Neutral Citation No: [2023] NICA 75	*Ref:* **McC12316**
	ICOS No: **20/075749/A01**
Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **10/11/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT

REX

v

LAURENCE CREANEY

Mr Conor O'Kane (instructed by Carlin Solicitors) for the appellant
Mr James Johnston (instructed by the Public Prosecution Service) for the respondent

---

Before: Keegan LCJ, McCloskey LJ, and Kinney J

McCLOSKEY LJ (*delivering the judgment of the court*)

INDEX

Introduction

[1] Laurence Creaney ("the appellant") renews his application for leave to appeal to this court, leave having been refused by the single judge, against the imposition of a determinate custodial sentence, for an offence of arson, of three years imprisonment, divided equally into custodial and licenced release periods, at Belfast Crown Court on 15 September 2023.

Grounds of Appeal

[2] The umbrella ground of appeal is that the sentence is manifestly excessive. This is particularised in the following way:

(a) The trial judge erred in declining to accept the appellant's "main mitigation point" namely that he "… committed the offences at the behest, direction and under severe pressure, coercion, intimidation and exploitation" from ["Mr X"] who "… on the Crown case is a drugs gang lord and murderer."

(b) The judge erred in "ruling" that "… he would not accept the appellant's main mitigation point … unless the appellant went into the witness box in open court and gave oral evidence against Mr X. This was in clear breach of the appellant's article 2 ECHR right to life."

(c) Whereas the appellant's co-accused (Ms Chanelle Walker) advanced the same ground of mitigation, the judge did not subject her to the same "ruling."

(d) The judge "… incorrectly and wrongly distinguished the appellant's sentencing from that of … Ms Walker."

[3] It is contended on behalf of the appellant by Mr O'Kane, of counsel, that the sentencing of the appellant should have taken the form of a non-custodial disposal namely a suspended sentence, an enhanced combination order or a deferred sentence.

Chronology

[4] The following are the salient dates and events in the chronology of the prosecution and sentencing of the appellant:

(a) 3 November 2019: commission of the offence.

(b) 14/15 November 2019: arrest/interview/remand in custody.

(c) 19 November 2020: committal for trial.

(d) 22 January 2021: arraignment.

(e) September 2021 – December 2022: three trial listings.

(f) 1 December 2022: Re-arraignment and revised plea of guilty.

5 December 2022: amended indictment of the co-accused specifying the single new offence of assisting an offender by driving the appellant from the scene of the offence with intent to impede his apprehension or prosecution, contrary to section 4(1) of the Criminal Law Act (NI) 1967.

(g) 6 December 2022: third listing of trial vacated.

(h) 17 January 2023: first plea & sentencing hearing – adjourned.

(i) 3 March 2023: "Newton" hearing ruling; defence evidence to precede any prosecution evidence; adjournment to 17 April.

(j) 17 April 2023: "Newton" ruling set aside on the basis that the appellant would sign his counsel's written submission in mitigation (done subsequently).

(k) 30 June 2023: *R v Tolera* ruling: the judge ruled that he was not minded to accept the assertion of coercion put forward on behalf of the appellant, adding that the appellant would of course be at liberty to give evidence in order to establish this assertion to the civil standard of proof.

(l) 15 September 2023: sentencing.

Applications and Rulings

[5] As appears from the foregoing the sentencing process in this case was a protracted one, giving rise to multiple listings accompanied by extensive written and oral submissions. It is necessary to tease out the chronology of events in a little more detail.

[6] The appellant's sentencing hearing was first listed on 17 January 2023. The written submission of his counsel provided in advance stated, inter alia:

> "The defendant committed the offence under severe pressure from, and at the behest of, a violent drugs gang leader, [Mr X], who is presently on remand for the murder of Robbie Lawlor. Mr Creaney owed the drugs gang money for drugs it had supplied to feed his own habit …
>
> In [Mr X's] High Court bail application, when refusing bail [the judge] stated 'There is a prima facie case that [Mr X] was involved in the murder …. which is believed to

> have been committed in the context of a drugs war between violent criminal gangs."

The replying prosecution submission contains the following passage:

> "[The foregoing] … was not a proposed plea basis nor is it an agreed basis. It is not accepted by the police and prosecution ….
>
> The prosecution submits that a Newton hearing is therefore required to determine the true and proper factual plea basis. That unagreed basis comes from the alleged facts within the exclusive knowledge of the defendant [who] should therefore be prepared to give evidence on this issue and have it tested under cross examination …
>
> At such a hearing the prosecution would also intend to call evidence from police and victims of this arson against whom criminal insinuations have been made of some kind of link to or agreement with [Mr X]. A Newton hearing is necessary so that Creaney can be sentenced on a basis which the court considers true and proper …"

[7] A further written submission on behalf of the appellant opposed the prosecution suggestion. Notably, this contained the acknowledgment "… there is a considerable dispute between the prosecution and defence." The submission further states:

> "The Crown have no evidence to contradict the assertion that [Mr X] compelled the defendant to commit the offence …
>
> The 'duress' point is the central and exceptional point in our mitigation submissions …
>
> We respectfully submit that the calling of police and injured party witnesses **will not, and could not possibly**, prove that the defendant's version of events is incorrect which is the core point."
> [Emphasis added.]

