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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF A REFERENCE BY THE DIRECTOR OF PUBLIC PROSECUTIONS

THE KING

v

KENNETH CLARKE
and
JAMIE McCONNELL

Mr Charles McCreanor KC with Mr Michael Chambers KC (instructed by the Public Prosecution Service) for the Applicant
Mr Gary McHugh KC with Mr Mark Farrell (instructed by Reid Black & Co Solicitors) for the Respondent Clarke
Mr Greg Berry KC with Mr Aaron Thompson (instructed by Madden & Finucane Solicitors) for the Respondent McConnell

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Before: Keegan LCJ, O'Hara J and McFarland J

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

Introduction

[1] This is a reference brought by the Director of Public Prosecutions for Northern Ireland ("DPP") under section 36 of the Criminal Justice Act 1988 as amended by section 41 of the Justice (Northern Ireland) Act 2002 in relation to the above named respondents.

[2] Both Clarke and McConnell pleaded guilty to the following offences:

(i) Conspiracy to steal, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 1 of the Theft Act

(Northern Ireland) 1969, in respect of automated teller machines ("ATM"s) belonging to other persons.

(ii) Conspiracy to commit arson, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Article 3(1) and (3) of the Criminal Damage (Northern Ireland) Order 1977.

This count relates to the respondents conspiring together and with persons unknown to, without lawful excuse, destroy or damage by fire certain property, namely vehicles belonging to other persons, intending that such property would be destroyed or damaged.

(iii) Conspiracy to commit criminal damage, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Article 3(1) of the Criminal Damage (Northern Ireland) Order 1977.

This count calculates to the respondents conspiring together with other persons unknown, to damage or destroy buildings and ATMs belonging to other persons with intent to damage or destroy such property or being reckless as to whether such property would be damaged or destroyed.

[3] The sentences referred to this court were imposed upon the respondents by Her Honour Judge McCormick KC ("the trial judge") as follows. Clarke was sentenced after a plea of guilty to a period of imprisonment of five years and eight months after reduction for a guilty plea. The starting point chosen by the 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.

[4] The DPP maintains that both sentences are unduly lenient.

The nature of the reference

[5] In *R v Sharyar Ali* [2023] NICA 20, this court recently explained the nature of a reference as follows:

> "The reference procedure does not provide the prosecution with a general right of appeal against sentence. Taylor on Criminal Appeals (3rd ed, 2022), helpfully summarises the applicable legal principles as follows:
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> > '13.51 As to the nature of the test for granting leave in a reference application the approach of the Court of Appeal Criminal Division (CACD) can be summarized as follows:

(1) The court may only increase a sentence that is unduly lenient and not merely because it is of the opinion that the original sentence is less than that court would have imposed, unless the disagreement results from a manifest error.

(2) Leave should only be granted in exceptional circumstances and not in borderline cases.

(3) Section 36 was not intended to confer a general right of appeal on the prosecution. The purpose of the regime has been stated as being to allay widespread public concern arising from what appears to be an unduly lenient sentence. A sentence will be unduly lenient where, in the absence of it being altered, it would affect public confidence or the public perception of the administration of justice.

(4) The procedure for referring cases ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.

(5) It has been held that a sentence is unduly lenient 'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'

(6) The CACD will ask: was the judge entitled, acting reasonably, to pass the sentence that they did? Did the judge give full reasons for doing so? Was the reasoning and conclusion open to the judge?

(7) The CACD will pay due deference to the advantage of the sentencing judge. The court has noted that sentencing is an art and not a science and that the trial judge is well placed to assess the weight to be given to various competing considerations.

> (8) Leniency of itself is not a vice. The demands of justice may sometimes call for mercy.'"

[6] As this court said in *Ali,* and in subsequent references, it follows from the above extract, that there is a high and exacting threshold for a reference to succeed. The Court of Appeal when considering a reference must first decide whether to grant leave. The court must then decide whether a sentence is unduly lenient not simply lenient. Finally, even if a court decides that a sentence is unduly lenient the court retains a discretion whether to interfere with a sentence in the circumstances of a particular case and in some instances where double jeopardy is in play. With these principles in mind, we turn to the circumstances of this case.

