Neutral Citation No: [2024] NICA 22	*Ref:*	**KEE12463**
	ICOS No:	**16/116930**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**22/03/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

GAVIN COYLE

_____

IN THE MATTER OF A REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2022)

AND IN THE MATTER OF AN APPEAL FROM THE CROWN COURT SITTING AT BELFAST

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Mr Magee KC with Mr McNeill (instructed by the Director of Public Prosecutions) for the Applicant
Mr Berry KC with Mr Fox (instructed by KRW Law LLP, Solicitors) for the Appellant

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Before: Keegan LCJ, Horner LJ and Kinney J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This case involves both a reference brought by the Director of Public Prosecutions ("DPP") dated 2 November 2023 and an appeal brought by the appellant of the same date in relation to a sentence imposed by Her Honour Judge Smyth, the Recorder of Belfast, ("the judge") on 6 October 2023 in relation to the appellant. This was a sentence of six years' imprisonment for two offences, namely:

(i) Membership of a proscribed organisation, contrary to section 11 of the Terrorism Act 2000 (count 3).

(ii) Providing property to be used for the purpose of terrorism, contrary to section 15(3) of the Terrorism Act 2000 (count 4).

[2] The above sentence is captured by the Counter-Terrorism and Sentencing Act 2021 and so any sentence of imprisonment that is imposed must comprise two thirds to be spent in custody and one third on licence as the judge stated in her judgment.

The points at issue

[3] In the unusual circumstance where the court has received both a reference and an appeal simultaneously, the court must determine whether the sentence imposed was unduly lenient or manifestly excessive. Considering the arguments made which overlap, we identify four core issues which must be determined by this court as follows:

(i) Whether the 12-year starting point for both offences was correct.

(ii) Whether there was culpable delay in this case for which a deduction from the sentence should have been made, and if so, the extent of that.

(iii) Whether the sentence was commensurate with the principle of totality.

(iv) Whether maximum credit should have been given by the judge for the guilty plea.

Background facts

[4] This case relates to a terrorist attack on a serving police officer, Ryan Crozier. At the relevant time he was serving with the Police Service of Northern Ireland ("PSNI") in Enniskillen. He was known to the appellant by virtue of their upbringing in the same locality. In 2007 and 2008 the appellant asked two individuals known to Constable Crozier about him. As the DPP states in the reference, whilst it is accepted that the attempts to obtain information about Constable Crozier were insufficient to launch the attack upon Constable Crozier in May 2008 and there was no evidence to confirm the information was passed on to others, it was accepted that the information sought would be of use to terrorists and was relevant to the offences to which the appellant pleaded guilty.

[5] On Saturday 10 May 2008, Constable Crozier returned to his home in Castlederg. At approximately 1800 hours he parked his blue Ford Focus in the driveway at the side of his house and it remained there until 2100 hours on Monday 12 May 2008 when Constable Crozier got into the car to go on duty.

[6] On Sunday 11 May 2008 the appellant's silver Audi A4 vehicle was used in the deployment of a bomb which was placed on the chassis of Constable Crozier's vehicle, directly under the driver's seat. Closed circuit television footage from the

area between the appellant's home and that of Constable Crozier for the period 11 and 12 May 2008 identified the appellant's Audi A4 driving through Castlederg and Victoria Bridge in the early hours of the morning headed for and returning from the vicinity of Constable Crozier's home. At times, the vehicle was seen in convoy with another vehicle. It was at this time that those persons in the vehicles attended Constable Crozier's home and deployed the bomb intending that it detonate the following day when they anticipated Constable Crozier would be driving.

[7] Constable Crozier was, however, not working a day shift on 12 May 2008. The car remained static until he drove it on the night of 12 May 2008 to carry out night shift duties. CCTV footage from the following evening close in time to when the bomb detonated show the appellant's car returning to the area within about 40 minutes of the bomb exploding. The inference drawn was that those involved in the deployment of the bomb became anxious that news of the explosion had not emerged prior to that.

[8] On the evening when the bomb did explode, Constable Crozier set off for work driving his vehicle to the Strabane Road and its junction with Drumnabey Road. Having travelled a short distance, the bomb which had been placed on the underside of his car directly under the driver's seat exploded. The windows of the car shattered, and various parts of the vehicle became dislodged. However, by some miracle Constable Crozier managed to take control of the vehicle and bring it to a halt. He recalled looking down and seeing his jeans were ripped, there was blood everywhere, but he managed to unbuckle his seat belt and exit the car. He began shouting for help and did ultimately get help. Constable Crozier collapsed on the side of the road as a result of his injuries. The vehicle caught fire and erupted into flames.

[9] Constable Crozier was attended at the scene, and it was clear that he had suffered substantial and serious injuries including puncture wounds and lacerations into his muscles in his legs with extensive contamination of his wounds. He underwent surgery for debridement and extraction of metal debris. The vehicle at the scene was burnt out and a crater was found in the road. A timer was located in the driver's seat and it contained a small, high explosive device. A magnet had been used to attach the device to the car. The timer would have allowed for up to two hours of a time delay before the device became armed.

