

**Neutral Citation No.: [2008] NICA 47**

Ref: **GIR7263**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: **26/09/08**

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

---

**THE QUEEN**

**v**

**MICHAEL CROMIE**

---

**Girvan LJ and Coghlin LJ**

**GIRVAN LJ**

**The application for leave to appeal**

[1] This is an application for leave to appeal against sentence the single judge having refused leave. The applicant was charged before Belfast Crown Court with the following offences:

Count 1 - burglary contrary to Section 9(1)(b) of the Theft Act (Northern Ireland) 1969 in that he on 5 November 2006 entered a dwelling house at 48, Ardenlee Avenue, Belfast and stole a car key to a BMW X5 vehicle registration number AIG 5737;

Count 2 - taking and driving away contrary to Article 172 of the Road Traffic (Northern Ireland) Order 1981 in that he on 5 November 2006 took BMW X5 vehicle AIG 5737 without consent of the owner or lawful authority for his own use.

Count 3 - handling stolen goods contrary to Section 21(1) of the Theft Act (Northern Ireland) 1969:

Count 4 - dangerous driving contrary to Article 10 of the Road Traffic (Northern Ireland) Order 1995 in that he on 5 November 2006 drove a vehicle dangerously:

Count 5 – driving whilst disqualified contrary to Article 167(1)(b) of the Road Traffic (Northern Ireland) Order 1981 in that he on 5 November 2007 drove a vehicle whilst disqualified;

Count 6 – no insurance contrary to Article 90 of the Road Traffic (Northern Ireland) Order 1981.

Count 7 – failing to stop contrary to Article 180 of the Road Traffic (Northern Ireland) Order 1981.

[2] On arraignment on 12 September 2007 he pleaded guilty to counts 1, 2, 4, 5 and 6. Counts 3 and 7 were not proceeded with and were left on the books not to be proceeded with without the leave of the court.

[3] The applicant was sentenced on 12 December 2007. On the burglary charge on count 1 he was sentenced to 3 years imprisonment. On count 2 in respect of taking and driving away he was sentenced to 18 months concurrently to that imposed under count 1. In respect of count 4 he was sentenced to 18 months imprisonment followed by 18 months probation and he was disqualified for 5 years and until tested. On count 5 he was sentenced to 9 months imprisonment concurrent with the sentence imposed on count 4. On count 6 he was fined £500.

[4] The applicant also faced a second bill of indictment for another count of burglary dated 24 June 2007. He was sentenced to 2½ years in respect of that count that sentence to run concurrently with the other sentences. The total effective sentence on both bills of indictment was accordingly 4½ years in custody followed by 18 months on probation. The applicant's appeal related to the sentences imposed on the first indictment.

### **The Offences**

[5] At some time after 10.30pm on Sunday 5 November 2006 the applicant smashed the hall window of a house at 48, Ardenlee Avenue, Belfast, entered the property and stole the keys to a valuable BMW X5 vehicle parked in the driveway of the property. He took the vehicle and drove away. At 2.20am on 6 November he was observed by police officers driving in Castle Place, Newtownards. He failed to stop when indicated to do so by the police and accelerated away from them towards the Portaferry Road at high speed. He proceeded through a red light along the Portaferry Road travelling very fast and overtook a car on a sweeping blind bend causing other vehicles to swerve. On reaching Greyabbey the police vehicle following the BMW reduced its speed for safety purposes and lost sight of the BMW. It was picked up by another police vehicle at Kircubbin. At that stage it was travelling at 100mph and again was lost by the police. At around 3.10am the police found the vehicle in a yard off the Rubane Road in Kircubbin. When

the police approached the vehicle and opened the door the applicant, who had been driving the vehicle, did not struggle and when the police officer said "This is hardly your car" the applicant replied "No mate". He was then arrested. Forensic testing of the applicant's clothing supported the proposition that his clothing had been exposed to the broken glass on the property at 48 Ardenlee Avenue.

[6] The applicant came before the court with an extensive criminal record totalling 74 convictions dating back to 1997. He had 5 convictions for burglary, 12 convictions for theft, 8 convictions for handling stolen goods and 17 previous convictions for various road traffic offences. He was first convicted of burglary in February 2005 and received a Custody Probation Order of 18 months detention and 12 months probation. He was again convicted in February 2005 for burglary and theft and received 6 months detention and in October 2006 he was convicted at Downpatrick Crown Court and received 18 months sentence in respect of the burglary charge. Amongst the various road traffic legislation offences he was convicted on 4 occasions of taking and driving away motor vehicles belonging to others.

