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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **7/03/2016**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**DAVID TAYLOR**

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**Before: Morgan LCJ, Weatherup LJ and Weir LJ**

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**MORGAN LCJ (giving the judgment of the court)**

[1] The appellant was arraigned on 8 May 2014 at Antrim Crown Court. He pleaded guilty to one count of possession of a small amount of cannabis found upon his person at the time of his arrest and entered not guilty pleas to eight further counts of burglary. On 6 October 2014 he was re-arraigned and pleaded guilty to 3 of the outstanding burglary counts. The prosecution did not proceed with the remaining counts. Her Honour Judge McColgan QC sentenced him on 7 January 2015 to a determinate custodial sentence of six years comprising three years in custody and three years on licence and consisting of three consecutive sentences of 18 months in relation to each of the burglaries, a further consecutive period of 18 months in relation to outstanding suspended sentences and a period of six months imprisonment concurrently in respect of the possession of cannabis.

[2] The factual background is that the burglary offences were part of a series of burglaries by a persistent burglar, the appellant, with assistance from his co-accused. These burglaries took place over a period of time from 13 -30 June 2013. Despite occurring on different dates, it was common case that the burglaries could properly be joined as a series of offences of a similar character on an indictment which also alleged the criminality of others connected to that series of burglaries.

[3] The victims reported that their homes had been broken into and their personal belongings had been stolen. All of the victims lived in the Ballymena area where the appellant had been living. There was a pattern of the homes being temporarily empty and jewellery being targeted. The appellant was later identified as having sold some of these items at a pawn shop. The drug offence arose out of a

search of the appellant upon his arrest 3 days after the last burglary on 3 July 2013. A small quantity of cannabis for personal use was found.

**The conviction appeal**

[4] The joinder of charges on the same indictment is addressed in section 4 of the Indictments Act (NI) 1945 ("the 1945 Act").

> "Subject to the provisions of rules under this Act, charges for more than one offence may be joined in the same indictment."

The relevant rule is Rule 21 of the Crown Court Rules (Northern Ireland) 1979:

> "Charges for any offence may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character."

There is no dispute between the parties that the cannabis offence is not founded on the same facts nor does it form part of a series of offences of the same or a similar character. The indictment is, therefore, defective.

[5] By virtue of section 5(1) of the 1945 Act where, before trial, or at any stage of the trial, it appears to the court that the indictment is defective, the court may make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. It follows that a defect in the indictment does not invalidate the commencement and progress of the trial and if in the course of the trial it is discovered that the indictment is defective the court can make an appropriate order. The issue in this case is the effect on any convictions if the defect in the indictment is not identified and consequently no order is made.

**Conviction**

[6] This issue has given rise to a range of conflicting decisions in England and Wales. In R v Bell 78 Cr App R 305 Lord Lane CJ stated that it could not be the law that a perfectly proper indictment containing one count alleging unlawful possession of cannabis could be made a complete nullity by the addition of counts contrary to the relevant Rule. In R v Newland 87 Cr App R 118 Watkins LJ held that a contravention of the Rule rendered the indictment invalid and that no valid trial could thereafter commence. Although referring to Bell, he sought to distinguish it.

[7] The issue was next addressed in R v Callaghan 94 Cr App R 226. Although that case was concerned with the joinder of a summary offence to an indictment the

issues were broadly the same. The court followed Bell and concluded that the misjoinder only affected the validity of the count which had been wrongly joined. The commentary on the case concluded that there was now a conflict with the Newland line of authority. That conflict was addressed in R v Smith 1 Cr App R 390. The court disapproved Newland noting that the suggestion that all proceedings flowing from an indictment containing a count improperly joined are a nullity simply asserted that proposition without advancing reasons for it, nor principle justifying such a consequence.

[8] Any doubt in the matter in England and Wales has been removed as result of the decision in R v McGrath [2013] EWCA Crim 1261. In particular, the court noted that there was a statutory power to amend the defective indictment in the course of the trial to remove any offending count. The statutory power in section 5 (1) of the 1945 Act is not in identical terms but the principle remains the same. The court concluded that the conviction on the wrongly joined count could not stand as it should have been removed in the course of the trial but that the convictions on the other counts were sound.

[9] The issue of joinder of indictments was considered by this court in R v Drake [2002] NI 144. The decision is strictly *obiter*. The court concluded that there was no misjoinder. Although the court proceeded on the basis that Newland was the governing authority, it does not appear that it was referred to Callaghan or Smith. We are satisfied that the reasoning in Newland proceeds on the basis that no valid trial can commence if there is misjoinder. That position is not compatible with the power in section 5(1) of the 1945 Act to amend a defective indictment. We consider that the reasoning in McGrath is correct and that we should follow it.

