

Judicial Communications Office

28 June 2024

COURT INCREASES SENTENCE FOR ATM THEFTS

Summary of Judgment

The Court of Appeal¹ today increased the sentence imposed on Kenneth Clarke for offences relating to the theft of ATM machines and related criminal damage to one of seven years and six months' imprisonment. It said that sentences for this type of offence must be a deterrent given the outrage this engenders and the financial loss and damage to local businesses.

Kenneth Clarke and Jamie McConnell ("the respondents") pleaded guilty to the offences of conspiracy to steal, conspiracy to commit arson, and conspiracy to commit criminal damage. The offences relate to the forced removal of ATMs from commercial properties, the theft of the machines and monies contained in the ATMs and the destruction by fire of machinery used to remove the ATMs. The charges span a period between 28 October 2018 and 6 December 2019 when there were nine separate incidents where ATMs were attacked using diggers across County Antrim. The offending was highlighted in the media and caused widespread concern amongst the community given the number of incidents that were happening on a regular basis. The financial loss was also significant to the business owners who were directly affected.

The prosecution contended that the offending was the work of a large criminal gang in which both respondents played a part. The offences all occurred in the early hours of the morning when a digger or excavator would be stolen close to the location of a targeted ATM. These ATMs were located at petrol stations and commercial units such as Spar shops. The stolen digger would be driven to the premises where it would rip out the ATM and load it onto a waiting vehicle, such as a car with a trailer. The ATM would be taken from the scene to be opened at some other location. The digger would then be burnt out at the crime scene to thwart forensic enquiries. The court noted that this offending required considerable planning and sophistication involving a number of persons. A total figure of loss and damage spanning the period of this offending of nearly 14 months was estimated to be in excess of £1,137,000. The prosecution connected the respondents to the conspiracy following analysis of telephone data evidence including the pattern of use of the respondents' phones and identified location on some of the multiple dates and times providing an evidential basis to properly infer criminal involvement. There was also evidence in relation to the use of vehicles.

The prosecution accepted the respondents' pleas of guilty on the basis that it was not capable of identifying them as having removed or disposed of ATM machines, of having handled or disposed of cash taken from the ATMs or the said thefts and having destroyed property but that they were guilty on a joint-enterprise basis:

- Clarke accepted the conspiracy charges in respect of six ATM thefts, together with the sourcing of a vehicle used in two of the ATM thefts. There was reference in the agreed basis of plea that Clarke was a scout/look-out or observer when some of the offences took place. As a result of specific incidents in which Clarke engaged, the approximate figures for damage in front of the sentencing judge were over £1million (£550,000 of cash was stolen

¹ The panel was Keegan LCJ, O'Hara J and McFarland J. Keegan LCJ delivered the judgment of the court.

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from the ATM machines, damage by arson amounted to £153,000 and damage to property with consequential loss was in the region of £472,000).

- McConnell's offending occurred between 18 April 2019 and 25/26 April 2019 and involved the theft of two ATMs. The loss of cash stolen from the ATM machines that McConnell was involved in was £263,000 with the damage caused by arson of £115,000 and the damage to property with consequential loss at £184,000.

Clarke was sentenced to a period of imprisonment of five years and eight months after reduction for a guilty plea. The starting point chosen by the trial judge was eight years. McConnell was sentenced to a total period of imprisonment of three years and eight months, after reduction for a guilty plea, the starting point chosen by the judge being five years in his case. The sentences were referred to the Court of Appeal by the Director of Public Prosecutions as being unduly lenient.

Sentencing guidelines

There are no direct cases in this area in this jurisdiction. The trial judge had been referred to a number of cases from England & Wales which the court said had some similar elements but ultimately were also fact sensitive. The maximum sentence for the offence of conspiracy to commit theft is 10 years' imprisonment and for the offences of conspiracy to commit arson and criminal damage the maximum is 14 years' imprisonment.

The court noted that the case was presented to the trial judge on the basis that the headline offence was the conspiracy to commit theft which carried the lower maximum sentence. It said it was therefore natural for the trial judge to choose a starting point of eight years for Clarke and five years for McConnell on the basis of their respective roles bearing in mind that others, unidentified as yet, would have had a greater role in the criminal enterprise. The trial judge also referred to the need for deterrent sentences in this area and applied the principle of totality. The court commented, however, the issue was in how totality was assessed in each case for the index offending which spanned a period of time.

The court cited its decision in *R v ZB* [2022] NICA 69 where it referred to the issue of totality. The principle of totality comprises two elements. When sentencing for more than a single offence, courts should pass a total sentence which reflects all the offending behaviour and is just and proportionate. This applies whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence. Further, it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with factors personal to the offender as a whole. The court said that, in this case, having decided to impose concurrent sentences, the trial judge needed to undertake a cross-check to make sure that the total sentence reflected all of the offending.