Factual background

[7] This case concerns offences of conspiracy involving the theft of machinery, the use of that machinery to damage property with 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 the Antrim area of Northern Ireland, with associated offences. The offending was highlighted in the media and caused widespread concern amongst ordinary people in the community. This reaction followed because the damage caused was widespread and of high value to shop owners. The financial loss was significant to the individuals who were directly affected. However, there was also significant impact upon the wider community given the number of incidents that were happening on a regular basis.

[8] It was the prosecution case that the offending was the work of a large criminal gang in which both respondents played a part. The stated modus operandi was similar in relation to most of these incidents given the following ingredients of the offending:

(i) 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.

(ii) These ATMs were located at petrol stations and commercial units such as Spar shops across County Antrim.

(iii) The stolen digger would be driven to the ATM where it would rip out the ATM and load it onto a waiting vehicle, such as a car with a trailer.

(iv) The ATM would be taken from the scene to be opened at some other location.

(v) The digger would then be burnt out at the crime scene to thwart forensic enquiries.

[9] Self-evidently, this offending involved considerable planning and sophistication involving a number of persons. Those involved would have had to have working knowledge of the area and the logistics of pulling off crimes such as this. 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.

[10] The prosecution connected the respondents to the conspiracy following analysis of telephone data evidence. This included 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.

[11] Both respondents entered an agreed basis of plea. This comprehensively sets out their involvement in the incidents and refers to the accepted fact in relation to each respondent that:

> "The prosecution accepts that the evidence is not capable of identifying the [respondent] 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. However, he accepts by his plea that he is guilty on a joint-enterprise basis."

[12] Specifically, Clarke accepted the conspiracy charges in respect of six ATM thefts, together with the sourcing of a vehicle a Mitsubishi L200 used in two of the ATM thefts in question. There is reference in the agreed basis of plea that Clarke was a scout/look-out or observer when some of these offences took place. As a result of specific incidents in which the respondent Clarke engaged, the approximate figures for damage in front of the sentencing judge were over £1m. £550,000 of cash was stolen 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.

[13] McConnell's offending occurred between 18 April 2019 and 25/26 April 2019 and involved the theft of two ATMs. In relation to the specific incidents in which McConnell was engaged, the loss of cash stolen from the ATM machines was £263,000 with the damage caused by arson of £115,000 and the damage to property with consequential loss at £184,000.

Aggravating and mitigating factors

[14] There is agreement among the parties as to the aggravating factors which are set out in the reference as follows regarding Clarke:

(a) Clarke had an involvement in the conspiracy which spanned the commission of six instances of ATM thefts, criminal damage and arson.

(b) Clarke's involvement spanned a period of offending from in and about October 2018 to December 2019, some 14 months, with associated very significant financial harm caused.

(c) The offending was pre-planned and executed with a high degree of organisation, it was criminally sophisticated.

(d) The geographical spread to the offending.

(e) The respondent acted in concert with others.

(f) Significant financial harm caused and gratuitous destruction of property of high value.

(g) The criminal record, the respondent was on probation during the offending.

[15] In relation to McConnell:

(a) McConnell had an involvement in the conspiracy which spanned the commission of two specific instances of ATM thefts, criminal damage and arson.

(b) McConnell's involvement spanned a period of offending in or about 10 April 2019 to 26 April 2019.

(c) The offending was pre-planned and executed with a high degree of organisation, that was criminally sophisticated.

(d) The geographical spread to the offending.

(e) The respondent acted in concert with others.

(f) Significant financial harm caused and gratuitous destruction of property of high value.

(g) The criminal record.

[16] In relation to Clarke, the judge considered all of the mitigation raised summarised as follows:

(a) The acceptance of full responsibility.

(b) Genuine remorse.

(c) That he was assessed as a medium risk of future offending.

