110 There is a danger in trying to formulate a policy from so few cases. The smaller the number of cases the greater the part played overall by the facts and circumstances of the case and the personalities of the individuals involved. The reporting of a case in the law journals does not necessarily mean that it is representative of arrest trends, indeed it may well have been reported because it is not representative. But the cases cited indicate how the Bench come to distinguish factors not provided for in the statutory provision but of vital importance in apportioning culpability. Indeed the court in R v Lawrence referred to:

"... the need to strengthen procedures for the determination of questions of fact going to sentence and to ensure that the form of the substantive criminal law is such that so far as possible the formal determination of guilt will resolve issues of fact which are critical to sentence." (8)

References

(1) 1967 Crim.L.R. 716.

(2) 1973 Crim.L.R. 62.

(3) 1977 Crim.L.R. 757.

(4) ibid p758.

(5) 1981 Crim.L.R. 421.

(6) (1982) 4 Cr.App.R.(S) 195.

(7) ibid p196. These points applied equally in R v Little unreported where the accused made £42,000 in three years from cultivating cannabis on a commercial scale. But given the scale of activities he was sentenced to six years imprisonment. The Daily Mail 3rd November 1984.

(8) ibid p422.

2.11 Section 8: Occupiers etc of premises to be punishable for permitting certain activities to take place there.

Section 8:

> "A person commits an offence if, being the occupier or concerned in the management of any premises, he knowingly permits or suffers any of the following activities to take place on those premises, that is to say -
> (a) producing or attempting to produce a controlled drug in contravention of Section 4(1) of this Act;
> (b) supplying or attempting to supply a controlled drug to another in contravention of Section 4(1) of this Act, or offering to supply a controlled drug to another in contravention of Section 4(1);
> (c) preparing opium for smoking;
> (d) smoking cannabis, cannabis resin or prepared opium."

The earlier cases now considered precede the 1971 Act but they are still relevant: in R v Blake (1) the appellant was convicted of keeping a disorderly house and was sentenced to 12 months imprisonment. It seems that he had been the manager of, and had a financial interest in, a club which was frequented by young people who consumed (sic) drugs there, certain of these drugs having been purchased on those premises. The appellant had not actively encouraged the behaviour of his customers but he was aware of it and he had consulted the police about it. It was held, dismissing the appeal, that the appellant continued as manager well knowing what was going on and the sentence was justified. The Court indicated that if the manager had played an active part, particularly in the sale and consumption of drugs then a much longer sentence would have been appropriate. Lord Parker C.J. was in the chair for Blake's appeal and also in R v Omer (2). There the appellant had been convicted of managing premises used for dealing in and knowingly cultivating and unlawfully possessing Indian hemp.

Police officers in disguise had called at the appellants house and they had been offered drugs by him. It was held, dismissing the appeal, that as there was evidence of a substantial volume of business the sentence of four years imprisonment was justified. The distinction between these two cases, it is submitted, is the difference between acquiescing in unlawful activities and actually participating in them. Examples of other earlier cases are R v Andrews (3) where appeals against sentences of two years imprisonment were dismissed although the report of the case is perhaps too brief to be of any assistance. In R v Hopkins (4) the appellant was convicted of permitting a number of persons younger than himself to use his flat for smoking cannabis and he was sentenced to nine months imprisonment. On appeal against sentence it was held that permitting the use of premises for smoking cannabis was a serious matter and that the sentence was "well on the light side" and upheld. A sentence of nine months imprisonment for a similar offence was said not to be wrong in R v Jones (5) but it was varied to a probation order because of the poor mental health of the appellant.

2.112 A more recent case is R v Dwyer (6) where the appellant was convicted of permitting premises to be used for smoking cannabis. Two American Air Force members were seen by police to go to Dwyer's house, spend some time there and then drive off. They were apprehended and found to possess substantial quantities of cannabis which they said they had bought from Dwyer and his wife although the latter two were acquitted of supplying cannabis. When the police went to the house they caught four persons smoking a reefer. They found £500 in English bank notes and $200 in American bank notes in the house. The appellant was sentenced to six months imprisonment suspended for two years and fined £200. On appeal it was held that in the circumstances, including the whole background

against which the offence was committed, imprisonment was not a proper sentence and that part of the sentence would be quashed. The fine would stand. The commentary of this case by Dr Thomas in the Criminal Law Review is noteworthy firstly for emphasising that the sentencer must accept the verdict of the jury as a basis for the sentence, whatever other suspicions he may have and secondly for the note that:

> "The sentencer was ... bound to deal with the appellant's on the basis that they tolerated the smoking of cannabis by their guests, for which a custodial sentence would rarely be appropriate. Accordingly, a suspended sentence was impermissible." (7)

This case is considered later with the remaining case law.

2.113 The appellant in R v Pusser (8) was convicted on a single charge of permitting premises to be used for smoking cannabis. The appellant was the licensee of a public house at which the police suspected that cannabis was smoked. Following a visit by police officers to the premises, when it was apparent that cannabis was being smoked, the appellant was warned not to permit cannabis smoking, and to call the police if he suspected that cannabis was being smoked. On a later occasion policemen carried out a search of the premises and found various amounts of cannabis in several forms, in different parts of the public bars on the premises. There was no evidence that the appellant had at any time personally smoked cannabis. A sentence of six months immediate imprisonment was passed. On appeal against sentence it was held that there was over whelming evidence that the appellant knew what was taking place, and made no attempt to stop it, despite being warned by the police. In dismissing the appeal Tudor Evans J. said:

> "It may well be that by permitting these activities to go on in the public house he was able to attract a large number of people to use it and so make a

> larger profit. In our judgement, a sentence of immediate imprisonment was fully merited, and we do not come to the conclusion that the sentence passed was in any way excessive. This was a bad case and we think the sentence was fully justified." (9)

2.114 The appellant in R v Spires (10) pleaded guilty to two charges of possessing cannabis, one of supplying cannabis and one of permitting cannabis to be smoked on his premises. His house had been searched and about three grammes of cannabis and 11 milligrammes of cannabis resin were found. He admitted that he had shared a reefer with two friends shortly before the police arrived. He was sentenced to nine months imprisonment on the charge of supplying cannabis, with concurrent terms on the other charges. On appeal the nine months imprisonment was reduced to three months imprisonment and suspended. It was held that as the prosecution had accepted his plea on the basis that he was not a trafficker in drugs, and he had no previous convictions for drug offences, an immediate sentence of imprisonment was not called for. The proper sentences on the charges of supplying cannabis and permitting the use of his premises for smoking cannabis would have been three months imprisonment, suspended, on each charge. The proper sentence on the charges of possessing cannabis would have been fines. As the appellant had been in custody, the sentence of nine months would be reduced to three months and suspended and the other sentences would be reduced to one day and suspended. Finally, in R v Hooper (11) the appellant pleaded guilty to permitting premises to be used for smoking cannabis resin and to possessing cannabis resin. Policemen had gone to the appellant's flat in the small hours of the morning, as a result of complaints about the noise at a party. The appellant held the door closed against the policemen when they first arrived but when they did gain access they found 6.74 grammes of cannabis under a carpet. The appellant admitted that he had allowed the flat to be used for smoking cannabis: he and two

friends had contributed £2 each and one of the friends had obtained some cannabis which they intended to smoke at the appellant's flat. The police arrived before they began to smoke it. The appellant was sentenced to three months detention. On appeal it was held that the Court was in no doubt that the sentencer was absolutely right to impose a custodial sentence on someone who allowed his premises to be used for the smoking of cannabis, whether or not he was a person of good character. Had it not been for the fact that the appellant had been on bail since being released from the sentence pending appeal, and had embarked on a trade in the interval, the Court would have returend him to complete his sentence. Although the penalty imposed could not be criticised, it would be quashed and a probation order of 12 months substituted.

2.115 There are, it is submitted, a number of trends in the occupier offence. In the earlier cases sentences of immediate imprisonment were passes. An influential person was Lord Parker C.J. and his views were stated clearly in Yeandel v Fisher (12) which concerned a public house licensee and his wife. Both were convicted of being concerned in the management of premises, their public house, used for the purpose of smoking cannabis. At all material times the wife was in charge of the bar on none of the occasions when the offences were committed (presumably that means the smoking of cannabis) was Mr Yeandel seen there. Both were convicted and an appeal against conviction the offence was held to be an absolute one. Lord Parker said that:

> "... this statute is dealing with the very important matter, particularly today, of dangerous drugs. I certainly take judicial notice of the fact that drugs are a great danger today and legislation has been tightening up the control of drugs in all aspects." (13)

It is submitted that this hard attitude to both conviction and sentence has been demonstrated in the earliest cases cited above, all of which involve the same Lord Chief Justice. The trend had changed by 1977 when Dwyer's case came to be considered and a far less stringent view of the offence was being taken. This was due in part to the newer offence in the 1971 Act incorporating a mental element absent in the earlier absolute offence. But it may also have been that over the decade the appellate bench had come to realise the comparative seriousness of the offence. Finally, Dr Thomas' commentary on Dwyer's case that a custodial sentence for tolerating the smoking of cannabis on one's premises would rarely be appropriate seems to have been incorrect given the approach adopted by the court in the cases of Pusser, Spires and Hooper.

References

(1) [1966] Crim.L.R. 232.

(2) [1966] Crim.L.R. 457.

(3) [1967] Crim.L.R. 376.

(4) [1967] Crim.L.R. 660.

(5) [1968] Crim.L.R. 120.

(6) [1977] Crim.L.R. 759.

(7) ibid p760.

(8) (1983) 5 Cr.App.R.(S). 225.

(9) ibid p226.

(10) (1984) 5 Cr.App.R.(S). 397.

(11) [1984] Crim.L.R. 637.

(12) [1965] 3 All E.R. 158.

(13) ibid p161.

2.116 Section 9: Prohibition of certain activities etc. relating to opium

Section 9:

> "... it is an offence for a person -
> (a) to smoke or otherwise use prepared opium; or
> (b) to frequent a place used for the purpose of opium smoking; or
> (c) to have in his possession -
> (i) any pipes or other utensils made or adapted for use in connection with the smoking of opium, being pipes or utensils which have been used by him or with his knowledge or permission in that connection or which he intends to use or permit others to use in that connection; or
> (ii) any utensils which have been used by him or with his knowledge and permission in connection with the preparation of opium for smoking."

There appears to be no reported cases on this section.

2.117 Section 9A: Prohibition of suppy etc. for articles of administering or preparing controlled drugs.

Section 9A:

> "(1) A person who supplies or offers to supply any article which may be used or adapted to be used (whether by itself or in combination with another article or other articles) in the administration by any person of a controlled drug to himself, or another, believing that the article (or the article as adapted) is to be so used in the circumstances where the administration is unlawful, is guilty of an offence."
>
> "(3) A person who supplies or offers to supply any article which may be used to prepare a controlled drug for administration by any person to himself or another believing that the article is to be so used in circumstances where the administration is unlawful is guilty of an offence."

There appears to be no reported cases on this section. (1)

References

(1) These offences are of very recent origin having come into force on 30th September 1986: for England and Wales by the Drug Trafficking Offences Act 1986 (Commencement No. 1) Order 1986 and for Scotland by The Drug Trafficking Offences Act 1986 (Commencement No. 2)(Scotland) Order 1986.

2.118 Section 11: Power to direct special precautions of safe custody of controlled drugs to be taken at certain premises

Section 11:

> "(1) ... the Secretary of State may be notice in writing served on the occupier of any premises on which controlled drugs are or are proposed to be kept give directions as to the taking of precautions or further precautions for the safe custody of any controlled drugs of a description specified in the notice which are kept on those premises.
>
> (2) It is an offence to contravene any directions given under subsection (1) above."

There appears to be no reported cases on this section.

2.119 Section 12 - Directions prohibiting prescribing, supply etc. of controlled drugs by practitioners etc. convicted of certain offences.

Section 12:

> "(2) A direction under this subsection in respect of a person shall -
> (a) if that person is a practitioner, be a direction prohibiting him from having in his possession, prescribing, administering, manufacturing, compounding and supplying and from authorising the administration and supply of such controlled drugs as may be specified in the direction;
> (b) if that person is a pharmacist, be a direction prohibiting him from having in his possession, manufacturing, compounding and supplying and from supervising and controlling the manufacture, compounding and supply of such controlled drugs as may be specified in the direction."
>
> "(6) It is an offence to contravene a direction given under subsection (2) above."

There appears to be no reported cases on this section.

2.120 Section 13: Directions prohibiting prescribing supply etc. of controlled drugs by practitioners in other cases.

Section 13:

> "(1) In the event of a contravention by a doctor of regulations made in pursuance of paragraph (h) or (i) of section 10(2) of this Act, or of the terms of a licence issued under regulations made in pursuance of the said paragraph (i), the Secretary of State may, subject to and in accordance with section 14 of this Act, give a direction in respect of the doctor concerned prohibiting him from prescribing, administering and supplying and from authorising the administration and supply of such controlled drugs as may be specified in the direction.
>
> (2) If the Secretary of State is of the opinion that a practitioner is or has after the coming into operation of this subsection been prescribing, administering or supplying or authorising the administration or supply of any controlled drug in an irresponsible manner, the Secretary of State may subject to and in accordance with section 14 or 15 of this Act, give a direction in respect of the practitioners concerned prohibiting him from prescribing, administering and suppling and from authorising the administration and supply of such controlled drugs as may be specified in the direction.
>
> (3) A contravention such as is mentioned in subsection (1) above does not as such constitute an offence, but it is an offence to contravene a direction given under subsection (1) or (2) above."

There appears to be no reported cases on this section.

2.121 Section 17: Power to obtain information from doctors, pharmacists etc. in certain circumstances.

Section 17:

> "(3) A person commits an offence if without reasonbable excuse (proof of which shall lie on him) he fails to comply with any requirement to which he is subject by virtue of subsection (1) (of section 17).

(4) A person commits an offence of in purported compliance with a requirement imposed under this section he gives any information which he knows to be false in a material particular or recklessly gives any information which is so false."

There appears to be no reported cases on this section.

2.122 Section 18 - Miscellaneous offences.

Section 18

"(1) It is an offence for a person to contravene any regulations made under this Act other than regulations made in pursuance of section 10(2)(h) or (i).

(2) It is an offence for a person to contravene a condition or other term of a licence issued under section 3 of this Act or of a licence or other authority issued under regulations made under this Act, not being a licence issued under regulations made in pursuance of Section 10(2)(i).

(3) A person commits an offence if, in purported compliance with any obligation to give information to which he is subject under or by virtue of regulations made under this Act, he gives any information, which he knows to be false in a material particular or recklessly gives any information which is so false.

(4) A person commits an offence if, for the purpose of obtaining, whether for himself or another, the issue or renewal of a licence or other authority under this Act or under any regulations made under this Act he -
(a) makes any statement or gives any information which he knows to be false in a material particular or
(b) produces or otherwise makes use of any book, record or other document which to his knowledge contains any statement or information which he knows to be false in a material particular."

There appears to be no reported cases on this section.

2.123 Section 19: Attempts etc. to commit offences.

This section now has different applications to the different jurisdiction of the United Kingdom:

Scotland and Northern Ireland

"It is an offence for a person to attempt to commit an offence under any other provisions of this Act or to incite or attempt to incite another to commit such an offence."

This is the original section as provided for by the 1971 Act.

England and Wales

"It is an offence for a person ... to incite another to commit such an offence."

This amended offence was provided for by section 10 of the schedule to the Criminal Attempts Act 1981.

2.124 A simple analysis of the original section 19 reveals three separate offences within the terms of the provision: viz; (1) attempt to commit an offence; (2) incite another to commit an offence; (3) attempt to incite another to commit an offence. However, the reports reveal only one case for a contravention of Section 19 and that relates to the first of the three alternatives. In R v Foo (1) the appellant pleaded guilty to attempting to possess herion. In appears that the heroin had been left under a carpet in a house where Foo lived. The drug was found by another resident and Foo attempted to recover it, he said, for a third party. The appellant's appeal against a sentence of four years imprisonment was upheld and that sentence was varied to two years imprisonment. The Court of Appeal did not interfere with the trial judge's recommendation that Foo be deported (2). In punishing individuals such as Foo for attempting to commit crimes the law is punishing them for

something they did not complete, for an unfulfilled intention. The justification for this is stated by Sheriff Gordon in two ways: firstly, someone who intends to do an unlawful act but does not succed is just as wicked as another who has the same intention but does succeed. But it may be that as the external harm is less with the former than with the latter then the punishment may be less. Secondly, an attempt at a crime reveals in law someone who may well later attempt the same unlawful act unless punished (3). As for punishment, Sheriff Gordon says that:

> "... a person guilty of attempt is usually thought of as guilty of a lesser offence than a person guilty of the completed crime, and so liable only to a lesser penalty." (4)

In the circumstances it would seem that the policy adopted is essentially that attempts will carry lesser penalties than completed offences but such a proposition cannot be tested fully with so few relevant cases.

References

(1) [1976] Crim.L.R. 456.

(2) Foo's case was reported because the Court had heard that a letter was found in his possession indicating that he was a trafficker and on that basis he had been sentenced. However it was clear that he had pleaded guilty, and presumably it had been accepted by the prosecution, to attempting to possess simpliciter. The report then is concerned in essence with the problem of evaluating the facts of the offence for the purpose of sentencing.

(3) Gordon p163-4 para. 6.02

(4) ibid p193 para. 6-48. In English law the sentence for attempt is now subject to the same maxima as that prescribed for the offence attempted: Powers of Criminal Courts Act 1973: Section 18(2).

2.125 Section 20: Assisting in or inducing commission outside United Kingdom of offence punishable under a corresponding law.

Section 20:

> "A Person commits an offence if in the United Kingdom he assists in or induces the commission in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place."

The international aspect of the drug problem is emphasised strongly by this provision. In R v Faulkner (1) the appellants has gone to Pakistan with the intention of becoming involved in a "hashish" run. They were approached by an American who asked them to take drugs in their luggage to Denmark for which they would be paid £1000 each on their arrival. They subsequently carried out a second "run" to Copenhagen and were apprehended when returning through customs at Heathrow Airport. They were found to be carrying cannabis which they had imported for their own use having paid for it in Copenhagen. The appeal point taken by the appellants was that although the maximum sentence for breaches of Section 20 of the 1971 Act was then 14 years imprisonment, the maximum in Denmark was only six years. It was submitted on these facts that lesser sentences could therefore have been awarded. In the view of the appeal court the Danish maximum penalty would be no more than a useful guide. In dismissing the appeals it was held that the maximum sentence under corresponding law of the country into which the drugs are imported is an irrelevant consideration. Where cases of planned international drug trafficking are brought before the sentencing court on the scale which existed have then there must be severe sentences for breaches of the 1971 Act. The sentences of four years were not therefore excessive.

2.126 Dr Thomas discribed (2) section 20 in his commentary on the case as a very unusual offence in that its existence depends entirely on the law of some place outside the United Kingdom. He argues that this gives some support to the argument advanced for the appellants in Faulkner's case. As liability depends on the existence of the foreign law, it was arguable that the gravity of the offence should also be regulated by the foreign law. Counsel seems to be seeking in such an argument to be trying to restrict the powers of the courts, powers that had as maxima been imposed by Parliament. Further, Parliament must be presumed to have realised and understood the implications of passing such an offence so that any change ought essentially to be for Parliament itself.

2.127 In R v Derrick (3) the appellant was convicted in the United Kingdom of assisting the commission outside this country of an offence punishable in another jurisdiction. Derrick was concerned with two others in the smuggling of cannabis from North Africa into Spain. The matter came to light when one of the two others was stopped in Spain with a motor car in which was concealed 49 kilogrammes of cannabis resin. Derrick had bought the car in England and arranged for the petrol tank and boot to be altered for the purpose of concealing drugs. He also took part in buying airline tickets that were needed, and he went to Spain and North Africa. He had previous convictions but none for drug offences. He was sentenced to six years imprisonment. On appeal, it was submitted that the sentence was above the normal range for importing cannabis, and that the evidence did not show that he was the leader of the enterprise so as to justify a higher sentence. The Court said that it was difficult to determine the exact part played by Derrick but clearly he was an active and important participant in the offence. After anxious consideration it had come to the conclusion that the sentence was unoriginally higher than his

established part merited. The sentence was reduced to five years. Perhaps the value of Derrick's case is threefold: firstly, the case is a good example of how section 20 works in practice to prohibit conduct that contributes to the success of an international criminal operation: secondly, as an illustration of the difficulty faced by the Court in major operations of apportioning blame, and especially when not all of the active participants are caught: thirdly, although section 20 is little used in practice it is or could be a powerful provision carrying heavy maximum penalties.

References

(1) This case has been reported at [1977] Crim.L.R. 47 and [1977] Crim.L.R. 679.

(2) ibid p680.

(3) 145 J.P.N. 351.

2.128 Section 23: Power to Search and Obtain Evidence

Section 23:

> "(4) A person commits an offence if he -
> (a) intentionally obstructs a person in exercise of his powers under this section; or
> (b) conceals from a person acting in the exercise of his power under subsection (1) above any such books, documents, stocks or drugs as mentioned in that subsection; or
> (c) without reasonable excuse (proof of which shall lie on him) fails to produce any books or documents as are so mentioned where their production is demanded by a person in the exercise of his power under that section."

There appears to be no reported cases on this section.

2.129 Section 27: Forfeiture

The law of forfeiture of controlled drugs has changed dramatically within the last seven or so years. The whole topic of forfeiture has become a political problem involving many issues and a great deal of consensus on all sides. Some what surprisingly then the three jurisdictions have developed this aspect of the law of controlled drugs at varying speeds. For that reason the jurisdictions are considered separately.

Section 27(1):

> "Subject to subsection (2) below, the Court by or before which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order."

A. Law before 1985

2.130 The nature of the order

It is certain that a Court by or before which a person is convicted has a power of forfeiture, but what is the nature of that order? The matter was considered in R v Menochal (1) where the appellant pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of controlled drugs contrary to section 3(1) of the 1971 Act. The appellant was sentenced to five years imprisonment on 31st January 1977 but nearly three and a half months later on 9th May 1977 the same judge purpoted to make an order under section 27(1) of the 1971 Act, or alternatively section 43 of the Powers of Criminal Courts Act 1973, for the forfeiture of £4371 in cash found in the appellant's handbag at the time of her arrest. The appellant appealed against the order on the ground that the order was:

> "... a sentence or other order made by the Crown Court when dealing with an offender."

within section 11(2) of the Courts Act 1971, and it had not been made within the time limits prescribed by the last-named provision.

2.131 The greater part of the judgement of Menochal's case in the Court of Appeal and the speeches in the House of Lords are irrelevant to Scots Law. Judicial activity in both the courts mentioned was directed at reconciling two provisions in different statutes, neither of which apply to Scotland (2), in the light of historical reasons for the English judiciary having a power to alter or add to a sentence of the court (3). However, what is of concern to Scots law is the decision of the House of Lords that forfeiture orders, including an order made under section 27(1) of the 1971 Act, was a sentence in the nature of a penalty (4). As Lord Salmon held:

> "All prison and other sentences against a convicted person, including money penalties and forfeiture of money in relation to an offence, have two purposes: (i) to punish the offender and (ii) to support the public good by discouraging the offender and other potential criminals from committing such an act in the future." (5)

As the statutory provisions giving rise to this dictum do not apply to Scotland it cannot be said to be binding but it is highly persuasive in explaining the nature of an order of forfeiture.

2.132 It is perhaps not out of place here to restate the general power of forfeiture in Scots law. The present authorities for the general power of forfeiture are contained in the Criminal Procedure (Scotland) Act 1975 which provides by section 223 for convictions on Indictment that:

> "(1) Where a person is convicted of an offence and the court which passes sentence is satisfied that any property which was in his possession, or under his control at the time of his apprehension -
> (a) has been used for the purpose of commiting, or facilitating the commission of any offence; or
> (b) was intended by him to be used for that purpose,
> that property is liable to forfeiture, and any property forfeited under this section shall be disposed of as the court may direct.
>
> (2) Any reference in this section of facilitating the commission of an offence shall include a reference to the taking of any steps after it has been committed for the purposes of disposing of any property to which it relates or of avoiding apprehension or detection."

Where a person is now convicted of an offence by a court of summary jurisdiction the same provisions are applied by section 436 of the 1975 Act (6).

2.133 An offence under the 1971 Act

Section 27 of the 1971 Act allows the power of forfeiture where a person is convicted of an offence under that Act. In R v Cuthbertson (7) the appellants had produced and supplied an illegal drug on a large scale as a result of which they made enormous profits. Two of the appellants transferred a substantial part of their share of the profits to bank accounts in France and Switzerland. They were convicted of conspiracy with other persons to contravene section 4 of the 1971 Act. Following their conviction and sentence, the trial judge ordered the forfeiture, under section 27(1), of the appellants' assets which had been traced as representing the proceeds of their criminal activities. Appeals were taken against the forfeiture orders arguing that the power of forfeiture contained in section 27(1) only applied where a person was convicted of an offence under the 1971 Act, and not to a conviction for conspiracy to commit an offence under that Act, and only extended to anything shown 'to relate to' an offence under that Act.

2.134 The Court of Appeal dismissed the appeals and the matter was taken to the House of Lords. There, in his speech, Lord Diplock held that:

> "This is a pure question of construction of section 27 read in the context of the Act of which it forms a part. The question should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers, such as the appellants, of the whole of their ill-gotten gains, however laudable such a consummation might appear to be. Parliament's intention must be ascertained from the actual words which Parliament itself approved as expressing its intention when it passed the Act in the terms in which it reached the statute book." (8)

And later:

> "The words of the section speak for themselves, clearly, without resort to extraneous aids." (9)

But, Lord Diplock also held that it was "with considerable regret" (10) that he found himself "compelled" to allow the consolidated appeals, and Lord Edmund-Davies was similarly "forced to the most reluctant conclusion" (11) that the appeals were to be allowed.

