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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

BRIAN RUDDY

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REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2002)

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Mr Henry KC with Ms Cheshire (instructed by the PPS) for the Applicant
Mr Hunt KC with Mr McKenna (instructed by Begley Solicitors) for the Respondent

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

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

Introduction

[1] This is an application by the Director of Public Prosecutions ("DPP") for leave to make a reference to the Court of Appeal under section 36 of the Criminal Justice Act 1998 to review the sentence of three years custody suspended for three years imposed on Brian Ruddy ("the respondent") at Newry Crown Court on 20 September 2024 by His Honour Judge Ramsey KC ("the judge"). The applicant submits that the sentence imposed was unduly lenient.

[2] In *R v Clarke & McConnell* [2024] NICA 52 at paras [5] and [6] (citing *R v Sharyar Ali* [2023] NICA 20) the nature of a DPP reference is discussed. The Court of Appeal noted, *inter alia*:

(a) A DPP reference is not intended to confer a general right of appeal but is a measure intended to permit the increase of an unduly lenient sentence where

public confidence in the administration of justice may be adversely affected, for example:

(i) where a judge has fallen into gross error resulting in an unduly lenient sentence, or

(ii) where the sentence imposed is outside the range of sentences the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

(b) Sentencing is an art, not a science, and the trial judge is well placed to assess competing considerations.

(c) Leniency of itself is not a vice, the demands of justice may sometimes require mercy.

(d) There is a high and exacting threshold for a reference to succeed.

[3] The applicant also relies upon relevant authorities which it maintains indicate the sentence imposed is unduly lenient namely *Kumar* [2013] NICC 12, *McDonnell & Fearon* [2013] NICC 16, *Czyzewski* [2004] 3 All ER 135 and *Grew & McLaughlin* [2011] NICA 31.

[4] The context in which this sentence arises is as follows. The respondent was committed for trial in the Crown Court on 28 September 2022 along with four other co-defendants. At arraignment on 5 January 2023, he pleaded not guilty to all four counts on the Bill of Indictment. At re-arraignment on 8 April 2024, the respondent pleaded guilty to counts 1 and 3. Counts 2 and 4 were left on the books in the usual way.

[5] The respondent was therefore convicted on;

(a) Count 1 - Fraudulent evasion of customs duty on cigarettes on a date between 1 January 2020 and 1 June 2020 contrary to section 170(2)(a) of the Customs and Excise Management Act 1979. Over £2.3 million of duty was evaded.

(b) Count 3 - Being knowingly concerned in the fraudulent evasion of VAT contrary to section 72(1) of the VAT Act 1994 on a date during the same period.

Factual background

[6] The factual background is set out in detail at paragraphs 2 to 42 of the DPP reference application and in the judge's sentencing remarks. In summary, on 30 May 2020 the transportation of over 5.6 million cigarettes from a warehouse in the Budel region of the Netherlands destined for Northern Ireland was intercepted at a

commercial haulage yard outside Newry. As a result of this offending over £2.3 million of duty was evaded.

[7] There were various persons involved each with different roles and responsibility as follows. A co-defendant, Patrick O'Donnell, owned the tractor unit and trailer which transported the cigarettes from Europe to GB. O'Donnell also owned the trailer in which the cigarettes were found in the raid of the commercial haulage yard outside Newry on 30 May 2020.

[8] Tomasz Marasek, a co-defendant, was employed by O'Donnell. Marasek drove the lorry to collect the cigarettes in Budel and drove it to his home in Chorley (Northwest England). Marasek then drove the lorry to Heysham where he deposited the trailer unit for onward transport to Warrenpoint. The trailer was collected at Warrenpoint by a Volvo tractor unit owned by O'Donnell.

[9] Shortly after arrival at the commercial haulage yard outside Newry, the authorities entered the premises, seized the cigarettes and arrested the males present - O'Donnell, the respondent and Gavin McCloskey. Daniel Ruddy (the respondent's brother) and Marasek were arrested at a later date.

[10] Several tonnes of tobacco, large sums of cash, counterfeit tax stamps, and equipment consistent with cigarette smuggling were found at the respondent's home. The respondent was classified by the prosecution as the organiser of the operation. In the pre-sentence report the respondent alleged he acted under duress, but this was not accepted by the court nor relied upon by the respondent's counsel.