(d) That he was noted as having poor decision making.

(e) Limited cognitive skills and susceptibility to peer influence.

(f) That there was a gap in his criminal offending.

(g) That the case had been hanging over the respondent and all defendants for four years and the respondent now had a stable lifestyle.

[17] In relation to McConnell, the judge noted the mitigation in relation to him:

(a) He had mental health issues which the court noted together with the fact that the respondent had achieved considerable stability in recent times.

(b) The pre-sentence report noted he has been assessed with a learning disability.

(c) The report also noted his positive progress.

(d) The risk of further offending was low. In addition to this the court had the benefit of expert reports and testimonials in relation to McConnell which referred to the ability to work in the community on his family farm.

[18] In addition, in both cases credit was given for a plea of guilty of roughly 25%-30% with which no issue is taken.

Sentencing guidelines

[19] There are no reported cases of direct application from this jurisdiction. However, the trial judge had the benefit of a number of cases from England & Wales which she recited in her comprehensive sentencing remarks. We will summarise some of these cases which have similar elements but, ultimately, are also fact sensitive.

[20] First is *R v Delaney* [2011] 1 CR App (S) 16 117. In that case the appellant had been convicted of two offences of burglary and other offences. The case involved two ramraid burglaries of commercial premises in August and November 2007. In both instances stolen JCBs were used to attack vehicles and a stolen vehicle was used as a getaway. Just over £10,000 was stolen on the first occasion and £88,000 on the second occasion with considerable damage to the buildings. The Crown Court in England & Wales imposed consecutive sentences of four years and eight years. On appeal this was substituted to consecutive sentences of three years and seven years. The England & Wales Court of Appeal referred to the decision in *Attorney General's Reference* [2008] 1 Cr App R (S) 8 where at para [40] the court said the previous

authorities "… suggest in the context of a single ramraid offence the starting point in the region of or approaching seven years following trial is implicit."

[21] The second case referred to is *R v Cassidy* which is, again, an Attorney General's Reference reported at [2015] 1 Cr App R (S) 30. This case involved an attack on an ATM, by attempting to blow it open. The total loss sustained was around £60,000. All defendants had relevant previous convictions. The court noted the offences were planned and the defendants worked as a group using stolen vehicles. An important distinguishing characteristic of this case was that they used explosives which caused damage potentially endangering life. Following pleas of guilty, the court imposed sentences of five years and four months for the offence of conspiracy to burgle and six years for the offence of causing an explosion.

[22] The next case referred to is *R v Beddows and others* [2015] EWCA Crim 2525. This case concerned seven appellants who had pleaded guilty or were convicted of offences of conspiracy to cause an explosion and conspiracy to burgle commercial premises. The conspiracies were over the course of more than one year. The court found that there was a high level of criminal skill and efficiency used. The total loss was around £800,000 plus damage costing around £500,000. The Court of Appeal for England & Wales held that "the appropriate starting point for sentence for those most heavily involved would be one of 20 years' imprisonment after a trial."

[23] The final case referred to is that of *R v Edwards* [2020] Crim 233. This case involved the defendant planning to blow up an ATM and steal the cash. The offence was not actually committed. Pleas of guilty were entered to possession of a firearm, conspiracy to steal and having an explosive substance. The defendant had a relevant criminal record. The court imposed a total sentence of six years and four months on a guilty plea. These were the only cases referred to the trial judge.

[23] Some guidance is also found within this jurisdiction as three other defendants Wilson, Close and McClurkin were sentenced for their involvement in a single ATM theft in Crumlin on 30 April 2019. On pleas of guilty sentences of between five years and three months and four years and six months had been imposed. The sentencing judge, Fowler J, in his sentencing referred to a starting point for these cases in a single incident of seven years on a range of between six and ten years.

[24] A further touchstone is the maximum sentence for the offences. In relation to the conspiracy to commit theft, the maximum is 10 years' imprisonment. On the conspiracy to commit arson and criminal damage offences the maximum is 14 years' imprisonment.