[10] We accept, therefore, that the conviction cannot stand in relation to the wrongly joined count. There may be cases where there is difficulty in identifying the relevant count but if in this case the question had been asked at any relevant time the only sensible answer would have been that the possession of cannabis count was the wrongly joined count. We accordingly allow the appeal against conviction in relation to that count.

**Sentence**

[11] The appellant is now a 34 year old single man. In the course of his teenage years he acquired a very substantial record for offences of dishonesty, including 16 convictions for burglary. The initial burglaries related to commercial premises but thereafter his offending consisted of burglaries of dwelling houses. The background to his involvement in the offences appears to have been connected to his drug taking. His record improved considerably in his early to mid-20s although there were three convictions for possession of drugs, one for burglary and two for thefts.

[12] The pre-sentence report indicated that by the time of these offences he had become a regular heroin user. That drug is well-known for its addictive qualities. It

is significant that he was convicted of handling stolen goods, an offence committed in December 2010, for which he was sentenced to 18 months' imprisonment suspended for two years and at the same time for burglary of a dwelling house in March 2011 for which he got a suspended sentence of two years. The picture, therefore, is that he had returned to his previous bad habits in order to fund his drug lifestyle. That appears to have been accepted by counsel acting for him in his plea at first instance.

[13] At the time of the commission of these offences the appellant was on licence in relation to a number of episodes of dangerous driving and failing to provide a specimen for which he received a determinate custodial sentence of three years. He was also in breach of the suspended sentences which were imposed in March 2012 in respect of the offences set out at paragraph 12 above. The pre-sentence report described the various array of sentences which had been imposed in respect of him but the conclusion was that it was clear from his continued offending that the sentences imposed had no impact on his attitudes towards offending or his willingness to engage in risk-taking offending for his own financial benefit. He was assessed, unsurprisingly, as having a high likelihood of reoffending.

[14] The learned trial judge was entitled to conclude that there was a significant element of preplanning in relation to the commission of these offences. In each case the property was targeted on the basis that the occupants were away on holiday. The appellant was assisted by his two co-accused. He initially sought to put the blame on them but now accepts that he was the principal in this offending. This was persistent, targeted offending which had all the hallmarks of a professional burglar. These offences were committed in breach of a suspended sentence and in breach of licence. Those factors contribute to the view that these were offences of high culpability and that the prospect of rehabilitation is remote.

[15] In those circumstances a deterrent sentence was required in this case. We consider that a starting point of six years for the offending was appropriate. Having regard to the fact that the plea came after arraignment the discount was appropriate. The suspended sentences had been imposed for similar offending a short time beforehand and as a matter of principle were properly imposed consecutively. The learned trial judge plainly looked at the issue of totality in deciding not to implement the suspended sentences in full. We do not consider that the sentences were manifestly excessive.

[16] The second basis upon which it was submitted that the sentence was excessive was on the basis of the disparity between the sentence imposed upon the appellant and that imposed upon his co-accused. One of those involved, McMaster, had a very limited role and was given a conditional discharge for 12 months. It is not suggested that his position was comparable to that of the appellant.

[17] The second co-accused was Graham. The pre-sentence report indicated that he was an alcoholic who had required admission as an inpatient to Holywell

Hospital on a number of occasions. He was at the time of sentencing engaged with Parkmore Drive Addictions Team in Ballymena. He was awaiting a bed for readmission to Holywell. He had been involved in the offences by driving the appellant to the scene of these burglaries and had been promised alcohol as his payment. He was 27 years old at the time of sentencing and had a short criminal record but had no convictions for dishonesty and had not served any time in custody. The pre-sentence report suggested that the suspended sentence would suffice to deter him from further offending in the near future. The learned trial judge imposed a sentence of 18 months suspended for a period of three years.

[18] The principles on which the court will interfere with the sentence on the grounds of disparity are well-established and helpfully set out in R v Delaney [1994] NIJB 31 by Carswell LJ.

> "In so arguing counsel was invoking the well-known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered: see R v Brown [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: R v Bell [1987] 7 BNIL 94, following R v Towle and Wintle (1986, The Times, 23 January)."

[19] There was obviously a marked difference in the approach to sentencing between the appellant and Graham. There were, however, marked differences between them. The appellant was sentenced on the basis that he was a professional burglar. He had been responsible for the targeting of the properties. Graham was sentenced on the basis that he was an alcoholic who had become entangled in this operation by the offer of alcohol by way of reward. Whereas deterrence was clearly appropriate in the case of the appellant, the same could not be said in the case of Graham. The difference in their criminal records was one of a number of factors which required a different approach to sentencing.

[20] In light of the comments in the pre-sentence report we do not consider that the sentence on Graham was unduly lenient. We agree that the disparity between the

sentences is very marked but that difference is entirely justifiable. There is nothing to suggest that anything has gone wrong which would require the court to step in.

**Conclusion**

[21] For the reasons given the appeal against conviction is allowed in relation to the count of possession of cannabis but the appeals against conviction and sentence are otherwise dismissed.