It was further submitted that to conduct a Newton hearing would be "completely disproportionate." Finally, it was submitted that the court should opt for the course of proceeding with the sentencing hearing and receiving the parties' submissions prior to determining the Newton hearing issue.

[8] A further written submission on behalf of the prosecution followed, containing the following noteworthy passages:

> "… the factual matter in issue is: did [Mr X] put the defendant under pressure to carry out this arson attack? ….
>
> The only two people who can speak directly to that fact are the defendant and [Mr X] ….
>
> The prosecution view is that the defendant is putting forward a false narrative which has never before been mentioned by him …
>
> The prosecution does not have positive evidence within the depositions to dispute the defendant's assertion ie to prove the negative that he was not under pressure …
>
> Where the issue arises from facts that are within D's exclusive knowledge, the defence should be willing to call their client. If D does not give evidence, the judge may draw appropriate inferences, subject to any explanation put forward …
>
> The facts being proposed here by the defence are inextricably linked to the charge and so are relevant to culpability. It is not mitigation in the normal sense."

With regard to the co-accused (Ms Walker):

> "… The co-accused's assertion was not accepted by the PPS. Simply because she asserted it in her defence statement does not make it a fact and does not add any credibility to what Creaney now asserts …
>
> Walker made that assertion in her amended defence statement*. Creaney made it for the first time in his sentencing submissions and only after he had already pleaded guilty without any agreed plea basis."

[*The appeal bundles contain only one Defence Statement ("DS") on behalf of the co-Accused dated 11 May 2022, albeit labelled "Amended".]

[9] A further written submission from the prosecution followed. With appropriate quotations from Blackstone and Archbold, this proposed –

> "… a document identifying precisely what is being alleged by the defendant …
>
> The matters in issue should be individually identified within a single document signed by the defendant …
>
> It will then be for the prosecution to consider this document and confirm which points are accepted or rejected …
>
> With full knowledge of what is in issue both sides can then marshall their evidence ….
>
> It was informally agreed at the recent oral hearing that the defendant would call his evidence first (ie oral evidence from Creaney) followed by the Crown's evidence …
>
> The burden of proof remains on the prosecution to satisfy the court that its version of events is the correct one. The criminal standard of proof applies."

These submissions were based largely on *R v Underwood and Others* [2004] EWCA Crim 2256 (see further *infra*).

[10] The central thrust of the replying submission on behalf of the appellant was that the appellant was not putting forward any factual matters contradicting the prosecution evidence. Quite the reverse: the appellant "… by his plea has accepted literally every part of the Crown's case in the papers. He has not disputed one fact." Based on this, the court was invited to re-examine afresh the Newton hearing issue.

[11] The court ruled that a "Newton" hearing should take place. This gave rise to the successive rulings noted in para [4](j) and (l) above. The first of these rulings was in these terms:

> "It seems to me that the issue that is raised before the court is one that relates to a culpability point, not a point of personal mitigation … if the court formed a view that was favourable to the defendant's point, [that] would have a material effect on his sentencing in his favour. The overriding objective, as the court made clear in **Beswick** is that the court must sentence somebody of a true and proper basis …

> I have come to the view that this matter is a substantial issue in dispute between the parties that does need to be resolved by way of ... a **Newton** hearing."

Next, noting the concession on behalf of the appellant by his counsel, the court ruled that at the envisaged hearing the defence evidence would precede any evidence on behalf of the prosecution.

[12] The next material development is documented in the transcript of a short hearing convened on 17 April 2023. On this occasion the judge announced that he was *setting aside* his previous ruling. Other passages in the transcript would indicate that this was prompted by the identification of an agreed different mechanism, namely the appellant would append his signature to his counsel's written submission in mitigation.

[13] At a further listing on 30 June 2023, the judge ruled thus:

> "… The defendant provided what is known as an 'Underwood' statement where he signed a statement setting out his position in relation to [the pressure claim]. That was signed on 17 April and then on 22 April the officer in charge of the case provided a written statement in relation to the issues that had been raised …
>
> There is no need for a Newton hearing where matters put forward by a defendant do not amount to contradiction of the prosecution case, but rather amount to extraneous mitigation, explaining the background to an offence or to circumstances – other circumstances which might lessen the sentence **and that's this case**. ….
>
> There will undoubtedly, in this case, be matters of personal mitigation at play in the sentencing exercise, which the court must consider. However, the issue in this case of the defendant Creaney claiming to have been pressurised into committing the offences is not, in my view, one of personal mitigation but rather speaks to the matter of culpability …
>
> Coercion, intimidation or exploitation …… might be a factor that the court would consider in regarding a case as being one of lesser culpability …
>
> In relation to establishing that point, that can on occasions be done through counsel making submissions, or it could be done through the calling of evidence by the defendant.