2.135 The essence of the decision of the House of Lords was that section 27(1) of the 1971 Act provided a power of forfeiture in relation to an accused who had been convicted of an offence "under this Act." It was clear from the whole structure of the Act that for an offence to come within that description it had to be an offence, whether substantive or inchoate, which had been expressly created by the 1971 Act, itself. As conspiracy to commit an offence under the 1971 Act was not an offence expressly created by the 1971 Act, it followed that there had been no jurisdiction to order forfeiture of the appellant's assests under section 27(1). This was so whether conspiracy

was charged at common law or, in England and Wales, as a statutory conspiracy following the coming into the force of section 1 of the Criminal Law Act 1977 on 1st December 1977. In setting on this narrower construction Lord Diplock held further that:

> "The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than they would ordinarily bear; and in the instant case, the whole structure of the Act in my opinion points conclusively in the opposite direction." (12)

2.136 The decision of the House of Lords, that there had been no jurisdiction to order forfeiture of the appellants' assets under section 27(1), was widely commented on when it became known and, indeed, it was criticised in the House of Lords (13). One academic commentator was moved to say that the result was "extra-ordinary, not to say incredible" (14) and went on to say that:

> "Conspiracy to commit a crime is in effect the same as doing the crime itself, the moral culpability may be as bad if not worse, there can be no reasons for any difference or limitation in the way the offenders are punished, including forfeiture." (15)

But does the decision of R v Cuthbertson apply in Scotland? It is certain that in the application of section 27(1) of the 1971 Act the court is bound to have regard to the fact that the offence of which the accused has been convicted is an offence under that Act. But the general power of forfeiture under sections 223 and 436 of the Criminal Proceudre (Scotland) Act 1975 extends to property used or intended to be used for the commission of any offence, and not merely the offence of which a person is convicted (16). Certainly, it has been suggested (17) that where the powers provided under a particular statute are different from the general powers provided by the 1975 Act,

the court should use the powers contained in the statute under which the person is charged (18). But the essence of Cuthbertson's case was that the appellants' were not charged under the 1971 Act and, it is submitted, that had the crime been committed in Scotland, the terms of the power in the 1975 Act would have been applicable.

2.137 Anything

'Anything' is defined in Collins Dictionary of the English Language is "any object" or "a thing of any kind". But, the question arises, does "anything" in section 27(1) mean "anything" in fact? In R v Beard (19) money was found in the accused's flat and it was clearly part of the proceeds of the sale of controlled drugs. Caulfield J. held:

> "I have no doubt that the word "anything" which is a very general description of personal property, includes money." (20)

Accordinly, the money involved, £3978, was ordered to be forfeited.

2.138 It has been shown, on the authority of R v Cuthbertson, that the power of forfeiture under section 27(1) of the 1971 Act may only be exercised where the accused has been convicted of an offence expressly created by the 1971 Act itself. But another major point arising from the same case concerned the things that might be forfeited. Cuthbertson and other accused had transferred a substantial part of their shares in the enormous profit arising from their criminal activity to various banks in France and Switzerland. The total value of their assets that had been traced as representing their proceeds was some £750,000 and at the conclusion of the trial the presiding judge had ordered these to be forfeited. This course of action had been upheld by the Court of Appeal. However, before the House of Lords,

Lord Diplock in the principal speech said that the trial judge and the Court of Appeal appeared to have been influenced by the argument of Crown Counsel that the Parliamentary purpose to which effect was intended to be given by section 27(1) was to strip drug traffickers of the whole of their profits of their crime whatever might be the way in which they had invested these profits. Lord Diplock held that even where a connection can be made between the specific thing sought to be forfeited and the substantial offence to which it related, it could not be suggested that section 27(1) authorised the court "to follow the assets", that is, to forfeit whatever those funds ultimately manifested themselves in. It was held further that:

> "No machinery whatever is provided by the section for effecting the assignment of choses in action and realising the charges on real and personal property which 'follow the assets' in this kind of way would entail. It is practical considerations of this kind which, in my view, lend weight to the conclusion based on the ordinary meaning of the language of the sections. They make it clear that, in the case of the sole offender, orders of forfeiture under section 27 can never be intended by Parliament to serve as a means of stripping the drug traffickers of the total profits of their unlawful enterprises: and the difficulties of using the section for this purpose are but multiplied when offenders are joint, assets in such a case would have to be followed down multiple trails ..." (21)

Scots lawyers may for choses in action, real and personal property read in general terms, incorporeals, heritables and moveables, respectively (22).

2.139 The remaining judges agreed, but Lord Scarman went further and was more specific:

> "... (2) 'anything' in the context of section 27(1) is any tangible thing; (3) section 27 is concerned not with restitution, compensation or the redness of illegal enrichment but with forfeiture. Counsel for the appellants put it correctly, though strangely,

> when he suggested that forfeiture was limited to "the accoutrements of crime", by which I took him to mean, in workaday English, the tools, instruments or other physical means used to commit the crime." (23)

Indeed it was further held that things which were tangible at the time of the arrest could be the subject of a forfeiture order. (24)

2.140 Relate to the offence

Section 27(1) of the 1971 Act allows forfeitre of anything shown to the satisfaction of the court to relate to the offence. In a number of cases Courts have had occasion to consider the purported links between crimes and things. In R v Morgan (25) the appellant pleaded guilty to two charges of possessing a controlled drug with intent to supply. The Court of first instance ordered the forfeiture of a pair of cylinder scales and £393 in cash found in the appellant's possession when he was arrested. On appeal against sentence the Court of Appeal held that the £393 was no doubt part of the appellant's working capital for trading in drugs, but did not appear to justify an order made under section 27(1). The order was held to have been made without jurisdiction and was quashed. It would seem from the report that the prospective clients of the appellant had made off at the approach of the police and that the appellant had not supplied the controlled drug although on his plea that had been his intention. Accordinly, the sum of £393 did not relate to the offences that were preferred against the appellant or that he pleaded guilty to. (26)

2.141 In R v Ribeyre (27) the Court of Appeal again held that where a person was convicted to having controlled drugs in his possession with intent to supply, an order under section 27(1) forfeiting cash proceeds had been made without jurisdiction as the words of section 27(1) "... relating strictly to the offence of which the person was convicted." The appellant would

not necessarily have required his "working capital" for the act of selling drugs, or so the court held, and the money was accordingly not "anything shown to be related to the offence." In R v Khan (28) the appellant Khan was sentenced to a total of ten years imprisonment on conviction on three charges of possession of cannabis resin and heroin with intent to supply and on pleas of guilty to four charges of supplying and possession of heroin. In addition he was ordered to pay a fine of £10,000 and by section 27(1) of the 1971 Act, an order was made for forfeiture of a motor car used in the offences of supplying. The judge also made an order under section 43 of the Powers of Criminal Courts Act 1973 for forfeiture of a house in St Albans in the name of Khan and under his control when used by him for the sale of one pound of heroin. On appeal the sentence of imprisonment was reduced to seven years and the fine of £10,000 and the forfeiture order on the car were upheld. The forfeiture order on the house was set aside as the judge had no jurisdiction on the point (29). The reasoning was that at appeal Crown counsel conceded that section 43 of the 1973 Act did not apply to real property. While section 43(1) used the word 'property' without qualification, nevertheless section 43(4) of the 1973 Act applied the Police (Property) Act 1877 and there 'property' was referred to as that in the possession of the police thus confirming that the provision was concerned with personal property and not real property. All this is of course irrelevant to Scots law as none of the authorities cited above apply here.

2.142 Further in Khan's case the Court of Appeal observed that in R v Beard, considered earlier, Caulfield J. had held that a house was not included in the word "anything" in section 27(1). In R v Cuthbertson Lord Diplock said the following of section 27(1):

> "I would apply a purposive construction to the section considered as a whole. What does it set out to do? Its evident purpose is to enable things to be forfeited so that they may be destroyed or dealt with in some other manner as the court thinks fit. The words are apt and, as it seems to be me, are only apt to deal with things that are tangible, things of which physical possession can be taken by a person authorised to to do so by the court and which are capable of being physically destroyed by that person or disposed of by him in some other way. To ascribe to that section anymore extended ambit would involve putting a strained construction on the actual language that is used, and so far from there being any grounds for doing so, it seems to me that if it were attempted to extend the subject - matter of orders of forfeiture to choses in action or other intangibles, this would lead to difficulties and uncertainties in application which it can hardly be supposed that Parliament intended to create." (30)

So far as Scotland is concerned, as section 223 of the 1975 Act provides a general power of forfeiture in relation to 'any property which was in the accused's possession, or under his control at the time of his apprehension,' then, under the latter limits, forfeiture of a house in certain factual circumstances may be acceptable to the Scots courts (31). Similarly, the statutory power of forfeiture under summary procedure is supplemented with a statutory power to grant warrant for a search for forfeited articles by section 437.

2.143 In Donnelly v H M Advocate (32) the appellant was originally charged on Indictment with one offence of possessing diamorphine and two offences of possessing cannabis resin, all with intent to supply. He pleaded guilty to one of the cannabis charges, and he was acquitted on two other charges. He was sentenced to eighteen months imprisonment, and £1047 found hidden in his house was ordered to be forfeited. He appealed against sentence on the ground that the order of forfeiture was incompetent. On appeal, counsel for the appellant argued that the forfeiture of

the money was incompetent. It was said that the forfeiture could not be justified, under reference to a number of cases in England. These cases are not referred to in the judgement of the court. Counsel also argued that forfeiture could not be justified under Section 223(1) of the 1975 Act. In reply, the Crown conceded that if the order depended on the justification given by section 27(1) of the 1971 Act it could not be supported. The Court agreed with that concession. No reasons were given by the Court but it was said that:

> "Section 27(1) could not protect this order if that is all that we have to look at in determining the competency of the forfeiture." (33)

But the Crown argued that the order of forfeiture was competent under section 223(1) and under both subheading (a) and (b) or either of them. The Court was of the opinion that the order was competent under section 223(1)(b):

> "In the circumstances of this case the judge was entitled to be satisfied that the money found concealed in the flat in association with the paraphernalia of trafficking, and, indeed, the cannabis resin, was intended to be used by the appellant for the purpose of committing an offence and, for that matter, an offence under the Misuse of Drugs Act 1971. The intention was there to be seen and it arises as a reasonable inference from the material which was before the trial judge." (34)

The appeal was dismissed.

2.144 Donnelly's case is of importance for several reasons: first, it is an authority that makes clear that the powers under section 27(1) of the 1971 Act and under section 223(1) of the 1975 Act are not mutually exclusive and that by implication both powers might be applied in justifying forfeiture of different articles in the same case. Second, the broad terms of section 223(1) are such that 'working capital' can be

forfeited in Scotland in circumstances where that has been held unjustified in England. Indeed, in his commentary on Donnelly's case Sheriff Gordon observes that:

> "The 1975 Act is wider since it applies to 'any offence', and not just to the offence charged. The money here could be forfeited under the Misuse of Drugs Act only if it was the proceeds of the supply to which the accused pleaded guilty. It might have been forfeited under the 1975 Act for that reason, as having been used by buyers to facilitate the commission of offences, or as was the view of the court, as working capital, and therefore money which it could be inferred was intended to be used by the accused to commit further offences." (35)

Third, the two sections with which we are now concerned are a good example of the pragmatic and expedient nature of Scots criminal law and procedure.

2.145 It would be interesting to know what the Scots courts would make of R v Chresaphi (36) where the only ground of appeal against sentence concerned a forfeiture order under section 27(1) of the 1971 Act. Chresaphi was convicted of being concerned in the supply of a controlled drug, heroin. During the investigation of the case the police found in a locked cupboard in the appellant's bedroom a large sum of money in £100 bundles. The total was £3520. The appellant was living with a lady at the time and she told the police that the money had been obtained in the drugs business by the appellant. At this trial the appellant gave evidence and he denied that the money was from drugs. He said the money was from his work and it was kept out of the sight of the tax man. He also said that the money had come from his legitimate business. On appeal Caulfield J. held that the evidence of what the woman had said was not evidence which was admissable on the issue as to whatever or not the Court was satisfied that this money which

was found in this bedroom was related to the offence which was the charge on which Chresaphi was being tried, namely supplying heroin (37). Crown counsel conceded on appeal that there was no evidence that the money discovered and ordered in part to be forfeited did relate (a) to the drug trade or (b) to the charge before the court. On that ground the forfeiture order was quashed (38).

2.146 A similar scenario arose in R v Llewelyn (39) where the appellant pleaded guilty to possessing cannabis with intent to supply, and two counts of possession of cannabis and amphetamines. Policemen executing a search warrant at the appellant's house found two polythene bags, one containing one ounce of cannabis resin and the other containing five pieces of cannabis and a quantity of amphetamine. Some £400 in cash was found during the search in the appellant's wife's handbag. He was sentenced to a total of nine month's imprisonment and the £400 was ordered to be forfeited under section 27(1). The appeal was only on the forfeiture order. It was decided by the appellate court, on the authority of the cases of Morgan and Ribeyre, that:

> "Although it was established that the £400 represented the appellant's working capital, it did not relate to the cannabis in his possession on the day of the search: the appellant would not require his working capital for the purpose of selling the cannabis in his possession on that day, and it was impossible to see how the money related to the cannabis which he had in his possession with intent to supply. The Court was satisfied that the trial judge's findings of fact (that the appellant was dealing commercially) were fully justified but that did not mean that the Court was able to make the forfeiture order. The words of the statute were clear and must be strictly followed. The forfeiture order must be quashed. (40)"

It is interesting that in Dr Thomas' commentary on this case he suggests that the appellant could have been fined a sum equivalent to the money found during the search. But, he cautions, the sentencer must avoid the trap (41) of justifying the fine by reference to earlier offences which have not been proved or admitted. To do so offenders against the principle that an offender should not be sentenced for offences which have not been brought home to him. He continues:

> "The sentencer must make it clear that he is imposing the fine solely for the offence for which the offender is before the court, and not for the purpose of removing the profits of earlier unproved offences." (42)

This of course contrasts with Donnelly's case where the court held the money in his possession to be in effect for the purpose of committing future offences. However, the foregoing cases all represent the practical results of Parliament's modest attempt to strengthen the power of the courts in dealing with drug offenders. It will be shown that what happened in 1985 represents a wholly different effort.

2.147 However, most recently in R v Churcher (43) the appellant pleaded guilty to various charges on three Indictments. The charges included supplying controlled drugs and possession of a controlled drug with intent to supply. The appellant admitted dealing in amphetamine sulphate and cannabis. He was sentenced to a total of two years imprisonment and forfeiture orders were made in respect of two sums of money; £610 and £577, which were found in his possession at the time of his apprehension for offences in two of the Indictments. The appellant claimed that one sum of money was a loan from his mother, and that the other had been withdrawn from a building society. The sentencer made the forfeiture orders without allowing the appellant to call evidence to show that the two sums of money were not related to

the offences in terms of section 27(1). On appeal it was held that the power to order forfeiture was valuable in drug offences and should be used when it was appropriate to do so: however, proper investigation had not been made to ensure that the provisions of the statute were fulfilled. The Court was concerned that the appellant had not had a proper opportunity to establish that the Court should not be satisfied that the money related to the offence. While the sentences of imprisonment were held to be wholly appropriate, the forfeiture orders were quashed. Lord Justice Woolf held that:

> "The Court is anxious to make clear that the power to order forfeiture is valuable in drug offences and should be exercised where it is appropriate to do so. Regretably this is another case on which, no doubt because of the pressure to which Crown Courts are now frequently subject, the proper investigations were not made so as to ensure that the courts can make a forfeiture order. It would be preferable that a little more time were taken to inquire into these matters to ensure that the provisions of the statute are fulfilled. If that were to be done it would not be necessary for this Court to interfere with regard to otherwise desirable forfeiture orders." (44)

In deciding this, the Court made it clear that it was not deciding the matter of forfeiture, only ensuring that the appellant had not had an opportunity of calling evidence in support of his contention that the money was not related to drugs offences.

2.148 Section 27(2) provides:

> "This court shall not order anything to be forfeited under this section, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made."

The power in subsection (1) is subject to that in subsection (2). It is interesting to note that the power in subsection (1) allows forfeiture, destructive or other expendient dealing although subsection (2) appears to relate only to forfeiture. There may be circumstances in which the distinction is material. For the moment one point that may be worth considering further is that the applicant by subsection (2) must be:

> "... a person claiming to be the owner or otherwise interested in ..."

the thing sought to be forfeited. It may well be said that such an applicant is not before the court as an accused person. The section does not appear to prevent the court making an order for forfeiture of property belonging to a person who has not been convicted of the offence in question (45). The final words of subsection (2) suggest that the onus is on the applicant throughout, although this cannot be said to be a legal burden, rather simply a persuasive one.

2.149 In R v Beard (46) Caulfield J. held:

> "My powers under section 27(1) are virtually unrestricted. I can order the destruction of the property, or I can order that it should be dealt with in such a manner as the court may order. Obviously, I must adopt a judicial not a whimsical approach as regards the words "in such other manner as the court may order." (47)

It has been shown, it is submitted, that the judicial power is far from 'virtually unrestricted' and that the bench have set limits on that power. Reported cases are generally few in number but it must, surely, be accepted that, as Lord Wilberforce has said, section 27 is:

> "... an important and necessary section for the suppression of the traffic in drugs." (48)

B. 1985 and later

2.150 (i) Scotland

The public pressure and political debate that preceded the changes in law in 1985 cannot really be divided amongst the jurisdictions of the United Kingdom. The essential reason for the distinction made here is that Parliament responded in different ways and at varying speeds in each of the two larger jurisdictions. There was a variety of sources of pressure of the border; for example the chairman of the Scottish Police Federation told that body's annual conference in April 1984 that:

> "... only pathetic attempts had been made so far to tackle the growing abuse in Scotland. The cost of stronger action would be cheap at the price when related to the human misery the problem caused."

In reply Mr Michael Ancram, the Under Secretary of State for Scotland, assured the policemen that:

> "... the Government shared their deep concern and revulsion at a growing evil, from which no section of society appeared to be immune." (49)

2.151 The response of the legislature became apparent in the Law Reform (Miscellaneous Provision)(Scotland) Act 1985. The nature of the provision is perhaps not strictly speaking a forfeiture but it is still convenient to consider the matter here. Section 39 of the 1985 Act inserted a new section into the 1975 Act namely section 193B. This section applied only to solemn procedure and to a person who is convicted of an offence to which the section applies (50) and who is sentenced in respect of that offence to a period of imprisonment or detention. In these circumstances it was provided that:

> "... the Court shall, unless it is satisfied that for any reason it would be inappropriate to do so, also impose a fine."

Subsection (2) provides that in determining the amount of a fine imposed:

> "... the Court shall have regard to any profits likely to have been made by the offender from the crime in respect of which he had been convicted."

In his annotations on the 1985 Act Professor JM Thomson of the University of Strathclyde makes two points about this sub-section:

> "First, it is only the profits likely to have been made by the particular offender from the crime which is relevant, not, for example the profits which a co-accused is likely to obtain by committing it: often the offender may only receive drugs for his part in the offence. Secondly, it is only the likely profits of that particular crime which are relevant. Thus, it would appear that profits from previous drug-trafficking - even if known - are excluded. There will also be difficulty in assessing what profits were "likely" to have been made from the crime." (51)

By section 193B(5) it is provided that where the fine has not been paid any period of imprisonment or detention imposed for non-payment of the fine is to be served consecutively upon the initial sentence, unless the initial sentence is one of life imprisonment or detention for life.

2.152 (ii) England and Wales

The modest development in Scotland of fining offenders for likely profits will be contrasted sharply with changes south of the border. But, as a preliminary, it is worth remembering that the international aspect of drug-related matters must always be kept in mind. The jurisprudence of drug abuse has always been developed by domestic legislation and international agreements. The almost universal move to tackle the assets of the drug

offender have been well documented (52) and in some countries very extensive (53). In recent years controlled drugs in all their aspects have received very extensive press attention. The adverse reactions to the decision in Cuthbertson's case was thus amplified and the subject of comment. Of all the participants in the criminal justice system the police were perhaps the most vocal. The Association of Chief Police Officers held a three day conference in April 1983 and the main point to arise was the concern expressed about the profits to be made from drugs. The Association sought a change in the law to enable the courts to tackle the "Mr Bigs" of the drug trade (54). Thereafter in a debate on the policing of London the Home Secretary made plain (55) the Government's intention to take action to prevent professional drug dealers from profiting from their crimes.

2.153 Further examples, for that is all that can be put forward here, of the concern felt appeared at regular intervals. The Council of Eurpoe, through the "Pompidou Group", convened a meeting in September 1984 at which it was decided to consider new moves to trace and confiscate the financial assets of drug traffickers (56). At the end of the same year the Head of H M Customs and Excise Investigations Division made a retirement speech that was widely quoted. He observed that he saw the confiscation of smugglers assets as the biggest possible deterrent (57). The Chief Constable of Cumbria Constabulary said at a conference that, in his view, the major drug traffickers had a considerable advantage over most law enforcement agencies in terms of human, financial and other resources. He too called for wider powers (58).

2.154 There is perhaps scope for a study of the politics of the reform of the law of controlled drugs. In the absence of such a work two matters must be considered in detail here as of particular relevance to recent legislation. The first matter was the

publication in June 1984 of the report of a committee chaired by Mr Justice Hodgson. Although the committee was given a remit by The Howard Committee on Penal Reform and the subsequent study met those terms, the title of the book, The Profits of Crime and their Recovery, does not reflect the wider contents. The result of the committee's inquiries was a number of recommendations which deal with making good the loss suffered by the victim and depriving offenders of the profit of their crimes. These recommendations are to be found in three groups: the first concerns compensation, that is to say making good a victim's loss. The second set concerns the deprivation of ill-gotten gains from crime. The Committee's principal proposal was that courts should be given new powers to order confiscation of the proceeds of an offence of which the accused has been convicted. The confiscation order, it was advised, should be limited to the Crown Court and should seek to deprive the drugs offender of the net profit of the offence. In particular it was recommended that wholesale suppliers of Class A or B drugs should have the burden of proving that assets acquired after the date of the first proved offence were obtained legitimatley. The Committee advised the retention of the existing and separate power of forfeiture under section 43 of the Powers of Criminal Courts Act 1973 but extending it to any property belonging to the accused which had been lawfully seized (59). The third set of recommendations concerned the practical matter of bringing the accused's assets under control of the court. The main proposal of the Committee was that a High Court judge should have the power to make an order freezing assets of an accused person prior to his trial. These interim measures were an attempt to prevent an individual disposing of his assets of profits on arrest in order to avoid being deprived of them subsequently on conviction.

2.155 The Report is important for English law in that the Committee has, in the words of Mr Martin Wasik,

> "... striven to deal with an area of law which is at present not only very untidy, with related provisions in numerous different statutes, but which is also beset by fundamental difficulties of principle arising from the incorporation of compensation, restitution and forfeiture within the more traditionally penal objectives of the sentencing system." (60)

The thoroughness and clarity of the document is a distinguishing feature as is the historical introduction. It is regretable that Scots law has been ignored generally (61). Certainly the law here might not be much further advanced than in England but, it is submitted, there was some scope for considering such provisions as we have, particularly as, in Chapter 4, the Committee found time to compare the law in various jurisdictions abroad. The conclusion must be that the Hodgson Report is of as little importance in Scotland as it is of great importance in England. Mr Wasik concludes that the Report is "full of challenging ideas which merit wide discussions" (62).

2.156 The second matter of relevance to be considered prior to the recent legislation is the text of a speech by Lord Lane. In July 1985 Lord Lane, as Lord Chief Justice, addressed the Lord Mayor of London's dinner for judges. In a speech covering several topics his Lordship urged Parliament to introduce laws enabling drug traffickers to be stripped of their profits and to put pressure on the drug producing countries to cut production. His lordship said that:

> "There seems to be few signs of urgency. How many more years will go by, how many more children and young persons will have to die degrading deaths, before action is taken? One would have thought that there would be few things more important for Parliament to get on with, and few things less contentious." (63)

A mere three weeks after this speech the Government indicated that in the autumn of 1985 a package of "Draconian legislative measures" would be introduced (64). It is difficult at present to assess the precise effect of Lord Lane's public intervention but it seems unlikely that the nature and extent to the observations would have been over looked.

2.157 It is in this context that the Drug Trafficking Offences Act 1986 can be considered. The Act, which received Royal Assent on 8th July 1986, provides new powers for tracing and freezing the proceeds of drug trafficking and for a confiscation order to be imposed on a person convicted of a drug trafficking offence. It also provides increased maximum periods of imprisonment in default where the amount of the confiscation order is not paid in full, and creates new offences of assisting another person to retain the proceeds of drug trafficking and disclosing information likely to prejudice a drug trafficking investigation. Perhaps this is not the best place to consider the whole Act but it is relevant to highlight the aspects of the new provisions that may affect sentencing policy.

2.158 The first aspect of the Act is the provision by Parliament of an indication of what constitutes "drug trafficking." This phrase has been used very widely as we have seen for a variety of purposes from a general description of an accused's activities to a term of abuse. Section 26(1) of the 1986 Act provides that "drug trafficking" means:

> "... doing or being concerned in any of the following, whether in England and Wales or elsewhere -
> (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the Misuse of Drugs Act 1971 or a corresponding law;
> (b) transporting or storing a controlled drug where possession of the drug contravenes section 5(1) of that Act or a corresponding law;

> (c) importing or exporting a controlled drug where the importation or exportation is prohibited by section 3(1) of that Act or a corresponding law;
> (d) entering into or being otherwise concerned in an arrangement whereby -
> (i) the retention or control by or on behalf of another of the proceeds of drug trafficking by him is facilitated, or
> (ii) the proceeds of drug trafficking by another are used to secure that funds are placed at his disposal or are used for his benefit to acquire property by way of investment."

Perhaps the first impression of the definition is that Parliament has extended the meaning of the term beyond the inclusion of merely offences from the 1971 Act. But a statutory definition is also given for the term "drug trafficking offence" which means any of the following:

> "(a) an offence under section 4(2) or (3) or 5(3) of the Misuse of Drugs Act 1971 (production, supply and possession for supply of controlled drugs);
> (b) an offence under -
> (i) section 50(2) or (3) of the Customs and Excise Management Act 1979 (improper importation); or
> (ii) section 68(2) of that Act (exportation); or
> (iii) section 170 of that Act (fraudulent evasion) in connection with a prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Misuse of Drugs Act 1971;
> (c) an offence under section 15 of this Act (assisting another to retain the benefit of drug trafficking);
> (d) an offence under section 1 of the Criminal Law Act 1977 of conspiracy to commit any of the offences in paragraph (a) to (c) above;
> (e) an offence under section 1 of the Criminal Attempts Act 1981 of attempting to commit any of those offences;
> (f) an offence of inciting another to commit any of those offences, whether under section 19 of the Misuse of Drugs Act 1971, or at common law; and
> (g) aiding, abetting, counselling or procuring the commission of any of those offences."