[10] On Tuesday 13 May 2008, the Tyrone Brigade of the Real IRA claimed responsibility for the bombing.

[11] At 6:35 am on Thursday 15 May 2008, police conducted a planned arrest of the appellant at his home in Omagh. The appellant's vehicle, a silver Audi, was parked outside the address. The appellant was arrested on suspicion of the attempted murder of Constable Crozier and for membership of a proscribed organisation. He was cautioned and made no reply. He was conveyed to Antrim

Serious Crime Suite where he was interviewed. He did not answer any questions during the course of a series of interviews.

[12] On 19 November 2008, the appellant was further arrested in respect of these matters. He made no reply to caution. He was interviewed again by police about these matters on each day between 19 and 25 November 2008. An extensive phased interview process was carried out. This included questions about the CCTV footage evidence of the movement of the car, the explosive findings, collecting information on Constable Crozier and the association with Constable Crozier. Again, the appellant did not answer any police questions.

[13] It was not until Wednesday 2 December 2015 that the appellant was again interviewed in relation to the attempted murder of Constable Crozier. The appellant made no comment throughout interview. At the conclusion of that interview process on 3 December 2015, the appellant was charged in relation to these matters. He made no reply to caution.

[14] Of note is the post-arrest conduct of the appellant regarding Constable Crozier which we summarise as follows. On 11 June 2008, the appellant was arrested for unconnected matters. At the time of his arrest he replied after caution, "Fuck off I spent five days in Antrim" in reference to his arrest and detention in respect of the attempted murder of Constable Crozier. During the course of the journey from Omagh to Enniskillen he stated, "when you are watching other people do you not realise you are being watched yourselves?" As they were coming into Enniskillen PSNI Station the appellant stated, "Is this where Crozier was stationed?" He paused and continued "No, that was Lisnaskea." The appellant made other threatening comments to police.

[15] As is apparent the appellant was not immediately charged with the instant offences. However, he was the subject of covert recording undertaken in February 2010 in Carrickmore in relation to terrorist activity. This recording was a key part of the decision to prosecute for the 2008 offences.

[16] In addition, on 5 April 2011 a search was conducted of a freestanding garage and office which was connected to a restaurant and bar complex. The complex was located at 187A Mountjoy Road, Coalisland. Contained within the garage section were four stolen vehicles comprising three cars and a Ford Transit van. Inside these vehicles police recovered a large cache of weapons and explosives. Items of significance recovered included four AK47 rifles with a large quantity of ammunition suitable for use therewith, a quantity of various types of low and high explosive, detonating cord, detonators, incendiary devices, timer power units, a PRIG warhead and component parts for other devices.

[17] The appellant was prosecuted in respect of his possession of the aforesaid items and pleaded guilty to offences of possession of explosives with intent, possession of firearms with intent and membership of the IRA on a date unknown

between 1 April 2010 and 22 April 2011 ("the Mountjoy offences"). The appellant was sentenced to a determinate custodial sentence of 10 years' imprisonment, five years in custody and five on licence in January 2014 for these offences by Her Honour Judge Philpott QC.

The sentencing remarks of The Recorder Her Honour Judge Smyth

[18] We have had the benefit of a comprehensive written note of the sentencing remarks made by the judge. At the outset we note that before the judge the appellant pleaded guilty to the two offences that we have outlined and fell to be sentenced in accordance with an agreed basis of plea which reads as follows:

> "(1) The [appellant] accepts that during the period 1 May 2007 – 13 May 2008 he was a member of the Irish Republican Army.
>
> (2) On the 11 May 2008, the [appellant] provided his Audi A4 vehicle to others knowing that it would be used for the purposes of terrorism. The [appellant] was not aware of the precise nature of its use when he provided his car.
>
> (3) The [appellant] accepts that his car was used in the deployment of the bomb which was planted under the vehicle of Constable Crozier in the early hours of 12 May 2008. The car was also driven to the location of Constable Crozier's home on the evening of 12 May 2008 when the bomb had not exploded.
>
> (4) The [appellant] accepts that whilst a member of the organisation he had sought and obtained information regarding Constable Crozier from witnesses I and J, as per their statements, which was of a kind likely to be useful to a person committing or preparing an act of terrorism against him. He did not have a legitimate reason for collecting that information. The information he obtained was not of itself capable of mounting this attack, nor is there evidence he communicated what he learned to others.
>
> (5) When the [appellant] provided his vehicle on 11 May 2008, he did not know or suspect that it was to be used in targeting Constable Crozier."

