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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**05/10/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

DARREN McALLISTER, THOMAS O'HARA AND THOMAS PEARSON

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MORGAN LCJ

Introduction

[1] These are appeals against the sentences imposed by the Recorder of Belfast on 11 May 2018. Count 1 which was a charge in relation to the perversion of the course of justice to which each of the appellants pleaded guilty and count 2 concerned the provision of a Renault Megane for the purposes of the UDA. Mr Pearson had contested the charge and the Recorder found him guilty.

Background

[2] Pearson was the owner of a silver Renault Megane and was approached by people he knew to be members of the UDA and asked to provide that vehicle. He knew they were speaking on behalf of people who held positions of power within the UDA and by arrangement therefore he left his unlocked vehicle with the keys in the ignition on or about Friday 5 August 2016. The vehicle was then used in a murder which was carried out in Sunningdale Gardens, Belfast, at 9:35pm on Sunday 7 August 2016 to transport the shooter to and from the scene. William John Boreland was shot dead outside his home and CCTV showed a Renault Megane driving along Sunningdale Gardens, from the direction of the Ballysillan Road. It was seen by a number of witnesses performing an aggressive U-turn when it reached the junction of Sunningdale Gardens and Grove and driving back up

Sunningdale Gardens. There were then two large bangs which correspond with the pathology evidence which show that there were likely to have been two discharges the first of which would have incapacitated the deceased and the second was a shot to the head which killed him.

[3] On the morning of 8 August after the shooting Pearson then drove his Megane to Derriaghy Road where he was carrying out some work as a decorator. Shortly after lunchtime on that day police appealed for information in relation to three vehicles seen leaving the scene, one of which was a silver Renault Megane and there was then evidence of a telephone conversation between Pearson and phones linked to McAllister. Pearson then engineered an agreement to leave the vehicle at the owner of the house that he was decorating maintaining that he could not get it started. That evening a Nissan Micra connected to McAllister drove to where the vehicle had been left. The vehicle was actually collected the following morning when again McAllister used his Nissan Micra first to collect Pearson and then to collect O'Hara. It is perfectly clear from the evidence that O'Hara had become a part of this venture on the previous day, that is 8 August, and that he has chosen not to give any account to explain how that arose. That he was involved in this incident is further enhanced by the material on his phone showing that he had been anxiously looking at the public statements in relation to what had occurred.

[4] After arriving at Derriaghy Road Pearson returned to the job that he was working on. O'Hara then got into the Megane and Pearson then led him in the Micra to a quiet spot. The evidence demonstrates that McAllister had during the journey purchased fuel and a lighter in premises before the trio had got to Derriaghy Road and it is perfectly clear that the entire operation was designed to ensure that the vehicle could be taken to a spot where it could be duly disposed of.

[5] All three defendants were then arrested on 11 September 2016. They eventually made admissions towards the end of their interviews having for long periods failed to disclose anything about what had occurred. In relation to O'Hara his interview was by no means comprehensive nor did it indicate the precise role he played in relation to these matters.

[6] The Recorder looked at the aggravating factors in relation to these counts and set them out in relation to count 1 at paragraph 18 of his judgment. He found that each defendant would have known about the murder of William John Boreland, that the vehicle was being sought in connection with that murder and that their actions involved the destruction of evidence that each would have known may have been of assistance to the police in relation to the police investigation and the apprehension

and prosecution of those responsible for the murder. In the cases of McAllister and O'Hara he also made reference to their records. In McAllister's case he has a criminal record some time ago for possession of Class B drugs with intent to supply but of more relevance is the fact that in 2008 he was convicted at Belfast Crown Court of blackmail and possession of a firearm in suspicious circumstances.

[7] So far as O'Hara is concerned he has a mixed record for a number of offences which are of a public order kind but he also has a serious conviction in 2013 for physical violence. The mitigating factors in each case were the pleas of guilty in relation to count 1, the health and family commitments of McAllister to which reference has been made by Mr McCreanor and the work record and family commitments of O'Hara who resides outside the jurisdiction. The Recorder accepted that there was a lack of sophistication in relation to the offending which perhaps to some extent relates to the manner in which the actual burning out was carried out but the court would be slow to accept that using your own vehicle was necessarily an indication of a lack of sophistication. So far as mitigation was concerned those were the matters taken into account in the first count and in the second count the Recorder specifically noted in Pearson's case that it was a mitigating factor that there was no evidence to suggest that he knew or suspected that the vehicle would be used for the murder but rather for an unspecified purpose to benefit the UDA. He also noted that the lack of a relevant and recent record reduced the seriousness of the offending in his case.

The issues

[8] The appeals are lodged in part on the basis that there was an error on the part of the court in relation to the starting points. Secondly, it is submitted that there are some features in relation to a number of the appellants which ought to have been reflected in further discount on the sentences. It is common case that there are no sentencing guidelines in relation to the offence of perverting the course of justice but that is a consequence to some extent of the fact that this offence can be committed in a very significant and different numbers of ways each of which will have different consequences in relation to culpability and deterrence.