2.159 The second aspect of the 1986 Act considered here is the various orders created under the Act. It must be true to say that these provisions are, if not new to law, of a wholly different

character to anything that has gone before given the powers granted to the court and the complexity of the whole matter. There are now three different types of orders available in English law:

(i) Confiscation Order

Where a person appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences the court may make a confiscation order: section 1(1). Before making such an order the court shall first determine whether that person has "benefitted from drug trafficking": section 1(2). A person who has at anytime received any payment or other reward in connection with drug trafficking carried on by him or another has benefitted from drug trafficking: section 1(3). The amount to be recovered under the confiscation order shall be the amount the Crown Court assesses to be the value of drug trafficking: section 3(1). The court shall then order the defendant to pay that amount or order that amount to be taken account of before making any other order by way of sentence: section 1(5).

(ii) Restraint Order

If at any time after proceedings have been instituted in England and Wales against the defendant for a drug trafficking offence but before they have been concluded, the High Court is satisfied that there is reasonable cause to believe that the defendant has benefitted from drug trafficking, the court may by order prohibit any person from dealing with any property available in respect of the defendant: section 6(1).

(iii) Charging Order

If, at any time after proceedings have been instituted in England and Wales against the defendant for a drug trafficking offence but before they have been concluded, the High Court is satisfied that there is reasonable cause to believe that the

defendant has benefitted from drug trafficking, the court may make a charging order on property available in respect of the defendant for securing the payment to the Crown of any amount which is recoverable in the defendant's case under a confiscation order or which, if a confiscation order were made in the proceedings, might be recoverable in his case under the order: section 7(1).

2.160 The remainder of the Act provides for various ancillary and supporting powers. Perhaps the most significant for sentencing purposes is that in section 5 of the 1986 Act. There, certain procedures are established for enforcing the payment of fines. Where the Crown Court orders a defendant to pay any amount under a confiscation order then the order shall have effect as if that amount were a fine imposed on the defendant by the Court. Further, substantial periods of imprisonment in default of payment are established: section 5(1)(b). As an indication of Parliaments determination it is provided additionally that any period of imprisonment in default of payment shall run consecutively to any period of imprisonment also passed as part of the same sentence: section 5(2).

References

(1) [1978] 3 All E.R. 961. The appeal to the House of Lords was reported at [1979] 2 All E.R. 511.

(2) Except for very minor provisions, section 58 of the Power of Criminal Courts Act 1973 excludes the Act from Scotland. There is a similar exclusion in section 59(5) of the Courts Act 1971.

(3) For discussion on the point see [1979] 2 All E.R. 511 per Lord Scarman at p513-4 and per Lord Edmund-Davies at p519.

(4) Lord Wilberforce dubitante, ibid at p511-2.

(5) ibid p516.

(6) as amended by the Criminal Justice (Scotland) Act 1980: Schedule 7 para 71. A number of cases concerning the power of forfeiture have been reported: in Simpson v Fraser 1948 J.C. it was held that it is not competent, in the absence of special statutory authority, to forfeit a motor car used as a conveyance to and form the scene of an offence against a fishing statute. Of immediate interest is the observation by the Lord Justice General (Cooper) in relation to the words 'the Court shall have power to order the forfeiture of any instruments or other articles found in his (the accused's) possession used, or calculated to be of use, in the commission of the offence' that:

> "It seems to me that these words import that there must be a direct and particular connexion between the use, actual or potential, of the article in question and the commission of the offence." (ibid p3).

(7) [1980] 2 All E.R. 401.

(8) ibid p403.

(9) ibid p403.

(10) ibid p402.

(11) ibid p407.

(12) ibid p404. The same argument was applied by analogy in R v Riley (1984) 5 Cr.App.R.(S) 335.

(13) Hansard H.C. Deb. Vol. 987 col. 1742 (3rd July 1980).

(14) A Samuels The Misuse of Rules of Statutory Interpretation 1980 Stat. L.R. 166 at p167 and see the reply by F Bennion 1981 Stat. L.R. 64. Mr Samuels had disagreed strongly throughout his article with the decision of the House of Lords and he argued at one point (p169) that:

> "... rules of statutory interpretation that permit convicted criminals to retain the fruits of their crimes either must be wrong or wrongly applied, or call for change."

Mr Bennion observed that this for him was a very strange proposition. He continued

> "... surely the change called for (if any) is in the Misuse of Drugs Act 1971, the wording of which irresistibly led to this result, and not in any rule of interpretation. We should not look to rules of interpretation to reverse the plain meaning of statutory words."

(15) ibid p167. But The Times of 12th November 1980 carried a story about the Inland Revenue issuing a large claim for back tax on the gains made in the course of the conspiracy thus halting the plans of the appellants to sue the authorities for the return of the assets.

(16) A point made by Sherrif Nicholson at para 7.01 at p113. It is submitted that the pragmatic terms of sections 223 and 436 of the 1975 Act might usefully be made apparent in circumstances such as occured in R Taafe The Times Law Report 16th April 1983. There the accused admitted being involved in unlawful importation but he was charged with importing cannabis resin. His defence was that he thought that he was smuggling gold. In these circumstances, in a Scots case the statutory power in the 1975 Act would still be open to the court even if the accused was acquitted, as Taafe was, for an offence had been committed.

(17) ibid para 7.03 at p113-4.

(18) Further, as there seems to be no authorities in Scotland on this point, it would seem at present that the general and specific statutory powers are not necessarily exclusive. Accordingly, a court might on determining forfeiture make an order under each of the powers for different items depending on the circumstances.

(19) (1974) 1 W.L.R. 1549.

(20) ibid p1551.

(21) [1980] 2 All E.R. 401 at p406.

(22) Gloag and Henderson p555 footnote 8.

(23) ibid p407.

(24) C.F. R v Marland (1985) 82 L.S.Gaz. 3696.

(25) [1977] Crim.L.R. 488.

(26) This line of argument seems to have been the reason for varying the forfeiture order in Haggard v Mason 1976 1 All E.R. 337 but that, it is submitted, is unclear from the reported judgement.

(27) [1982] Crim.L.R. 538.

(28) The Times Law Report 7th August 1982.

(29) In South Africa the relevant statute provides for the forfeiture of "any immovable property": Reed p71-83.

(30) [1980] 2 All E.R. 401 at p406.

(31) see my article at (1983) 51 S.L.G. 15 at p18.

(32) 1984 S.C.C.R. 93.

(33) ibid p95.

(34) ibid p95.

(35) ibid p95.

(36) 27th March 1984, unreported.

(37) No reason was given in the judgment as to why that evidence was inadmissable but presumably the accused had not been present when that was said. Alternatively, if the lady did not give evidence at the trial then someone else must have narrated her explanation so that it would then be hearsay. The judgement is short on facts but it may have been given extempore.

(38) However, the court did increase the appellant's legal aid contribution be increased and, presumably, the tax man would take an interest.

(39) [1985] Crim.L.R. 750.

(40) ibid

(41) illustrated by R v Ayenshu (1982) 4 Cr.App.R.(S) 248 and R v Johnson (1984) 6 Cr.App.R.(S) 227.

(42) ibid p751.

(43) (1986) 8 Cr.App.R.(S) 94.

(44) ibid p96.

(45) A point made by Dr Thomas; Thomas p337.

(46) ibid

(47) ibid p1551.

(48) R v Menochal [1979] 2 All E.R. 510 at p512.

(49) The Times 26th April 1984.

(50) These offences are outlined in Section 193B(4) and may generally be described as most drug offences other than simple possession.

(51) (1985) Scottish Current Law Statutes.

(52) see for example (1983) 35 Bulletin on Narcotic Drugs. This publication of the Narcotic Drugs of the United Nations produced a special issue on the forfeiture of the proceeds of drug crimes.

(53) The Drug Enforcement Agency in the USA drafted and sponsored a Bill that eventually became the Drug Paraphernalia Act 1979. This Act generated considerable comment: L.B. Corwin Anti-Drug Paraphernalia Laws: Void for vagueness. (1981) 61 Boston Uric L.R. 453; KE Johnson The Constitionality of Drug Paraphernalia Laws (1983) 58 Notre Dame L.R. 833.

(54) The Times 9th April 1983.

(55) Parliament 11th May 1984, reported in The Times 12th May 1984.

(56) The Irish Times 15th September 1984. The subject-matter was raised to ministerial level in later discussions: The Times 17th June 1986.

(57) The Daily Mail 31st December 1984.

(58) The Times 30th April 1985.

(59) Hodgson p153. The restrictions associated with section 43 were described by Lord Justice Bridge as "deplorable" in R v Hinde (1977) 64 Cr.App.R. 213.

(60) [1984] Crim.L.R. 708.

(61) Scotland gets only two passing mentions in relation only to compensation at p58 and 116.

(62) ibid p724.

(63) The Times 10th July 1985.

(64) The Times 30th July 1985. The "Draconian" effect of the intended legislation was restated later at the Conservative Party conference that year: The Times 10th October 1985.

CHAPTER 3 SPECIALTIES

3.1 In describing the legal model of the drug trade the relevant case law has been analysed in terms of the statutory offences. But it is clear that there are amongst the cases a number of particular themes which cut across the whole variety of such statutory offences. These themes or categories are considered now under the headings of conspiracy, couriers, addicts and deportation. There are amongst these categories various important idications of sentencing policy.

3.2 A. Conspiracy

Inchoate offences, of which conspiracy is one, are committed when some step is taken to put a criminal intention into effect. Whereas the crime in view is not completed, the step taken is nevertheless sufficiently serious for it to merit punishment. It is worth mentioning, at this early point, that in Scotland conspiracy is still a common law crime (1), but in England and Wales it has been superceded by statutory provisions (2). The importance of this point, it is submitted, lies in the powers of the court in sentencing: in Scotland conspiracy as a common law crime is not subject to any maximum punishment provided by statute. In England conspiracy is now subject in all cases to the same maximum term of punishment as the consummated offence (3). For the latter reason it would seem from a reading of the judgements that the Court of Appeal (Criminal Division) that many of the appellants are treated, which is to say sentenced, as if they had committed the consummated offence. Much of the dicta therefore does not necessarily apply specifically to the crime of conspiracy. However, as the appellants have been convicted of conspiracy these judgements must be considered here.

3.3 The earliest case in which an indication of sentencing policy is laid down preceded the 1971 Act but only by about 18 months. In R v Ardalan (4) the appellant and a number of others had been charged on Indictment with a conspiracy to commit an offence contrary to the then customs legislation. This involved a conspiracy to obtain 10 kilogrammes of cannabis which had been imported illegally. After conviction, Ardalan was sentenced to three years imprisonment and the others similarly convicted were sent to prison for various periods. All appeals against conviction were refused and in the course of considering the appeals against sentence Lord Roskill L.J. said that:

> "It is plain, and this has been said in this court and elsewhere before, that for those who indulge in these drug conspiracies where there are large profits at stake, exemplary deterrent sentences are necessary. Amongst those of whom it is essential for the courts to strike in some effort to stop this trade are those who arrange the illegal importation into this country of drugs of this kind in defiance of the prohibition on their importaion. It is the man at the centre whom the court should be especially concerned to aim punishment both to punish him and to warn others that those who indulge in similar conspiracies are likely to receive similar or perhaps even longer sentences." (5)

and later it was added that:

> "In the view of this court it is almost inevitable that those who take part in conspiracies of this kind, great or small, receive custodial sentences and the fact that an immediate custodial sentence was imposed cannot be criticised in principle." (6)

3.4 The next case to be considered reflects precisely the policy settled in the first observation from Ardalan's case. R v Kemp (7) arose out of various concurrent activities which amounted to a number of conspiracies relating to the manufacture and production of lysergide, known as LSD. The conspiracies covered

a period of about seven years, and it was claimed that the appellants were responsible for the production of almost all the LSD seized in the United Kingdom in the years immediately before 1979, together with a significant proportion of that seized in Holland. Kemp was a highly qualified chemist (8) and his main co-appellant Bott was a medically qualified woman (9). None of the appellants had relevant previous convictions. The complexity of the issues at appeal and the parts in the venture played by each of the appellants is perhaps indicated by the fact that the hearing in the appeal court lasted four days. The court had to hear submissions ranging over five Indictments. The applications for leave to appeal against sentence concerned in essence the imposition of 13 years imprisonment on Kemp and Todd as the manufacturers and sentences ranging from three to 11 years imprisonment on the various distributors. In the event this important case came to be reported for the statements on the sentencing policy of the courts in relation to Class A drug offences. Lord Roskill in giving judgement observed that the Court had been greatly assisted by counsel who had put before it "every conceivable argument" in support of the general submission that the sentences were too high (10). In discussing the parts played by the ringleaders in the matter the Court said that they:

> "... were concerned quite deliberately, knowing full well what they were doing, in the manufacture and production of this vast quantity of LSD. But they of course needed channels of distribution for it was not much use having this vast quantity unless channels of distribution existed through which ... it could be moved around this country and out into Europe and indeed even in Australia, so that the full consequences of the evil in which these people were engaging might reach the far corners of the earth." (11)

3.5 In sentencing the appellants the trial judge had applied the statutory provision relating to conspiracy charges (12) and he regarded 14 years as the maximum sentence which was open to him to pass in the case of the ringleaders, that being the then

statutory maximum for the relevant substantive offences by the time the most serious part of this conspiracy had taken place. The appeal court had to consider two matters on sentencing: firstly, the trial judge's ceiling sentence and, secondly, the individuals sentences which the trail judge imposed on each of those involved in "this appalling story of crime." Before turning to consider these two matters there were certain general views:-

> "We have often said in this Court that this Court will not, where a trial judge over a long period of time and taking all the care that Park J. took, allocates degrees of responsibility as he sees it, whether after trail or pleas of guilty - interfere with the trial judge's assessment, unless he can clearly be shown either to have overlooked some fundamental fact or in some respect to have gone wrong in principle. A trial judge hearing the evidence, seeing the accused, hearing the mitigation of counsel, watching the course of the trial, is in an infinitely better position than this Court, with all its experience, can possibly be in dealing with such a matter. Of course from time to time questions of disparity of sentence do arise and when they do, this Court has to deal with them as best it can, without the advantages which the trial judge possesses. But where in a case of this kind disparity is alleged by most of the applicants, and the trial judge has taken the pains that Park J. took, the burden upon you who seek to disturb the sentences arrived at with such care is indeed formidable and no counsel has shrunk from that fact." (13)

3.6 In dealing with the question of the trial judge's ceiling sentence, the appeal court had to consider the evidence led by one of the appellants. That evidence was from a doctor of medicine and it was to the general effect that LSD was less dangerous than heroin in that it was not addictive, that it did not lead to violence and that its effects were less devastating to the individual than heroin. The doctor was of that view based on his own researches and also of the view that LSD ought not, if the decision rested with him, to be a Class A drug. Counsel argued that where a trial judge is face with a case involving a

controlled drug, he might require evidence to assist him as to the propensities of that particular drug. In so doing, the trial judge ought to have had the benefit of such evidence and graded LSD cases such as the present appeals below heroin in gravity (14). The appeal court rejected that argument stating explicitly that it is no part of the duty of a trial judge nor of that Court to grade the categories of Class A drugs into sub-categories. While the trial judge and that Court may be assumed to have certain knowledge as to drugs the prosecution and the defence, in appropriate cases, would be ready to assist with any additional information or evidence if required. Regretably the Court did not continue the point to state what knowledge the trial judge and the Court may be assumed to have on controlled drugs. It was said later:

> "We are therefore concerned - whatever the relative dangers of heroin or LSD, it is no part of our duty to rule on them and we have not the slightest intention of being drawn into such a controversy - and the learned judge was concerned, with a conspiracy on an enormous scale to manufacture, produce and distribute LSD, a category A drug." (15)

It was on that basis that the Court rejected the argument that the ceiling of 14 years taken by the trial judge was wrong in principle. But the sting in the tail was the threat from the Court that:

> "If crimes of drug abuse with LSD or heroin cannot be stopped by sentences such as the learned judge found necessary to impose in these cases, then something else has got to be done to stop it, and the only remaining weapon in the hands of the courts, reluctant as any court is to pass very long sentences, will be consecutive sentences." (16)

3.7 The second matter for the appeal court was the individual sentences imposed on each appellant and the failure, or so it was said, of the trial judge to give sufficient weight to the mitigation. The Court acknowledged that the effect of heavy sentences on families, wives, girlfriends and children was "highly tragic." But so far as each of the appellants was concerned it was stated that:

> "Without Kemp none of this would ever have taken place, because it was his skills and techniques which found a way of manufacturing ever purer LSD from these very simply obtained basic chemicals. If people choose to offend on this scale against the laws of society, then society through the courts can only respond by ensuring that over a long period of years the talents with which nature endowed them are not allowed to be abused to the peril of so many." (17)

The Court made the same views known about the appellant Todd. The trial judge had dealt with those who manufactured and produced the drug at the top of the scale and then graded those who were responsible for distribution further down. This arrangement was upheld on appeal. As for Bott, the Court held that there was little or no mitigation as she had assisted in the distribution of the drugs:

> "She took part in this conspiracy, she did it with her eyes open and society must ensure that those people who indulge in this sort of crime are not free again to indulge in it and once again to abuse their personal freedom for a long time, however much they may now seek to persuade this court that if they were now free their lesson would have been learned." (18)

3.8 More particularly the gravamen of the submission on behalf of the remaining appellants was that the trial judge had got the apportionment of blame wrong. The appeal Court belittled this submission. While it could be shown that one appellant had fewer tablets in his possession than another or another could

be shown to have made a lesser profit the Court held that:

> "... the sentences in these cases do not have to be assessed on a percentage basis by reference to who had what, who distributed what, who gained what. Some no doubt gained more than others. What the learned judge had to do was to apportion the blame, the degree of responsibility, as he saw it, and we see nothing wrong whatever with the sentences which he passed..."

The Court concluded that:

> "In the result therefore, giving these cases the most anxious considerations that we can, fully realising the implication for the families of these men of upholding these very long sentences, we think the learned judge would have been failing in his duty if he did not impose sentences on the scale which he did, in this by far the worst drug conspiracy case that has yet fallen to be dealt with in our courts, by ensuring that the willing participants, whether involved for some false motives of idealism or purely for greed, should receive sentences which reflected the gravity of the offences of which they were guilty." (19)

Accordingly the applications for leave to appeal against sentences were refused.

3.9 The week after Kemp's case was heard in the Court of Appeal the same forum, but with a different combination of judges, had to consider the appeals in R v Frish (20). There the appellants had pleaded guilty to conspiracy to contravene section 4 of the 1971 Act by offering to supply a Class A drug, namely heroin, to another. Each was sentenced to nine years imprisonment. It was accepted by the prosecution that there was no evidence of other involvement in the drug trade by the appellants and that the transaction for which they came before the court was their only transgression. The facts were that Sen, the second appellant, had obtained 491 grammes of heroin and then enlisted Frish's assistance in selling it. Frish contacted a potential buyer who

turned out to be a police officer. Lord Lawton L.J. laid down policy:

> "What, then, is the proper sentence? This court is familiar with the tragedies which arise from this heinous trade of trafficking in heroin; and the policy of this court, as of courts all through the civilised world, is to do all it can by the sentences it imposes to stamp it out. When professional drug pedlars of heroin are convicted they must expect very severe sentences indeed. When beginners in this terrible trade are caught they must expect severe sentences.
>
> The question is whether the sentences passed in this case were appropriate to beginners in the trade. We have come to the conclusion that they were met, they were too severe for mere beginners, as the prosecution through the police officers accepted that they were. We cannot draw any distinction between them. Mrs Sen had the heroin and Frish was willing to distribute it. In these circumstances they should have the same sentences." (21)

The Court allowed the appeals in so far as the periods of imprisonment for each appellant was reduced to seven years.

3.10 The broad nature of the conspiracy charge is indicated in the following charges. In R v Saleem (22) the appellant was convicted of conspiracy to import, and conspiracy to export, morphine tablets. The tablets were imported from Pakistan and it was intended to export them to Denmark. Saleem was sentenced to seven years imprisonment. At the trial and on appeal, it was said that he had made little or no profit of the affair. The Court said that the matter was exceedingly serious, some twelve thousand tablets being involved. London was being made a centre for the traffic and the Court did not want the country to become a clearing house for drugs or to be known by other countries as being a temporary warehouse for drugs. Such drug offences required long sentences in the hope that the trade in drugs would thereby be stopped. However in all the circumstances, the

sentence would be reduced to five years, bringing it in line with the sentences passed on the accomplices. But to mark the Court's disbelief of the claims that Saleem had made no profit, there would be a fine of £2000 with one year's imprisonment consecutive in default of payment.

3.11 The case of R v Carrington (23) is a very notable drugs conspiracy case not least for the occupation of the appellant: he was a detective sergeant in the Drugs Squad of the Metropolitan Police. He was convicted of conspiracy to contravene the provisions of the 1971 Act and two charges of supplying a controlled drug. The activities of the squad in 1976 led to the seizure of 11½ hundred weight of cannabis. That drug was taken to a police store prior to destruction. Some of it was removed from a van in which it had been put for conveyance to the destruction point. Over a period of six months or so, Carrington supplied 950 pounds of one variety of cannabis and a further quantity of another variety and he received £6000 which was later recovered from him. He was sentenced to seven years imprisonment. On appeal it was submitted that the sentence did not sufficiently take into account that another man involved in the matter as a result of giving a false account of events (including saying that Carrington blackmailed him into taking part and that he received very little of the proceeds of the sale of the cannabis) was discharged conditionally, that Carrington was subordinate to senior officers against whom there was insufficient evidence to support a committal for trial, that the offences were stale and that he had tried to help with police investigations. The Court held that the disparity with the other man could not be taken into account in the circumstances and that allowance was made for the fact that he was the tool of his superiors. The appeal court accepted that Carrington had been under strain for a long period and that he had given assistance

but, nevertheless, it went on to say that:

> "... one is bound to observe, if it needs observation, that this type of offence committed by this type of man, a sergeant in the Drug Squad of the Metropolitan Police, strikes at the very foundation of justice and that may be a cliche, but it is a necessary cliche, in these circumstances. These types of offences undermine the whole administration of the criminal law. One does not have to attend very many trials in this part of the country to realise what the effect of this sort of behaviour by a police officer means so far as the administration of justice is concerned, what it means so far as deliberations of juries are concerned. It cannot be too strongly emphasised that these offences are as grave as any can be so far as justice is concerned and in these circumstances, though it grieves us in many ways to have to do it, we are bound to say that there is nothing wrong in the length of this sentence." (24)

There may well be a reasonable argument for saying that Carrington's case would be more apposite for a study of sentencing and breach of trust. Perhaps the importance of the case for this study is as an illustration of the insidious nature of the drug trade. Further, it is a good example of an exemplary sentence in the circumstances. Saleem also received a heavy sentence by way, clearly, of warning others. A common factor of the cases is profit and the involvement of others not before the court. The Court stated explicitly that it did not believe that Saleem did not make a profit and the recovery of £6000 in cash from Carrington appears to have been an influencing factor in his appeal.