[19] The judge sets out this basis of plea in her written sentencing remarks. She also refers to the impact on the victim and the fact that Ryan Crozier explained how he has suffered over a period of 15 years. He had just completed his PSNI probationary period, and every aspect of his life has been affected. He suffered permanent disfiguring injuries after painful and invasive medical treatment, battled mental ill health, has lost his home with serious financial consequences and the cumulative stress has wrecked his personal life. Reference is made to the serious financial as well as emotional repercussions and the practical realities of having to relocate away from his family and friends. The delay in concluding the legal process, it is noted, also had a significant impact upon him. In this area the judge refers to the fact that "repeated adjournments and the uncertainty around the process had dealt heavy blows" upon the victim of this attack.

[20] The judge then refers to an issue which wisely was not pursued by Mr Berry with any vigour in this appeal. That is the significance of the section 15(3) charge rather than a charge under section 57 of the Terrorism Act 2000. The judge did not accept the argument that section 15(3) is by definition less serious than section 57, nor did she accept that authorities relating to fundraising for a terrorist purpose are of assistance.

[21] Next, the judge turned to look at culpable delay, breach of Convention rights and remedies. She set out the law in this area. She also referred to the chronology of the case and said that after a careful perusal of the chronology a number of reasons for delay are apparent which do not lie at the prosecution's door. The judge referred to the fact that the appellant was granted bail throughout the proceedings and there is no evidence that he suffered any specific prejudice other than the fact that he was not sentenced on an overall basis for both the Mountjoy offences and the 2008 offences. The judge ultimately decided that whilst totality remained a live issue in the proceedings, she was not satisfied that the appellant had, in fact, suffered any prejudice.

[22] At para [47] of her judgment we find the judge's conclusion on delay expressed as follows:

> "[47] The question of remedy for the culpable delay between 2010-2015, does have to be considered. The [appellant] was in custody in relation to the Mountjoy offences for much of that period until his release on licence in April 2016. He has now pleaded guilty on two separate occasions to serious terrorist offences and membership of a proscribed organisation which is committed to murder and destruction. The admitted provision of his vehicle to others in the knowledge that it would be used for terrorist purposes, albeit he was unaware of the particular purpose, is a very grave matter justifying condign punishment. In my view, taking into

> account all of the relevant circumstances, the breach can largely be met by a public acknowledgment and any reduction in sentence should be marginal."

[23] The judge then deals with the totality argument. In this regard she states at para [48] as follows:

> "[48] It is an agreed position that in determining the appropriate sentence, the principle of totality requires the court to consider the overall sentence which HHJ Philpott QC would have passed had she been dealing with both the Mountjoy offences and the 2008 offences."

The judge then indicates that in relation to totality some reduction should be made.

[24] The methodology applied by the judge to her sentence is encapsulated in the final paragraphs of the judgment which we summarise as follows. First, the judge chose an overall sentence for the 2008 offences of 12 years in prison before reduction for a guilty plea. In respect of the membership count she took a starting point of seven years. Next, the judge decided that the appellant was entitled to a full reduction for his guilty plea as that avoided a lengthy trial with a significant saving to the court and the public. Third, she decided that the overall sentence should therefore be eight years. The sentence in respect of the membership charge she decided at four years eight months to run concurrently. Then she decided on the totality issue. In that regard she said that there should be some reduction to reflect totality and a marginal reduction for delay. Therefore, she decided that the overall sentence should be six years which she imposed on count 4. Since the sentence for the membership charge was made concurrent it was to remain at four years eight months.

[25] The judge then made a series of ancillary orders which are not contentious or under appeal, namely notification requirements for 15 years and the application of a Serious Crime Prevention Order which was to be made the subject of further submissions. The judge recorded that as a consequence of the Counter-Terrorism and Sentencing Act 2021 the custody licencing split was amended so that two thirds of the sentence will now have to be served in custody and after that period has been served the Parole Commissioners will determine when the appellant will be released.

Discussion of the issues

(i) Methodology

[26] The recommended methodology is to determine the correct notional starting point for the offences. Then consideration should be given to whether there should be any reduction for totality and delay. After any reduction is made it is then that a

reduction should be made for the guilty plea. We proceed to deal with the issues in that order.

(ii) Starting point

[27] Before dealing with the arithmetical basis of the decision on sentence, we make some brief mention of the charge which the appellant faced and the different charges available under the Terrorism Act 2000. The ingredients of a section 15(3) offence which was preferred in this case, is contained in Part III of the Terrorism Act 2000 and provides:

> "**Fund-raising**
> …
> (3) A person commits an offence if he—
>
> (a) provides money or other property, and
>
> (b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism."

[28] Section 57 is contained in Part VI of the Act and provides:

> "**57 Possession for terrorist purposes**
>
> (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism."

[29] There was clearly debate on the import of each charge at the lower court which we need not repeat. Suffice to say that we entirely agree with the judge's analysis on this issue. The section 15 offence refers to fundraising in its heading; however, the elements of this offence are comprised within that offence and a wide interpretation should be applied. Wisely Mr Berry did not pursue this point before the appellate court.