> The decision as to whether or not evidence is to be called would be that of the defendant. There's no entitlement to an indication as to whether or not the matters put forward are accepted by the court. However, as was said in **R v Tolera** [1999] such an indication is desirable …
>
> [**Ruling**]
>
> … I do not accept the point as has presently been put before the court in the manner that it has. To adopt the words used in **R v Guppy**, in my view 'at present before the court it is of doubtful value.' And therefore that is the indication of the court on this point. If the defendant wishes to give evidence and to seek to establish the matter, a civil burden … rests on him, but the decision as to whether or not he wishes to give evidence is a matter that is for him to decide upon … having taken advice."
>
> [emphasis added]

The exchanges which followed confirm that the court would be amenable to revisiting this ruling if considered appropriate. The preceding exchanges confirm an acceptance by appellant's counsel that the civil burden of proof was engaged for the appellant.

[14] By this stage the position of the prosecution was unequivocal: the appellant's assertion of coercion was robustly rejected, it being further stated that the police did not accept that the appellant even knew Mr X. The die was well and truly cast accordingly.

The Sentencing of the Appellant

[15] Following the labyrinthine path charted above the sentencing hearings in respect of both the appellant and his co-accused proceeded on 15 September 2023. The central pillar of the appellant's mitigation – the alleged coercion - was unchanged. The appellant did not give evidence. The further written submissions on behalf of the appellant at this stage included the following:

> "… The court's previous indication that (without Mr Creaney giving evidence and as matters stood at that time) it was not minded to accept his 'pressure from Mr X' point was a preliminary, interim view. It was not a final position or conclusion the matter … we made it clear that we would be revisiting the matter at today's sentencing hearing …

> The Crown are not disputing one word of Ms Walker's account about driving Mr Creaney to meet Mr X, Mr Creaney owing Mr X a drug debt and Mr Creaney telling her we were doing it for Mr X etc …
>
> It is completely fanciful to suggest that all of that was done to somehow set up a false mitigation point if they happened to get caught …
>
> It is not logical, reasonable or fair to reject the reason given by Mr Creaney and Ms Walker ….
>
> It would be completely illogical, contradictory and dangerous for the defendants to go into the witness box and give evidence against Mr X. It would undermine their assertion of being in fear of Mr X."

[16] The materials available to the sentencing judge included counsel's written sentencing submissions in respect of the co-accused. These contained the following excerpts from her amended DS (which this court has received and considered):

> "The defendant was in a relationship with her co-accused at the relevant time. The defendant accepts that her account given to police at interview was untruthful. This account was given out of fear of reprisal from her co-defendant and his associates if she were to tell the truth… The defendant now seeks to give a truthful account in spite of her fears about the consequences for her safety ….
>
> On 3rd November 2019 the defendant agreed to drive her co-accused to [the relevant location]." She believed him to be going to meet an associate by the name of [Mr X]. She had previously driven her co-accused … to meet [Mr X] when her co-accused had left her vehicle and got into [Mr X's] vehicle to speak with him. In this regard it was not an unusual request from the co-accused ... the co-accused left the vehicle …
>
> After some time, the co-accused returned to the vehicle in a panicked state and told her to drive …."

The written submission continues:

> "Ms Walker understood that her co-accused, Creaney owed money to [Mr X] ….

> Following the incident the defendant was told by her co-accused that he had carried out an arson at the behest of [Mr X] as payment for debts owed to him by the co-accused …
>
> The defendant had no prior knowledge or suspicion that her co-accused was going to carry out an arson or any crime on 3rd November 2019 …
>
> The defendant had no prior knowledge or suspicion that her co-accused was going to carry out an arson or any crime on 3rd November 2019. She believed him to be going to meet an associate who she had driven him to meet before."

As regards the co-accused, by the stage of the plea and sentencing listing there was a new, second indictment specifying the offence of assisting an offender (*supra*). Mr Johnston, on behalf of the prosecution, informed this court that the original indictment subsisted, with the result that the count of arson against the co-accused received a "left on the books" disposal.

[17] The materials available to the sentencing judge included the report of Dr Davies, Consultant Clinical Psychologist, dated 29 April 2022. A remote interview was necessary because the appellant refused to attend an in-person appointment. Dr Davies states, and repeats, that there is no basis for considering the appellant to be of "very limited intellectual ability." The account given by the appellant (now aged 35 years) was one of childhood conduct disorder and a lengthy history of drug and alcohol abuse dating from his early teenage years. This is reflected in his criminal record, which documents 159 convictions beginning when the appellant was aged 14. Dr Davies does not diagnose <u>any</u> psychiatric disorder. The concluding passage in his report simply describes the appellant as presenting with "a number of marked dysfunctional personality traits" which he then particularises.