3.12 In R v Ross (25) the appellant had conspired to supply cocaine to two policemen who were pretending to be customers. Seventy-eight grammes of cocaine was obtained by one of the conspiracters for the purpose of the transaction. The appellant was sentenced to six years imprisonment: the co-defendant who obtained the cocaine

and thereby played a greater part in the conspiracy received three years imprisonment. The judgement of the Court of Appeal is interesting for the almost unique description by the trial judge of the way in which he arrived at sentences. That judge had said that the first thing that he had to do was decide what the correct sentence was for Ross's part in the conspiracy to deal in cocaine of this quantity. The evidence was that it was in an uncut state, that it had been bought for £3000 on credit and that it would be sold for £7000. He came to the conclusion that an appropriate sentence would be seven years imprisonment, and that allowing for Ross's plea of guilty and mitigation the sentence ought to be six years which was what was imposed. The issues of sentencing policy not necessarily concerned with controlled drugs but raised by this case was twofold: first the discount allowed for a plea of guilty which need not be considered further here (26) and second the recognition given by the Courts of the assistance given by accused persons to the police. Ross alleged that he was aggrieved because his co-conspirator had been sentenced to a lesser period of imprisonment after a document had been handed up to the trial judge. The contents of this document was not known to Ross but it was known to the Court of Appeal who dealt with the point and said that:

> "It is well-established that those who give information to the police get a very substantial discount on their sentences. It is one of the facts of life that in dangerous crimes such as distribution of drugs, which is done in secrecy, and in which very large sums of money are involved, there is no way in which the law can be enforced without the help of information. No more need be said about that." (27)

Thereafter the Court referred to the co-defendant receiving the substantially discounted sentence as being in a "special category." This is an unambiguous statement of policy by the

English appeal court and it is intended to encourage accused persons to assist the police not for purposes of altruism but for very positive rewards. As Ross appears not to have assisted the police he did not fall into that category. However, according to the appeal court, the plea of guilty by Ross did put him into another category and the Court held that the discount of one year for that much had been too little. The discount ought to have been two years. Furthermore, as the initial sentence of seven years was thought to be too high, a more realistic sentence was six years. The appeal by Ross was allowed to the extent of quashing the sentence of six years and substituting a sentence of four years. Similarly in R v McCullough (28) the appellant had pleaded guilty to a conspiracy to supply a controlled drug namely LSD. He was arrested in possession of sufficient LSD to make 8000 doses, and admitted being concerned in a scheme to import and sell LSD with an estimated value of £42,000. He was sentenced to six years and on appeal it was held that a sentence of eight years imprisonment would not have been out of place for an operation on this scale. Further, the court held that the trial judge had given sufficient credit for the appellant's unfortunate personal circumstances, his plea of guilty and the help that he had given the police; in short

> "That the learned judge made a reduction of two years was a sufficient indication to the appellant and others that frankness does pay even in these circumstances." (29)

3.13 The remaining reported cases concerning conspiracy are more important for the drugs issues raised than any other issue. In R v Suermondt (30) the appellant pleaded guilty to conspiring to import 4 kilogrammes of cocaine in two separate consignments, and being concerned in the importation of a further consignment of 5.9 kilogrammes of cocaine. He had been concerned in the purchase of cocaine in Peru and its importation with a view to sale in the United Kingdom. The

total estimated street value of the three consignments was about £1,400,000. He appealed against a sentence of 10 years imprisonment. The judgement of the Court set out the extra-ordinary facts of the conspiracy involving Suermondt as the ringleader and detailed the points made in submission by his counsel at appeal. Of interest now was one particular point, namely that the trial judge had failed to give sufficient weight to the clear distinction in the appellant's mind between the seriousness of importing cocaine as he was doing and the seriousness of importing a dangerous drug like heroin. In fairness, the matter had been raised before the trial judge and that had led him to adjourning for further evidence about the dangerous qualities of cocaine. In view of that evidence and a further report that had been put before the Court of Appeal, the latter Court held that:

> "It is clear ... that on any showing cocaine is both addictive and dangerous and is a socially harmful drug. It may well be that it is less dangerous and less socially harmful than heroin but it seems to this Court that there is little profit in comparing its importation with the importation of heroin because if the appellant had been caught importing heroin on the scale of this importation of cocaine the sentence would have been very much higher and in the region of 14 to 15 years.
>
> It may well be that because of the higher price of cocaine its socially harmful effects are less obvious than the socially harmful effects of other drugs, but (counsel for the appellant) eventually submitted to us that cocaine should be considered on a par with amphetamines in its dangerous qualities and we are content to deal with the matter on that basis." (31)

In concluding the judgement and dismissing the appeal the Court laid down that:

> "... this is a case where the overwhelming consideration to be borne in mind by the sentencer is one of deterrence. Here the appellant admitted taking three substantial consignments of a dangerous and addictive drug and, to use a cliche, took part in a game in which he was playing for high stakes, high profits on the one hand, if he avoided detection, a heavy sentence on the other, if he was caught. In those circumstances, any persons considerations of the appellant must be outweighed by the deterrent considerations." (32)

3.14 Exemplary sentences were also passed in R v Prevost (33) where 14 years imprisonment was given to a man said to be the leader of an international gang of cocain smugglers, and in R v Miller (34). In the latter case the appellant was a man aged 43 with a severe criminal record for offences of dishonesty and drugs. He had been released from prison in 1981 and three months later he was engaged in the current offence of conspiracy. On arrest he was searched by the police and he was found to be carrying £2000 which he had offered to pay for a supply of heroin. He was sentenced to an extended term of 10 years and on appeal it was held that in view of the gravity of the offence and his previous convictions for drug offences the sentence imposed was entirely appropriate. In R v Andaloussi (35) a 30 year old Morrocan became involved with 24 other individuals in the illegal importation of drugs into the United Kingdom. Over a period of four years at least 88½ kilogrammes of cocaine valued at £2,250,000 were smuggled. The grounds of appeal was disparity between his sentence and those of two of his confederates. It was held that the appellant was a principle in a serious long lasting conspiracy to import an addictive drug and he could therefore have no complaint against his sentence.

3.15 Finally R v Mansoor (36) is of interest for the detailed consideration of the appellant's place in the venture. The

appellant was convicted of a charge of conspiracy to contravene the 1971 Act and of possession of heroin with intent to supply it to another. He was sentenced to nine years imprisonment on each charge, concurrently. It seems to have been accepted all round that Mansoor was merely one member of a large team of people who were involved. At the relevant time he was found in possession of 321 grammes of heroin. In passing sentence the trial judge made it clear that he did not regard the appellant as being in the front rank of this conspiracy. He placed him "in about the second or possibly the third rank" (37) and he stressed Mansoor's role in providing a place to conceal the drug, in conducting negotiations and in indicating that other deals would follow although this was the first. On appeal, counsel for the appellant submitted that his client had been "further away from the original importer" than the trial judge had inferred from the evidence. There was nothing, according to the submission, to connect Mansoor with the importation and, it was emphasised, he was "a middle man very low down the line and not the financier." It was conceded that he was deeply involved (38). The appeal court held that a heavy sentence here was not wrong in principle but on the facts that passed was excessive. The sentence of nine years was quashed and sentences of seven years imprisonment on each charge was substituted, the sentences to run concurrently.

References

(1) Gordon p198.

(2) Criminal Law Act 1977 section 1(1).

(3) 1977 Act Section 3.

(4) [1972] 1 W.L.R. 463.

(5) ibid p471.

(6) ibid p472.

(7) There was a total of fourteen others involved variously as accused and appellants: (1979) 69 Cr.App.R 330.

(8) Lee and Pratt is the story of Kemp's case by the senior investigating policeman and a journalist. The diagrams (at p366-9) set out the nature of the conspiracy. The academic qualifications of most of the participants are impressive (at p371-8). Kemp's case was at the time the greatest drug conspiracy in the United Kingdom but that honour may soon have to be passed to others: in R v Boswell The Times 11th July 1984 the conspiracy was said to involve cannabis valued at £6 million. In R v Wyatt The Times 8th August 1985 two brothers pleaded guilty to conspiring to smuggle heroin and each was sentenced to 14 years imprisonment. The report narrates that 2.5 kilogrammes of heroin with a street value of £2.5 million. In R v Comerford The Glasgow Herald 21st December 1985 the defendant was said to be at the centre of a £1 million international drugs conspiracy was sentenced to 14 years imprisonment and his son to 10 years. There have been many other cases with similar sums.

(9) It is interesting to note that Christine Bott was subsequently struck off the medical register by the decision of the professional conduct committee of the General Medical Council in 1979. She sought to be restored to the register in 1983 but this was refused. In support of her application, counsel had said that Miss Bott had been released on parole in August 1982 and she lived in York doing voluntary work with the mentally handicapped. While in prison she had completed a degree with the Open Univercity. Non of this apparently influenced the members of the Committee: The Scotsman 23rd July 1983.

(10) ibid p343.

(11) ibid p346.

(12) ibid at footnote 3.

(13) ibid p347.

(14) ibid p348.

(15) ibid p349. The court also rejected firmly the point that LSD was harmless on the authority of R v Lipman (1969) 53 Cr.App.R. 600 where the appellant had killed his girlfriend while he was under the influence of the drug. Lord Roskill said that one:

> "... may venture to question how it can truly be said, or at least in the present state of medical or scientific knowledge, that LSD is as harmless as some believe, however much less harmful it may be than heroin, opium and certain other drugs."

(16) ibid p350.

(17) ibid p350.

(18) ibid p351.

(19) ibid p352.

(20) (1979) 1 Cr.App.R. (S) 226.

(21) ibid p228.

(22) 144 J.P.N. 27.

(23) 145 J.P.N. 457.

(24) Transcript of judgement.

(25) (1981) 3 Cr.App.R.(S) 291.

(26) It is quite clearly a principle of sentencing policy in England that a plea of guilty will entitle a defendant there to look for a discount on sentence. Such a principle has been said unquivocally not to apply in Scots law: see my note:(1983) 84 SCOLAG Bul. 140-1.

(27) ibid p293. Similar considerations arose in R v Morgan [1977] Crim.L.R. 488 where the appeal court held that insufficient credit had been given for assisting the police and a sentence of imprisonment was reduced.

(28) (1982) 4 Cr.App.R.(S) 362.

(29) ibid p364.

(30) (1982) 4 Cr.App.R.(S) 5.

(31) ibid p7-8.

(32) ibid

(33) The Times 24th December 1983. This was a very brief news report devoid of any meaningful detant. The only other matter of note was the judge's description of the defendant as "a most wicked man." R v Ilahi The Times 28th June 1985 concerned an enormous conspiracy that appears from the newspaper report not to have got beyond the planning stage. Nevertheless the defendants, a doctor, a barrister and a fish shop owner were described as "merchants of misery and death." The two professional men received 10 years imprisonment each.

(34) (1984) Halsbury's Monthly Review para D1419e (July).

(35) (1984) Halsbury's Monthly Review para D1735e (Sept).

(36) (1985) 5 Cr.App.R.(S) 404.

(37) ibid p406.

(38) ibid p407.

3.16 B. Couriers

The crucial importance of the prohibition on the importation of controlled drugs has been underlined earlier in this work. The various attempts to circumvent the prohibition may, perhaps generously, be described as tests of human ingenuity. One of the least subtle of these attempts is simply to have an individual transport the controlled drug through the point of entry. The small size of many controlled drugs tends to ease the problems associated with such attempts and also to provide an incentive. This part of this work is about the individuals who transport personally the controlled drugs and who therefore act as couriers. This particular trade has caused considerable judicial comment and some anguish at hard decisions that have had to be taken.

3.17 In R v Ayoub (1) the appellant had been convicted on two charges of being knowingly concerned in the fraudulent evasion of the restriction on the importation of cannabis and sentenced to six years imprisonment on each charge concurrent. On appeal it was said that as the evidence had shown that the appellant had a quantity of cannabis worth retail about £30,000 to £50,000 (2); that her house appeared to be a major distribution centre; that in letters found in her possession she appeared to express pleasure at evading the authorities on previous occasions and that she knew a considerable amount about the material law and penalties; that she was to be regarded as a professional trafficker and to be sentenced accordingly. The defence submission that her enforced separation from her young children would be disasterous for them was rejected in that as she had had the children with her at the time of her apprehension. She had used them to evade the likelihood of being stopped. Lane J., as he then was, said that:

> "That type of behaviour does not endear the mother to someone who is looking for mitigating circumstances." (3)

Further, the offence was such that the appellant must go to prison for a considerable time and children, being what they are, will get over the "first wrench of deprivation." The Court held that this sort of offence must inevitably be visited with a harsh sentence to punish the appellant and to discourage others. Accordingly, application for leave to appeal against sentence was dismissed. This aspect of discouraging others is common to most courier cases and the appeal court is frequently presented with cases in which the personal problems of the appellants are extreme ones.

3.18 Indeed couriers appear generally to be selected by their paymasters precisely for their problems. In R v Mehagian and Fenwick (4) the appellants were convicted to being knowingly concerned in the fraudulent evasion of a prohibition on the importation of drugs. Both appellants were American girls who had gone to Syria and taken work as dancers in a night club. Both became pregnant and moved to Lebanon. Mehagian was anxious to consult an English doctor but she had no money for the air fare to England. Money was given to her in return for taking twelve suitcases, containing 512 pounds of cannabis to England. Fenwick accompanied Mehagian. On conviction each was sentence to two years imprisonment. Subsequently, Mehagian's child was born with a heart condition. Fenwick's child died. The families of both girls were willing to take them back and look after them. On appeal against sentence Lord Lawton L.J., held:

> "It would have been easy for this Court to have taken a sentimental view. It would have been easy to say that the British public will benefit from the fact that the appellant Mehagian will leave the country and never come back, but the Court has to do its duty, and has to do its duty

> not only to the young of this country. It has to do its duty to the young all over the world. One thing which must not happen is that the unscrupulous villans who put these drugs into circulation should think that if they get hold of young people to bring drugs into England then they are going to have drugs brought into a country where the law is prepared to take a sentimental view. The Court has had to steel itself in this case to the fact that what has happened here was what happens in so many cases. These narcotic peddlars are always on the look out for young persons who will be willing to act as carriers. They change their tactics according to the views of the Courts which have dealt with the carriers. If they have reason to think that the Courts will be lenient with a woman who has a number of children, then they will find such a woman to act as carrier. If they think that the Courts will be lenient with students, then students are used as carriers. No doubt these villans in the Lebanon thought that two pregnant girls would excite the sympathy of the Court and the girls would not be running quite the same risks as others might who were apprehended as carriers. In those circumstances this Court feels obliged to uphold these sentences. It does so reluctantly but it does so in what it conceives to be its duty." (5)

It is impossible to know whether Lebanese drug barons in fact took notice of what English judges had to say on these matters or whether they simply sought to vary the type of people acting as couriers. The aim of the latter would be to avoid the authorities associating the carriage of drugs with any particular group. Further, the types of people in fact selected would be more susceptable to inducements or threats. The importance of the judicial observations in Mehangian's case lies in the view of these matters by the judges and, in particular, how their subjective assessment of accused persons was being 'tested' by the drug barons. The remaining relevant cases follow this narrow theme but the judicial views expressed are of interest.

3.19 In R v Taylor (6) the three appellants each pleaded guilty to fraudulent evasion of the prohibition on the importation of heroin. They had each been concerned in a world wide operation to transport heroin from the Far East through London Airport to America. One of the appellants had been stopped at the airport in possession of 516.5 grammes of heroin strapped to her legs. The appellants were all young women in their twenties, of previous good character and citizens of the United States. They were each subject to various personal or financial difficulties, and they had co-operated with the authorities after their arrest. Each appellant had been sentenced to five years imprisonment. In the Court of Appeal Philips J. noted that:

> "The value of the heroin was £1.5 million, perhaps £8 million in the United States of America."

and further that:

> "Each of (the appellants) was sentenced to five years imprisonment. A man named Laws, who was described as a field organiser, was sentenced to nine years imprisonment. A man named Beutes, who was one of the financiers, was sentenced to 10 years imprisonment."

and finally that:

> "(the appellants) were all young women of good records, but in difficulties of one sort or another. This is very pertinent to the matter in hand, because they are the sort of persons likely to be recruited as carriers for a number of reasons: (1) they look like tourists or holiday makers (2) being financially straightened, they were likely to go fairly easily for easy money, albeit they originally did not know what was involved and got involved to such an extent that they could not withdraw." (7)

It was on all those grounds that the Court dismissed the appeals and held that personal circumstances such as those of the appellants could be only of relatively minor importance.

3.20 Similarly in R v Anderson (8) the appellant, a woman of good character and the mother of young children, pleaded guilty to being concerned in the importation of cannabis. She was caught coming through customs with a holdall containing 7.88 kilogrammes of cannabis said to have a street value of £9000. She was sentenced to three years imprisonment and ordered to forfeit £500. The Court reaffirmed the relevant principle when Michael David J. held, in dismissing the appeal, that:

> "... when sentencing this appellant the learned trial judge said, "one of the terrible features of this evil trade is that those who organise it very often choose people in difficult circumstances to act as couriers and your case is no exception to that pattern."
>
> We agree, and would add that one of the reasons for so doing is that the evil persons who profit most by this trade are able to say to such couriers: "Well, of course, if you are caught, because of your circumstances you will be dealt with leniently."
>
> This Court has said in many cases - and we repeat - that people who act as couriers in this class of trade must expect substantial immediate sentences of imprisonment. The sentence imposed in this case is well within the tariff for cases of this sort. Indeed, it is rarely, if ever, that a sentence would be reduced by this Court to less than three years imprisonment in such a case ... It is quite impossible for this Court to say that this sentence was either wrong in principle or manifestly excessive, and accordingly, this Court has no hesitation in upholding it." (9)

3.21 Again in R v Taylor (10) the trial judge had said that the

> "... message must be writ large and clear for all to see, that those convicted of importing this drug into this country, whether for distribution here or as a staging-point, await substantial sentences of imprisonment." (11)

The 'staging-point' mitigation had in effect been disposed of by Lord Lawton in Mehagian's case when he made it clear that the Court owed a duty to the young all over the world but the matter was raised subsequently as we have seen and unsuccessfully so. Equally in R v Mbelu (12) the appellant was found to be in possession of 3.47 kilogrammes of cannabis and he was convicted of importing that substance. Mbelu was then a passenger in transit from Nigeria to the United States and it was accepted that he intended to remain in the United Kingdom, between planes, for only about one hour. He was sentenced to 18 months imprisonment. On appeal against sentence, Drake J. said that:

> "What is urged on this Court as grounds for reducing the sentence was his good character up to the present time; that he was merely in transit through the country on the way to the United States and, finally, the hardship which results from the length of this sentence to himself and his family. Unfortunatley, the fact is that many, many of those who engage in smuggling drugs are people of previous good character. As to the argument that the Court should treat this matter more leniently because the drugs were not destined ultimately for this country but were destined for the United States, that is not an argument which impresses this Court. It is not really a very attractive argument to say that this man can be sentenced very lightly because he was going to supply people or import the goods, if not to supply them at all, to people in a friendly country, but not this one. As to the hardship which may result to himself and his family, that again is really a matter that all to familiarly flows from criminals convictions." (13)

3.22 The case to be considered now is perhaps the best known of the courier cases, or it ought to be as it has been reported in at least five different journals. In R v Hamouda (14) the appellant, an Arab woman of 27 years, was illiterate and spoke very little English. She pleaded guilty to fraudulently importing 10.8 kilogrammes of cannabis resin. She had arrived at Heathrow Airport on a flight from Egypt, and was found to be carrying slabs of cannabis resin in the false bottoms of two holdalls. The cannabis resin had an estimated street value of £20,000. The appellant claimed that she had agreed to carry the cannabis resin for a man in Cairo, and would hand it over to someone in London. She was to receive £1000 which she needed to pay for an operation on her child who had a heart complaint. She was sentenced to two years imprisonment. In dismissing the appeal, Lord Lawton said:

> "It is a very sad case. But even sadder is the current abuse of drugs in the United Kingdom. From case after case coming before it this Court is aware that around the world, and in particular in the Middle East, are those who are doing all they can to get controlled drugs brought unlawfully into this country. Those who plan drug smuggling operations seldom themselves bring in the drugs; they employ couriers to do so. It is also the experience of this Court that they are always looking for couriers who, if they are caught, can tell a story which may affect their sentences. All kinds of couriers have been before the Court. The fashion in them changes depending on the attitude of the Court. A few years ago the courier was very often a student, and we were told that his life would be ruined by a sentence of imprisonment. The court found itself unable to accept that as mitigation. As a result students were not chosen as couriers. Then pregnant women were sent here as couriers, being told that not very much would happen to them by way of sentence. The Court decided that even pregnant woman would have to be dealt with in accordance with the full rigour of the law. Now we find this young married woman with a sick child acting as a courier. The same situation will probably happen if the court takes a lenient view in her case. Couriers

> will be told that not very much will happen to them, in the unlikely event of their being caught, if they are ignorant of the English language and have a young child.
>
> The menace of the illegal importation of controlled drugs is so great that the court has reluctantly had to take the view that those who engage in this traffic must expect severe custodial sentences. It is obvious from the facts of this case that the attitude of the learned judge that he had in mind all the points which were urged upon him and which have been urged upon us, and that he mitigated the severity of the penalty by imposing at the lower end of the bracket normally passed in this kind of case.
>
> It is with regret that in the circumstances we are unable to treat this case as an exception.." (15)

The echoes of Lord Lawton's earlier judgement in Mehagian's case are clear in Hamorda and by 1982 his Lordship clearly regarded the organisers of the drug trade as still probing the sensibilities of the judiciary with emotional cases. But whether or not these organisers actually care about what happens to their couriers is an open question. The main focus attention is most likely to be the drugs in question.

3.23 In 1983 The Times carried a number of reports of a trial at Maidstone Crown Court and these newspaper reports are most instructive. In R v Redding (16) about 30 individuals were either covicted of or pleaded guilty to a total in excess of 21 charges of fraudulently evading the prohibition on the importation of cannabis. They had committed the offences over a period of about three years and it was said that:

> "The gang ... devised a way to get accomplices into the immigration area ... known as "smotherers" their job was to "mind" through customs couriers who had large quantities of cannabis hidden in suitcases.
>
> They would create a diversion if officers looked likely to stop and search their colleagues. Frail, elderly women were used as couriers .." (17)

Most of the press attention focused on one such old lady, Margaret Redding then aged 69 years. She had been chosen, it was said, because of her age and her apparently innocent looks!

3.24 There are a good many other examples of couriers cases which fit in the general pattern outlined, for example in R v Parada (18) the appellants were both Bolivian women who could not speak English. They pleaded guilty to being concerned in the importation of cocaine hydrochloride. The substance was said to have a total street value of £½ million. One woman was arrested at the airport, the other at a London hotel, after apparently delivering the consignment to a companion. It appeared that the amount offered to the women was vastly more than they could expect to earn in normal employment. Each was sentenced to six years imprisonment. On appeal it was held that deterrent sentences would be passed in the hope of making it too expensive for people to act as couriers. Heavy as the impact of the sentence was on the appellants, the Court could not say that it was wrong in principle or unduly long.

3.25 The issue for July 1983 of the Bulletin of the Judicial Studies Board carried an interesting and relevant article concerning drug couriers. The writer was Judge Hilliard who discussed certain problems associated with drug importers and bail provisions; in particular an attempt was made to try to discover why warrants were issued so often for alleged drug offenders who had failed to appear for trial. The bail problem is irrelevant here but the judge said that:

> "Many of the defendants are birds of passage, or tourists with no real ties with this country They have no assets. They may not speak English, and they almost certainly have no home to go to here. They may have been forbidden to work in this country as a condition of entry so that they cannot lawfully maintain themselves..."

And later:

> "It must be borne in mind that this sort of crime is a highly organised business. No one can dispose of £10,000 of drugs swiftly, secretly and successfully unless there is already in existence a well organised disposal system, which is seldom detected. The organisers recruit couriers from those with the best mitigation potential in the event of capture. They study the sentences and appeals from them with some care. This is evident because if any particular mitigation strikes a responsive cord with the judiciary e.g. elderly smugglers, or mothers of children with holes in their hearts, such successful mitigation is thereafter followed by a number of further couriers with similar mitigation potential, who have been deliberately recruited."

Authorities for the judges' propositions are those cited earlier. An interesting point from the article is that the answer to the problem of absconding defendants is a large cash deposit on the basis that this would 'impose great financial strain on the illict organisation behind them, if couriers do not attend their trials'! Clearly the English judiciary see couriers as merely the foot soldiers of the army of drug traffickers. None of the judges seems to have considered that the carrying of drugs may well have been spread round as diverse a group of people as possible to lessen the chance of detection, with little regard to the ultimate fate of the couriers.

3.26 Finally, in R v Darby (19) the appellant pleaded guilty to being concerned in evading the prohibition on the importation of cocaine. He had been detected at an airport carrying 2.95 kilogrammes in various packets which were strapped to his back and his shins. The report narrates that the cocaine was in fact cocaine hydrochloride of 80 per cent purity. The drug was valued at £472,000. He was sentenced to ten years imprisonment and he was refused leave to appeal against sentence. The Court of

Appeal held that the sentence fell within the limits suggested for large scale importation of Class A drugs in R v Aramah. The sentence was correct. The Court seemed again to have the measure of the nature of the individuals with whom they were dealing for Leonard J. said that

> "... the applicant is a man who, to all intents and purposes, is of previous good character. We would only add that, of course, the normal situation in cases of this kind is that people who carry drugs - whether simply as couriers working for other people or, as would appear to be so in this case, as independent contractors or purchasers on credit - are generally people of good character because they are less likely to be suspect."

and later:

> "What seems to this Court to be important is the actual value and the considerable quantity of the drug which was imposed." (20)

The Court, with increased experienced of the drug trade, has clearly distinguished between couriers as agents for undisclosed principals and couriers working on their own account. Such is the objectivity achieved by the Court of Appeal in England that no longer are long sentences for importation upheld for couriers with good mitigation in judgements heavy in apologetic or sympathetic tones. Rather the precise occupation within the drugs trade is established and then, it is submitted, the appropriate sentence follows.

References

(1) (1972) 56 Cr.App.R. 581. The offences in this case precede the coming into force of the 1971 Act.

(2) It is perhaps worth reminding ourselves that the appeal was heard on 6th March 1972 so that comparable values, given inflation, would be much greater now.

(3) ibid p582.

(4) (1973) 57 Cr.App.R. 488.

(5) ibid p489.

(6) (1980) 2 Cr.App.R.(S) 175.

(7) ibid p176-7.

(8) (1980) 2 Cr.App.R.(S) 393.

(9) ibid p394. Anderson's case was reported and commented on by Dr Thomas: [1981] Crim.L.R. 270. In a short but interesting note he compares and contrasts this case with one decided shortly before and which has come to be regarded as a classic statement of sentencing policy. In R v Bibi [1980] Crim.L.R. 732, a case of importing cannabis, the court indicated that one category of case where shorter sentences might be imposed was that of the minor participant on the fringes of a major crime. In reducing the sentence for Bibi the court not only adverted to the "dangerous overcrowding of prisons" but also made it clear that it did not treat the appellant in that case as a courier deliberately chosen on the basis that she might receive more lenient treatment if caught, and, said Dr Thomas, the present decision seems to confirm that the long established policy towards couriers is not affected by the decision.

(10) ibid foot note 6.

(11) ibid p177.

(12) (1981) 3 Cr.App.R.(S) 157.

(13) ibid p158.

(14) (1982) 4 Cr.App.R.(S) 137.

(15) ibid p138.

(16) 10th August 1983 and thereafter.

(17) ibid

(18) [1984] Crim.L.R. 631.

(19) (1986) 8 Cr.App.R.(S) 33.

(20) ibid p34.

3.27 C. Addicts

Introduction

Aldous Huxley was a persuasive and committed advocate of the use of controlled drugs and in particular of mescaline. In his book Doors of Perception he said:

> "That humanity at large will ever be able to dispense with Artificial Paradise seems very unlikely. Most men and most women lead lives at worst so painful, at best so monotonous, poor and limited that the urges to escape, the longing to transcend themselves if only for a few moments, is and has always been one of the appetites of the soul. Art and religion, carnivals and saturnalia, dancing and listening to oratory - all these have served, in H G Wells' phrase, as Doors in the Wall. And for private, for everyday use there have always been chemical intoxicants." (1)

It is submitted that the reasons for addiction are in law irrelevant. The fact is that it exists and some consideration must be given to the definitions of drug addiction in its present context. In English law a "drug addict" meant:

> "... a person who, by reason of the habitual taking or using, other than upon medical advice, of any controlled drug within the meaning of the Misuse of Drugs Act 1971 -
> (a) is at times dangerous to himself or to others, or incapable of managing himself, or his affairs; or
> (b) so conducts himself that it would not be reasonable to expect a spouse of ordinary sensibilities to continue to cohabit with him." (2)

The spouse, while the section was in force, could apply to a Magistrates Court for a matrimorial order to be made under the provisions of the 1960 Act, on the ground that their spouse was a "drug addict" as defined above. Futher, and more recently, The

Misuse of Drugs (Notification of and Supply to Addicts) Regulations 1973 (3) contain provisions prohibiting doctors, except under licence from the Secretary of State or in certain cases for treatment, from supplying or prescribing cocaine or diamorphine to persons they consider or suspect to be addicted to certain controlled drugs. For the purpose of these Regulations it is provided, by Regulation 2(2) that:

> "... a person shall be regarded as being addicted to a drug if, and only if, he has as a result of repeated administration become so dependent upon the drug that he has an overpowering desire for the administration to be continued."