[30] In addition there is force in the prosecution's identification of the fact that the maximum sentences between the section 15 and section 57 offence differed marginally. The 15 years is applicable in respect of section 57 and 14 years in respect of section 15. It is not unusual for offending of this nature to be captured by the provisions of section 15 of the 2000 Act. By virtue of the pleas and the agreed basis of plea, the appellant provided his Audi A4 car to others knowing that it would be used for the purposes of terrorism, although he was not aware of its precise purpose, and he did not know or suspect that it was to be used in targeting Constable Crozier.

[31] The main authority in this area is the case of *R v Harkness* [2008] NICA 51. This was an appeal from a sentence of seven years' imprisonment imposed upon an appellant in relation to a charge under section 57 of the Terrorism Act 2000. The offender pleaded guilty at trial to two counts: assisting an offender under section 4 of the Criminal Law Act (Northern Ireland) 1967 and possession of an article for the purposes of terrorism under section 57 of the Terrorism Act 2000.

[32] Relevant passages are found from paras [19]-[22] of the judgment, as follows:

> "[19] The appellant, in pleading guilty must be taken to have accepted that the circumstances in which the vehicle was to be used gave rise to a reasonable suspicion that he intended it to be used for a purpose connected with the commission of an act or acts of terrorism. In such circumstances it is important to bear in mind the wording of the document upon which this plea was based. At paragraph 1(b)(i) of his skeleton argument Mr McCrudden referred to the appellant being charged with suspicious possession of the vehicle at the time when he was apprehended by the police some two hours after the murder. However, we do not consider that the relevant circumstances should be so restricted. As noted above, the agreed basis of the plea was that at the time when he was stopped the circumstances gave rise to a reasonable suspicion that the vehicle had been used for a terrorist purpose. Such possession was quite consistent with the admission by the appellant to the Probation Officer that he had been approached by a man whom he knew to have paramilitary associations who told him that he would be using his car for a few hours. This admission cannot be disavowed by the appellant nor ignored in the sentencing exercise. In effect, the appellant gave open-ended permission for his car to be used for an unspecified purpose. In light of his account to the probation officer, he must have anticipated that this would be a terrorist purpose. His action in permitting the car to be used which facilitated the murder or the avoidance of detection of those responsible for it cannot be divorced from the fact that a murder was committed. The fact that a young man was killed in the incident in which the appellant's car played some part cannot be left out of account in the selection of the sentence that should be imposed on him. As Lord Phillips has said the potential or actual harm caused plays an important part in determining the seriousness of any offence.

[20] Ultimately, both the appellant and the co-accused entered pleas on the basis that neither knew the specific nature of the offence that had occurred. In our view the fact that an accused does not know the exact terrorist purpose or plan, whether as a result of genuine or self-induced ignorance, is of little moment in terms of culpability when he willingly makes an article in his possession available for use in circumstances giving rise to a reasonable suspicion that the purpose of such use is the furtherance of paramilitary/terrorist activity. The trial judge was entitled to take into account the seriousness of the offence that had been actually committed. In the circumstances, we consider that the decision not to make any distinction from the sentence imposed upon the co-accused was well within the discretion of the trial judge and did not constitute either a gross or marked disparity in the penalty appropriate to each offence.

[21] In the course of advancing his second main submission Mr McCrudden drew our attention to the sentence of 7½ years' imprisonment imposed in *Rowe* in respect of manuscript notes including instructions on how to assemble and operate a mortar and a substitution code detailing the type of venue susceptible to terrorist bombings contrary to Section 57. He also referred to the sentence of 6 years' imprisonment imposed by Weatherup J for possession of computer discs containing a menu for the manufacture of explosives and silencers in a political and terrorist context in *R v Abbas Boutrab* [2005] NICC 36. In both *Rowe* and *Boutrab* the respective sentences were passed after a contest.

[22] As the learned trial judge emphasised in his carefully constructed sentencing remarks, terrorist organisations cannot carry out operations which in many cases may result in murder or other grave crimes unless there are persons who provide the kind of assistance contemplated by Section 57 or Section 4 and participation in such activities generally warrant the imposition of severe deterrent sentences. Once again, we fully endorse those remarks and, in particular, the important part that the actual harm caused is likely to play in the selection of such sentences. In neither of the cases to which reference has been made earlier in this judgment had there been actual harm caused by the terrorist offences of which the

> offenders had been convicted. After giving the matter careful consideration we have reached the conclusion that the respective degrees of culpability reflected by the differing activities of the appellant and his co-accused did not warrant any degree of distinction in terms of sentencing. Accordingly, the appeal will be dismissed."

