Neutral Citation No [2017] NICA 23 | *Ref:* **MOR10275**

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

Delivered: **5/04/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JOSEPH HUGHES

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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] This is an application for leave to appeal against the applicant's conviction for conspiracy to rob on foot of his plea of guilty entered at Belfast Crown Court on 25 February 2014. He also appeals against the determinate custodial sentence of 9 years comprising 4½ years in custody and the same on licence imposed in respect of that count.

Background

[2] On 3 January 2013, around 11am, various members of the public telephoned the police in relation to the suspicious activity of the occupants of a Renault Laguna parked in a street adjacent to an Ulster Bank on the Ormeau Road when a cash in transit delivery was taking place. These reports included reference to the occupants of the Renault Laguna wearing masks and the sighting of a male carrying what appeared to be a handgun.

[3] At the same time, a customer inside the bank informed the area manager of the suspicious activity taking place outside the bank and the area manager contacted the police. The area manager then went outside the bank and observed the Renault Laguna and the male carrying the gun. The police arrived a short time later and gave chase to the Renault Laguna which was subsequently found abandoned in an alleyway off Baroda Street with no trace of the occupants.

[4] There were reports that a silver BMW had been travelling in convoy with the Renault Laguna. Police in the area observed a silver BMW parked in Candahar Street, a short distance from Baroda Street. When police approached this vehicle, it sped off towards the Ormeau Road. The police gave chase but the BMW drove at the police car, swerved, collided with part of the vehicle and then continued along the Ormeau Road. The BMW turned into Baroda Street and drove through the police cordon and into the crime scene. Police jumped out of the way of the BMW which came to rest when it collided with the rear of the Renault Laguna. The applicant was driving the BMW and he was arrested at the scene.

[5] The BMW which was to be used as a getaway car for the occupants of the Renault Laguna, was stolen from the Royal Victoria Hospital in September 2012. The BMW had false number plates and the police located a still saw (which is an angle grinder) and a water jug or basin in the BMW. These items were commonly used as an effective method of entry to cash in transit boxes, to kill the tracking system and to reduce the spread of ink on opening the cash box if the security system was activated.

[6] The Renault Laguna was purchased for £200 from a Mr Luke McCorry on 29 December 2009, five days before the incident. The applicant was identified by Mr McCorry by way of VIPER as one of the two purchasers of the vehicle. A Crime Scene Investigator recovered a number of items from a bin in Baroda Street and the applicant was forensically linked to one glove, possibly to another glove and to a fleece.

[7] In relation to the firearm, a Mr Kelly was in the alleyway off the Ormeau Road when a gun was thrown from a passing car and landed at his feet. He handed the gun into a local Winemark where it was later seized by the police. After examination, it was found to be an imitation Glock 17 firearm and, while not forensically linked to the applicant, from his remarks to the police on arrest referring to a firearm of the same make, it was clear he was aware of the presence of the gun.

[8] On 7 October 2013, the applicant was arraigned and pleaded guilty to dangerous driving (count 1), driving while disqualified (count 2), going equipped for theft (count 4), using a motor vehicle with no insurance (count 6), fraud by false representation (count 8), acquiring criminal property (count 9), possession of criminal property (count 10) and using criminal property (count 11). He also pleaded not guilty to carrying a firearm with intent to commit an indictable offence (count 3) and conspiracy to rob (count 7). A count of handling stolen goods (count 5) was left on the books.

[9] The applicant swore an affidavit in which he said that he attended court on 25 February 2014 when the case was listed for trial. He consulted with counsel and the attending solicitor at 10am. Prior to the consultation, two documents titled 'Forms of Authority' had been drafted by his legal team. The first form related to the

applicant contesting the charge of conspiracy to rob and the second form was in relation to the applicant pleading guilty. After a short period of time, the applicant signed the Form of Authority indicating a guilty plea to conspiracy to rob. The applicant states that the advices given on the day of the trial commenced at 10am and concluded some time before 10.18am. The court log notes the case being called at 10.18am. The form of authority is marked as being signed at 10.20am. The applicant says this suggests it was signed very shortly before the case was called or perhaps even signed within the court room.

[10] On 25 February 2014, the applicant was then re-arraigned and pleaded guilty to conspiracy to rob (count 7) and he withdrew his plea in respect of going equipped for theft (count 4). The court consented to the applicant vacating his plea previously entered in respect of this offence as this offence was absorbed within count 7. Count 3 (carrying a firearm with intent to commit an indictable offence) and count 4 were left on the books.