[18] Also available to the sentencing judge was the pre-sentence report dated 5 January 2023. The Probation Officer's assessment was that the appellant presented a medium risk of re-offending within the next two years. The threshold of a significant risk of serious harm was not overcome. Minimisation of his personal responsibility was identified as a striking feature. The report further discloses that the Probation Service was seeking revocation of the Community Service Order imposed on the appellant on 26 July 2022.

[19] In sentencing the appellant the judge, in substance, affirmed his *R v Tolera* ruling, reiterating his previous view that this issue "... goes to culpability and not …. personal mitigation." He reasoned thus:

> "It was not mentioned by him at interview; it does not find expression in his defence statement; while Ms Walker's amended defence statement does make mention of a point, that is not evidence … and counsel's submissions … while often will be accepted without further enquiry in relation to matters of personal mitigation, a different approach is taken when they go to issues of culpability …"

[20] The first determination made by the judge was that the appellant should not be sentenced as a "dangerous" offender. Next, he noted that the maximum punishment for the offence of arson is a term of life imprisonment, while the court may alternatively impose an unlimited fine or a custodial term or both. Continuing, the judge highlighted the following facts and considerations: the offending was characterised by planning; it was to a certain extent "amateurish"; given the estimated financial losses of almost £900,000 this was "a high value case" (the language of the Sentencing Council guidance – *infra*); there was a lengthy history of alcohol and drug misuse; the appellant had sought professional help; he had expressed remorse; the risk of re-offending had been assessed as minimum; and his criminal record was noted. The judge then expressed himself satisfied that there had been no culpable delay in the prosecution. A contested trial culminating in a conviction would have warranted a custodial term of four years. An "appropriate reduction" would be provided to reflect the guilty plea. The threshold for a custodial disposal "has quite clearly been passed …" The judge concluded that a determinative custodial sentence of three years, divided equally between imprisonment and licensed release, was appropriate. This was followed by his recommended licence conditions, which had a heavy emphasis on the need for the appellant to address his addictions.

The Sentencing of the Co-Accused

[21] The same judge sentenced the co-accused on the same date in the following terms, in summary. Now aged 30 years, she had experienced a disturbed and disrupted upbringing during her teenage years in particular, giving rise to long term trauma counselling. She is the mother of five children, only one of whom is in her care namely the youngest, aged around 10 months. She has a Youth Court criminal record, having last offended when aged 14. A custodial sentence of 14 months would have been appropriate following a contested trial. Given her plea of guilty a sentence of ten months imprisonment was indicated. The judge determined to suspend this for a period of two years, giving substantial weight to this offender's family circumstances, in particular the lack of any other suitable adult carer for her child and giving lesser weight to the delay in sentencing the offender which had characterised the final phase of the proceedings.

The Appellant's Pleas

[22] When interviewed separately by the police the appellant and the co-accused concocted a story that they had been present in their parked vehicle at the relevant location for an entirely innocent purpose. There were significant differences between these accounts. Furthermore, they were maintained in the teeth of the highly incriminating CCTV evidence. Neither of them made any claim of intimidation or threats.

[23] The first DS on behalf of the appellant was provided some 14 months after the offending. It maintains the bogus claim of innocent conduct. It says nothing about intimidation or threats. An amended DS followed some nine months later. The same observations about its contents apply. Furthermore, this flew the veritable kite of a real possibility of an "insurance job." His later amended DS was to like effect.

[24] The appellant's re-arraignment and revised plea of guilty materialised over three years following his initial arrest, interview and charge. At this stage an irregularity crept into the trial process. Having regard to the preceding chronology of events, this radically changed situation cried out for either a further amended DS or (as a minimum) the appellant's proposed basis of plea. The late plea of guilty did not absolve the appellant from his duty of continuing compliance with the rigorous requirements of the Criminal Investigations and Procedure Act 1996 (the "1996 Act"). Both the original and the amended DS lost their currency entirely when the plea of guilty was entered. The scenario which unfolded thereafter was one wherein the amended DS was not substituted. A barrage of written submissions compiled by the appellant's counsel was in substance permitted to operate as a substitute for a further amended DS or a basis of plea proposal or agreement.

[25] It is clear from the various transcripts and multiple written submissions that the trial judge was thrust into a challenging situation. At the stage when the critical development of the appellant's radical change of plea occurred, there was no basis of plea – draft, agreed or otherwise – and no consideration was given to its absence. Insistence upon a further amended DS at this stage or, as a minimum, a proposed basis of plea would have been appropriate. The written submissions of counsel are no substitute for a DS, whether original or amended. Nor are they a substitute for a basis of plea. Every DS operates as a formal, solemn statutory mechanism connecting the accused person directly with the court of trial. The written submissions of an accused person's counsel are of a quite different ilk. An accused person's legal representative can never walk in the shoes of his client.