[7] A pre-sentence report was obtained in relation to the applicant. This showed that he had been released from custody only a few days before he committed the offences. His lifestyle centred round the misuse of alcohol and drugs and association with offending peers. He lacks any structure in his life and has not responded to any treatment or counselling for his alcohol or drug problems. Previous disposals have had limited rehabilitative or deterrent effect. The probation officer concluded in his report that the applicant had a very high likelihood of involvement in further offending and presented a medium risk of harm to the public as in the past he was prepared to use violence and threats of violence.

## **The Sentencing**

[8] In his sentencing remarks the Recorder of Belfast stated:

"I believe that looking at this I could very clearly, quite easily give a sentence based on the consecutive nature to which I have referred of upwards of 8 years imprisonment in this case. And I say that because for the burglary and the taking and driving away I could give 3 years. For the driving which was appalling including the offences of no insurance and including the offence of driving whilst disqualified a period of say 2½ years and for the second burglary again a period of 2½ years and that is making the resistance against arrest concurrent with that as well. So we

are faced are we not with the totality argument of standing back and seeing what this whole chapter of offending should be visited with in terms of imprisonment I have decided that the effective sentence, that is before I address the question of Article 24 would be a period of 6 years for all this offending. I am prepared to agree to Article 24. I think these problems are deep seated. It will take longer than the year to which I have referred although it would be a lot easier for this defendant if he were to engage in this work in prison to maximise the chances of his coming out ... If he agrees to undergo this work then I will make the effective sentence 6 years but reduce that to 4½ years imprisonment to be followed by 18 months post custodial supervision."

The judge then proceeded to sentence as follows:

"Count 1 - 3 years. Count 2 - 18 months concurrent, counts 4 - 18 months to be followed by 18 post custodial supervision on the terms I have suggested. That to be consecutive to counts 1 and 2, that is on count 4, count 3 was left on the books, count 5 driving while disqualified 9 months concurrent with count 4. I have taken into account there. Count 6 no insurance a fine of £500 immediately payable. In respect of all of those there will be a disqualification from driving for 5 years. On the second Bill then there will be on count 1 a period of 2½ years that will be concurrent to the other offences as will count 2, 3 months which is concurrent to count 1 but concurrent to the offences in the other Bill. I believe that gives an effective sentence of 4½ years imprisonment together with 18 months post custodial supervision."

[9] The judge's sentencing remarks indicate that he decided to pass sentence *ex tempore* rather than follow the probably more desirable course of speaking from a structured speaking note or from a written text. It was common case that in sentencing the applicant to 18 months on count 2 the Recorder was imposing a sentence in excess of the statutory maximum namely 12 months. In considering the proper sentence in respect of that count this court must take of the plea of guilty and the applicant's early acceptance that he was driving a car belonging to somebody else, albeit recognising that

he was caught red-handed. In sentencing for this offence it has to be noted that he had 4 previous convictions for taking and driving away with increasing period of imprisonment which had not deterred him from committing the current offence. We consider that the proper sentence for this count should be 9 months.

[10] The applicant contended that the rest of his sentence was manifestly excessive and wrong in principle. The sentencing Judge failed to give sufficient weight to the early plea of guilty. He was wrong to impose consecutive sentences in respect of the offences which arose out of a single criminal episode. He gave insufficient weight to the lack of aggravating features present in the offence of burglary. Counsel referred to the fact that the premises were unoccupied at the time of the burglary, the offence was opportunistic and there was no ransacking or vandalism of the property.

[11] The task of the sentencing court in a case such as this is to determine the proper sentence in relation to the individual counts. It must consider the question whether the sentences on the individual counts should be concurrent or consecutive and if consecutive it must stand back and consider the global sentence to consider whether it would be fair or required a downward adjustment to reach a balanced outcome. Under Article 24 of the Criminal Justice (Northern Ireland) Order 1996 the court is obliged to consider whether it is appropriate to make a Custody Probation Order. If it does consider it appropriate the court must give effect to Article 24(2) which requires the court to reduce the period of actual custody to take account of the effect of the offender's supervision by the probation officer on his release. The period of reduction of actual custody does not automatically have to be equivalent in duration to the period of supervision. The appropriate reduction must take of the period of probation and all the circumstances of the case.

[12] In respect of the 3 year sentence in relation to count 1 we have not been persuaded by the applicant's argument that it was manifestly excessive or wrong in principle. In R v Brewster [1998] 1 Crim App R(S) 181, which was cited with approval in R v Megarry [2002] NICA 29, Lord Bingham pointed to the gravity and prevalence of domestic burglaries. The factors which may aggravate the seriousness of an offence of burglary include whether the goods taken were of high value and whether there was a pattern of repeat offending. While some of the aggravating features mentioned by Lord Bingham were not present (there being no evidence of planning or organisation, vandalism to the premises or traumatic effect on the householder) in this instance the defendant had a record for carrying out burglaries and theft. The car taken was of high value and it was a matter of chance that there was nobody present in the house when the burglary took place. Taking account of the range of sentencing discussed in R v Megarry and R v Black [2003] NICA 51 the 3 year sentence was not excessive.