[9] The test in relation to these cases of this sort was set out in the R v Tunney [2007] 1 Cr App R (S) 62 and it is agreed that there are really three features which need to be taken into account when looking at the appropriate sentences. The first is the seriousness of the substantive offence, the second is the nature or degree of persistence in the conduct and the third is the effect of the attempt in relation to the administration of justice. In this case this is a case of the greatest seriousness in

terms of the primary offence committed. This was a murder but it was not alone a murder but a terrorist murder carried out by a terrorist organisation and the three appellants all knew exactly what that offence was and what the background in relation to it was. So from that point of view it places the case right at the upper end.

[10] So far as the nature of the conduct is concerned in this case that was to seek to destroy evidence which would have been of significance in terms of the investigation and may have assisted in the securing of the prosecution and conviction of those who were responsible. Albeit that it was an unsophisticated successful operation in that regard there was clearly a degree of planning which might have occurred on 8 August in relation to this and the basics of the offence were carried out in an efficient way in the sense that the vehicle did get burnt out. The third question is what was the effect of the attempt to do this? The effect was to deprive the investigators of the forensic opportunities that would have been available were the vehicle to have been recovered and to have been examined.

[11] The Recorder placed some emphasis on the case of Harkness and it is interesting to see to what extent there is assistance to be gained from an examination of Harkness. This was case in which the appellant was jointly charged with another in relation to an offence of murder. He pleaded not guilty to the offence and eventually an amended indictment was brought forward setting out two offences against him. The first was that on 29 September 2004, knowing or believing an arrestable offence, namely murder, had been committed, he did an act with intent to impede the apprehension or prosecution of the offender, namely assisted in removing evidence from the scene. That appears to have been in relation to a gun that was removed from the scene.

[12] The second matter was an offence contrary to section 57 of the Terrorism Act that he had in his possession an article, namely a motor vehicle, in circumstances which gave rise to a reasonable suspicion that his possession was for a purpose connected to terrorism. It is important to recognise in Harkness' case that the basis of the plea was set out at paragraph 8 of the judgment and noted that the accused's plea was accepted on the basis that he owned and was stopped in possession of the vehicle and at the time he was stopped the circumstances gave rise to a reasonable suspicion that the vehicle had been used for a terrorist purpose. There is no evidence that he knew the exact purpose. The Crown's acceptance of the accused's plea noted that in its opinion the fibre evidence could no longer establish a direct link between the murder and the said vehicle. That is a distinction in relation to Harkness which is not helpful to the appellants. In this case it is common case that

their conduct was carried out with full knowledge of the background to the terrorist incident.

[13] At paragraph 12 the Court of Appeal then approved and adopted the remarks of the learned trial judge who as it happens was Lord Justice Treacy who said:

> "It is clear that 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 by section 4. When a person is convicted or pleads guilty in this terrorist context and it is undisputed that he committed the offence actively and willingly the court which sentences him should pass an appropriate deterrent sentence which as well as punishing the accused is intended to deter others."

[14] The importance of the reference to a deterrent sentence is that in those circumstances personal mitigation is not likely to be significant in the sentencing exercise. The court dealt with the outcome in that case at paragraph 20 where it said that 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 or terrorist activity. The trial judge was entitled to take into account the seriousness of the offence that had actually been committed. In the circumstances we consider that the decision not to make any distinction in the sentence imposed upon the co-accused was well within the discretion of the judge and did not constitute either a gross or marked disparity in the penalty appropriate to each offence.

[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.

[16] So far as Pearson is concerned his involvement is different because not alone did he participate in the offence in relation to events after the murder but he also made his vehicle available in relation to events before the murder for the purpose of the exercise. It is clear that his knowledge in each of those was different. Whereas in the second offence it is clear that he knew exactly what he was doing and in connection with which offence he was acting, the evidence does not establish that he had knowledge of the intent to use his vehicle for the purpose of the murder.

[17] Clearly that would have been a matter of some distinction but it does seem to us that the Recorder exercised some considerable degree of restraint in imposing a sentence of two years in relation to the provision of the vehicle and we certainly would not want anyone to think that a sentence of 2 years in those circumstances would be likely to be a starting point in a case of this kind if it had been the only offence that was established in relation to Pearson. The Recorder was plainly aware of the issue of totality in relation to him and it seems that that must have influenced his decision to exercise the leniency that he did in relation to the provision of the car. He then further dealt with that as a matter of totality when he reduced the total from 6½ to 6 years.

[18] In our view the Recorder's approach to this case is impeccable and could not be criticised. He appears to have taken into account everything that he should and everything that he did was well within the area of his discretion. We find no basis upon which to interfere with the outcome. Accordingly, the appeals are dismissed.