These Regulations concern only controlled drugs specified in its Schedule and an examination of that Schedule reveals a very much smaller number of substances and products than is to be found in the Schedules to the principal Act. It is worth noting, it is submitted, that accused persons who describe themselves or are described in the reported cases as "registered drug addicts" mean no more than that their doctors have informed the Chief Medical Officer of their status which may or may not, on the wording of the regulation, be a matter of fact. Further, there does not in the case law appear to have been any occasion on which the two definitions stated above have had to be considered or reconciled.

3.28 The brevity of these definitions contrasts with the 1950 definition from an expert committee of the World Health Orginisation:

> "Drug addiction is a state of periodic or chronic intoxication detrimental to the individual and to society, produced by the repeated consumption of a drug (natural or synthetic). Its characteristicics include (1) an overpowering desire or need (compulsion) to continue taking the drug and to obtain it by any means; (2) a tendency to increase the dose; (3) a psychic (psychological) and sometimes, a physical dependence on the effects of the drug." (4)

Edwin Schur in his important study of drug addiction contrasts addiction with the mere habit forming consumption of substances such as tobacco. Genuine addiction, he argues, implies tolerance and physical dependence whereas a psychological habituation is not truly addictive. The "causes" of this addiction need not concern us here but the features of it do. Schur described, as a continuing feature of the American drug problem, the spreading of the drug habit by addicts themselves. His analysis continues:

> "Some addicts may encourage friends to take up drugs. More typically the addict engages in actual drug peddling - usually to finance his own habit. There maybe less obvious factors also motivating the addict to introduce others to drugs. The more addicts there are, the larger the overall illicit traffic is likely to be, and this would operate to the drug-seeker's advantage; similarly addicts may rely on each other for help in cases of temporary shortage. Futhermore, there maybe a social-psychological need to feel a sense of group belongingess, which can be established only with fellow addicts." (5)

Elements of most of these points will become apparent in the following study of the case law. Before proceeding in that direction some brief reference ought to be made to Thomas De Quincy whose life and works form the basis of so much early work on drug addiction. De Quincey had been introduced to opium by a friend who had recommedned it as a means of relieving rheumatic pains. In his subsequent addiction to opium, he was to describe it as "the abyss of divine enjoyment", "the secret of happiness" and "a panacea for all human woes." Rather than consider directly the writings of De Quincey, it might be of interest to turn to Grevel Lindop's recent biography. Lindop seeks to synthesize the great amount of material on his subject since the publication in 1936 of two separate biographies. In a most interesting book the author produces a comprehensive literary and historical study of De Quincey and in the epilogue

Lindop argues:

> "Almost every aspect of the theory of addiction is highly controversial, so our conclusions must be tentative, but it seems clear that De Quincey's addiction was not a matter of chance. Contrary to his own assertion, he must have known a certain amount about opium before he first tried it in 1804, and he found it at a time when he was very vulnerable to its temptations. Perhaps the main factor in his continued use of the drug was a reluctance to face up to unpleasant situations. Opium helped him to forget or evade painful obvigations, and dulled the awareness that by doing so he was laying up trouble for the future." (6)

This introduction has been, of necessity, superficial for the nature, causes and consequences of drug addiction are clearly complex elements within a difficult subject. But, notwithstanding these aspects, the case law reveals a pattern of judicial attitudes to drug addicts, attitudes that are markedly difficult from those apparent when considering others participating in the drugs business.

3.29 Case Law

There might well have been a note of exasperation in the voice of Lord Parker C.J. when he said, in R v Glasse (7) that:

> "These hard drug cases, or indeed any drug cases, are extremely difficult to know how to deal with."

Some aspects of the difficulties facing the Bench were apparrent in a slightly earlier case that the same Lord Chief Justice had been required to deal with. In R v Fraser (8) the applicant had been found to be in possession of 24 heroin tablets. He had pleaded guilty to possessing these illegally and he had been sentenced to six months imprisonment and ordered to pay £200 towards the costs of the prosecution. Fraser applied for leave to appeal against sentence. By the time the Court of Appeal came to consider the application Fraser had taken treatment "of an

extremely disagreeable kind" but he had the "courage to go through with it" and the court accepted that he was by then no longer an addict. Lord Parker's difficulties perhaps started with being faced at all by someone such as Fraser:

> "He is a man of twenty-nine of extremely good family, his father a merchant banker, educated at a famous public school, having served with two renowned regiments."

But, it was held, this did not entitle the applicant to special treatment by reasons of these privileges. If anything, those privileges raised greater responsibilities and would tempt the court to give more rather than less by way of sentence to him than to a person who was deemed then man in the street. The Court made it clear, however, that:

> "... a man in the position of the applicant is not sentenced because he is an addict; everyone is extremely sorry for him. What he is being sentenced for is commencing the taking of the drug."

Later in the judgement some of the reasons for that compassion are explained:

> "... anybody who takes heroin puts himself body and soul into the hands of the supplier or the supply. Such persons have no moral resistance to any pressures that may be brought to bear on them." (9)

Notwithstanding the applicants successful efforts to rid himself of his addiction, the Court held that the public interest must be considered and not merely his own interests. In the absence of any special circumstances the Court was not satisfied that the sentence could be faulted in anyway in principle and the application was refused.

3.30 The importance for American criminal jurisprudence of Robinson v California (10) is that in that case the Supreme Court held it to be unconstitutional for a Californian statute to make it a misdemeanour to be addicted "to the use of narcotics." Dr Harvey Teff has argued that to label in this way the addict as a criminal and punish him for his addiction is rather like singling out one section of the community and making it subject to strict liability. This was not to say that compulsory measures for addicts are in all circumstances necessarily unacceptable, but merely that an exclusively punitive approach was even more negative in their case than for conventional criminal categories (11). Thus, in sociological terms, drug addiction in American law was seen as a status rather than an act. Lord Parker in Fraser's case sought to make it clear that the applicant was not being sentenced for his addiction although technically it was his unlawful possession that constituted the offence rather than the fact that he had started taking heroin. In the recent Scots case of H M Advocate v Ramsay (12) the appellant had pleaded guilty to possession of small quantities of heroin on two occasions. The trial judge, saying that he treated the case as a serious case of drug addiction, imposed a sentence of four years. On appeal against sentence the Lord Justice General (Emslie) observed:

> "Well, of course, drug addiction is not a crime and it looks as if the learned judge in proceeding to sentence has exceeded the bounds of what would be an appropriate sentence for possession and possession alone. From the information we have, this registered drug addict was consuming about one gram of heroin a day. Accordingly, ... what he was found to possess was little more than a day's supply of the drug which he appeared to need to feed his addiction. In addition to taking drugs, of course, we have heard that he consumed about two bottles of vodka a day. The daily cost must have been immense and it is not perfectly clear where the money came from ..." (13)

In the circumstances the sentence was reduced from four years imprisonment to two years imprisonment. The question arising is

whether it is reasonable to infer that the Court is applying a subjective test? It may be, for example, that another person in similar circumstances has developed a tolerance level of two grammes of heroin a day. While possession of this quantity is double that of Ramsay it is stall only that required to feed a daily habit. In short, much of the details are relative and vary with the individual concerend.

3.31 The decision in Ramsay's case raises two interesting points. The first point is that the Court limits somewhat less than obliquely at the cost to the individual of his habit of consuming heroin and vodka on the daily scale indicated. Bakalar and Grinspoon have commented that:

> "Many addicts, maybe most of them, have made a mess of their lives. They are socially isolated, neglect their health, and have no job or family; they pass the time committing burglaries, selling drugs on the street, waiting for a connection and nodding off. Eventually, if they survive long enough, they are likely to end up in prison, civil confinement, a detoxification clinic, or a methadone maintenance programme. Addicts who do not lead that kind of life often have enough fortitude and social support either to sustain the addiction on their own or to give it up on their own, untreated." (14)

An addict who trades in controlled drugs may do so in one of at least two ways: he may either deal in the substances as a means of livelihood on a large scale, in which case it maybe argued that his addiction is incidental, or he may deal in the substance on a small scale, mainly to pay for his habit. In relation to the former of these two possible alternatives R v Doherty (15) is relevant: the appellant was sentenced to four years imprisonment for possessing cannabis. The report is superficial but it appears that the Court of Criminal Appeal had evidence that he was trafficking in the drug which was being sent to him by relatives in Nigeria. Accordingly, the Court appears to have

regarded it as a special consideration that:

> "... he was not merely an addict, but traded the drug which was a very serious matter from the point of view of public health and morals."

In R v Bond (16) the appellant had become a drug addict and the Court said that:

> "Since taking drugs his personality had changed. He has become aggressive, he is anti-authoritarian and his only hope is co-operation in treatment not only to get him off the drugs but to get rid of the craving for the drugs." (17)

But while the Court below and the appeal court had given detailed consideration to the appellant's problems and conditions they were:

> "... not considering solely the question of curse but of punishment. This man was a pedlar - it has been suggested a technical pedlar, but he did go to Worthing Assembly Hall selling such tablets that he did not need and using the proceeds to buy or obtain more." (18)

The facts of the case tended to show that the appellant had made a considerable percentage profit from his sale of methedrine and benzedrine tablets. The Court declined to interfere with the sentence of three years imprisonment and the appeal was dismissed.

3.32 But if an attempt has been made to distinguish large scale dealings by an addict from small scale dealings then it maybe that such a distinction is regarded on occasions as being without merit: in R v France (19) the appellant received a total of four years imprisonment. He was found to be in possession of 5 grammes of heroin with a street value of £600 - 700, glucose for use as a dilutant, sets of scales and a list of customers. In mitigation it was claimed that he had dealt with drugs for the

short period of three weeks to finance his own addiction. On appeal, it was held that this type of addiction was:

> "... likely to perpetrate itself as the activities entered into to satisfy one addict's needs would in turn cause the misery and probable death of others."

Accordingly, as the sentence was in no way excessive the appeal was dismissed. Further, on the authority of McWilliams v H M Advocate (20) it would appear to be the case that the dealings by an addict referred to earlier need not necessarily involve financial gain. The appellant had pleaded guilty to supplying heroin to another addict and he explained that this had been done because his friend was suffering so severely from withdrawal symptoms that he felt he had to help. The appellant had shared his own supply with his friend. The appellant was unrepresented at his appeal hearing and the judgement of the Lord Justice General (Emslie) records that the appellant had told the court that:

> "... at the time of the offence of supply he was physically and mentally unstable, and that his ambition is to keep clear of drugs and to help those who have become addicts and who have had their lives ruined by the taking of drugs. He mentioned one or two other matters, like the consequences of his imprisonment, namely, the loss of his house and the contents thereof, and his inability to pay outstanding debts to the council and to the Gas Board. As he put it, rather graphically at the end, three years for sharing his own fix with a friend must be an excessive sentence." (21)

The Court considered these aspects, as had the trial judge, and held that while the sentence was severe it was not excessive and refused the appeal.

3.33 The second point arising from Ramsay's case is the element of compulsion. The philosophical aspect is that the overwhelming demand or requirement to continue the use of the controlled drug or to increase the use of it renders that person less "free" to decide his own actions. The need to satisfy the craving for the particular drug affects adversely the mind of the addict. Indeed that craving might be so great or immediate as to cause an addict to commit a number of other serious crimes to obtain the drug or money to purchase the drug. In R v Bath (22) the accused pleaded guilty to burglary, forgery, obtaining property (drugs) on a forged document and unlawful possession of drugs. In mitigation the accused said that he was under the influence of drugs at the time of the burglary and at the time of the forgery his prescription from the drug clinic he attended had been cut and he would do anything to avoid getting bad withdrawal symptoms. He was sentenced to terms of three and two years imprisonment concurrent. The accused had previous convictions and the Court appeared to take note of his failure to benefit from treatment at the clinic. On appeal the sentences were upheld, the Court saying that when drug addiction takes an individual to the lengths of breaking into chemist shops and forging prescriptions a serious aspect was introduced which "justifies and requires a punitive element" in the sentence. Such an element was also apparent, and was tempered, in R v Larcher (23) where a sentence of eight years imprisonment was held to be excessive for a series of burglaries of doctor's premises and chemist's shops by a drug addict who had not previously served a sentence of imprisonment. The appellant admitted a series of such crimes and to obtaining drugs by such means. The sentence was reduced to five years. Ormrod L.J. held that these were very serious offences and he commented that:

> "The social inquiry report is a typical report of the drug scene. There is a great deal of false optimism about an otherwise

> totally hopeless way of life. The appellant is not working and he is never likely to do any work as far as one can see." (24)

3.34 Perhaps the mose vivid example of the difficulties that drug addicts get themselves into as a result of their addiction is R v Gould (25). Gould and a number of other men pleaded guilty variously to charges of robbery, possessing imitation firearms and other offences. The robberies were for the most part committed in shops or similar premises, where assistants were threatened with imitation firearms or a knife, and cash or goods varying in total value from £160 to £7,900 were stolen. The appellants were sentenced to terms of imprisonment varying in total from seven years to 10 years. It was held that on the basis of the existing guidelines (26) the sentences imposed were proper and the appeals were dismissed. Counsel for the appellants had, however, pointed out a number of matters for the Courts consideration. More particularly, the appellants had been used by a man called Williams who was described (27) as "the prime activator of these offences" and he had escaped the clutches of justice. It was said that Williams was a "purveyor of heroin" and, according to Lord Lane C.J., that:

> "... by dint of persuading people like these appellants to take drugs, and then withdrawing the supply of drugs from them, he put them into a state of mind where they felt obliged to carry out these offences.
>
> It is put forward that since what was done was to get money for drugs to which they had become habituated, in order to stop withdrawal symptoms, this in some way was mitigation of the gravity of the offence. It is not. Whether one calls addiction to heroin, or other drugs, a a disease or not, it must be made perfectly plain that it is not an excuse of any sort for committing crime that the proceeds of the crime are going to be used in order to supply the offender with drugs to stop the onset of withdrawal symptoms." (28)

In short, the fact of drug addiction in an accused was to be regarded by the Courts in England as no mitigation.

3.35 Dr Thomas' analysis (29) of the primary decision with which the sentencer is faced is perhaps a most apposite decision in dealing with the drug addict. Does the sentencer impose in the name of general deterrence a sentence intended to reflect the offender's culpability or should an attempt to made, as an alternative, to influence the future behaviour of the addict? The English courts appear generally to have considered individualized measures as being suitable for addicts from a point and although the aims might have been constant the means have varied. An initial statement of principle maybe found in R v Ford (30) where the appellant pleaded guilty to housebreaking and larceny and he was sentenced to 27 months imprisonment. There was a co-accused. Goods to the value of £100 were taken of which about £60 were recovered. Ford had a few previous convictions for dishonesty but a large number for drunkeness and he was said to be a chronic alcoholic. The long sentence was given so that Ford could receive continuous treatment. On appeal, Sacns L.J. held that the appropriate sentence for the offences would be 12 months. This was on the basis that Ford seemed not to try to help himself. It was held further that:

> "This Court only desires to add one further thing. In relation to offences of dishonestly sentences of imprisonment - except when there is an element of protection of the public involved - are normally intended to be the correct sentence for the particular crime, and not to include a curative element. This Court wishes to make it clear that what it is now saying has nothing to do with special cases such as those of possessing dangerous drugs or cases where the protection of the public is involved ..." (31)

3.36 An attempt of a controlled drugs special case was R v Glasse (32) where the appellant was a drug addict who would not co-operate with treatment in open conditions. The Court held that a comparatively long custodial sentence, that is to say five years imprisonment, was appropriate since it provided the "best hope of a cure'. In R v Gaines (33) the Court passed a sentence of five

years imprisonment on a drug addict as being

> "... the right course ... with an eye to a possible early release date."

The rationale was said to be that the discretion about releasing the appellant was left to the authorities to exercise once they thought it right to do so. This appeal was heard on 18 March 1970 and therefore concerned the controlled drug legislation prior to the 1971 Act. The next relevant decision is R v Grimes (34) which was heard on 14 November 1974 and it appears to mark a change in judicial attitude over the intervening period. Grimes had been sentenced to three years imprisonment for a variety of offences relating to controlled drugs. In sentencing him the trail judge had made it clear that he was sentencing him not by reference to what the proper sentence was for the offences as such but what the judge thought the proper period of incarceration should be to enable the authorities to treat Grimes for his drug addiction. It was relevant that by committing these offences Grimes was in breach of an existing probation order. On appeal, Roskin L.J. said:

> "If his drug addiction can be treated in prison so much the better, but it is not right to pass a longer sentence because such a longer sentence might enable the drug addiction to be treated merely because a shorter sentence might not produce that report. Indeed, there is no reason in this case to think a shorter sentence would not equally enable the drug addiction to be treated in so far as it can be treated." (35)

The Court reduced the sentence in effect to 18 months imprisonment. It felt that this course was open to them because, on the basis of the reports before them, the appellant had responded well to treatment in prison and he would be offered assistance on release by the probation service on a voluntary basis if he sought it.

3.37 Any doubt that it improper necessarily to impose a sentence of imprisonment disproportionate to the offence to allow the offender to benefit from the treatment while in prison was removed, it is submitted, in R v Roote (36). The appellant, a woman aged 26 years, pleaded guilty to unlawful possession of morphine, forgery of a prescription and demanding drugs by means of a forged prescription. Sentence was deferred and the appellant was subsequently arrested when she failed to appear, having taken an overdose of drugs. There was a medical report to the effect that the appellant had a very tenuous hold on life and a long sentence would probably save her life. On appeal, it was held that a substantial term of imprisonment was appropriate for the offences but having regard to the appellant's past history and in all the circumstances the sentence would be reduced to a total of three years imprisonment. The judgement of the court was given by Drake J. who noted that:

> "... she had not the strength of mind to give up drugs of her own free will and it is clear to this Court that what the judge was in fact doing was passing a longer sentence than he would otherwise have considered appropriate, the additional term of imprisonment being passed for the benefit of this appellant and not in any way by way of punishment." (37)

and the Court then stated succinctly the principle to be applied then:

> "This Court is firmly of the view that, save in exceptional circumstances, the court should not pass a sentence of imprisonment outside the range appropriate for the offence and for the particular offender on the grounds that the additional term of imprisonment will be of benefit to the offender in society in helping overcome some addiction such as an addiction to alcohol or drugs." (38)

The Court has reserved to itself the possibility of there still being exceptional circumstances which would justify a lengthy period of imprisonment. Dr Thomas observed in his commentary on Roote's case that:

> "The assertion of the principle of proportionality in the present case, given the facts, is particularly strong and the implication is that the exceptional circumstances to which the court refers as justifying the importation of a disproportionate sentence would be exceptional indeed," (39)

3.38 Again, in R v Bassett (40) the appellant pleaded guilty to various charges on four Indictments of burglarly, obtaining by deception and possessing a controlled drug. He had committed a series of offences of dishonesty in order to obtain money to buy heroin, to which he was addicted. He was sentenced to a total of five years imprisonment, the trial judge observing that the only hope for the appellant was a considerable period in custody. On appeal, the Court held that curing an offender of drug addiction was an improper reason for passing a long sentence of imprisonment. Lord Lane C.J. said that:

> "It seems that the applicant (for leave to appeal) had a happy and settled life until he became addicted to heroin after the suicide of his brother. He managed to stay away from trouble for some considerable time, so far as his honesty was concerned prior to these offences. The learned judge who sentenced him accepted that the heroin addiction was largely responsible for the offences which he had committed. It is the usual pattern of the addict having to find very large sums of money to keep himself in heroin and being unable to obtain such large sums of money except by means of crime. It is an all too familiar picture in this court." (41)

The Court of Appeal noted that the trial judge had said on sentencing that keeping the applicant in prison would keep him away from drugs. The Court continued:

> "With respect to the experienced learned judge, that is an improper reason for passing a long sentence of imprisonment. A long sentence of imprisonment will not cure drug addiction. It will perhaps cure the physical addiction but it will almost certainly not cure any psychological addiction." (42)

In the circumstances the appeal was allowed to the extent that the sentence of five years was reduced to three years imprisonment.

3.39 The remaining reported cases involving drug addicts serve, it is submitted, as good illustrations of the difficulties faced by the Courts. In R v Heather (43) the appellant admitted a robbery at a chemist's shop in which an assistant was threatened with a knife and drugs were demanded from the pharmacist. There were also guilty pleas to lesser charges involving controlled drugs. The appellant was sentenced to five years imprisonment for the robbery and to 12 months imprisonment concurrent on the other charges. On appeal it was held that the five years imprisonment was not considered to be wrong in principle. However, in giving judgement for the court, Lord Roskill L.J. held

> "This, like other cases of its kind, raises a very difficult drug offence sentening policy, concerning a young man who is in danger of becoming a hopeless and incurable drug addict." (44)

Heather had applied for leave to appeal, and the single judge had on the information before him, refused leave to appeal and the appellant had renewed his application. He had been in custody prior to his trial and some thirteen months had passed between the original sentence being passed and the matter of the appeal coming before the appeal court. By the date of the latter hearing additional reports had been obtained and these showed that the appellant seemed to be responding to his circumstances in a favourable way although he lacked the strength of character

to wean himself from the drugs. It was then said that:

> "The problem faced by the Court is that this was a grave offence of a kind for which a sentence of five years was well justified, and normally to reduce it would be wrong. There was nothing wrong in principle with the sentence. We fully accept that deterrent sentences are required in cases of this kind. But this young man has been in prison for some time and there are clear signs that he is beginning to benefit from the discipline there." (45)

Accordingly, the Court "not without a great deal of hesitation" gave the appellant one more chance and placed him on probation for three years.

3.40 In H M Advocate v Gaitens (46) the panel was convicted of possessing heroin and cannabis and possessing them with intent to supply. The street value of these drugs was said to be about £3000. In mitigation, Counsel had submitted that the panel had been on probation at the time of the offences and a medical report showed that he had been involved with drugs since he was 16 years old, graduating from cannabis to heroin (47). However at the time of the trial Gaitens maintained that he had overcome the drugs habit. Lord Ross, the Lord Justice Clerk, was reported as saying that offences of this kind spread misery to other people. If repeated warnings by the Court about severe sentences were ignored then the consequences must be accepted. Gaitens was sentenced to seven years imprisonment. It is submitted that it would be reasonable to infer from these circumstances that no leniency was shown for the panel's drug addiction (48).

3.41 Perhaps the best place to start a summary is to return to the beginning: in the fundamental case in Northern Ireland of R v McCay (49) the Court of Criminal Appeal enunciated eleven principles governing sentencing policy for drug offences. In the

course of the appeal, Lord Lowry C.J. said that:

> "We observe first that the learned county court judge made the correct general approach by condemming the practice of taking drugs otherwise than on a doctor's orders. This practice is a crime. The fact that the offender is usually the main sufferer distinguishes it from most other crimes, but cannot obscure the social evil which results. One may feel sympathy with the plight of an addict while maintaining a necessarily severe attitude in the interests of those who may be tempted to do likewise and indeed in the interests of the accused. The present cases do not exemplify physical or psychological addiction, but this fact removes one circumstance which is likely to promote a lenient approach.
>
> There are, as in almost every criminal field, cases among drug-takers, and even suppliers - though they are both exceptional - in which great leniency may be justified, and a judge with the duty of sentencing will be vigilant, in the interests of the community as well as the accused, to recognise them." (50)

This clearly anticipated the run of English cases enunciating the same principles. The concern about drug addiction was thus expressed at the highest level and continues to be so now. For example on 7th December 1983 Lord Boothby put the following question in the House of Lords: he sought

> "To ask Her Majesty's Government what steps they are taking to combat the rising level of drug addiction in the country, particularly among young people." (51)

Lord Elton, the Parliamentary Under Secretary of State at the Home Office replied that the Government was taking steps to prevent the illegal importation and supply of controlled drugs within the United Kingdom by improved enforcement action by H M Customs and Excise and the police. They were seeking to reduce supplies at source by increasing the Government's

contribution to the United Nations Fund for Drug Abuse Control and by offering additional aid for law enforcement activities in Pakistan. The Government indicated that they were making a further £6 million available over the next three years for new initiatives in the treatment and rehabilitation services for drug misusers. In addition it was said that ways were being looked at of dissuading young people in particular from misusing drugs. In passing it may be said that Lord Boothby's concern was not entirely objective as he made clear when he concluded his remarks:

> "... may I ask the noble Lord whether he realises that the number of drug pushers in this country is getting frightening. I do not know what steps can be taken, such as more police, but the numbers of pushers is increasing. A new lot have landed just close to where I live and I sometimes go down to look at them - not to purchase, but to watch their activities." (52)

There was no suggestion in the Government's answer of a change in law so far as drug addicts were concerned: the inference that is to be drawn, it is submitted, being that such addicts were being dealt with adequately. In 1984 there were 5,415 registered drug addicts in the United Kindgom. More than half of this total were under 25 years of age and 4,900 (91 per cent) were addicted to heroin (53). The question to be considered now is this: to what extent, if at all, does the fact of drug addiction affect an accused person before the courts having been charged with drug or other offences?