[13] In relation to the sentence on the count of dangerous driving the sentence which the judge would have imposed but for the reduction to take account of the Probation Order was 3 years. This is clear from the fact that the judge indicated that the overall sentence for the all the offending would have amounted to 6 years. The judge's initial view in the course of his sentencing remarks was that a sentence of 2½ years could be considered appropriate for the count of dangerous driving. He ultimately opted for an effective sentence of 3 years.

[14] Sentencing an offender for dangerous driving is always a difficult task and the facts of individual cases will vary enormously. The statutory maximum sentence was significantly increased from 2 to 5 years after 27<sup>th</sup> September 2004 by Article 4(7) of the Criminal Justice (No 2) (NI) Order 2004. Sentencers must take such legislative changes into account when deciding the appropriate sentences and review earlier guideline cases in the light of the increased maximum (see the comments of Judge J in R v Richardson and others [2006] EWCA 3186.)

[15] There are no guideline cases from this court in relation to sentencing for dangerous driving simpliciter since the increase in the maximum sentence. Some guidance is to be had from a number of cases before the increase and they must be read in the light of that increase. In R v McShane (16 March 1998)(Unreported) the defendant was observed by police driving a vehicle with four passengers on board. When he discovered that he had been spotted by police he drove in an "appallingly dangerous" fashion evading or breaking through check points, travelling at enormous speeds and ignoring signals to stop. He eventually collided with one of two police landrovers drawn up in formation to stop him. Some of his passengers and a number of police officers in the landrover were injured. The defendant eventually pleaded guilty. He had previous convictions on 11 previous occasions, virtually all for driving offences including reckless driving causing death. He was sentenced to 2 years imprisonment for dangerous driving (which at the time was the maximum that could be imposed) and a consecutive sentence of 1 year imprisonment for driving while disqualified. Kerr J, giving the decision of the Court of Appeal, quashing the sentence and substituting it with 22 months imprisonment for dangerous driving and eleven months imprisonment consecutive for driving whilst disqualified, stated:

"The appellant has an appalling record of convictions for offences similar to those to which he pleaded guilty. His driving on this occasion was also appalling. His counsel suggested that it was not the worst case of its type; this may be so but we do not consider that the option of the maximum sentence must be reserved for the worst conceivable case in each category.

Having said that, we have concluded that some discount on the maximum sentence is warranted. Although most, if not all, of the aggravating features which prompt consideration of the maximum penalty are present in this case, as we have said, where a plea of guilty has been entered, the imposition of the maximum sentence must

remain an exceptional event. Despite its obvious seriousness, we do not consider that this case qualifies for such exceptional disposal.”

In R v McConnell (unreported 24 January 2003) the court approved the use of consecutive near maximum sentences for persistent road offenders even in cases of pleas. In that case the Court of Appeal upheld consecutive sentences of 20 months for dangerous driving with drink involved, 10 months for driving while disqualified and three months of a suspended sentence for driving while disqualified. In R v Boyd [1996] the Court stressed that the theft of a vehicle before it was dangerously driven was a considerably aggravating feature. Since those decisions the statutory maximum sentence has been more than doubled reflecting the public concern that exists in relation to the offence and its capacity to cause death and injury. It is to be expected that the sentences in those cases after the increase would have been appreciably longer.

[16] The present case was a particularly bad case of dangerous driving and a bad example of a kind of this sadly not uncommon dangerously anti-social behaviour that puts the lives of others at risk. In this instance the applicant had a bad record for driving offences. The manner of driving was exceptionally bad involving as it did the driving of a stolen vehicle at high speed for a protracted distance and over a protracted period of time. The applicant drove through a red light driving on the wrong side of the road causing other drivers to take evasive action. In these circumstances the sentence of 3 years could not be considered as manifestly excessive or wrong in principle. The judge’s conclusion that a Custody Probation Order was appropriate was one he was fully entitled to reach. While the applicant argued for an increase in the period of probation (and hence argued that there should be a reduction by an equivalent period in the period of actual custody) there is nothing to suggest the judge erred in his approach in determining that the proper period of probation should be 18 months. In any event even if the court were to increase the period of probation to 24 months it by no means follows that the period of custody should be reduced accordingly. Nor could it be said that the judge erred in reducing the period of actual custody by the full period 18 months to take account of the period of probation bearing in mind that he considered that the proper period of actual custody should be 4½ years and noting that the sentence of 3 years for driving was pitched by the Judge at a somewhat higher level than he had initially considered appropriate.

[14] Accordingly we grant leave to appeal, reduce the sentence on count 2 to 9 months but will not interfere with the remainder of the sentence.