[33] The only other case substantially referred to is *McAllister, O'Hara and Pearson* [2008] NICA 45. In that case reliance is placed upon the *Harkness* case as is evident from paras [9]-[17]. At para [15] the following conclusion is found:

> "[15] The starting point in *Harkness* is not specifically set out but it is clear by implication that it was in or about 10 years and that was recognised by the Recorder in his judgment. He was of the view that in this case that the proximity to the actual murder itself was not as close as it was in the case of *Harkness* and he started off on the basis that the appropriate sentence was one of 6 years and 8 months in relation to both McAllister and O'Hara. In our view it is clear that both of them were involved in the carrying out of this operation from 8 August on and albeit that the roles may have been different it was in our view well within the discretion of the trial judge that no distinction should be drawn between them. It is clear that he carefully considered how he should deal with the issues in relation to each of the accused because he took the view in relation to Pearson that as a result of his lack of record and his age that some distinction should be drawn, and he used a starting point of 6 years in relation to him. Despite the fact that they pleaded not guilty at arraignment he gave them a 25% discount adding to that in the case of O'Hara as he was the first person to plead which resulted in his sentence of 4 years and 9 months."

[34] It seems to us that these authorities are clear in relation to the ingredients of the offence at issue. In this case the point is well made that the fact that the accused does not know the exact terrorist purpose whether as a result of genuine or self-induced ignorance is of little moment in terms of culpability when he willingly makes an article in his possession (in this case a car) available for use in circumstances giving rise to a reasonable suspicion that the purpose of such use is the furtherance of paramilitary and terrorist activity.

[35] Accordingly, when properly analysed the starting point that was chosen of 12 years is clearly within range. In line with the authorities, if this were a single offence under section 15 the appropriate starting point would be 10 years. Given that there was also a membership charge where the maximum sentence is one of 10 years, we

think the judge was quite entitled to raise the starting point before reduction for the plea to 12 years. It is unrealistic of Mr Berry to argue otherwise and to make a case that the starting point should have been 8-8½ years. We reject that submission as given the seriousness of this type of offending the starting point was entirely appropriate.

(iii) Totality

[36] The court is also invited to consider whether the reduction made by the judge in respect of totality was correct. The court further reduced the sentence to be imposed by two years to include totality and delay. The prosecution accept that the court was under an obligation to consider the issue of totality given that the appellant had been sentenced for the Mountjoy offences. However, the appellant also failed to engage in multiple opportunities to clean the slate and bring these proceedings to a head which may have allowed the late Judge Philpott to deal with them at a timelier remove.

[37] The case of *R v Green* [2019] EWCA Crim 196 is of some assistance in this regard. In that case the Court of Appeal in England & Wales held that judges should consider all the circumstances in deciding what, if any, impact the previous sentence should have when the new sentence is passed. The circumstances outlined in that case included, without laying down an exhaustive list:

(a) How recently the previous sentence was imposed;

(b) The similarity of the previous convictions to the incident offences; in this regard, it will usually be helpful to obtain as much information as possible about the previous offences;

(c) Whether the offences overlap in terms of the time they were committed;

(d) Whether on the previous occasion the offender could realistically have cleaned the slate by admitting other offending;

(e) Whether to take the previous sentence into account would, on the facts of the case, give the offender an underserved uncovenanted bonus which should be contrary to the public interest.

(f) The age and health of the offender, particularly if the latter has deteriorated significantly as a result of his incarceration and any other relevant circumstances including, for example, his conduct whilst in prison; and

(g) Whether, if no account is taken of the previous sentence, the length of the two sentences is such that, had they been passed together to be served consecutively, that would have offended the totality principle.

[38] We adopt these principles as relevant to an exercise of this nature. Having done so none of the factors when applied result in a positive outcome for the appellant save point (g) which requires a court to consider whether two sentences for similar offences lead to a disproportionate result. In addition, point (d) above militates against the appellant because we think it tolerably clear that he could have cleaned the slate on the instant offences at an earlier stage.

[39] We have also identified a problem with the methodology applied by the judge in this case. That is because we think that the judge was led into error by the agreed question which was put to her which was recorded at para [48]. We appreciate that practitioners and judges may all have thought that this was the correct question and not just in this case. We take this opportunity to correct this mistake. The question is not what Judge Philpott would have decided at a particular point in time. A more accurate question is - taking into account the fact that the appellant was sentenced for similar offences which post-date the current offences should there be some reduction for totality?

[40] The judge ultimately found there should be some modest reduction and we agree with that having asked the correct question. Why it is a modest reduction is for the following reasons:

(i) The appellant was interviewed repeatedly in respect of his alleged involvement in this offending since 2008. He failed to admit his involvement during those interviews.

(ii) The appellant was interviewed in relation to other terrorist related offending since 2008 and failed to clean the slate in respect of this offending. Instead of bringing these matters to the attention of the police at an earlier stage, the appellant stayed silent in the hope he would remain undetected. The appellant deliberately accepted the risk that there could be a subsequent prosecution.

(iii) The sentence in respect of Mountjoy was imposed nine years prior to the sentences imposed in the present case.