3.42 The first point to be made is that the status of registered drug addicts appears to be inconsequential in law. Such a status may be put forward by way of mitigation but that confers no rights or immunities. Indeed the nature and terms of the relevant legislation (that a doctor must consider or suspect addiction to only certain of the controlled drugs) impose a duty on a doctor

rather than on the addict. The only benefit for the addict seems to be the implication that by registering his addiction he is co-operating with someone who might generally be described as being in authority. The second point to be made is that the Courts do not know what to do or how to deal adequately with drug addicts. This state of affairs arises partly from the lack of specific statutory powers to deal with drug addiction and partly from the difficulties that addiction causes to the legal concepts involving responsibility. Sheriff Gordon has said that:

> "... the phenomenon of addiction presents awkward problems from whatever side the question is approached. The addict is by definition unable to control his craving, and so might be said not to be responsible for anything he does as a result of the craving, or of the effects of any drug for which he craves. Nor will punishment cure his addiction. But his condition may be the result of his own earlier actings, so that he can be said to have made himself an addict. His addiction was at one stage a habit, and it may be said that persons are responsible for their habits." (54)

or more generally:

> "Addiction is the type of case for those situations in which a man voluntarily puts himself into a condition in which he is incapable of free action, and then does something criminal." (55)

It is submitted that given the large number of drug addicts - a number that grows relentlessly - it is essential that the jurisprudential aspects of the problem are clarified and settled.

References

(1) Huxley p50.

(2) Section 16(1) of Matrimonial Proceedings (Magistrates Courts) Act 1960 as amended by Section 34 of the Misuse of Drugs Act 1971. However, the former authority was repealed by the Domestic Proceedings and Magistrates Courts Act 1978, Section 89(1) and Schedule 3.

(3) 1973 S.I.No.799 which came into force on 1st July 1973.

(4) quoted in Schur p16. The definition is quoted in Bean (1974) p8 and in the pages following that Bean describes the subsequent changes in that definition away from "addiction" to "dependence" and then back to the former. He shows how definitions tend to reflect the profession of any particular writer. He concludes, at p12, that:

> "There is of course no particular virtue in having agreed or settled definitions as such; definitions are after all for use as conceptual tools. Neither is the variety of definitions unique to the study of drugs ... What is important is that usage has certain consequences, one of which is to direct attention at societal reaction to the phenomenon being studied."

Perhaps there is an argument for a settled legal definition of drug addiction so that like cases maybe treated alike.

(5) Schur p140-1. Plant (1975) p255 describes "peer-group pressure, curiosity and drug availability" as seeming to be the main predisposing factors.

(6) Lindop p390.

(7) (1969) 53 Cr.App.R. 121 at p122.

(8) (1967) 3 All E.R. 544.

(9) ibid p545. On the last point, Lord Devlin has put it in an alternative way "A supplier of heroin can acquire a dominating influence over those dependent on it." Patrick Devlin Easing the Passing: The trial of Dr John Bodkin Adams. (1985) at p10.

(10) (1962) 370 U.S. 660.

(11) Teff (1975) p75.

(12) 1985 S.C.C.R. 409.

(13) ibid p410.

(14) Bakalar and Grinspoon. p57-8.

(15) [1963] Crim.L.R. 375.

(16) (1969) 53 Cr.App.R. 109.

(17) ibid p110.

(18) ibid p111.

(19) (1984) Halsbury's Monthly Review para. G233g.

(20) 1985 S.C.C.R. 419.

(21) ibid p420.

(22) [1970] Crim.L.R. 295.

(23) (1979) 1 Cr.App.R.(S) 137.

(24) ibid p138.

(25) (1983) 5 Cr.App.R.(S) 72.

(26) as set out in R v Turner (1975) 61 Cr.App.R. 67.

(27) ibid p74.

(28) ibid p75.

(29) Thomas (2nd ed.) p8 et seq.

(30) [1969] 3 All E.R. 782.

(31) ibid p783.

(32) (1969) 53 Cr.App.R. 121. Dr Thomas also cites the unreported case of R v Simone 14th March 1968 reference 5326/67 as a similar authority: see [1970] Crim.L.R. 356.

(33) [1970] Crim.L.R. 355.

(34) unreported: reference 2420/C/74.

(35) transcript p2.

(36) (1980) 2 Cr.App.R.(S) 368.

(37) ibid p370.

(38) ibid p371.

(39) [1981] Crim.L.R. 190.

(40) (1984) 6 Cr.App.R. 75.

(41) ibid p76.

(42) ibid p76.

(43) (1979) 1 Cr.App.R.(S) 139.

(44) ibid p139.

(45) ibid p140.

(46) The Glasgow Herald 23rd October 1985.

(47) This point was made also in the earlier case of R v Glasse, ibid where Lord Parker C.J. said, at p122, that:

> "This is a young man of just twenty-one and for some years now he had been taking drugs and it is not without interest to note, what this court is finding time and time again, that he has, as it were, progressed. He started on cannabis, then went on to amphetamines and, as I have said, had been on heroin for three and a half years at the time of the trial."

Promoters of legislation to legalise the possession of cannabis have always refuted this theory of progression: see generally Schofield (1971).

(48) The same newspaper article carried details of H M Advocate v Moffat at the High Court of Justiciary at Paisley. There too the panel was said to be a drug addict who had been found guilty of housebreaking and possession of heroin with intent to supply. The Court was told that Moffat had "a long and desperate addiction to heroin and stole to get money to pay for the drug." He was sentenced to five years imprisonment.

(49) [1975] N.I.5.

(50) ibid p6.

(51) Weekly Hansard (H.L.No. 1233) col. 1082.

(52) ibid col. 1083.

(53) Home Office figures published in an article in The Times 4th September 1985. This compares with 4186 registered drug addicts in 1983: The Times 16th August 1984.

(54) Gordon p56.

(55) ibid p57.

3.43 C. Deportation

The international aspect to controlled drugs has resulted in a number of relevant authorities on deportation. This point is considered further as deportation is an element of a sentence passed on a convicted person. It may also be that a recommendation for deportation is a severe punishment to that person. The law in broad terms on deportation is contained in the Immigration Act 1971. By section 3(6) of that Act a person of 17 years or over at the time of his conviction, who is not a British citizen maybe recommended for deportation where he is convicted of an offence punishable with imprisonment. Further, by section 5 the Secretary of State has a discretion whether or not to make a deportation order on the basis of such a recommendation. Thus, deportation is essentially an administrative decision for the executive. The Misuse of Drugs Act 1971 has in itself no power or authority in addition to or in place of the powers within the Immigration Act 1971.

3.44 In R v Nazari (1) the Court of Appeal in fact considered four cases together in order to review the principles governing the power to recommend offenders for deportation, and to lay down guidelines - as opposed to rigid rules - for the assistance of courts below. These guidelines were such that Courts should keep them in mind when considering whether to recommend deportation. The essence of the guidelines was that the Court before whom an accused person appeared for sentence must consider whether the accused's continued presence in the United Kingdom is to its detriment. Offenders who have committed serious crimes or who have long criminal records are suitable for recommendation, but a minor offence such as shoplifting by a visitor would not normally merit a recommendation, unless it was part of a series of offences committed on different occasions or carried out as part of a planned raid by members of a gang. The appellant Nazari was a young man of Iranian citizenship and he

had pleaded guilty to fraudulently importing 1.95 kilogrammes of opium. The prosecution accepted that opium in the form in which it was imported could not be converted into heroin. He was sentenced to four years imprisonment and recommended for deportation. It was claimed that if he was deported his studies would be interrupted, he would be unable to marry his English girlfriend, and he would face the possibility of being sentenced to death in Iran. The sentence of imprisonment was not in issue but it was upheld in effect when Lord Lawton L.J. said that:

> "There is no application for leave to appeal against the sentence of four years imprisonment, which is in line with the kind of sentences which are passed upon those who try to smuggle dangerous drugs into the United Kingdom." (2)

The Court applied the guidelines indicated and found Nazari's continuing presence to be detrimental to the United Kingdom and upheld the recommendation for deportation.

3.45 In R v Rossi (3) the appellant had pleaded guilty to possessing cannabis. In October 1979 he was stopped by policemen who were keeping watch on a public house known to be a haunt of drug addicts and suppliers. Rossi said that he had been to the public house to try to obtain heroin but he had not been successful. His house was searched and there was found 2.7 grammes of herbal cannabis. He was aged 19 years at that time, a native of Italy and he had come to the United Kingdom in 1978. He had three previous conviction, two for possessing and one for theft. He had been fined on each occasion. He was sentenced to one month's imprisonment and recommended for deportaion. It was submitted on appeal that having regard to his age and record, the fact that the cannabis was for his own use and that he had kept out of further trouble since 1979 the recommendation ought not to have been made. The Court held that the principle it had to consider was what threat Rossi would be to society if he was allowed to

remain here. The matter was on the border line but it had come to the conclusion that the interests of society did not require him to be deported and that the recommendation should be quashed. However, if he committed any further offence it was likely that a different view would be taken.

3.46 It is clear that the Court draws an inference of future behaviour from the circumstances of the offence then before it: in both cases cited the trial courts and the appeal court have expressed a view on recommendation for deportation. However, in R v Omisore (4) the court did not state an opinion one way or the other. The appellant was a 32 year old Nigerian whose wife and two children were living in Nigeria. Up to the age of 30 he had been a student living in England. Omisore was detained by customs men at London Airport when he called to collect a crate. On examination it was found that the crate had a false compartment which contained 4 kilogrammes of cannabis. He said that he was collecting it for a friend and that he thought it contained palm oil. There were no previous convictions. He was sentenced to five years imprisonment and recommended for deportation. On appeal it was submitted that the sentences passed were out of line with the usual run of sentences in such cases and that the sentence was affecting his health because of worries about his family and his inability to eat the food provided. The Court of Appeal held that in the circumstances the sentence would be varied to three years imprisonment. The report cited adds the courts judgement that:

> "The deportation order was a matter for the Home Secretary and not one for the Court of Appeal."

It seems strange that the court could not even say that such an order was not wrong in principle for the choice of words above suggests, it is submitted, that the appeal court has no locus to

consider the matter. Contrasted with the foregoing case in R v Patel (5) where the appellant was a married man aged 42 years with eight children. He had been born in India and he had first come to the United Kingdom in 1972, possibly as a visitor, and remained there. His family arrived in 1978. In April 1980 he went back to India, he was refused leave of re-entry on his return in May 1980 and he was served with a detention order. Since that date he had remained in the United Kingdom under a temporary admission order. On re-entry in May 1980 he was found to be carrying a suitcase in which was concealed 14½ pounds of cannabis resin with a street value of £7500. Patel had been sentenced to three years imprisonment and recommended for deportation. On appeal, it was held that although the appellant was a carrier he had pleaded guilty and he was a man of previous good character, therefore the period of imprisonment would be reduced to two years. Further, the appeal court held that the court was entitled to consider the effect that deportation would have on innocent persons not before the court, the object being not to break up families or impose hardship on them. In the circumstances the recommendation of deportation would be set aside. Perhaps the best conclusion from these cases is in essence that each case turns on its own merits and that there is at present no overt policy!

References

(1) (1980) 2 Cr.App.R.(S) 84.

(2) ibid p86.

(3) 145 J.P.N.701.

(4) (1983) Halsbury's Monthly Review para. B669e (March).

(5) (1983) Halsbury's Monthly Review para. B979f (May).

PART FOUR

POWERS AND CONCLUSIONS

Chapter 4

A. Sentencing Powers

4.1 The 1971 Act is identical to many criminal statutes in that the judges are given by Parliament a very wide discretion in the matter of sentence with the only inhibiting factor being the statutory maxima. The aim of this part of the work is to consider generally these maxima as they are now and in the 1971 Act. To assist, the Appendix to this chapter reproduces at Table A the whole of schedule 4 to the 1971 Act as that schedule was when it was brought into force at first. Futher, Table B reproduces the same schedule as at 31st December 1986. In the 12 or so years between these two dates there have been considerable amendments and how the changes were brought about is a reasonable consideration in this work.

4.2 Three principal Acts have included provisions relating to controlled drugs and to penalties:

(a) Criminal Law Act 1977

This Act was of great importance to criminal law and procedure. Section 28 of the 1977 Act concerned the penalties on summary conviction for drug offences. More particularly Section 28(8) amended the penalties for certain offences referred to in schedule 5 of the Act and those included offences under the Customs and Excise Act 1952, which was then in force, and the 1971 Act itself. The main alteration was the reduction from six months to three months imprisonment as the maximum term of imprisonment on summary conviction. Perhaps of almost equal

importance was the introduction of a standard maximum fine of £1000 on summary conviction. That sum was "the prescribed sum" but it could be such other sum as is for the time being substituted in that definition in section 28(7) of the 1977 Act by section 61(1) of the same Act. The section was derived from recommendations in the James Report (1).

(b) Customs and Excise Management Act 1979

Section 26 of the 1971 Act made particular provisions for the increase of penalties for certain offences under the then existing Customs and Excise Act 1952. With the repeal of the latter and the re-enactment of many of the provisions in the Customs and Excise Management Act 1979, section 26 of the 1971 Act was repealed: see section 177(3) and Schedule 6 of the 1979 Act. Schedule 1 of the 1979 Act enacted particular variations of maximum penalties for existing offences; that is to say, sections 50(5), 68(4) and 170(4) of the 1979 Act.

(c) Controlled Drug (Penalties) Act 1985

This is a very short Act of only three sections. The Act provides by section 1(1) that for the conviction of offences under the 1971 Act of the production, supply and possession with intent to supply a Class A drug, the maximum sentence was no longer to be 14 years but instead life imprisonment. By section 1(2) of this Act convictions involving Class A drugs on Indictment under the Customs and Excise Management Act 1979 made the accused liable to a maximum penalty of life imprisonment or a financial penalty of any amount or both. For Class B drugs the penalty was a maximum of 14 years imprisonment or a financial penalty of any amount or both.

4.3 This is not the place to discuss the politics of the Bill although it is fair to say that a reading of Hansard indicates a great deal of unanimity on all sides for the aims of the

legislation. The sponsor of the Bill, Mr Keith Raffan M.P., said at the Third Reading that:

> "The Bill is not directed at addicts who pathetically push hard drugs to finance their habits. It is directed at the big boys - the Mafia-style drug dealers and godfathers - of drug trafficking who are not addicts themselves but who are out to exploit addicts for financial gain." (2)

The Government minister involved, Mr David Mellow M.P., Parliamentary Under Secretary of State at the Home Office, took a keen interest in the whole subject and in the same debate he said:

> "In erecting barriers against drugs, it is essential to have a framework of law and penalties which enable sentences of imprisonment to be visited on drug dealers which are commensurate with the gravity of the offence and enable a warning to be sent to those who might become involved that the courts will not overlook such behaviour and that it will be visited with severe sentences of imprisonment." (3)

If there was ever any doubt as to the seriousness with which the authorities viewed involvement at the upper end or higher levels of the durgs trade then this Act must have removed that doubt.

4.4 (d) Criminal Justice Act 1982

This Act is of importance in sentencing matters, not so much for altering the 1971 Act, but rather for the nature and extent of the legislative involvement in parole. The relevant part of the Act is section 32:

> "(1) The Secretary of State may order that persons of any class specified in the order who are serving a sentence of imprisonment, other than -
>
> (a) imprisonment for life; or

(b) imprisonment to which they were sentenced -
(i) for an excluded offence;
(ii) for attempting to commit such an offence;
(iii) for conspiring to commit such an offence;
(iv) for aiding or abetting, counselling, procuring or inciting the commission of such an offence,
shall be released from prison at such time earlier (but not more than six months earlier) than they would otherwise be so released as maybe fixed by the order; but the Secretary of State shall not make an order under this section unless he is satisfied that it is necessary to do so in order to make the best use of the places available for detention.

(2) In this section "excluded offence" means -
(b) an offence under an enactment specified in Part II of that Schedule;
(c) an offence specified in Part III of that Schedule."

Thereafter the Act contains the following -

"Part II: Offences Mentioned in Section 32(2)(b)

Misuse of Drugs Act 1971 (c38)

18. Section 4 (production or supply of a controlled drug)
19. Section 5(3) (possession of a controlled drug with intent to supply it to another).
20. Section 20 (assisting in, or inducing the commission outside the United Kingdom of, an offence relating to drugs punishable under a corresponding law, as defined in section 36(1).)

Part III: Offences Mentioned in Section 32(2)(c)

Offences under sections 50(2) and (3), 68(2) and 170 of the Customs and Excise Management Act 1979 in connection with a prohibition or restriction on importation or exportation of a controlled drug which has effect by virtue of section 3 of the Misuse of Drugs Act 1971."

Section 32 of the 1982 Act came into force on 28 October 1982 by virtue of section 80(1) of that Act.

4.5 The origins of this particular legislation lie in the acute shortage of prison accommodation and the response of the Government to what it perceived as demands for "a stricter policy" towards "real criminals". Controlled drugs were covered by this legislation but perhaps the essence of the matter is the involvement and the power of the executive in criminal justice. Accordingly, the problem is not discussed further here but it should be noted that the change in parole policy did not go unchallenged. In R v Secretary of State for the Home Department ex parte Findlay and Others (4), a bank robber and others, including a drug trafficker, appealed to the Court of Appeal from a refusal by the Divisional Court to grant them judicial review of the policy statement. It was held, Lord Browne-Wilkinson L.J. dissenting, that there was no ground for granting judicial review of the policy statement made by a Government prior to legislation (5).

B. Prior Writings

4.6 In the review of the existing literature on sentencing at the start of this work, one writer was omitted deliberately so that further and more detailed consideration could be paid in the light of the case law. In 1979 Lord Devlin published his book The Judge (6) which consisted of a collection of essays and lectures. The importance of the work lies not only in the value of what was said but that it had been said by so senior a judge, a Lord of Appeal in Ordinary in the House of Lords. In total the book is a study of different aspects of the English Judge. The second chapter is the most relevant here and in broad terms it begins by asking whether judges should be penologists and answers that they should not. Lord Devlin seeks to establish a line whereby justice and penology maybe divided practically, each at work within its own province, instead of being assimilated.

> "To make a judge a penologist would be to make him an expert in a subject other than law." (7)

The second part of the chapter concerns the limitations of a working paper on sentencing. The conclusion reached is that it is a most unsuitable instrument of planning for institutional change, which is what would be meant by the training of judges in penology as the working paper recommended. A more considered analysis of these views follows.

4.7 The Judge as Sentencer I

The first part of the paper was in fact Lord Devlin's address to the Howard League for Penal Reform in September 1975. The general theme of that address was that judges were concerned with justice and penologists with crimes. Further, the amount of an offender's debt to society should like any other debt be quantified as the amount owed and not as the amount which the creditor would like to spend on improving the debtor's moral character (8). Lord Devlin attacked the superficial attraction of dovetailing the penologist into the judge. A lawyer, he argued, is not by nature a social worker because their aptitudes are different. The lawyer's working hypothesis is that all men are reasonable, but this is not appropriate for a social worker. He observes that:

> "Penology falls between two ancient disciplines. There is the discipline of medicine, where the sin is not to cure where you can, and there is the discipline of law, where the sin is to cure the man against his will." (9)

But the power to sentence an offender lies with the courts and therefore with lawyers and Lord Devlin warns that:

> "The sentence must not be longer than is justified by the gravity of the crime and must not fall below the least that retribution demands." (10)

In addition to these objects Lord Devlin, secondly, champions the judge as the non-expert and emphasises his value as such. He asserts that the jury is still the "indispensable instrument" of the criminal trial, in which the judge still plays no more than his traditional part. The change in the judge's role is due to the encroachment of penology. The origins of this in England is said to be the first set of Prison Rules in 1899. These laid down that the object of imprisonment should be the reform of the prisoner as well as deterrence. This statutory action imposed upon the judge the task of making the punishment fit the criminal as well as the crime. Since then alternatives to imprisonment devised by penologists have multiplied.

4.8 However, Lord Devlin still sees the English judge as the "juryman writ large." The implications of this is that of promoting open justice and that the judge is more than just a specialist. Further, everything that goes into the judge's mind on fact is seen to go in by way of evidence and during its passage it is subject to counsel's comment. Partial training by way of judicial training is therefore rejected as it would result only in a 'half-baked' expert. If the judge is to be trained he should be fully trained. He will then be an expert who holds views of his own. Consequently, his decisions will cease to reflect the attitude of the ordinary man applying an intelligent mind to technical questions and the judge will become a product of a technique. Lord Devlin observes also that now that the reform of the criminal has increased in importance as an objective and that imprisonment has come to be considered as a form of treatment as well as punishment, the adequacy of the "instant sentence" is becoming more apparent. As treatment continues to play a larger part in the determination of the period of incarceration so the judge's control is diminished. The prisoner's future is more a matter for administration decision than judicial action. It is this point that Lord Devlin

founds on for his assertion that judges would not make good penologists.

4.9 The Judge as Sentencer II

The second part of the paper was an assessment by Lord Devlin of a consultative paper by a Home Office Working Party issued in August 1976. The main feature of the Paper was a proposal for judicial training, although disapproving notice was taken of Lord Devlin's views outlined above. This training was in theory to last a year but financial constraints produced a suggestion of a shorter course of one month. Lord Devlin's ascorbic view was that the Working Party did not seem to have taken the views of those who would be appointed to attend this training. Further, the Party had concerned itself only with the mechanics of a change, the virtues of which had been taken for granted (11). His sustained criticism included an overtly political assessment of the Paper when he wrote that:

> "I must say at the outset that the show piece of the new scheme, the month's incarceration, strikes me, even on the assumption that judges should be penologically minded, as a dazzing manifestation of the unacceptable face of socialism, that is, an excessive zeal for setting up at public expense institutions for regimenting people into doing things which any sensible person does for his own benefit, at his own expense, and in his own way." (12)

He concludes by asserting, almost jubilantly it seems, his complete ignorance of most of the subjects, contained in the proposed syllabus course, when he was first appointed to the bench in 1948. Indeed he says:

> "When sentencing I did not feel handicapped by my ignorance of penal theory and criminology; I have not from my slight subsequent acquaitance with them discovered to what use I could have put them." (13)

His Lordship's general test when sentencing an individual was to ask himself what the minimum sentence was that would do. He, like all judges in his view, was a person of independent and mature mind, determined to do justice. Accordingly, the judge did not need to know the "recondities of case law" but he ought to know the general principles and "above all" he should know the tariff.

4.10 This superficial analysis of Lord Devlin's views is an important aspect in seeking to establish a legal model of the drug trade as a means of assessing sentencing policy. It is the judicial approach that is now being considered rather than the minutae of the decisions. Lord Devlin's views stated explicitly are in broad terms very similar to what might have been inferred from the case law of sentenced drug offenders. It is submitted that this whole approach manifests itself in various ways: firstly, there is minimal reference in the judgements to the technical aspects of controlled drugs. It maybe that each individual controlled drug has different propensities in similar conditions but this and other distinctions are never followed. The cases repeat regularly the distinction between "hard" and "soft" drugs without explaining the reasons for the difference or stating authoritatively into which category all the drugs fall. Lord Devlin champions the value of the English judge as a non-expert, speaking for the ordinary man, and that is reflected, it is submitted, in the reasoning stated. Secondly, not only is technical evidence not relied on in judgements but it is, on Lord Devlin's proposition, positively discouraged. He considers the judiciary to have what might be termed a generalised faculty of analysis applicable to all criminal cases irrespective of the subject matter. This is evident in his description of judges as being 'independent and of mature mind'. In relation to controlled drugs it will be shown later that the judges really do view the whole of the drugs trade as simply a vast commercial

enterprise and while occasionally police evidence is called as to the nature and extent of that trade there seems a reluctance to state authoritatively what precisely the various trades are in the business. Judges rely on some assistance from the 1971 Act but supplement that with their own views of the parts played. Similarly, with the street values of drugs there is a reluctance to examine or establish technical means of assessing that value. Thirdly, that judges exist to do justice in an objective manner is most apparent in the sentencing of drug addicts. There, notwithstanding the expression of concern, the judges still proceed to pass sentences of lengthy periods of incarceration on addicts whose criminal responsibility ought in many circumstances to be a matter more for medical treatment. Finally, an important aspect of judgements in controlled drugs cases is the homily, a stage at which Lord Devlin would say that the judge expresses simply the views of the ordinary man. Homilies appears to be variations on constant themes of, for example, "Mr Bigs" in the background and the "harrowing plight" of drug addicts with the "death and misery" brought about by drugs. Mr Steven White has studied the use of the homily in courts (14). His article in the Criminal Law Review is the end product of research into the use of homilies by judges and magistrates when sentencing offenders. The value of the article lies in considering the sentiments that the homilies are used to express. His view is that whether or not condemnation was made explicit, although generally it was, those imposing sentences managed by the manner in which they pronounced sentence to create the impression that sentencing was a fairly hostile process (15). It is submitted that many of the cases cited earlier show a marked judicial hostility to the drugs trade and to virtually all those involved in it. Surprisingly also, there have been a few examples of such hostility and condemnation by academic writers and commentators, as will be shown, in circumstances where one would have anticipated with introspection and reflection that a more

detached view would have prevailed.

4.11 Review of articles

Just as there is said to be nothing new under the sun so there have been earlier academic studies of sentencing policy and controlled drugs. These studies must be reviewed now to see if their conclusions can assist here. Three particular writers have produced amongst them five relevant articles and these articles are considered now for simplicities sake in chronological order:

(1) Alec Samuels

(a) 1968 (16)

The learned author describes the sentencing of drug offenders as then being a comparatively new task for the courts but there had been sufficient cases to permit a review of the policy of the courts. In twelve pages Mr Samuel sets out all of the reported cases in English law and a considerable number of the unreported cases for which the transcript reference number is cited. His conclusion is that the proper sentencing principles to be applied by the courts cannot be said to have been then widely and clearly disseminated and understood. If that was so then it seems reasonable to infer that Mr Samuel's article would have had a considerable impact. His systematic exposition would have assisted the bench and practitioners in a field that they had little experience of. Indeed it maybe that one judicial attitude adverted to on several occasions in this study has its foundations in this article: Mr Samuel's first proposition was that drugs may be "broadly classified into hard and soft." While this is supported by inference in an extensive bibliography cited there is no explanation or justification for the distinction. Moreover, the author saw certain principles emerging and he summarised these (17) by saying that the relevant

factors to be taken into account in sentencing were:

> (i) whether the drugs were hard or soft;
> (ii) whether the accused was peddling or trafficking for commercial gain;
> (iii) whether the accused was running a club, or merely having a party with friends at his own home;
> (iv) the need to protect young people;
> (v) and (vi) the age and previous convictions of the accused;
> (vii) the extent of the accused's addiction or dependence;

Factors (iv), (v), and (vi) are not peculiar to the drugs trade and indeed they are of relevance in any sentence passed by a Court. Of the remaining factors, (iii) appears now to be fairly less important than it did in 1968. It seems that the English courts at this time were most concerned at the supposed role played by clubs and their proprietors in making conditions amenable to the drug trade. Exemplary sentences have been noted earlier as having been handed down to occupiers of premises who permitted various drug activities to take place there. Factor (i) has to some extent been superceded by the emphasis given by the Courts to the Class into which the drug falls rather than by a mere measurement of 'hard' or 'soft'. Factor (vii) is wrongly stated by the author as being the "extent" of addiction. It is submitted that such a status was and still is important and that its extent cannot really be assessed. But it is clear the beyond anything else the existence of a commercial motive is the single most important aspect of any drug case. Factor (ii) therefore is still highly relevant but what difference the author saw in 1968 between "peddling" and "trafficking" is unclear.