First Ground of Appeal: Rejection of Mitigation

[26] The coercion issue was the subject of extensive and careful consideration by the trial judge from the stage when it was first raised until the date of sentencing. Procedurally, the judge's handling of this issue was scrupulously fair. The appellant's legal representatives were afforded, and availed of, ample opportunity to

make representations to the court. Furthermore, by the final stage, they had extensive notice of the judge's intimation that he was not minded to accept the appellant's claim of coercion. The appellant had the opportunity to provide credible supporting evidence of this claim but declined to do so

[27] The court pressed Mr O'Kane, of counsel, on the precise nature of the legal infirmity which this ground of appeal entails. Nothing of any substance resulted. The terms of this ground of appeal are that the sentencing judge "erred" in rejecting the appellant's principal mitigation. The nature of the judge's suggested "error" has at no time been identified. In substance, this court was invited to conduct a "right or wrong?" exercise. "Error" is not a recognised ground of appeal – in any litigation context – because it does not constitute a coherent legal standard or touchstone. In an appeal against sentence, a ground of appeal formulated in this way fails to engage with the function of this court in sentencing appeals. The first of the two long established grounds of appeal is error of principle or other error of law. The second is that of manifestly excessive sentence (viz this case: see para [2] above). In this species of appeal, the function of this court is one of review: see *R v Ferris* [2020] NICA 60, paras [36]–[43]. This court's function of review, applying the 'restraint' principle, does not entail substituting its opinions or assessments for those of the sentencing judge. Appropriate deference is accorded to matters of discretion and evaluative judgement. "Error" and its derivatives, without more, should not be the language of grounds of appeal or argument.

[28] It is essential in every appeal against sentence to formulate with precision the legal infirmity (or error) which might permit this court to intervene. Inexhaustively, these include disregarding some important information; misunderstanding some material evidence; taking into account some immaterial fact or factor; misapplying some material legal rule or principle; applying an unfair procedure; misapplying a burden of proof; or making an assessment or conclusion which qualifies for the rare condemnation of irrationality.

[29] Reverting to the present case, there is no legal rule or principle which obliged the judge to accept the coercion claim. Ultimately, the judge affirmed his provisional inclination to reject it. He provided relevant and sufficient reasons for doing so. In substance, the judge was not persuaded by this claim which, properly analysed, resolved to belated, bare and unsubstantiated assertion from beginning to end. Precisely the same characterisation applies to the relevant passage in the DS of the appellant's co-accused, which suffered from the additional frailty of being hearsay in nature and, further, did not contain the full detail of the reported coercion which was being advanced in written submissions by the appellant's counsel.

[30] To summarise, the judge's rejection of the coercion claim entailed the exercise of fact and context specific evaluative judgement falling comfortably within his margin of appreciation. It did not involve any of the legal infirmities adumbrated in para [28] above. Finally, it was the product of a scrupulously fair decision making process. In summary, no basis for intervention by this court has been established.

Second Ground: Art 2 ECHR

[31] The article 2 ECHR ground of appeal is formulated in bare terms in the grounds of appeal and was not developed in any meaningful way in the supplementary written submission or orally before this court. Evidentially it is palpably impoverished. Furthermore, there has been a manifest failure to address the relevant legal principles and jurisprudence.

[32] At its height this discrete ground might raise the issue of the protective/preventive dimension of article 2 ECHR. The legal test to be applied in this kind of situation is well settled. There can in certain, well defined, circumstances be a positive obligation on a public authority (which under the Human Rights Act includes a court) to take preventive operational measures designed to protect a person whose life is at risk from the criminal acts of another. In order to trigger this obligation:

> "It must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."
>
> [*Osman v United Kingdom* [1998] 29 EHRR 245, para 116.]

[33] This test is manifestly not satisfied in the present case. Ultimately, following protracted ventilation of this issue before the sentencing court, the only person realistically capable of providing the material to satisfy this test was the appellant. He scorned repeated opportunities to do so. The judge was left with no information from <u>any</u> source bearing on the asserted intimidation. All that he had was a belated, bare and unsubstantiated assertion communicated to the court by the appellants' legal representatives in the form of submissions. The judge, for reasons which this court has found unassailable, and in the context of a robust rejection of the appellant's claim by the police, dismissed the assertion. This ground does not begin to satisfy the *Osman* test.

Third and Fourth Grounds: Disparate Sentences

[34] We turn to consider the differential treatment ground of appeal. The amended DS of the appellant's co-accused rehearsed his self-serving and unsubstantiated claim that he had committed the arson at the behest of "Mr X" as payment of unspecified and unproven debts owed by him to the latter. This claim was vigorously and consistently contested by the police. Ultimately, as we have

seen, it was rejected by the sentencing judge. It availed neither the appellant nor the co-accused in any way. More fundamentally, the coercion belatedly asserted on behalf of the appellant was exclusive to him. Coercion formed no part of the co-accused's case as rehearsed in her amended DS. The sole relevance to the co-accused of the coercion asserted by the appellant was that it became the platform upon which she sought to explain why her initial account to the police was untruthful, with the further consequence that her guilty plea also was a heavily delayed one. Furthermore this issue did not feature in the sentencing of this Appellant: see para [21] above. This analysis exposes the manifest lack of merit in this ground.