Clarke

Clarke's offending took place over a substantial period, in a substantial number of incidents which caused damage of over £1m. The court said this is at the high end of offending in cases of this nature and clearly high harm was occasioned. In terms of culpability, the court noted it was correct to say that Clarke could not be identified as a prime mover in this criminal enterprise, however, he pleaded guilty based on joint enterprise and, therefore, it could not be said that his was anything other than high culpability. Given the interplay between the conspiracy to commit theft, arson, and

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criminal damage, the court did not think that the trial judge should have felt constrained by the fact that conspiracy to commit theft was indicated as the headline offence. It considered the range for sentencing applying the principle of totality faithfully was between ten and fourteen years on a contest when aggravating and mitigating factors are taken into account. That was primarily because the damage caused was so high and because there were multiple incidents. The court added that the weight given to Clarke's mitigation including his limited cognitive skills, assessed within that factual matrix, is considerably lessened.

The court, however, was prepared to accept, having looked at the role that could be attributed to Clarke, that he should not attract the absolute maximum of fourteen years within these parameters given that others could have even higher culpability. Rather, it considered that for Clarke's specific offending the starting point should have been ten years. Thus, the trial judge was in error as to the choice of a lower starting point. However, the court pointed out that the trial judge was unwittingly drawn into this error as the case was presented to her based on a headline offence attracting a ten years' maximum sentence. In fact, greater sentencing flexibility was available given the other offences which attracted a fourteen year maximum:

"In a multiple incident case such as this with such high harm we are entirely satisfied that this sentence was not just lenient but unduly lenient because of the error of principle that we have identified. In Clarke's case we propose to grant leave for the referral and to substitute a sentence of seven and a half years' imprisonment having applied a reduction of 25% for the plea of guilty to the starting point of 10 years that we deem appropriate."

McConnell

The court said there was a substantially different factual matrix in respect of McConnell. His offending was over a very short period of some 16 days compared to Clarke who offended over 14 months. In addition, the damage caused by McConnell was not so great as that caused by Clarke albeit it was still of a significant level. Additionally, the court commented that a factor of force was the strong mitigation in McConnell's case noting that he has paranoid schizophrenia and a long history with mental health services. Also, McConnell's learning disability is significant, was identified at an early stage at school and is illustrated by the fact that he is still unable to read or write. The medical expert referred to the fact that persons with learning disabilities "have higher levels of suggestibility and are more prone to be influenced by others."

Taking these mitigatory factors into account the court said the starting point to reflect two incidents, over a 16-day period, should have been in the region of five to seven and a half years. It commented that the trial judge's choice of five years as a starting point may therefore be described as generous to him. However, having carefully considered the matter, given the available mitigation and the advantages which the judge had in assessing this case, it was not minded to interfere with that sentence in this particular case. That was essentially because of the very short period in which McConnell was involved in the offending which contrasted with the involvement of Clarke along with the mitigation. Therefore, in McConnell's case, the court decided not to alter the sentence imposed by the trial judge.

The court said that sentences in this area must be a deterrent given the outrage that this type of persistent reckless offending engenders, and the financial loss and damage occasioned to local businesses:

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“Those who commit these offences can expect significant sentences if they are involved in this type of offending for a period of time.”

General sentencing comments

The court said this reference illustrated the fact that prosecutors should consider charging for separate offences where possible as that would allow more flexibility and a more natural route to sentencing in these types of cases. That said, it understood the difficulties in evidence gathering and that on an overall view of this case conspiracy was the only valid way to charge:

“Whether the charging is for separate offences or for a conspiracy offence, prosecutors should consider the use of burglary or conspiracy to burgle counts (with a maximum of 14 years) should the evidence indicate a trespass or intended trespass on premises to steal machinery and then on other premises to steal ATMs and their contents causing damage to the building. In either case prosecutors should not repeat the mistake which occurred here in relation to identification of a headline offence which has the effect of restricting sentencing powers.”

The court also provided specific guidance that in cases involving multiple incidents a range of ten to fourteen years’ imprisonment is appropriate before reduction for a guilty plea. Where one or two incidents are involved over a short period the appropriate range is five years to seven and a half years before reduction for a guilty plea. In cases where it can be established that a defendant was more centrally involved in this type of offending than either of these two defendants a longer sentence would be justified, or consecutive sentences may be imposed.

Conclusion

In the case of Clarke, the court substituted a sentence of seven years and six months in place of the sentence of five years and eight months imposed by the trial judge. It dismissed the reference in the case of McConnell whose sentence remained unchanged at three years and eight months.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://www.judiciaryni.uk/>).

ENDS

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