(iv) The failure to make admissions meant that the investigation mounted by police was unduly complex and time consuming resulting in inevitable delay. It is accepted, however, this does not explain the delay occasioned in full.

(v) There was no overlap in the offending which occurred at Mountjoy.

(vi) There is no evidence of deterioration in health as a consequence of the appellant's sentence imposed in 2014.

[41] Accordingly, we consider that the judge should have taken into account totality and did. However, only a marginal downward adjustment was appropriate, of between one-two years in all the circumstances of this case.

(iv) Delay

[42] In the judgment the judge sets out the chronology of this case in relation to delay. In particular, she sets out how the case progressed from the interview to charge. The judge rightly said the question of delay is central to the issues the court has to consider.

[43] We also reflect on the unhappy picture of delays in this case as follows. The appellant was not immediately charged, however, following on from that there was covert recording from Carrickmore undertaken in February 2010 which was a key part of the decision to prosecute for the 2008 offences. This recording required six expert reports from Professor French over a period 8 February 2012 to 14 July 2016. Additional reports were required due to changes in the format of the evidential disc, the necessity of recalculating timings and the provision of new sample material following a judgment in relation to voice recording in the High Court in *R v Corbett* [2016] NIQB 23.

[44] It is correct that in December 2015, after the fifth report the appellant was charged. The final voice report was received in July 2016, two months after the new sample material was sent to Professor French and three months after the appellant's release on licence for the Mountjoy offence. The defence submits that the expert analysis simply took too long to complete and resulted in culpable delay which has prejudiced the appellant. Leaving aside the voice analysis issue, the defence submits that the guilty plea to the Mountjoy offences strengthened the prosecution case and that he should have been charged at that point. The chronology goes on to refer to contested committal proceedings in the magistrates' court which were concluded on 10 May 2017.

[45] After arraignment on 21 June 2017, the trial was adjourned on three occasions at the request of the defence for valid reasons (10 October 2017, 26 January 2018 and 1 September 2020). Between September 2018 to October 2019, the appellant was tried along with a co-accused for blackmail and intimidation and acquitted. The appellant did not object to the blackmail trial proceeding even though it caused delay in this case. Thereafter, this trial was vacated on two occasions because of a defence section 8 application and the unavailability of a judge and/or counsel. The trial finally concluded on 17 April 2023 when pleas to an amended Bill of Indictment were entered.

[46] A number of legal authorities have been referred to us in relation to delay, the first being *R v Dunlop* [2019] NICA 72. This was a drugs case where delay led to a defendant being able to address his addiction. As such the defendant in that case was able to avail of a non-custodial option. However, as the court itself stated, the

case is fact specific, we consider that this case is of limited use in dealing with the delay issue in this case.

[47] The most helpful authority is *DPP's Reference (No.5 of 2019) Harrington Legen Jack* [2020] NICA 1. This case discusses the reasonable time requirement in criminal cases which applies in domestic law and is found in article 6 of the European Convention on Human Rights. It is from paras [43] – [44] of the *Harrington Legen Jack* judgment that we draw the following principles which should apply when determining the question of whether the time between the criminal charge and the hearing is unreasonable. These are:

(i) The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed.

(ii) In determining whether a breach of the reasonable time requirement has been established the court will consider in particular but inexhaustively, the complexity of the case, the conduct of the defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap.

(iii) Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration.

(iv) If there is a breach of the reasonable time requirement the remedy should be effective, just and proportionate, depending on the nature of the breach in all the circumstances including the rationale which is that a person charged should not remain too long in a state of uncertainty about his fate. The appropriate remedy should take into account not only the impact of the delay on the offender but also the requirement that offenders are realistically punished for their offences. In relation to the impact of the delay, this must be established in evidence by the offender and must take into account that usually the offender has been at liberty throughout the period of the breach. Frequently, a public acknowledgment of the breach will be sufficient.

[48] In the *Harrington Legen Jack* the court also recognised the variety of factual circumstances in which delay may arise and declined to give prescriptive guidance except to observe:

> "That in cases involving hardened recidivists who must be impervious to concern, in the case of vile and heinous crimes or in the case of dangerous criminals who pose a significant risk to members of the public of serious harm the appropriate response would be a public acknowledgment without any reduction in the penalty. The public could not have confidence in a criminal justice

> system that first caused delay and then as a consequence unleashed a dangerous criminal on the public. …"

We adopt those principles.

[49] Self-evidently this is a case where we think the public would not have confidence in the criminal justice system if a disproportionate view were taken of the delay. On one side of the balance is the highly complicated nature of the investigation, the seriousness of terrorist crime and the appellant's lack of cooperation. It would be an invidious outcome if police were not allowed adequate time to investigate such crimes and offenders gained credit from failing to cooperate. On the other side of the equation are the systemic issues which caused delays in getting the case into shape for trial. The voice analysis issue clearly required painstaking expert opinion as the judge pointed out. However, she also points out that no explanation has been given for the initial delay of two years from the secret recording in February 2010 until the first report by the expert in February 2012. A further period of two years elapsed before the second report in March 2014. It was October 2015 before the fifth report based on a recalculation of timings was received and the charging of the defendant in December 2015.