[35] By the next discrete ground of appeal it is contended that the appellant's sentence is manifestly excessive by reason of the non-immediate custodial disposal in the case of his co-accused. This ground of appeal also is developed in meagre terms which do not identify any relevant legal principle or judicial decisions.

[36] The legal principles which this ground engages are well settled. They were considered by this court in *R v Stewart* [2009] NICA 4 at para [21] ff. Reiterating the approach in *R v O'Neill*, [1984] 13 NIJB (2) Kerr LCJ stated at para [22]:

> "The principle expressed in this passage is quite clear. An appellant who has been properly sentenced cannot benefit from an inadequate sentence wrongly passed on a co-defendant. He cannot expect a reduction on his sentence solely on account of the unjustifiably lenient treatment of someone involved in the same offence. The fact that the 'sense of grievance' is unjustified is secondary to the primary import of the principle which is, as we have said, that a properly passed sentence cannot be altered because of an error in sentencing a co-accused."

The court further adopted its earlier decision in *R v Delaney* [1994] NIJB 31, where the touchstones formulated by Carswell LCJ were those of "very marked" disparity and "glaring" difference in treatment. Furthermore, the Lord Chief Justice emphasised that an offender's asserted sense of grievance will not warrant intervention by the appellate court. In *Stewart* this court stated unequivocally, at para [25]:

> "It is not unfair to an appellant who receives a perfectly proper sentence that a co-accused is punished less severely."

[37] The sentencing of the co-accused has been outlined in para [20] above. We consider that the cases of the appellant and his co-accused had obvious material differences. Ultimately, the only <u>active</u> count against the co-accused was that of assisting an offender (the appellant). This per se betokens a significant distinguishing feature. Furthermore, the basis on which the judge sentenced the

appellant, which this court has endorsed, differed markedly from that upon which the co-accused was sentenced. The basis of her sentence was manifestly more favourable to her than that of the appellant and clearly lay within the range of reasonable assessments open to the judge. The appellants' appalling criminal record provides yet another point of distinction. Furthermore, his ultimate stance before the court was one of protracted non-co-operation, extending for over three years. We refer to, without repeating, our assessment of the preceding ground of appeal, which is overlapping in nature. Giving effect to all of the foregoing, this ground resolves to a vague complaint of imbalance or inconsistency bereft of substance or merit.

Final Ground: Sentencing Guidelines Publication

[38] The final ground of appeal, which overlaps to some extent with the others, complains that the sentence imposed on the appellant is manifestly excessive. In sentencing the appellant the judge observed that there is no guideline decision of this court relating to sentencing for the offence of arson. He further recorded that he had considered the relevant part of the publication of the England and Wales Sentencing Guidelines Council. This had indeed featured prominently in counsel's written submissions. The judge, as noted above, when focusing on the issue of the appellant's culpability identified "a degree of planning." This is entirely consistent with his subsequent statement that the offending was "to a degree, amateurish." This, however, while at most diluting somewhat the gravity of the planning element did <u>not</u> warrant an assessment of limited culpability.

[39] The appellant's case in writing was, in substance, that the sentencing court was bound to follow the Sentencing Council's publication; and that in doing so the judge was bound to conclude that this was a "Category 1 Harm/Culpability C" case, thereby engaging a sentencing range of 6 months to 18 months with a starting point of nine months; and, finally, failed to recognise a series of asserted exceptional circumstances warranting a non-immediate custodial disposal. Before this court this contention was diluted somewhat, the emphasis shifting to the Council's suggested aggravating and mitigating factors.

[40] The judge was under no obligation to sentence in accordance with the Sentencing Council publication. This has been made repeatedly clear by this court: see *R v McKeown* [2013] NICA 28, *R v McCaughey and Smyth* [2014] NICA 61 and *R v McCormick* [2015] NICA 14.

[41] Nor did the judge err in failing to allocate the appellant's offending to "Category C" ie the lowest culpability category on account of "little or no planning; offence committed on impulse …" As the judge's rehearsal of the factual features of the appellant's offending demonstrates, this was, on any objective and reasonable assessment, an offence involving significant planning. In the relevant passage the judge identifies the equipment brought to the location by the appellant. Furthermore this was the offending of a career criminal whose voluminous criminal

record includes over 60 offences of burglary, theft and kindred crimes. In short, this offence of arson was committed by someone who knew what he was about, equipped himself accordingly and accomplished his aim, namely a major arson of commercial premises.

[42] Properly exposed, this aspect of the appeal seeks to challenge a series of evaluative judgements which the judge was fully entitled to make. Furthermore, we consider that there has been insufficient emphasis on the indelible fact that this offence of arson committed by the appellant wreaked devastation. The premises of four substantial commercial enterprises were destroyed or damaged. The cost was estimated at just under £1 million. This court will readily infer that there must have been major and protracted disruption, anxiety and distress for the owners and operators of the businesses, their employees and the families of all. In addition, substantial insurance payments doubtless resulted, with inevitable ripple effects. Finally innocent people and Fire Service employees were exposed to risk.