(b) 1977 (18)

This article is less substantial than that of 1968 and, if it does anything of value, it covers reported sentencing appeals over the period between 1968 and 1977. The article starts with a fairly broad, emotive and sweeping statement that:

> "Drug abuse is a most serious social evil. People, mostly young people, deliberately slowly destroy themselves. The only cause for a little negative relief in contemplating the drug scene is that the problem appears not to have grown, or to be growing, as fast as was gloomily predicted a few years ago." (19)

No authority is cited for any of these propositions which are by no means self-evident. And later:

> "What happens to drug addicts? Many become debilitated, infected, diseased, exhausted and die, often of an overdose after several years addiction. Some come off because of exhaustion, having seen a friend die, having found something of a passive desire to come off ..." (20)

Perhaps the single most important criticism of the article is that Mr Samuel's attempts too much in too short a space. Lord Devlin has maintained that an attitude of demarcation is essential, with lawyers being concerned with the law and with justice and penologists with punishment. Mr Samuel's, it is submitted, has approached the subject on too wide a front and in the result fails adequately to deal with anyone of the matters he raises.

(b) 1979 (21)

This article on close examination appears to be almost identical to that of 1977 with the addition of a few new cases. In these circumstances what has been said of the earlier article applies equally, it is submitted, to the latter.

4.12 (2) Desmond Marrinan (22)

This article is in essence an analysis of the two important sentencing cases from Northern Ireland considered earlier in this work, namely McCay's case and that of Magee. Mr Marrinan's exposition is set in the context of the policy as it then was in England and as it could be inferred from the case law. Some consideration is also given to the relevant statistics of the United Kingdom dealing with drug abuse. There is then little to be gained from a rehersal of the cases. There are two conclusions which are worth restating: first, in condisering R v McCay the learned author concludes that the principles which emerge from this case are broadly in line with the policy of the English courts with the proviso that the English courts had no sought to draw such a marked distinction between LSD and cannabis (23). The Court in Northern Ireland was certainly correct in drawing such a distinction because LSD is classified as a Class 'A' drug whereas cannabis is a Class 'C' drug. But, it is difficult to think of an English authority that does not draw such a distinction and anyway Mr Marrinan does not cite a case in support of his proposition. The second conclusion is that the principles set out in R v McCay are clear and broadly in line with the English position although the Irish Courts seem to prefer a harder line towards the first offender involved with possession of cannabis and similar drugs but not concerned with the supplying of drugs for gain. Both Courts have rightly advocated and imposed very severe deterrent sentences on pushers. That too is unobjectionable but then the Court of Northern Ireland have a far closer affinity with the English courts given the supremacy even in criminal matters of the House of Lords. Mr Marrinan's final question as to whether the use of the deterrent sentences for users would have the desired effect can be answered in the negative.

4.12 (3) Stephen Woolman (24)

This article, published in July 1985, is the most recent and the author purports to point to some causes for concern in the practice of the Scottish Courts in sentencing drug offenders. In the opening line of the article the author adverts to the serious problem of "hard" drugs but does not specify which he means or why they should be so described. Nevertheless the author's aim is to try to obtain "an idea" of current sentencing practices and to this end he examined those cases reported in the law reports together with all the cases reported by The Scotsman in the first four months of 1985. It is then conceded immediately that this is an unrepresentative sample with an undue bias towards the more serious cases. He does not seem to concede that the reports he examines are concerned in all probability with east central Scotland in general and Edinburgh in particular. Nor does he explain how in these continued circumstances a meaningful result can be gleaned. This superficial study is based on the briefest of details of cases in two separate groups namely offences involving cannabis and offences involving heroin. It is emphasised at the end of the article that no conclusions can be drawn as the survey is unrepresentative. The first comment then is that cannabis is often treated in a very similar fashion to heroin at least for offences greater than simple possession. It is difficult to see, with respect, what case or cases that this proposition is founded on and even if there is some sort of authority within the article the admission that the survey is unrepresentative weakens the whole matter. The second point by the author that guidelines ought to be given cannot be faulted and indeed ought to be encouraged. There is no need for the Scots judiciary to accept simply the authority of R v Aramah but there is a need for some clear statement of policy other than a bald statement of the requirement for exemplary sentences. This is a most important point being put forward by Mr Woolman but the remainder of his

article is disappointing.

4.14 Review of books and reports

(1) The Australians

As a matter of comparative jurisprudence some consideration is given now to important Australian reports that may indicate one possible future trend. In their substantial study of Australian drug offenders (25) Iran Potas and John Walker report on the degree of sentencing disparity in the Australian courts in dealing with drug offenders, especially in relation to the importation, supply and possession of heroin. The aim of the researchers is to identify those factors which the courts regard as crucial in determining sentence length. The study is concerned with those individuals who have been sentenced following a conviction of an offence under section 233B(1) of the Customs Act 1901 (Commonwealth). This section divides into seven sub-sections each one of which constituting a different offence and the whole section being cast in the broadest of terms. It would seem that each sub-section amounts to what is an offence contained in a separate section under the 1971 Act. The authors consider a total of 253 judgements of trial court level where drug offenders were convicted under section 233B and had been imprisoned. From a study of these cases a total of 60 factors relevant to sentence were drawn up and these indicate the matters taken into account. Table C in the Appendix to this Chapter reproduces the list of these factors. Perhaps a first observation that might be made is that this list in itself would provide a suitable model for analysing the relevant case law. The value of the report for present purposes is that as the factors on the list are only those which have been expressly adverted to or clearly implied in the course of the courts' deliberations on sentence then a picture of Australian judicial attitudes can be inferred. This is all the clearer for the

researchers evaluation, set out at Table D, of the aggravating and mitigating factors which are referred to by the judges in the transcripts of at least ten cases.

4.15 This superficial treatment of the report is necessary in the present circumstances and it does not do justice to the work of authors (26). Perhaps what is most noteable is their conclusion that:

> "This study has shown that it is possible to develop sentencing models with the aid of the computer that can not only mathematically describe, but also prescribe, sentences with a remarkable degree of accuracy. All that is required is certain specific items of information. The fact that the cases analyzed fit so neatly into logical and intuitively sound models suggest that sentencing disparity, in so far as it applies to Federal drug offenders who have been sentenced to terms of imprisonment is not such a serious problem as has been imagined." (27)

In his discussion of this report, Mr Wasik has concluded in essence that a computer can assist the mechanical process of collecting and evaluating sentencing cases but ultimately it is the researcher who decides certain crucial factors, such as how close a fit to the actual sentences imposed by the court is acceptable as confirming their model as an accurate one (28). In short, while the computer-aided research can produce a "check-list" of essential factors in any sphere of sentencing, this really only confirms what is already judicial practice: the study describes, it cannot prescribe. Indeed, Mr Wasik himself raises an important point that perhaps indicates the future of sentencing:

> "If we decide, in the end, that we need sentencing guidance to reduce disparity but otherwise to reflect existing practice, the Court of Appeal could further develop its guidelines judgements, or we could

> implement legislative guidelines to the same job at a single stroke. Logically, though, there are questions which need to be settled first. If we are going to have guidelines, who should draw them up - the Judges, Parliament, or an independent commission? And should they embody existing sentencing practice, or should their production give an opportunity to re-think the principles of sentencing?" (29)

4.16 (2) Bruce MacFarlane

In his very extensive and thorough examination of the Canadian Law of controlled drugs, Bruce MacFarlane concludes with a study of the principles of sentencing drug offenders (30). As his book was published in 1979 and the preface is dated 20 January of that year, the author was presumably stating the law as at that date. The first and perhaps major principle that Mr MacFarlane states is supported by seven authorities dated between 1969 and 1977:

> "Where an accused has been convicted of either trafficking or possession for the purpose of trafficking, the courts have consistently ruled that deterrence and the protection of the public are the paramount considerations and that, in the absence of "exceptional circumstances", a period of incarceration should generally be imposed." (31)

Immediately thereafter the learned author cites further authority for the proposition that courts have tended to suggest that "exceptional circumstances", if they exist at all, should flow from the offence and not the offender. Further, the Canadian courts have concluded also that in trafficking cases specific variables tend to either aggravate or mitigate the position of the accused:

> "Accordingly, while no definite rule can be promulgated in relation to the length of sentence which should be imposed in a given case, the courts do tend to rely upon the existence of specific facts as materially affecting the length of the appropriate sentence." (32)

Mr MacFarlane lists the factors which tend to affect the sentence imposed for trafficking and possession for the purpose of trafficking:-

" 1. Quantity of the Drug.
2. Element of Commercialism.
3. Presence of Weapons or Arms.
4. Where Accused was Addict at Time of Offence.
5. Effect of an Undercover Agent's Actions.
6. Nature of Drug.
7. Age and Character of Purchaser.
8. Trafficking in a "substance".
9. "Mode" of Trafficking.
10. Where Accused is an Informant."

Mr MacFarlane cites an impressive number of authorities in support of each of these factors and the net effect is to produce a distinct legal model of sentencing drug offencers in Canada. But the study proceeds further with a statistical analysis of sentencing ranges. The reason for this is said to be that drug offences, unlike many other criminal activities tend to attract the full spectrum of sentences prescribed by Parliament. The analysis is of the statistics gathered by the Health and Welfare departments. Regretably this analysis cannot be pursued here but it is interesting that Mr MacFarlane expresses a hope that he assists the bench and counsel when they are required to undertake the

> "... rather difficult and delicate task of sentencing a drug offender." (33)

4.17 (3) Richard Lord

The publication of Mr Lord's textbook on controlled drugs was a notable advance for this aspect of criminal law. The merits of the book have been set out earlier in this work. Part of the importance of the book lies undoubtedly in the unique chapter on the sentencing of drug offenders. Textbooks on individual areas of criminal law had been published before 1984, of course, but Mr Lord is perhaps the first author to do this and include a

chapter on sentencing. Such a development is indicative of the increasing importance of sentencing as a subject, of the increasing complexity of the law and of the demand for practitioners to advice their clients knowledgably and fully. Table E sets out the sentencing table devised by Mr Lord on the strength of the authorities then known to him. The learned author's main contention is that the basic principles of sentencing are apparent from the statutory maximum penalties and depend in particular on the particular drug involved and the precise offence of which the accused has been convicted (34). He continues:

> "The range of offences specified by the Misuse of Drugs Act 1971 can be graded by severity of maximum punishment. At the bottom end of the scale is the simple possessor. He is least likely to present a danger to society in general and is least likely to have financial gain as a motive for his crime. Next up the scale is the supplier. Suppliers of controlled drugs can be subdivided into two basic categories - the social supplier and the commercial supplier. Although the maximum penalties are the same in either case, the courts tend to take into account the wide scope of the offence of supplying. A 'supplier' who collects money from his friends, contributes some himself and then purchases some drugs for their communal use is treated more leniently than a wholesale dealer in drugs who may not use them at all himself and whose sole motive is financial gain ..."

While acknowledging that even specialised texts have limitations, this description by Mr Lord is disappointingly brief. However, the author continues to assert:-

> "The trends in drug sentencing have varied considerably over the years since the mid-1960's when drug abuse became a serious problem. Despite the court's frequent proclamations on the evils of drug trafficking and the need to eliminate it, sentences have in general become less severe in recent years. Many of the

> earlier cases cannot be regarded as giving guidelines on sentencing policy." (35)

The first sentence of the last quotation maybe wrong if Mr Lord means that the trend swung to one extreme and then back to leniency and back again to extreme harshness. The initial reaction to an apparent drugs problem as shown by the judgements of the Court of Appeal - and Lord Parker C.J. in particular - was one of stiff resistance. What might now be regarded as comparatively minor crimes were met with heavy sentences, clearly of an exemplary nature. Mr Lord may be correct if specific offences such as simple possession of cannabis is concerned for there sentences are undoubtedly a shadow of their former size. The second sentence in the quotation - that sentences have become lighter - is misleading. The great increase in drug offences has led to a more precise demarcation of offenders, at least in England and Wales. The heavy sentences passed for crimes of production or wholesale supplying are most certainly not lighter than they were before. (36)

C. Conclusions

4.18 Mr Philip Bean of the University of Nottingham has been a regular and critical commentator on matters of controlled drugs. In another of his valuable works, Drug-taking and the Courts: Some Persistent Dilemmas (37), he argues that as interest in drug-taking only really began in the middle or late 1960's, for a long time anyone who appeared to know something about "drugs" was an expert. More, he says, is now required for that description. Interest was initially directed to drugs, but subsequently the drug-takers were considered more. Mr Bean sought to widen the area of debate because, he said, it had until then (he was writing in 1974) been too narrow and it thereby masked some of the more profound issues which are central to the legal and penal system. He then considered three areas

which he thought ought to be the focus of special attention. Two of these areas were concerned with barbiturates and other similar drugs and these are not considered further here. The third however was:

> "... that age-old question about sentencing, and as far as drug offenders are concerned, sentencing for what purpose?" (38)

It seemed to Mr Bean that there were two main arguments behind the controlled drugs legislation, one was to stop the spread of drug abuse by illicit sales, gifts or prescribing and the second was to protect the offender from himself, that is, to convict him so that he may be stopped using illicit drugs again. It was said by the author that it had only been since the mid-1950's that a third such argument had been put forward, that sentences should be reformative, and passed on the offenders for their own welfare. He said that:

> "In practice sentencing policy for drug offenders is likely to be a pragmatic one, based on the circumstances of each case. Yet drug offenders like other offenders appearing in the courts have a right to know if they are being sentenced for their own good or for deterrent reasons ..."

And later:

> "Drug offenders highlight the issue about welfare sentences because their behaviour is immediate in its impact and because of the rather curious ways in which we select certain types of drug use for moral condemnation and not others." (39)

Mr Bean saw that the major difficulty in discussing drug offenders was, and still is, that they are not a hamogeneous group. He had suggested earlier in his works that durg offenders fell into two broad categories, those who were working

class and delinquent prior to drug-taking, and the second group who were middle-class and only delinquent after drug-taking. By 1974 the writer thought that it was doubtful if such a categorization would still hold. He continued:

> "... it is still convenient to talk about addicts and non-addicts, and although this is a useful working distinction addicts appear to take non-addictive drugs too. In other words drug takers in Britain use a variety of drugs, some addictive and some not addictive, and it makes little sense to see them solely in terms of the type of drug for which they are prosecuted." (40)

Mr Bean was of the view that one should be wary of making generalizations because there were "no" experts in this field. The situation was too fluid and the knowledge base too thin to make qualitative predictions. He concluded that:

> "Drug use, drug abuse and drug misuse are features of our society and although they affect the courts they also have deeper philosophical implications which, as Iran Illich says, are bound up with notions of health, pain, profit and vested interests." (41)

In the twelve or so years that have passed since publication of that article by Mr Bean, the subject matter has grown out of all proportion to what must have been expected generally by even the most attentive of researchers. The 'knowledge base' referred to is now far greater than then but, it is submitted, we are no nearer to solutions and Mr Bean's observations still hold good. The working of the marker system combined with fickle consumer demands and intermittent political involvement produce together an area of human behaviour that is so uncertain.

4.19 Four aims were established at the start of this study.

> 1. The first aim was to consider the framework of the legislation and common law for the disposal of any drug-related case before the courts.

Perhaps the first conclusion to be set down is that it would be an error to consider the 1971 Act as being comprehensive. Although that statute contains the basic offences it has been shown that there are a considerable number of other Acts and delegated legislation which have a bearing on controlled durgs. With the expressed intention of Parliament being to attack the wealth brought by involvement in drugs it must be expected that this area of the law will simply grow inexorably over the next few years.

> 2. The second aim was to analyse the subsiduary or supporting legislation which appears in drug-related cases, more than in any other crime, to be of immense importance.

The comments in relation to the first aim apply equally to the second. Of course the schedules of maximum penalties have been increased in criminal statutes as well as the 1971 Act. But few Acts have had as comprehensive a supporting statute as the Drug Trafficking Offences Act 1986. The political will-power behind these changes has been and at the time of writing continues to be more determined than in many other criminal statutes. Further, the complexity is likely to increase as statutes covering the different jurisdictions are passed and come into force at varying times.

4.20

> 3. The third aim was to consider the development of the legislation and judicial attitudes as a means of assessing drug-related activities.

This work purports to be a study of the law relating to sentencing drug offenders and judicial attitudes to the same

offenders. In assessing drug related activities it is most clear that the commercial element is uppermost in the attention of the legislature and the judiciary. In considering this aspect further it might assist to have regard to Miss Mary McIntosh's perceptive study The Organisation of Crime. Broadly her work is concentrated on the managerial angle of professional crime rather than the sociologists and criminologists traditional approach of individual deviation. The study is of value here in that the profit motive in drug-related crimes such as distribution is self-evident. On the basis that professional crime has a higher degree of skill invovled in the performance of the crime, Miss McIntosh argues that:

> "... professional crime is organisationally distinguished from other crime in one sense. Because professional crime is a relatively distinct occupational sphere, it has its own patterning and continuity, whereas amateur activities, being only part-time, are much more influenced by a variety of circumstances, often peculiar to the individual criminal. Professional crime is thus distinguished not by its scale, or degree of turpitude or efficiency but by its organisational differentiation from other activities." (42)

And so it is that some of the heaviest sentences - in absolute and comparative terms - have been passed in drugs cases with the highest degree of preparation and planning. These cases ordinarily involved individuals who have personal mitigation that might be thought of as compelling but that has little influence over the court.

4.21 The analysis of Miss McIntosh continues and she outlines four varieties of organisation named as picaresque, craft, project and business:

> "Briefly, the picaresque organisation, which is typical of pirates and brigands is a fairly

> permanent gang under one man's leadership, sometimes with a few supporting officers. Profits are shared among the members according to rank. The craft organisation, typical of people performing skilled but small-scale thefts and confidence tricks, is a small, fairly permanent team, usually of two or three men, each of whom has a specific role to play in the routinised thefts in which the team specialises. It is a team of equals and the profits are shared equally at the end of each day. The project organisation, typical of burglars, robbers, smugglers or fraudsmen, engaged in large-scale crimes involving complicated techniques and advance planning, is an ad hoc team of specialists mustered sometimes by an entrepreneur, for the specific job in hand. Profits are shared on a basis worked out before hand, though some participants may work for an agreed flat fee. Business organisations, typical of extortionists and suppliers of illegal goods and services who have gained some degree of immunity from legal control, is the largest in scale and the most permanent. It has a hierarchy of participants who engage in specialised activities, sometimes being paid by their superiors and sometimes receiving a share of the takings in their particular sector." (43)

The extensive study of the cases earlier reveals similar organisations to those described above and even if there is no reported case for any group above then within the whole trade it is easy to see how such groups could exist.

4.21 It is submitted that the drugs trade can be viewed in one of two possible ways for the purpose of locating an individual in that trade: Miss McIntosh has provided the clue with the use by her in the last quotation of the phrase "hierarchy of participants." There is a vertical approach and a horizontal one.

(a) Vertical Approach

Professor John Kaplan has said that:

> "... the illegal market can best be seen as a pyramid, with the smallest number of traffickers close to the source." (44)

The judiciary have a similar ascending metaphor in mind when dealing with drug offenders. In R v Ford (45) the judge said that he placed the accused "at the very bottom rung of the ladder" of those who deal in drugs. in R v Tann (46) the appellant was described as "not being an underling." This vertical aspect clearly suggests various trades for in R v Vickery (47) it was held on appeal that those who supplied drugs should be treated more severely than those who merely possessd them. In his commentary Dr Thomas said succinctly that:

> "... the court has distinguished between different kinds of suppliers, and in particular between the supplier of cannabis on a small scale and the "middleman" and importer respectively." (48)

(b) Horizontal Approach

But such a hierarchy is not the only way of viewing matters for in R v Bebbington (49) the trial judge referred to the defendant as being "in a chain" of suppliers. In R v Atkins (5) it was said that the appellant was:

> "... shown to have been part of a chain of distributors, of some sort of another, of the supply of hard drugs for illicit purposes, and therefore would be playing an active part in the chain." (51)

The cases cited are illustrative only for the reports contain a large number of similar observations. The truth of the matter, or so it is submitted, is that both views are correct for the

producer of the controlled drug can only get the substance to the consumer by means of a continuous series of contacts. Further, whether measured by value or volume the controlled drugs reach several critical points, high points that is, in the course of progress so that there is undoubtedly a hierarchy of participants.

4.22 This study has been confined to reported cases but in the initial inquiries at the very outset the case of R v Ogunmokum (52) was discovered. There in the course of rejecting appeals against sentences the Court said:

> "The background to this case was dealing with heroin, and in the summer of 1973 the Police were keeping observation in Gerrard Street in Soho where, apparently, a good deal of buying and selling of heroin was going on. A large number of arrests were made. People who were buying only for their own use were dealt with in the Magistrates Courts. The next levels were what are called "runners" - the link between the buyers and the pushers. Many of these "runners" were addicts themselves, selling heroin in order to raise the money to supply their own requirements .. the phrase "addict-pushers" was used to describe some, at any rate, of these people." (53)

Thus, while the judiciary have supplemented the legislation with what has been told to them of the drugs trade to produce what may in fact be a full picture of the trade, the complexity of the whole business is such that statutory definitions of the trades might be very difficult. But this is not to say that such definition ought not to be attempted. Indeed it might be unobjectionable to provide in a statute that a court in passing sentence ought to give merciful consideration to certain aspects including where applicable, for example, the status of addict-pusher.

4.23 4. The forth aim was to consider whether existing legislation can be shown to be ineffective to meet the drug-related criminal activities and therefore to suggest improvements in the law.

The contemporary nature of the problems related controlled drugs are revealed most obviously at this point. It would have been until recently a matter for great emphasis that legislation was required to tackle profits made from these activities. This work purports to state the law as at 31st December 1986 but it is clear that legislation passed immediately after that date sought to provide for those types of gain from drug-related crime. As that legislation, at the time of writing has just been passed, it cannot be said to have been tested in the courts and the observation applies only to England and Wales, for the relevant Scots legislation is still to be passed. Leaving that matter to one side, there are two other points to be considered here: street values and drug classifications.

4.24 A. Street Values

It is apparent from even the most cursory of glances at the reported cases that the value assessed for a given quantity of controlled drugs is crucial: the higher the value the greater the degree of seriousness. The 1971 Act provides no indication as to the means to be used in calculating the value of controlled drugs. What is commonly referred to as the "street value" is not the subject of any judicial definition at least in relation to controlled drugs. Some assistance with the assessment may be found in considering other importing authorities: in Byrne v Law (54) the appellant was convicted before justices of fraudulently evading the prohibition on the importation on indecent goods that is to say 1000 magazines and 650 line films, contrary to section 304 of the Customs and Excise Act 1952. The invoice price of the articles in question, expressed in Danish Kroner, was equivalent to £2335. The accused was sentenced to a fine of

£3000 or 12 months imprisonment in default. He appealed to quarter sessions who varied the sentence by imposing a sentence of imprisonment, suspended, and substituting a penalty of £100 for the penalty of £3000 imposed by the justices. Quarter Sessions reduced the amount of the fine on the ground that, since the importation of the articles was prohibited, there would be no "open market". For then, within the meaning of the 1952 Act, the "open market" was the test by which the court could fix the value of the goods concerned and so determine the then maximum penalty which the court could impose, it being the sum of £100. Section 305(2) provided that:

> "Where a penalty for any offence under any enactment relating to an assigned matter is required to be fixed by reference to the value of goods, that value shall be taken as the price which those goods might reasonably be expected to have fetched, after payment of any duty or tax chargeable thereon, if they had been sold in the open market at or about the date of the commission of the offence for which the penalty is imposed."

On appeal to the Queen's Bench Division, it was held that the appeal would be allowed and the case sent back for the offence to be reassessed. For the purposes of section 305(2) any distinction between the so-called black and white markets was irrelevant; all that was necessary to ascertain the penalty was to ask what the price was which would be paid by a willing buyer to a willing seller at the port of landing. An invoice from the overseas seller to the intended recipient would be a good, and sometimes the only and conclusive, guide to the open market value of the goods in question.

4.25 In reaching that decision Lord Widgery C.J. referred to Rolex Watch Co Ltd v Commissioners of Customs and Excise (55) where the nature of the goods was different but the same formula of

the open market price was used. There Birkett L.J. held that:

> "If there is a sole concessionaire ipso facto the free open market vanishes, and one must do the best one can, taking a notional open market, and considering all the factors bearing on the question of price." (56)

In Byren's case Lord Widgery observed that the reference to the sole concessionaire was because in that case the goods in question came into this country in the ordinary course of business through a sole concessionare, and thus difficulties were presentend in assessing the open market price. But Lord Widgery expressly adopted Lord Birkett's "common sense approach" and he added that:

> "One must do the best one can; one must take a notional open market and consider all the facts here which bear on the question of price." (57)

and further that:

> "It is important that justices should realise that if the material seems scanty, the direction is that they must do their best. What they have to do their best to achieve is to find the open market, willing buyer, landed price of these goods." (58)

Section 305(2) of the 1952 Act was repealed and re-enacted as section 171(3) of the Customs and Excise Management Act 1979 in identical terms.