[50] Within this factual matrix to our mind the judge did correctly decide that the question of culpable delay between 2010 and 2015 does have to be considered. However, ultimately, she thought that a public acknowledgment was sufficient. We agree with this analysis in large measure save to say we think some deduction should have been made for delay in this case. We appreciate that these are complicated cases, however, they have frankly been taking too long within the criminal justice system and this must change.

[51] Our analysis does not change the outcome in this case as ultimately, we consider that the judge's analysis of a two-year deduction to encompass both totality and delay was entirely appropriate along with a public acknowledgement that there was culpable delay in this case.

(v) Reduction for the plea

[52] In this case the judge has allowed maximum credit for the plea of guilty. Article 33 of the Criminal Justice (Northern Ireland) Order 1996 is the legislative provision in this jurisdiction which provides a guide as to the application of credit. It states:

> "33.—(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account—

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which this indication was given."

[53] The application of this provision was discussed in the case of *R v Maughan and Maughan* [2019] NICA 66, and *R v Maughan* [2022] UKSC 13. The judgment of the Supreme Court specifically refers at paras [43]-[44] and [49]-[50] as follows:

> "43. Article 33 of the 1996 Order is neither prescriptive nor exhaustive. It does not expressly require the judge to reduce the sentence because of the plea nor does it prescribe any rate of discount if he does so although there is a clear steer that a discount should be considered. It does not prescribe how any indication of an intention to plead should be given or indeed to whom it should be given. Admissions at interview have been considered sufficient but correspondence from solicitors to the Public Prosecution Service or an indication at court during a remand would also be sufficient to trigger the obligation under Article 33. If the judge reduces the sentence for the plea, he must articulate that he has done so and take into account when and in what circumstances an indication of an intention to plead was given.
>
> 44. Just as it does not prescribe any rate of discount at any stage of the proceedings neither does it prevent the court from adopting a sentencing policy by way of guidance designed to ensure transparency and consistency. … Article 33 does not prevent the adoption of a sentencing policy which treats as relevant to sentencing discount the failure to admit wrongdoing during interview.
> …
>
> 49. The sentencing practices applied by the Court of Appeal in Northern Ireland are typical of those applied from time to time in all three jurisdictions over many years. They are justified by the utilitarian approach and the interests of victims and witnesses which have largely been accepted throughout the United Kingdom as the bases for the discount for the plea. They reflect the statutory background and circumstances of that

> jurisdiction and are well within the area of discretionary judgement available to that court.
>
> 50. Early guilty pleas by those who have committed offences promote confidence in the general public in the system of the administration of justice. The achievement of that outcome is affected by the structure of the system of criminal justice in each jurisdiction. The absence of a mechanism to enable indictable cases to be brought speedily to the Crown Court in Northern Ireland has resulted in long standing and unfortunate systemic delay."

[54] Article 33 is concerned with the stage at which the proceedings for the offence which the offender indicated to plead guilty are and the circumstances in which any indication of guilt is given. In addition to the statutory background this court has provided guidance on the issue of credit in this jurisdiction as we do not have sentencing guidelines as in England & Wales and as *Maughan* discusses our criminal process differs in some respects. The broad principles are now well established in this jurisdiction that maximum credit is usually reserved for a plea at an early stage or at arraignment and that this is one third. Thereafter, credit will reduce if the plea is not provided at the earliest opportunity to a maximum of around 20-25% up to the start of the trial. This is all with the caveat that sentencing judges retain a discretion to apply greater or lesser credit for a plea at a later stage if the circumstances dictate it and are explained.

[55] In this case it is important to bear in mind that the appellant made no admissions in respect of any act or offence during his many police interviews. He contested committal proceedings resulting in protracted magistrates court proceedings. He pleaded not guilty to all offences upon arraignment. He filed a defence statement which made no admissions as to any act. He failed to identify ownership of the vehicle never mind provision of the vehicle or in respect of attempts to obtain information. He denied membership of a proscribed organisation. These are all important background factors.

[56] When the case was ready and listed for trial, following the provision of a draft opening note for the purposes of trial, the appellant invited the prosecution to consider pleas to the offences to which he ultimately entered guilty pleas. As is apparent, the more serious offence of attempted murder was not proceeded with. However, within this factual matrix the question is whether the judge was justified in allowing the maximum credit of a third for the appellant.

[57] The prosecution submission is that this amount of credit is inappropriate. The prosecution submit that the appropriate reduction should have been in the region of 15%. Against that the argument made by Mr Berry was that this was a plea

that was only available after the indictment was changed and amended and so could not have been given earlier.