[43] The gravity of the offence of arson is reflected in the maximum punishment for which Parliament has legislated, namely life imprisonment. The threshold to be overcome in seeking to establish in any given case that a sentence is manifestly excessive is one that is not easily overcome. We are satisfied that the sentence of three years' imprisonment imposed on this appellant, one of the ingredients whereof was a manifestly generous allowance for a heavily delayed plea of guilty in circumstances where the case against him was overwhelming, fell comfortably within the range of sentences reasonably available to the judge.

Guidance

[44] The sentencing process underlying this appeal raises issues and involves reported cases which do not commonly come before this court. Some guidance to sentencing judges and practitioners is considered appropriate accordingly.

[45] We draw attention firstly to the decision of the English Court of Appeal in *R v Tolera* [1999] 1 Cr App R 29 at pp 31 - 33:

> "The position may however be different where the defendant pleads guilty. In the ordinary way sentence will then be passed on the basis of the facts disclosed in the witness statements of the prosecution and the facts opened on behalf of the prosecution, which together we shall call the "Crown case", unless the plea is the subject of a written statement of the basis of the plea which the Crown accept. The Crown should, however, consider such a written basis carefully, taking account of the position of any other relevant defendant and with a reasonable measure of scepticism. If the defendant wishes

to ask the court to pass sentence on any other basis than that disclosed in the Crown case, it is necessary for the defendant to make that quite clear. If the Crown does not accept the defence account, and if the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of a Newton hearing to resolve the issue. The initiative rests with the defence which is asking the court to sentence on a basis other than that disclosed by the Crown case.

It often happens that when a defendant describes the facts of an offence to a probation officer for purposes of a pre-sentence report, he gives an account which differs from that which emerges from the Crown case, usually by glossing over, omitting or misdescribing the more incriminating features of the offence. While the sentencing judge will read this part of the pre-sentence report, he will not in the ordinary way pay attention for purposes of sentence to any account of the crime given by the defendant to the probation officer where it conflicts with the Crown case. If the defendant wants to rely on such an account by asking the court to treat it as the basis of sentence, it is necessary that the defendant should expressly draw the relevant paragraphs to the attention of the court and ask that it be treated as the basis of sentence. It is very desirable that the prosecution should be forewarned of this request, even though the prosecution will now ordinarily see the pre-sentence report. The issue can then be resolved if necessary by calling evidence.

A different problem sometimes arises where the defendant, having pleaded guilty, advances an account of the offence which the prosecution does not, or feels it cannot, challenge, but which the court feels unable to accept, whether because it conflicts with the facts disclosed in the Crown case or because it is inherently incredible and defies common sense. In this situation it is desirable that the court should make it clear that it does not accept the defence account and why. There is an obvious risk of injustice if the defendant does not learn until sentence is passed that his version of the facts is rejected, because he cannot then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing can be held, and evidence called to

> resolve the matter. That will ordinarily involve calling the defendant and the prosecutor should ask appropriate questions to test the defendant's evidence, adopting for this purpose the role of an amicus, exploring matters which the court wishes to be explored. It is not generally desirable that the prosecutor, on the ground that he has no evidence to contradict that of the defendant, should simply fold his hands and leave the questioning to the judge."

We take this opportunity to state that this court endorses unequivocally the guidance contained in these passages from the judgment of Lord Bingham CJ.

[46] The guidance in *Tolera* is of an intensely practical nature: thus requires some emphasis. Its application requires alertness, initiative and constructive co-operation among all concerned – the prosecutor, the defence legal representatives and the sentencing judge alike. We would emphasise the word "guidance." It does not purport to be comprehensive (no 'guidance' ever is). Rather it is to be applied with appropriate flexibility and modification suited to the particular features of the individual case. In one part of the guidance consideration is given to the appropriate course in circumstances where a defendant advances – or proposes to advance – an account of their offending which the court feels unable to accept "… whether because it conflicts with the facts disclosed in the Crown case or because it is inherent incredible and defies common sense." We would observe that this passage is not set in stone. It does not purport to be exhaustive. In principle there could, in any given case, be <u>other</u> reasons for the court's reluctance to accept the claims of the defendant. Furthermore, this decision also serves to remind that the sentencing court is not bound by the prosecution's acceptance of claims made on behalf of the defendant. This extends to cases where there is an agreed *inter-partes* basis of plea.

[47] The events in the present case and the guidance in *Tolera* warrant reiterating the strictures of this court relating to the agreed basis of plea mechanism in its recent decision in *R v Sangermano* [2022] NICA 62, at paras [31] and [40]–[48] especially. Of course the sentencing court cannot compel prosecution and defence to agree a basis of plea. The powers of the court are confined to exhorting this course and facilitating it via timetabling and kindred arrangements. Close and periodic supervision of events in the process culminating in the plea and sentence hearing - by the same judge where possible - is obviously desirable.