4.26 It seems that the general approach in practice on assessing the value of controlled drugs is to lead evidence of policemen that indicates the highest price that the open market would bear. But it maybe argued reasonably that this matter is too vague and has too many elements left uncertain. There is no definition of "street value". No allowance appears to be made for either

regional variations in market price or for inflation. A police witness in a trial may also, it appears, give evidence as to value thus assuming the role of witness to fact and expert witness. It may be that the various police forces share knowledge and establish common current values for controlled drugs but this essentially administrative arrangement has basis in law which is what it perhaps ought to have. There is an increasing awareness of this whole problem on the bench, as R v Darby (59) indicates. There the appellant pleaded guilty to being concerned in evading the prohibition on the importation of cocaine. He had been detected at an airport carrying 2.95 kilogrammes in various packets which were strapped to his back and to his shins. The report narrates that the cocaine was in fact cocaine hydrochloride of 80 per cent purity. The drug was valued at £472,000. He was sentenced to ten years imprisonment and he was refused leave to appeal against sentence. The Court of Appeal held that the sentences fell within the limits suggested for large scale importation of Class A drugs in R v Aramah. The sentence was right. Leonard J. said that:

> "According to evidence which was given at the Court below or was before the court in the form of a statement, the value was calculated as being £472,000. That calculation rested on comparison with a quantity of the same drug at a much lower purity and involved the multiplication of the quantity in the present case by a figure which produced an equivalent in relation to the degree of purity. There is no challenge to the conclusion which was drawn by the customs officer who, from his experience, made that comparison." (60)

It is interesting that the judgement records that the appellant had been told that the drug was valued at £50,000. The importance of the commercial value of the drugs was stressed

when the Court held further that:

> "... what seems to this Court to be important is the actual value and the considerable quantity of the drug which was imported." (61)

It is submitted that the customs officer in calculating in the way that he did was in essence continuing a trend, for he based his figures on an earlier case valuation. There seems to be no assessment in this case of what an open market would value these drugs at, unless that valuation assumes but does not express that to be the basis of valuation. Further - and this point may reflect Scots practices - there is no statement of what the customs officer's experience was in terms of years service and length of detailed involvement in the drugs trade. In White v H M Advocate (62) the High Court had to decide, in relation to the possession of a controlled drug with intent to supply it to another, whether the opinion evidence on the dosage of drugs a user would consume, is competent only to medically qualified persons. It was held that:

> "Police officers who have served for some time with the drug squad do acquire knowledge of such matters as the quantity of drugs which a drugs user would consume in a day or in a week and so forth. Provided such a witness's qualifications as a police officer and his experience in the drug squad are first established such evidence, in our opinion, is clearly competent. Evidence of this nature is not competent only to medically qualified witnesses." (64)

It is submitted that by analogy the same principle applies to expert witnesses who are called to give evidence on matters such as the street value of controlled drugs.

4.27 B. Classifications

The 1971 Act provides for the classification of controlled drugs by section 2 and schedule 2. It is trite that these are classified into A, B and C and that Parliament has not explained why any drug has been so classified. It is interesting as a matter of comparison that the same legislation for the Republic of Ireland contains a very similar list of controlled drugs but without any division amongst the substances. (64) It has been shown above how counsel, in R v Kemp (65), made attempts to try to distinguish between controlled drugs within each classification. But the distinction between the classes is forgotten occasionally: in R v Suerdmont (66) on appeal against sentence Skinner J. said that:

> "It may well be that because of the high price of cocaine its socially harmful effects are less obvious than the socially harmful effects of other drugs, but (counsel for the appellant) eventually submitted to us that cocaine should be considered on a par with amphetamines in its dangerous qualities and we are content to deal with the matter on that basis." (67)

Several important points arise from this and the first is that the judges should not equate cocaine with amphetamines as each is in a different Class. Second the judgement seems to suggest or now be authority in England for some test of whether a drug has "socially harmful effects," whatever that may mean. Thirdly, the judgement concerns only two out of very many controlled drugs thus failing to place these two in context in relation to the others (68). A further criticism of the classification of controlled drugs is that quality does not seem to be considered as being relevant. Thus, an accused maybe sentenced on the basis that the controlled drug in his possession is Class A and he may expect, all things being equal, a heavier sentence than the next person in similar circumstances who has a Class B drug.

But it may well be and probably frequently is the case that an accused has a very poor quality of Class A drug. The constant buying and selling of a drug means in accordance with trade practices that the substance is frequently adulterated. In the circumstances posed above the quantity of Class A might be a very poor financial asset compared to the high quality Class B drug. In short, the courts ought, it is submitted, give weight to the comparative qualities of the controlled drugs concerned.

4.28 End Note

The law of controlled drugs and the relative sentencing policy maybe described, modestly in the circumstances, as a developing subject. This work might well, indeed probably will, be overtaken by events sooner rather than later. Still, a few propositions can be formulated. The judiciary have a keen sense of the market and how the drugs trade represents individuals carrying into effect very simple and basic economic functions. That the profits in this trade are enormous is well known and the "profit-stripping" legislation represents a reaction to such gains. While the judges do make observations about the drugs trade, sustained analysis by them of the business does not seem to exist. This maybe contrasted, for example, with the view of one criminologist that:

> "The illegal drug market, as it functions in the urban ghetto, maybe viewed as a social and economic sub-system interpenetrating with the large capitalistic economy. The spirit of enterprise infuses the hierarchy of distributers and dealers, while consumers invest in and sustain the market place activity. The absence of regulations to ensure the manufacturing of quality drugs and the spy system fostered by repressive drug-control policies tend to generate chaos in the market ..." (69)

Further, the greater volume of cases in England means that the judiciary have a better opportunity to explain and condem the

various participants and their activities. In Scotland the judiciary has tended to more dogmatic condemnations. If this work is to have any real aim it is perhaps to assist in some way to reduce desparity, if it exists, amongst accused. Lord Elwyn-Jones, a former Lord Chancellor, has said that:

> "... few things give a man or a woman more sense of injustice than to receive a penalty manifestly more severe than that imposed on another accused person where the facts and circumstances are broadly similar." (70)

It is or ought to be a mark of a legal system's degree of development that justice to the accused continues to be a relevant consideration at all times.

4.29 Mr J A Finch of the University of Leicester said in his very helpful book Introduction to Legal Theory that:

> "Those familiar with literary criticism will appreciate the way in which differing standards maybe applied when one treats the writings of another. Two principal methods maybe found by which to criticise any piece of writing, whether the critic is addressing his assessment to form, or to content, or to a mixture of the two. The first is to consider whether the project merited treatment at all, or in the particular context in which it appeared. The second is to consider whether it achieved the object intended by its author. When contributions to any field of knowledge, art or literature, are criticized out of hand without regard to the object which the author set out to achieve, the second form of criticism is ignored at the cost of preconception and inaccuracy... The former approach... may take the form of an inquiry as to whether the object undertaken was justified and worthy of treatment, in terms of the standards and point of view which the critic held even before encountering the work which he is now assessing... This difference in approach indicates the distinction between subjective and objective analysis." (71)

The extent of the problems relating to controlled drugs are such, it is submitted, that the wisdom of examining in this work the judicial approach cannot be doubted. All trades and professions have an interest in the matter on account of the size and complexity of what is at base a social problem. As judges strive to answer the question of what to sentence drug offenders for, the accused are not the only group to be concerned to know what that answer is. This work is but a very small part of an enormous literature on a developing subject. Twenty years ago there would probably not have been sufficient material to allow complection of this work even if there had been any interest in it. It is impossible now to know what events will be like in twenty years from now. Drug offenders, using the term in the broadest possible context, cannot be seen as people apart: they are, like practitioners in other criminal activities, simply part of our society. But, as was observed in a leading article in The Times:

> "For rescue from moral and cultural decline
> a society must turn elsewhere than to the
> criminal law." (72)

References

(1) Paras 200-201.

(2) Hansard Vol. 77 col. 650 (19 April 1985).

(3) ibid p576.

(4) The Times Law Report 7th July 1984.

(5) Sarah McCabe discusses the policy change in The Powers and Purposes of the Parole Board [1985] Crim.L.R. 489 and further at [1985] Crim.L.R. 761-2.

(6) All references to the book in this work are to the paperback edition of 1981.

(7) ibid pviii.

(8) ibid p34.

(9) ibid p29.

(10) ibid p30.

(11) ibid p35-6.

(12) ibid p37.

(13) ibid p39.

(14) Homilies in Sentencing [1971] Crim.L.R. 690.

(15) ibid p695.

(16) Sentencing Drug Offenders [1968] Crim.L.R. 434.

(17) ibid p435.

(18) Sentencing the Drug Offenders 141 J.P.N. 63.

(19) ibid p63.

(20) ibid p64.

(21) The Law and Practice on Sentencing the Drug Offender (1979) New.L.J. 899.

(22) Sentencing Drug Offenders in Northern Ireland [1977] 28 N.I.L.Q. 21.

(23) ibid p28.

(24) Sentencing Drug Offenders (1985) 106 SCOLAG 106.

(25) Potas and Walker (1983). Mr Potas has completed a further study by himself and there he presents some statistical material relating to New South Wales together with a list of relevant sentencing decisions. This is intended to complement the earlier study and this particular state has been chosen as it contains the best statistics and the largest number of drug offences: Potas (1983).

(26) The only discussion in the United Kingdom of the report that I have been able to discover so far is Martin Wasik's Determining Sentence Levels for Serious Drug Offenders 147 J.P.N. 439. In that 1983 article the author seeks also to make comparisons between the findings of Potas and Walker and English sentencing case law in general. There has been, of course, critical comment in the Southern Hemisphere: Austin Lovegrove Research Note: A Critique of Potas and Walker (1983) 16 A.NZ.J.Crim. 248.

(27) Potas and Walker ibid p95.

(28) Wasik p441.

(29) ibid p442.

(30) MacFarlane at p547-569.

(31) ibid p548.

(32) ibid p548.

(33) ibid p566.

(34) Lord p91.

(35) preceding quotation and this one: ibid p92.

(36) Bucknell and Ghodse also consider sentencing policy at p94-96 and p144-6. For a book that is otherwise so comprehensive a study of the law of controlled drugs and related matters the parts dealing with sentencing are disappointingly superficial.

(37) (1974) 30 The Magistrate 114.

(38) ibid p115.

(39) ibid p116.

(40) ibid p117.

(41) ibid p118.

(42) McIntosh p12.

(43) ibid p37.

(44) Kaplan p66.

(45) (1980) 2 Cr.App.R.(S) 33.

(46) (1982) 4 Cr.App.R.(S) 17.

(47) [1976] Crim.L.R. 143.

(48) ibid

(49) (1978) 67 Cr.App.R. 285.

(50) (1981) 3 Cr.App.R.(S) 257.

(51) ibid p257-8.

(52) Court of Appeal 16th January 1975 ref.976/C/74.

(53) ibid p1-2.

(54) [1972] 3 All E.R. 526.

(55) [1956] 2 All E.R. 589.

(56) ibid p593.

(57) Byrne ibid p529.

(58) ibid p530.

(59) (1986) 8 Cr.App.R.(S) 33.

(60) ibid p34-5.

(61) ibid p35.

(62) 1986 S.C.C.R. 224.

(63) ibid p226.

(64) Section 2(1) and schedule to the Misuse of Drugs Act 1977 as amended by the Misuse of Drugs Act 1984.

(65) (1979) 69 Cr.App.R. 330.

(66) (1982) 4 Cr.App.R.(S) 5.

(67) ibid p8.

(68) The Advisory Council on the Misuse of Drugs has authority, by section 1(2) of the 1971 Act, to recommend the control of any drug which is being misused or which is likely to be misused. The exact criteria governing the control of drugs under the 1971 Act are explicit in the words of section 1(2), namely, the drugs concerned are those:

> "which are being or appear to (the Council) likely to be misused and of which the misuse is having or appears to them capable of having harmful effects sufficient to constitute a social problem."

The classification is therefore based on the absolute harmfulness of drugs when they are misused. Harmfulness maybe judged variously including the point of view of a drug's effects on an individual or how far the individual suffering the effects can be regarded as a social problem. The Council has recognised that it is difficult to give precise definitions to the terms "misuse" and "social problem" : 1979 Report Chapter 3 para. 3.6. But is this all a matter for judges to consider when sentencing?

(69) Rock p204.

(70) [1979] 2.M.L.J.C. reprinted from (1978) 34 The Magistrate 188.

(71) Finch p11-12.

(72) 29 November 1979.

Appendix to Chapter 4

Table A

Schedule 4 to Misuse
of Drugs Act 1971

SCHEDULE 4

Section 25.

PROSECUTION AND PUNISHMENT OF OFFENCES

Section Creating Offence	General Nature of Offence	Mode of Prosecution	Punishment			
			Class A drug involved	Class B drug involved	Class C drug involved	General
Section 4(2)...	Production, or being concerned in the production, of a controlled drug.	(*a*) Summary ...	12 months or £400, or both.	12 months or £400, or both.	6 months or £200, or both.	
		(*b*) On indictment	14 years or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 4(3)...	Supplying or offering to supply a controlled drug or being concerned in the doing of either activity by another.	(*a*) Summary ...	12 months or £400, or both.	12 months or £400, or both.	6 months or £200, or both.	
		(*b*) On indictment	14 years or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 5(2)...	Having possession of a controlled drug.	(*a*) Summary ...	12 months or £400, or both.	6 months or £400, or both.	6 months or £200, or both.	
		(*b*) On indictment	7 years or a fine, or both.	5 years or a fine, or both.	2 years or a fine, or both.	
Section 5(3)...	Having possession of a controlled drug with intent to supply it to another.	(*a*) Summary ...	12 months or £400, or both.	12 months or £400, or both.	6 months or £200, or both.	
		(*b*) On indictment	14 years or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 6(2)...	Cultivation of cannabis plant ...	(*a*) Summary ...	—	—	—	12 months or £400, or both.
		(*b*) On indictment	—	—	—	14 years or a fine, or both.

Section 8 ...	Being the occupier, or concerned in the management, of premises and permitting or suffering certain activities to take place there.	(*a*) Summary ... (*b*) On indictment	12 months or £400, or both. 14 years or a fine, or both.	12 months or £400, or both. 14 years or a fine, or both.	6 months or £200, or both. 5 years or a fine, or both.	
Section 9 ...	Offences relating to opium ...	(*a*) Summary ... (*b*) On indictment	— —	— —	— —	12 months or £400, or both. 14 years or a fine, or both.
Section 11(2)	Contravention of directions relating to safe custody of controlled drugs.	(*a*) Summary ... (*b*) On indictment	— —	— —	— —	6 months or £400, or both. 2 years or a fine, or both.
Section 12(6)	Contravention of direction prohibiting practitioner etc. from possessing, supplying etc. controlled drugs.	(*a*) Summary ... (*b*) On indictment	12 months or £400, or both. 14 years or a fine, or both.	12 months or £400, or both. 14 years or a fine, or both.	6 months or £200, or both. 5 years or a fine, or both.	
Section 13(3)	Contravention of direction prohibiting practitioner etc. from prescribing, supplying etc. controlled drugs.	(*a*) Summary ... (*b*) On indictment	12 months or £400, or both. 14 years or a fine, or both.	12 months or £400, or both. 14 years or a fine, or both.	6 months or £200, or both. 5 years or a fine, or both.	
Section 17(3)	Failure to comply with notice requiring information relating to prescribing, supply etc. of drugs.	Summary ...	—	—	—	£100.
Section 17(4)	Giving false information in purported compliance with notice requiring information relating to prescribing, supply etc. of drugs.	(*a*) Summary ... (*b*) On indictment	— —	— —	— —	6 months or £400, or both. 2 years or a fine, or both.

Section Creating Offence	General Nature of Offence	Mode of Prosecution	Punishment			
			Class A drug involved	Class B drug involved	Class C drug involved	General
Section 18(1)	Contravention of regulations (other than regulations relating to addicts).	(*a*) Summary ...	—	—	—	6 months or £400, or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 18(2)	Contravention of terms of licence or other authority (other than licence issued under regulations relating to addicts).	(*a*) Summary ...	—	—	—	6 months or £400, or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 18(3)	Giving false information in purported compliance with obligation to give information imposed under or by virtue of regulations.	(*a*) Summary ...	—	—	—	6 months or £400, or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 18(4)	Giving false information, or producing document etc. containing false statement etc., for purposes of obtaining issue or renewal of a licence or other authority.	(*a*) Summary ...	—	—	—	6 months or £400, or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 20	Assisting in or inducing commission outside United Kingdom of an offence punishable under a corresponding law.	(*a*) Summary ...	—	—	—	12 months or £400, or both.
		(*b*) On indictment	—	—	—	14 years or a fine, or both.
Section 23(4)	Obstructing exercise of powers of search etc. or concealing books, drugs etc.	(*a*) Summary ...	—	—	—	6 months or £400, or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.

Table B

Schedule 4 as
amended to Misuse
of Drugs Act 1971

SCHEDULE 4
(Section 25)

As amended by the Criminal Law Act 1977 s. 27, s. 28 and Sch. 5, the Magistrates Courts Act 1980 s. 32 (2) and (5), the Criminal Justice Act 1982, s. 46 and the Controlled Drugs (Penalties) Act 1985

PROSECUTION AND PUNISHMENT OF OFFENCES

*(The prescribed sum is at present £2,000—S.I. 1984/447)

Section Creating Offence	General Nature of Offence	Mode of Prosecution	Punishment			
			Class A drug involved	Class B drug involved	Class C drug involved	General
Section 4(2)	Production, or being concerned in the production, of a controlled drug.	(*a*) Summary	6 months or the prescribed sum, or both.	6 months or the prescribed sum, or both.	3 months or £500, or both.	
		(*b*) On indictment	Life or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 4(3)	Supplying or offering to supply a controlled drug or being concerned in the doing of either activity by another.	(*a*) Summary	6 months or the prescribed sum, or both.	6 months or the prescribed sum, or both.	3 months or £500, or both.	
		(*b*) On indictment	Life or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 5(2)	Having possession of a controlled drug.	(*a*) Summary	6 months or the prescribed sum, or both.	3 months or £500, or both	3 months or £200, or both.	
		(*b*) On indictment	7 years or a fine, or both.	5 years or a fine, or both.	2 years or a fine, or both.	

Section Creating Offence	General Nature of Offence	Mode of Prosecution	Punishment			
			Class A drug involved	Class B drug involved	Class C drug involved	General
Section 5(3)	Having possession of a controlled drug with intent to supply it to another.	(*a*) Summary	6 months or the prescribed sum or both.	6 months or the prescribed sum or both.	3 months or £500, or both.	
		(*b*) On indictment	Life or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 6(2)	Cultivation of cannabis plant.	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	14 years or a fine, or both.
Section 8	Being the occupier, or concerned in the management, of premises and permitting or suffering certain activities to take place there.	(*a*) Summary	6 months or the prescribed sum or both.	6 months or the prescribed sum or both.	3 months or £500, both.	
		(*b*) On indictment	14 years or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 9	Offences relating to opium	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	14 years or a fine, or both.
Section 11(2)	Contravention of directions relating to safe custody of controlled drugs.	(*a*) Summary	—	—	—	6 months or the prescribed sum, or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.

Section Creating Offence	General Nature of Offence	Mode of Prosecution	Punishment			
			Class A drug involved	Class B drug involved	Class C drug involved	General
Section 12(6)	Contravention of direction prohibiting practitioner etc. from possessing, supplying, etc. controlled drugs.	(*a*) Summary	6 months or the prescribed sum or both.	6 months or the prescribed sum or both.	3 months or £500, or both.	
		(*b*) On indictment	14 years or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 13(3)	Contravention of direction prohibiting practitioner, etc. from prescribing, supplying, etc. controlled drugs.	(*a*) Summary	6 months or the prescribed sum or both.	6 months or the prescribed sum or both.	3 months or £500 or both.	
		(*b*) On indictment	14 years or a fine, or both.	14 years or a fine, or both.	5 years or a fine, or both.	
Section 17(3)	Failure to comply with notice requiring information relating to prescribing, supply, etc. of drugs.	Summary	—	—	—	See note 33
Section 17(4)	Giving false information in purported compliance with notice requiring information relating to prescribing, supply, etc. of drugs.	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 18(1)	Contravention of regulations (other than regulations relating to addicts).	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.

33 By s. 46(1) Criminal Justice Act 1982 the penalty is at Level 3 of the standard scale—at present £400 (S.I. 1984/447)

Section Creating Offence	General Nature of Offence	Mode of Prosecution	Punishment			
			Class A drug involved	Class B drug involved	Class C drug involved	General
Section 18(2)	Contravention of terms of licence or other authority (other than licence issued under regulations relating to addicts).	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 18(3)	Giving false information in purported compliance with obligation to give information imposed under or by virtue of regulations.	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 18(4)	Giving false information, or producing document, etc. containing false statement, etc., for purposes of obtaining issue or renewal of a licence or other authority.	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.
Section 20	Assisting in or inducing commission outside United Kingdom of an offence punishable under a corresponding law.	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	14 years or a fine, or both.
Section 23(4)	Obstructing exercise of powers of search, etc., or concealing books, drugs, etc.	(*a*) Summary	—	—	—	6 months or the prescribed sum or both.
		(*b*) On indictment	—	—	—	2 years or a fine, or both.

Table C

Extract One
Potas and Walker
"Sentencing the Federal
Drug Offender" (1983)

LIST I

00 Drug

01 type of drug
02 quantity of drug
03 value of drug
04 quality of drug

10 Nature of drug

11 as a 'lead' to hard drugs
12 a comparatively harmless drug
13 a highly destructive or harmful drug
14 drug as a serious social evil
15 user/addict involved in crime
16 corruptive, filthy, detestable, vile, wretched
17 as a 'lead' to crime

20 Purpose of Offence

21 trafficking for commercial gain
22 for personal use
23 high profit expectation
24 trafficking in general

30 Nature of offence

premeditated/planned
spontaneous
involving co-offender/s
offence carried out alone
syndicate/organized or professional crime
large scale/major offence
small scale offence
use of violence, incl. use of weapon
offender threatened with violence to comply with importation

Offender's role

principal/instigator
minor role
courier
mere paid agent
mere physical control, incl. having no knowledge of drugs
determined by factors beyond offender's control
Relatively less significant role than co-offenders

50 Offender

51 prior drug criminal record
52 bad character, incl. non-drug offences
53 prior good character/first offender
54 unemployed
55 drug addict
56 on parole/probation/bond at time of offence
57 under influence of drugs/alcohol at time of offence
58 age of offender
59 alien or ethnic background
60 mental instability or disorder
61 physical illness or handicap
62 familial, domestic circumstances
63 pressures (unspecified)

70 Other

71 effect of sentence on offender's employment prospects
72 'free' to do what one wishes
73 lack of affirmative evidence
74 degree of cooperation with authorities
75 remorse
76 prospects for rehabilitation
77 guilty plea
78 delay
79 no reasons given for sentence
80 prevalence of drug use
81 isolated offence
82 trafficking to support own habit
83 time already spent in jail
84 influence of other on offender
90 conversion to religion
91 ambivalence to gravity of trafficking

Table D

Extract Two
Potas and Walker
"Sentencing the
Fedral Drug Offender"
(1983)

TABLE 6: FACTORS CITED IN 10 CASES OR MORE

Factor	Label	Number of Citations		% of Cases
		Mainly Aggrav.	Mainly Mitigat.	
Trafficking for commercial gain	F21	86		34.0
Prior good character/ first offender	F53		80	31.1
Quantity of drug	F02	75		29.6
Premeditated/planned	F31	55		21.7
Degree of co-operation with Authorities	F74		52	20.6
Type of drug	F01	48		19.0
Prospects for rehabilitation	F76		33	13.0
Guilty plea	F77		31	12.3
High Profit expectation	F23	29		11.5
Age of offender	F58		27	10.7
Highly destructive drug	F13	26		10.3
Drug Addict	F55	25		9.9
Value of drug	F03	24		9.5
Courier	F43	21		8.3
Time already spent in jail	F83		21	8.3
Principal/instigator	F41	21		8.3
Family/domestic circumstances	F62		19	7.5
serious social evil	F14	19		7.5
Involving co-offenders	F33	18		7.1
Drug for personal use	F22		17	6.7
Remorse	F75		15	5.9
Offender's role in general	F40	13		5.1
Prior drug criminal record	F51	12		4.7
Delay in court hearing	F78		12	4.7

Table E

Sentencing Table:
Richard Lord
"Controlled Drugs:
Law and Practice"
(1984)

5 Sentencing Table

Section creating offence	*Nature of offence*	*Class A*	*Class B*
CEMA 1979, s. 170(2)	'...evasion of prohibition on importation...'	Heroin etc. up to £100,000, 7 years and up appropriately to £1m, 12–14 years. Seldom less than 4 years for appreciable amount.[1] Not necessarily less for cocaine or LSD.[2]	Small amounts, as for possession. Less than 20 kgs, 1½–3 years. Medium quantities, 3- years. Large scale, up to 10 years.
MDA, s. 4(2)	Production	(Usually applies to LSD), 7–13 years if large scale.[3]	(Usually amphetamine analogous to importation.[4]
MDA, s. 4(3)	Supply/Offer to supply	Seldom less than 3 years. May incur sentences similar to importers.[1]	Large quantities up to 10 years. Otherwise 1–4 years.
MDA, s. 5(2)	Possession	No general rule. Prison often appropriate.[1]	Fine often sufficient. Persistent flouting may lead to imprisonment.
MDA, s. 5(3)	Possession with intent to supply	As for supplier.	As for supplier.[5]
MDA, s. 6	Cultivation of cannabis	If commercial motive or distribution, as for supplier. If not, as for possession.[6]	
MDA, s. 8	'...Permitting premises...'	Depends on activity permitted.[7]	
MDS, s. 20	Involvement in foreign offences	Depends on nature of offence.	

[1] *Aramah* (1983) 76 Cr App Rep 190. [2] *Virgin* (1983) 5 Cr App Rep (S) 148. [3] *Bott* (1979) 1 Cr App R (S) 218; *McCulloch* (1982) 4 Cr App Rep (S) 98. [4] *Rubinstein & Grandison* (1982) 4 Cr App Rep (S) 202. [5] If a defendant is acquitted of a charge under section 5(3) or if the prosecution accept a not guilty plea to such a charge, he must not be sentenced on the basis that he is a supplier: *Spires* (infra). [6] See *Stearn* (1982) 4 Cr App Rep (S) 195; *Lawrence* (1981) 3 Cr App Rep (S) 49. [7] Even permitting premise to be used for smoking cannabis, the least serious section 8 offence, will usually merit a custodial sentence: *Spires*, 17 November 1983, CA (unreported).