[11] The respondent is a resident in the Republic of Ireland. He has convictions for motoring offences in Northern Ireland and a conviction for driving while under the influence of drink or narcotics in the Republic of Ireland ("RoI"). The pre-sentence report prepared by probation services in RoI refers to a conviction for a tobacco smuggling incident in RoI in 2004 for which he received a suspended sentence.

Judge's sentencing remarks

[12] The sentencing proceeded on the basis of an agreed prosecution opening which described the respondent as the organiser of this smuggling operation. This is reflected in the sentencing remarks in which the respondent was dealt with last in order and received the highest sentence of three years' imprisonment. All others received sentences of two years suspended for two years.

[13] In the sentencing remarks the judge accurately noted the history of the proceedings and factual background. He also cited the relevant legal authorities provided by the prosecution of *Kumar* [2013] NICC 12, *McDonnell & Fearon* [2013] NICC 16, *Czyzewski* [2004] 3 All ER 135 and *Grew & McLaughlin* [2011] NICA 31. At para [8] of *Kumar* the court noted a suspended sentence may be appropriate for

persons with a lesser role who plead guilty at an early opportunity, show remorse and have a clear criminal record. The judge also rightly stated that "each case and each defendant have to be considered on its own facts."

[14] Applying the relevant legal authorities the judge found that:

(i) This type of offending is particularly serious because of the loss to the Exchequer, public health issues, loss of retail to legitimate retail outlets, large scale offending and public interest in supressing this kind of offending.

(ii) Culpability should be assessed by reference to inter alia the tax evaded, duration of offending, efforts to conceal offending, involvement of others, defendant's personal gain, plea and amount recovered.

(iii) The judge stated that "one of the most important factors in the matter is that a destruction order is sought for the cigarettes … but there are no proceeds of crime proceedings, and no confiscation sought and that in my mind is a very significant factor" which indicated the respondent "got very little out of this operation." The judge also appeared to conclude that other people were involved in the operation.

(iv) The respondent accepted that he organised the transport of the cigarettes. As such the judge found "it very significant that there are no proceeds of crime proceedings taken against Mr Ruddy … and I think that has a high significance in the way in which I propose to deal with him."

(v) The judge then considered the impact that a custodial sentence would have on the respondent's young son who has autistic spectrum disorder. He found that the respondent is "very closely involved in his care." The judge referenced the report from the clinical psychologist Ms Creggan dated 5 June 2021 which noted the importance of routine and the child's social communication difficulties.

(vi) Specifically, the judge noted that the respondent's son was aged three when the above report was written. He also referred to the fact that the report diagnoses the child with Autistic Spectrum Disorder, social and communication challenges and sensory difficulties, deficits in emotional reciprocity, deficits in non-verbal communication, insistence on sameness and fixed interests and difficulties requiring substantial support.

[15] The judge also had information from the child's mother, from whom the respondent is separated - she stated in a letter to the court that she relies heavily on the respondent in raising their son and in coping day to day. Finally, the judge noted that 10 staff relied on the respondent for employment in his public house and restaurant in Carlingford and that it was suggested that a custodial sentence would put their jobs in peril.

[16] Having considered all of the above factors the judge repeated the accepted fact that the respondent had a more serious role than the other defendants in this criminal enterprise and was an organiser of the operation. He also stated that the respondent has mental health issues as in 2005, after a previous relationship breakdown, the respondent made an attempted suicide and was admitted to a mental health hospital. On this point the judge also recorded that he reports that he is better equipped to manage life's stressors now.

[17] Then the judge noted what he described as the "powerful mitigation" in this case. Thereafter he said that "on balance", and "with some hesitation" the judge imposed a suspended sentence. The judge opined that the previous conviction for non-payment of excise on 220 kilos of tobacco in relation to which he received a two-year suspended sentence would not interfere with the index suspended sentence as over 20 years had elapsed between the separate offences. He repeated there are "no proceeds of crime proceedings which … was a very, very significant factor in the sentences I passed in this case."

[18] Finally, the judge referred to the respondent's position that he committed the offences under duress from a notorious criminal gang and was not an active participant in the cigarette or tobacco trade.

Grounds supporting the reference

[19] The DPP submits the sentence imposed was unduly lenient for the following reasons:

(a) The judge adopted too low a starting point.

(b) The circumstances of this case did not warrant a suspension of the respondent's sentence.