[11] The case was listed for plea and sentence on 25 March 2014. On foot of the content of the pre-sentence report, the defence sought an adjournment in order to investigate the significance of the applicant's medical/psychological health. A report was prepared by Dr Mark Davies who administered the Wechsler Adult Intelligence Scale (3rd edition (UK version) in order to formally assess the applicant's intellectual ability. This consists of 11 sub-tests broadly divided into verbal and non-verbal (or performance) intelligence. Dr Davies administered 9 of the 11 sub-tests. The applicant obtained a pro-rated Full Scale IQ score of 72 (range 68 – 77; 95% confidence level). This placed his general intellectual ability in the third percentile, or the bottom, 3% of the general population in his age range (25 – 29 years). There was no significant discrepancy between his verbal and his performance IQ scores.

[12] The principal sentence was that of 9 years for the conspiracy to rob and the learned trial judge ordered that two suspended sentences should be put into operation adding a consecutive period of 3 months.

The appeal

[13] The ground of the application for leave to appeal conviction is that the plea of guilty in respect of count 7 (conspiracy to rob) is a nullity and should be set aside because:

- The applicant did not understand the advice given to him by his legal representatives at the time due to his mental impairment. He was presented with two pre-prepared documents which were couched in terms that he was unable to comprehend. The applicant's mental impairments were such that his instructions to enter a guilty plea should have been taken in the presence of an independent person who was able to ensure the applicant comprehended what he was pleading guilty to.

- Dr Milligan's report demonstrated the applicant was a vulnerable individual who would not have understood the documents which were read out to him shortly before his trial by his then legal advisers in the circumstances in which this was done.

- The pre-sentence report disclosed that the applicant did not intend or did not understand he was pleading guilty to a charge of conspiracy to rob and that he believed he should have been convicted of a lesser offence thereby expressing equivocation. The learned trial judge should have enquired whether the defendant's mind had, in fact, gone with his plea when re-arraigned or if the equivocation expressed in the pre-sentence report represented his state of mind at re-arraignment.

[14] Dr Milligan carried out a psychological assessment of the applicant on 15 January 2015. She administered the Wechsler Adult Intelligence Scale (IV). She obtained a result for processing speed which was significantly below that for other test scores and she was of the opinion that the result could have been affected by stress. She concluded that the applicant presented with moderate learning difficulties. His reading skills were extremely limited, falling well within the well below average range (range associated with severe learning difficulties). There was evidence of severe language deficit. When presented with information, the applicant may find it difficult to use all the facts and details available to him. The SMOG Readability Analysis suggests, in order to read, process and understand the information contained in the two Forms of Authority, it would require the applicant to be educated to University level. The applicant's anxious and nervous demeanour, level of cognitive ability and language deficit would render him vulnerable to the adverse influence of others.

[15] She concluded that even if the written forms of authority had been read to the applicant, he would not have understood or comprehended what had been said. She set out the evidence on which her opinion was based and added, due to such evidence, she was of the opinion that the applicant would not have been able to listen to, process and comprehend the information presented to him within a period of twenty minutes. Due to his significant learning difficulties, it appeared the applicant would have been more vulnerable and susceptible to possible inducements or incentives given by people he trusted. He presented as passive and acquiescent as evidenced by him agreeing to Dr Milligan's suggestion of undertaking counselling without him understanding what counselling was and, therefore, what he was agreeing to. It was her perception that the applicant perceives "professionals" as "knowing what's best."

[16] The prosecution obtained a psychological report from Joe Dwyer. His results largely agreed with those of Dr Milligan although he obtained a significantly better score in respect of processing speed. He noted that the applicant had a learning disability and that his moderate learning difficulty was identified at primary school

and led to him going to a specialist school for learning disability for his secondary educational provision. The applicant was functionally illiterate and had difficulty in understanding complex sentences and comprehending the meaning of abstract terms. Because of that he was not able to read over a text to gather meaning. He has enormous difficulty in living independently and has been in serious trouble for offending behaviour. He is an extremely vulnerable adult and requires a high level of support and supervision which seems not to have been available to him in the past. While capable of knowing right from wrong he may easily succumb to the influence of those with whom he associated and whom he needed to rely on. Mr Dreyer's expert report was plainly independent and not designed in any way to advance the case of his client.