[25] It appears clear to us that this case was presented to the judge on the basis that the headline offence was the conspiracy to commit theft. This was a mistake to which we will return.

Consideration

[26] We begin our consideration by commending the trial judge for the comprehensive sentencing remarks that she provided in this case. The judge was well versed in the facts, she was directed by counsel to the law which she considered, and she applied the aggravating and mitigating factors to reach a starting point. This was a high-quality sentencing exercise.

[27] The point at issue is whether, in fact, an error of principle has crept in, not through any fault of the judge, but on the basis of how this case was presented to the judge. We say this because it seems to us clear from the sentencing remarks that the judge was being presented with a headline offence of the conspiracy to commit theft with a maximum of 10 years. Thus, it was natural for her 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.

[28] In her sentencing remarks the judge also referred to the need for deterrent sentences in this area and she applied the principle of totality. However, the problem, in our view, lies in how totality is actually assessed in each case for the index offending which spans a period of time.

[29] This court in a recent decision of *R v ZB* [2022] NICA 69 at para [63], referred to the issue of totality in the following way:

> "[63] In answering this question we find some assistance in the England & Wales Totality Guidance 2012 as it focuses the judge's mind on two core questions as follows:
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> > 'The principle of totality comprises two elements:
> >
> > 1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
> >
> > 2. 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.'"

[30] In this case the judge considered the making of consecutive sentences but decided against that. Such an approach is fine in principle and one with which we take no issue. However, having taken that approach, and having decided to impose concurrent sentences, the judge obviously needed to undertake a cross-check to make sure that the total sentence reflected all of the offending in the case.

[31] Clarke's offending was over a substantial period in a substantial number of incidents which caused damage of over £1m. This is at the high end of offending in cases of this nature. Clearly, high harm was occasioned. In terms of culpability, it is 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 cannot be said that his is anything other than high culpability.

[32] In addition, given the interplay between the conspiracy to commit theft, arson, and criminal damage, we do not think that the judge should have felt constrained by the fact that conspiracy to commit theft was indicated as the headline offence. We consider 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 is primarily because there were multiple incidents and because the damage caused was so high at over £1million. The weight to be given to Clarke's mitigation including his limited cognitive skills, assessed within that factual matrix and is considerably lessened.

[33] However, we are 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, we consider that for Clarke's specific offending the starting point should have been ten years. Thus, the judge was in error as to her choice of a lower starting point. However, we point out that she 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.

[34] 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 ten years that we deem appropriate.

[35] Turning then to McConnell's case we note a substantially different factual matrix. In summary, 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.

[36] Additionally, there is more weight to be given to the strong mitigation in McConnell's case We note the supportive testimonial from his mother. We also note that Mc Connell has paranoid schizophrenia and a long history with mental health services documented by Professor Robin Davidson, Consultant Clinical Psychologist. In addition, 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. Professor Davidson refers to the fact that persons with learning disabilities "have higher levels of suggestibility and are more prone to be influenced by others."

[37] Taking these mitigatory factors into account 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. The judge's choice of five years as a starting part 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, we are not minded to interfere with that sentence in this particular case. That is essentially because of the very short period in which this respondent was involved in the offending which contrasts with the involvement of Clarke along with the mitigation we have referred to. Therefore, in McConnell's case we are not minded to grant leave for the reference or alter the sentence imposed by the trial judge.

[38] As these are cases which involve considerable custodial sentences double jeopardy does not arise.

[39] By way of final comment, we point out 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. Those who commit these offences can expect significant sentences if they are involved in this type of offending for a period of time.

[40] This reference also illustrates 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, we understand 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.

[41] Furthermore, the specific guidance we provide is 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 respondents a longer sentence would be justified, or consecutive sentences may be imposed.

Conclusion

[42] Accordingly, we grant leave, allow the reference, and substitute the sentence of seven years and six months as we have said in the case of Clarke. We dismiss the reference in the case of McConnell.