(c) The judge erred in law by allowing the absence of any application for confiscation to inform the length of sentence and whether it should be suspended.

(d) The judge erred in law by allowing the request for a destruction order to inform the length of sentence and whether it should be suspended.

Our analysis

[20] There are two errors of law in the judge's sentencing which were not seriously contested by the respondent. The first concerns the respondent's role in the criminal enterprise. The respondent's "11th hour" claim noted in the pre-sentence report that he was coerced by a gang into the offending was abandoned by the defence and was not relied on for the purposes of sentencing. The applicant submits the judge erred

by finding that, because there were no proceeds of crime and no confiscation order sought, "quite clearly" there were others involved.

[21] The applicant submits that on the evidence there was no one else above the respondent in terms of culpability and if there was involvement of others, this would be an aggravating feature. Also, Mr Henry argued that the judge's conclusion is unsupported by evidence and completely at odds with the evidence. We agree with both propositions.

[22] The second error of law is that the judge plainly took into account the fact that there was no proceeds of crime application. The applicant submits the judge erred in law by treating the absence of a confiscation order as a "very significant factor." This factor should not have informed the length of sentence nor the suspension of same. The applicant is entirely justified in this submission as the judge's approach was plainly wrong and is readily exposed as such when the relevant legislation is examined as follows.

[23] Section 156 of the Proceeds of Crime Act 2002 ("the 2002 Act") is clear in its terms in that:

(a) Confiscation orders can only be imposed after conviction (section 156(2)(a)). The respondent was convicted on 9 April 2024.

(b) Confiscation orders are not part of the sentencing exercise; they are civil orders which require the payment of money (para 64).

(c) Considerations as to whether a prosecutor will seek a confiscation order under section 156(3)(a) include whether the defendant has any assets, where they may be located and the likelihood of securing an order for the payment of money based on those assets (para 65).

[24] Further, section 163(4) of the 2002 Act provides:

> "Subject to subsection (2) [which deals with financial penalties], the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant."

[25] The decision in *R v Grew & Ors* [2011] NICA 72 at para [42] confirms the applicant's submission:

> "The 2002 Act makes clear that the fact that a confiscation order is made is not a relevant factor to the sentencing judge who has to fix the appropriate sentence for the offence."

[26] Ancillary to this basic error the judge made a further error in law of allowing the absence of a confiscation order to impact the sentence imposed. That is because to our mind the judge further erred in law in treating the imposition of a destruction order as an important consideration in the sentencing exercise

[27] As to delay, the applicant submits that, in the circumstances of the complex investigation and Covid pandemic there was no delay, and that the proceedings progressed at an impressive pace. Any delay post-arraignment was due to various defence applications. There was no culpable delay caused by the prosecution. On an overall realistic view of this case which was not without complexity we agree with this submission.

[28] Turning to the issue of the starting point for sentence the guiding authorities are *Kumar* [2013] NICC 12, *McDonnell & Fearon* [2013] NICC 16, *Czyzewski* [2004] 3 All ER 135 and *Grew & McLaughlin* [2011] NICA 31. Drawing from these we can see that the broad categories of sentence for a first-time offender are:

- Less that £1000 - fine or conditional discharge
- £10,000 - community service, high fine or custody
- £10,000-£100,000 - up to nine months for a low-level offender
- More than £100,000 - sentence to be determined by degree of professional and aggravating features, but nine months to three years for £100,000-£500,000
- Three years to five years for £500,000-1million
- Five to seven years for several million.

[29] Of course a sentencing judge also retains a discretion to impose a higher sentence based on aggravation such as previous offences or for instance if violence is involved. Also, the greater the organisational involvement of an offender the higher the sentence and those with the lowest level of involvement lower sentences. However, the above brackets are a helpful guide in cases of this nature in this jurisdiction.

This case

[30] The relevant authorities demonstrate that given the scale of the offending in this case, the custody threshold was passed for the respondent who was the organiser of the criminal enterprise. Mr Hunt did not argue otherwise.

[31] This brings us to what we think is the real point of substance in this appeal which is whether the sentence should have been suspended due to exceptional

circumstances pertaining to the respondent's son and the effect imprisonment of his father would have on him.