[17] In light of the allegations made about the circumstances in which the applicant pleaded guilty to the offences he waived his legal privilege and submissions were received from his solicitor and barrister. These disclosed that there had been extensive consultations with the applicant prior to the morning on which he entered his plea and in particular that there had been a long consultation on the day before the trial at which the various difficulties of the case were discussed. This was evidently a case in which there was very substantial evidence against the applicant in relation to the conspiracy to rob count. It was accepted by Mr Greene that the account provided by the solicitors and barrister could not be challenged and that he could not advance the case that there was evidence that could be admitted pursuant to section 25 of the Criminal Appeals (NI) Act 1980 to sustain the argument that the applicant was not properly advised in relation to his plea of guilty. Accordingly we are entirely satisfied that the conviction is safe.

The sentence appeal

[18] In her sentencing remarks the learned trial judge stated conspiracy to rob was a serious and specified offence and then referred to a number of authorities in respect of robbery cases (AG's Reference (No. 1 of 2008)(Gibbons, Stilges and Crone)[2008] NICA 41 which considered the most recent robbery cases). The learned trial judge stated there were many similarities between this case and the present case but noted the difference that in the present case the defence conceded the applicant knew of the presence of the imitation firearm and she added that any other suggestion would be wholly unrealistic. Also, in AG's Reference (No. 1 of 2008) there was much discussion as to the circumstances which would lead to a conclusion a robbery was planned, sophisticated or professional.

[19] AG's Reference (No. 1 of 2008) considered AG's Reference (No. 1 of 2004) [2004] NICA 6 and AG's Reference (No. 1 of 2005)(Rooney and Others) [2005] NICA 44 (which provided in a commercial robbery carried out as a well-planned venture where firearms or imitation firearms are used and where the perpetrators use or are prepared to use violence, the starting point for sentence after a contest was 15 years imprisonment. On a plea of guilty at the earliest opportunity the appropriate starting

point is 10 years imprisonment. Where a plea is later, the reduction is adjusted to take account of the lateness of the plea and the reasons it was not entered earlier).

[20] The learned trial judge considered the present case was well-planned, an imitation firearm was used, two cars were involved and the applicant was connected with both. The car driven by the applicant was clearly the getaway car for the occupants of the Renault Laguna and it housed the saw and the water container. However, the applicant's role was slightly lesser than the roles of the occupants of the Renault Laguna. Reference was made to the applicant having a relevant record, albeit at a lower level and to his failure to respond to previous sentences. In all these circumstances, the learned trial judge stated the starting point was 10 years imprisonment.

[21] The learned trial judge went on to state that, in mitigation, the applicant had entered a plea at a very late stage and in circumstances where he was caught red-handed. Therefore, the credit given could only be minimal. She stated she took the applicant's vulnerabilities as outlined in Mr Davies' report into account and his limited intellectual ability and susceptibility to the suggestion of others. The learned trial judge added that, nevertheless, as Mr Davies pointed out, the applicant "displays highly compulsive behavioural patterns encompassing alcohol misuse, gambling and offending behaviour." She added that robbery remains one of the most prevalent crimes and the courts must react with sufficiently severe penalties to send out a clear signal that lengthy periods of imprisonment will be imposed where involvement in such crime is established.

[22] We are satisfied, therefore, that the learned trial judge took into account all material factors in determining the sentence that she should impose. We also consider that we should take into account the evidence from Dr Milligan and Mr Dwyer insofar as it bears upon the vulnerability of the applicant. In our view the proper way to construct the sentence was to look first at the appropriate starting point for an offence of this kind bearing in mind the vulnerability of the applicant.

[23] For those centrally involved in an offence of this kind involving a well-planned attack upon a cash in transit van a starting point after a contest of in or about 15 years for an offender with no or no material record is appropriate. This applicant had a record for acquisitive crime apparently related to his gambling addiction but the learned trial judge accepted that the applicant had a somewhat lesser role than some of the others involved, he was not central to the planning of the attack, an imitation firearm rather than a real firearm was used and the applicant was vulnerable.

[24] Mr Greene suggested that the appropriate starting point before taking into account credit for his late plea was somewhere between eight and 11 years. In our view the appropriate range was somewhere between 10 and 12 years. The plea of guilty came very late in the day just before his trial was due to commence. He was

also effectively caught red-handed. In those circumstances the degree of discount for the plea must be substantially diminished and Mr Greene accepted that a 15% discount was appropriate. That suggests that the appropriate sentence was somewhere between 8½ years and 10 years. In our view the sentence of nine years imposed by the learned trial judge was well within range and ought not to be disturbed. Although we recognise that the applicant will need to be supported when he re-enters the community we do not consider that there is any reason to disturb the balance between the custodial and licence periods in this case.

Conclusion

[25] For the reasons given the application for leave to appeal is refused.