[58] Dealing with the argument made by Mr Berry, we note the authority of *Attorney General's Reference (Number 1 of 2006) McDonald, McDonald and Maternaghan* [2006] NICA 4 which is to the effect that an amendment of the indictment is not an automatic trump card which may be played to achieve maximum credit. Of course, this argument cannot apply at all to the membership charge. However, in relation to the other charge para [18] of *Maternaghan* which we adopt is worth repeating in full as follows:

> "[18] None of the offenders pleaded guilty to any offence until 11 October 2005 by which time proceedings were well advanced. It is suggested that since the offence of affray was not preferred until that date the failure to plead guilty to the other offences is in some way mitigated on that account. We wish to firmly scotch that suggestion. If a defendant wishes to avail of the maximum discount in respect of a particular offence on account of his guilty plea, he should be in a position to demonstrate that he pleaded guilty *in respect of that offence* at the earliest opportunity. It will not excuse a failure to plead guilty to a particular offence if the reason for delay in making the plea was that the defendant was not prepared to plead guilty to a different charge that was subsequently withdrawn or not proceeded with."

[59] It follows from the above that the reduction in a charge does not fully assist the appellant in this case. Further, whilst respecting the position of the trial judge we cannot see a valid rationale for allowing the maximum reduction for the guilty plea in this case. We consider that the correct credit for the plea in the particular circumstances of this case should have been in the region of 20%. That remains a substantial credit for a plea of guilty at such a late stage but also reflects the fact that the plea was not entered at the earliest stage in the proceedings.

Conclusion

[60] We return to the two applications which we must decide in this case. Firstly, as this is a reference the court must determine whether the sentence was unduly lenient. In parallel we must decide whether the sentence was manifestly excessive. We have been greatly assisted by the high quality and comprehensive sentencing remarks of the judge with which we agree in large part. We have also been assisted by both sets of counsel who have provided high quality submissions.

[61] We will deal with the second question first as it does not cause us any great difficulty. In our view, the ultimate sentence reached of six years could not on any

reading be said to be manifestly excessive for serious terrorist offending of this nature. The only valid question is whether this was an unduly lenient sentence. This court has dealt with the issue of references and unduly lenient sentences in the case of *R v Ali* [2023] NICA 20 at paras [3]-[5] therein. This decision reiterates the high threshold for a reference to succeed. A sentence must not simply be lenient it must be unduly lenient.

[62] Applying the said principles and upon a careful analysis of the case, we consider that the sentence in this case was not simply lenient but was unduly lenient for offending of this nature. We consider that if the starting point was 12 years with a two-year reduction for totality and delay the sentence should have been in the region of 10 years before reduction for the guilty plea. An appropriate reduction for the plea as we have explained is 20%. Applying this methodology the final sentence should have been one of eight years rather than six years' imprisonment.

[63] We will therefore grant leave and substitute a custodial sentence of eight years for the sentence imposed by the judge. Given the Counter-Terrorism and Sentencing Act 2021 provisions this sentence will be comprised of a two thirds period in custody. We dismiss the appeal against sentence and allow the reference for the reasons we have given.

Postscript

[64] After delivering of our judgment as is usual practice we invited counsel to submit any typographical errors. A few were raised and we have amended the draft accordingly. The solicitor for Mr Coyle also asked that we consider double jeopardy.

[65] Double jeopardy was not raised in any written or oral argument by the experienced counsel who appeared before us. That is entirely understandable as by virtue of the reference we were considering whether a substantial custodial sentence should be increased. Apart from the fact that this issue is now raised after the event the facts of this case make the answer to the belated question self-evident.

[66] The respondent to this application has not had to wait a long period of time to discover his fate on appeal, nor is he near the end of his custodial sentence, nor did he receive a non-custodial option before the trial judge. It should be known to practitioners that double jeopardy does not result in a reduction in every case.

[67] The Court of Appeal has considered this issue recently in *R v Ahamad* [2023] NICA 52 at para [19] as follows:

> "[19] The text *Blackstone's Criminal Practice* 2023 at paragraph D28.5 refers to the fact that when the Court of Appeal increases the sentence under the reference procedure its practice has often been to allow some discount on the sentence it would consider appropriate

> because of what is usually termed the double jeopardy of the offender having to wait before knowing if the sentence is to be increased. Where an offender has a substantial part of a long determinate sentence remaining this principle is of limited effect. However, where an offender is close to release or had a custodial sentence substituted for a non-custodial sentence a reduction should be applied. *Blackstone's* refers to a discount of 30% in such circumstances. We also refer to the case in this jurisdiction of *R v Corr* [2019] NICA 64. In this case we have considered the argument that the offender did not think that he was going to be subject to a period of imprisonment following his sentencing and so we will apply some reduction for double jeopardy, in the order of 10 months."

[68] Accordingly, having been asked to specifically consider the matter we can expressly state that it is not appropriate to make a reduction for double jeopardy in this case. As a matter of practice counsel should raise this argument in the alternative at hearing if it is to be pursued.