[32] The lead case in this jurisdiction on this issue is *R v Devlin* [2023] NICA 71. This involved VAT fraud totalling £5 million. The sentencing judge in this case was not referred to *Devlin* which is unfortunate as the Court of Appeal noted at para [24] that "highly exceptional circumstances" were required to justify suspending custodial sentences where a deterrent sentence is required.

[33] In the reference the applicant refers to paras [31], [35] and [40] to [44] of *Devlin* which highlight certain aspects which informed that sentence as follows:

(a) The appellant's good employment record, voluntary activities, good relationship with his child.

(b) The need for extraordinary factors to warrant suspending the sentence given the need for proper deterrence.

(c) A weighty factor is that this is not a case on the cusp of the custody threshold but is rather a case where custody could not be proportionately avoided.

(d) Although there are factors which point to difficult circumstances for the family, the circumstances are not so exceptional to merit a suspension of the sentence in light of the nature and extent of the offending.

[34] The applicant submits the offending in the index case is serious, the respondent was an organiser in a serious criminal enterprise that involved the importation of over 5.6 million cigarettes with an unlawful failure to pay over £2.3 million duty. The applicant maintains that there were no highly exceptional circumstances to justify suspending the sentence. In addition, the applicant submits the mitigating circumstances identified by the judge were not so exceptional as to justify suspending the custodial sentence. The applicant submits the clinical psychologist report dated 15 June 2021 merely confirms the respondent's son has autism and does not underline "the impact that such a prison sentence would have on his relationship with the child" as stated by the judge. The applicant further notes the respondent is not the child's primary care giver.

[35] Replying to the above, the respondent submitted some fresh evidence on the child's position which we received *de bene esse*. This was an educational psychologist's report dated 30 March 2024, a letter from the educational psychologist dated 25 January 2025 and a letter from a chartered clinical psychologist dated 28 January 2025.

[36] The educational psychologist's report of 30 March 2024 explains that the child attends a special Autism class. He resides with his mother but spends most Wednesday nights and every other weekend with his father. He is pre-verbal and

has been found to be within the extremely low range in all five elements of the Griffiths 111 developmental assessment (ie language and communication; hand eye coordination; gross motor skills; etc). It also records concerning behaviours and that this child has "complex and multifaceted needs.

[37] The educational psychologist's letter dated 25 January 2025 also opines that:

> "any change to the child's care routine 'may be particularly significant for [him] due to the distinctive way he processes emotions, social interactions, changes in routine and transitions.'"

[38] The chartered clinical psychologist's letter dated 28 January 2025 notes that such children need routines and stability in their lives and need to be with adults who understand them and can interpret their needs.

[39] We have considered the competing arguments carefully with reference to all of the materials before us. Having done so we consider that on the basis of the aggravating factors an immediate custodial sentence of six years was appropriate prior to alteration for guilty plea.

[40] However, applying the methodology that the trial judge utilised in *Devlin* when dealing with mitigation where the article 8 rights of an autistic child were also engaged, we can see that a judge could reach a lower starting point prior to reduction for the plea to around four and a half years. Then applying a reduction for personal circumstances, the final sentence should have been in the region of three and a half years.

[41] In this case the trial judge did not arrive at the sentence in the way we have just described. He did not set any starting point or explain how he reached a final sentence of three years. However, these failings are not of most concern to us. Where the real difficulty arises with this sentence is that the judge has found exceptional circumstances which led him to suspend the sentence. Clearly, the fact that there was no proceeds of crime was factored in. That assessment was wrong. The second factor was the effect on the child of the family. That was a valid consideration which we have considered carefully.

[42] We remind ourselves of the balancing exercise conducted in *Devlin* encapsulated in the following paras:

> "[39] There is little doubt that the medical evidence concerning the applicant's son is significant and, given the interference in the child's right to private and family life, it required a full and proper assessment of the proportionality of a prison sentence removing the father from the family home for a period in the region of two

> years, with a possibility of further detention should the father not comply with his licence conditions.
>
> [40] Against these intensely private interests which relate to the applicant's son must be weighed the public interest. The duty of the courts to impose appropriate punishment on criminals is clearly a very weighty factor in the balance. As Hughes LJ stated in his seventh point in the *Petherick* guidance, the graver the offence the lesser is the interference in family life. In this case the applicant's criminality is very grave and his culpability is elevated. He is also an intelligent man who entered third level education, with a successful business life and an annual income in excess of £100,000. Despite having all these advantages in life, he found it necessary to set up and run with his co-accused an organised crime group, recruiting people into that organisation and cheating the HMRC out of sums in the region of £5 million over a sustained period.
>
> [41] A weighty factor is that this is clearly not a case on the cusp of the custody threshold. Rather, this was a case where custody could not proportionately be avoided, even with the effect on children or other family members. In addition, the sentence was mitigated to take into account the effect on the son of his father's imprisonment.
>
> [42] Thus, whilst there are factors in this case which point to difficult circumstances for the family, with whom the court is sympathetic, we do not consider that the circumstances were so exceptional to merit a suspension of the sentence in light of the nature and extent of the index offending. In this case the public interest requiring condign punishment and deterrence decisively outweighs the competing private interests."

[43] There are some differences in this case in that the respondent's child is younger and his mother, who is the primary carer has said she needs the respondent around, has mental health issues and limited support. In addition, we note the case made that the respondent's business will not be sustainable if he is imprisoned as bar manager could not be found.

[44] Notwithstanding the above, applying the principles set out in *Devlin*, we find that the public interest also outweighs the private interest in this case. That is because the respondent was the organiser of a high-level operation which avoided

millions of pounds of duty. In our view, an immediate custodial sentence should have been imposed otherwise no deterrent is provided by the courts to prevent this type of crime. Therefore, we grant leave for the reference and declare the sentence unduly lenient.

[45] Having determined that this sentence was unduly lenient we turn to the disposal of this reference. We have an overarching discretion as to whether to quash the sentence. This discretion was discussed by the Court of Appeal in a reference of *R v Corr* [2019] NICA 64 when the court ultimately took the view that whilst the sentence was unduly lenient it would not be quashed applying double jeopardy. The court's rationale is found in the following paras of the judgment:

> "[60] We consider that the sentence was unduly lenient but that does not mean that it must be quashed. Rather even if it is decided that a sentence is unduly lenient there is discretion as to whether to quash the sentence – see *Attorney General's Reference (No: 1/2006) Gary McDonald and others* [2006] NICA 4 at paragraph 37.
>
> [61] The respondent has now served the custodial element of his 18-month sentence and accordingly if the sentence was quashed and this court imposed an increase in sentence that would involve him returning to prison. Ordinarily that is a factor to be taken into account by way of a reduction to the sentence to be passed under the principle of double jeopardy, see *R v Loughlin (Michael) (DPP Reference No. 5 of 2018)* [2019] NICA 10 at [35]. However, on the unusual facts of this case we take it into account as a factor of some minor weight at this anterior stage in exercise of discretion as to whether to quash the sentence.
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> [62] A feature of particular importance and a factor which has considerable weight in this case is that by this reference the prosecution is seeking to advance for the very first time an entirely new case. That is unfair to the respondent because it exposes him to the risk of a significantly greater sentence on an entirely new basis not advanced before the judge. It is also unfair to the judge who gave detailed consideration to the sentencing exercise as it was advanced before him. The prosecution have the obligation to place before the trial judge any arguments or material that is relevant to the issue upon which the judge is called upon to make a decision. We consider that on the facts of this case this amounted to conspicuous unfairness to the respondent.

> [63] We have taken into account the countervailing interest in an appropriate sentence being passed on the respondent. We note that by this judgment we have identified various matters that should assist in any future sentencing exercises. On the facts of this case and taking all those factors into account we consider that the feature which we have identified in the previous paragraph taken in combination with the fact that if the sentence was quashed and an increased sentence was passed then this would mean that the respondent would return to prison means that in the exercise of discretion that the sentence should not quashed."

[46] The Court of Appeal has also considered double jeopardy 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."

[47] We accept that the respondent did not think he would be subject to a custodial sentence at all and so the principle of double jeopardy may be applied. Against that the sentence imposed is well out of step with the appropriate sentence in a case of this nature. If the respondent is credited for the adverse effects on his son which are apparent and his plea the lowest possible sentence that could be arrived at is in the region of three and a half years. We will adjust the sentence further given the nature of a reference to arrive at a final revised sentence of three years' imprisonment.

Conclusion

[48] We therefore affirm the sentence of imprisonment imposed but remove the suspension and so the respondent must surrender himself to serve a sentence of 18 months' imprisonment and 18 months on licence.