[48] Progressing from the general to the particular, there are two features of the <u>decision</u> in *Tolera* which are worthy of note. In that case, the appellant having pleaded guilty to possession of a class A drug (heroin) with intent to supply, following a *Newton* hearing was sentenced to five years' imprisonment, accompanied by a recommendation for deportation. The sentencing decision was challenged on two grounds. The first complained of the judge's assessment of the

role of the appellant as that of a distributor rather than a "mere" courier. Rejecting this ground the Court of Appeal stated, at p 33:

> "The judge was fully entitled to **infer** that the appellant was not in the position of an ordinary courier acting as a mule to carry goods from one place to another. For a period of some three days or so he was actively engaged in distributing heroin to the value of £10,000 in total, obtaining the goods from the wholesaler, passing them on to third parties, receiving cash from the third parties and remitting that cash to the wholesaler for a daily fee."[Our emphasis.]

[49] The second ground of appeal in *Tolera*, namely that the judge was not entitled on the evidence available to reject the appellant's claim that he had been subject to a degree of compulsion falling short of duress, succeeded. The court, drawing on *R v Kerrigan* [1993] 14 Cr App R(s) 179, stated that "... there is an onus on the prosecution to rebut an explanation of this kind" (p 33). (See in this context *Sangermano* at para [40]). This statement must not be isolated from its full context. It is clear from the passages following that a threshold must first be overcome which the court described in the language of "a degree of probability attaching to his account …" Thus the account must be one of reasonable and sufficient substance – which will in every case be a matter of evaluative judgement for the sentencing judge. Finally, and of obvious importance, in *Tolera* the appellant gave sworn evidence at his plea and sentencing hearing. The sentence of imprisonment was reduced to four years and the deportation recommendation quashed.

[50] The sentencing process in the present case involved consideration of two further decisions of the English Court of Appeal upon which it is appropriate to comment. The first is *R v Underwood and Others* [2005] 1 Cr App R 13, which featured the inter-related considerations of guilty pleas, basis of plea and Newton hearings. The judgment of Judge LJ contains a mixture of legal principles and practical guidance, which we summarise thus:

> (a) "The essential principle is that the sentencing judge must do justice": para [2] .
>
> (b) "So far as possible the offender should be sentenced on the basis which accurately reflects the facts of the individual case": para [2].
>
> (c) "The starting point has to be the defendant's instructions. His advocate will appreciate whether any significant facts about the prosecution evidence are disputed and the factual basis on which the defendant intends to plead guilty. If the

resolution of the facts in dispute may matter to the sentencing decision, the responsibility for taking any initiative and alerting the prosecutor to the areas of dispute rests with the defence": para [3].

(d) The prosecutor's view of any proposed basis of plea "… is deemed to be conditional on the judge's acceptance of it": para [3].

(e) "If the agreed basis of plea is not signed by the advocates for both sides, the judge is entitled to ignore it; similarly, if the document is not legible": para]4].

(f) "The Crown may reject the defendant's version. If so, the areas of dispute should be identified in writing and the defendant should focus the court's attention on the precise fact or facts which are in dispute": para [4].

(g) "The third, and most difficult, situation arises when the Crown may lack the evidence positively to dispute the defendant's account. In many cases an issue raised by the defence is outside the knowledge of the prosecution. The prosecution's position may well be that they had no evidence to contradict the defence assertions. That does not mean that the truth of matters outside their own knowledge should be agreed. In these circumstances, particularly if the facts relied on by defendant arise from his personal knowledge and depend on his own account of the facts, the Crown should not normally agreed the defendant's account unless it is supported by other material. There is, therefore, an important distinction between assertions about the facts which the Crown is prepared to agree, and its possible agreement to facts about which, in truth, the prosecution is ignorant. Neither the prosecution nor the judge is bound to agree facts merely because, in the word currently in vogue, the prosecution cannot "gainsay" the defendant's account.": para [5].

(h) In the latter type of case, "After submissions from the advocates the judge should decide how to

proceed. If not already decided, he will address the question whether he should approve the Crown's acceptance of pleas. Then he will address the proposed basis of plea": para [6].

(i) "... the judge is not bound by any such agreement and is entitled of his own motion to insist that any evidence relevant to the facts in dispute should be called before him": para [6].

(j) "The prosecuting advocate should assist the judge by calling any appropriate evidence and testing the evidence advanced by the defence. The defence advocate should similarly call any relevant evidence and, in particular, where the issue arises from facts which are within the exclusive knowledge of the defendant and the defendant is willing to give evidence in support of his case, be prepared to call him. If he is not, and subject to any explanation which may be proffered, the judge may draw such inferences as he thinks fit …": para [7].

(k) "The judge must then make up his mind about the facts in dispute. He may, of course, reject evidence called by the prosecution. It is sometimes overlooked that he may equally reject assertions advanced by the defendant, or his witnesses, even if the Crown does not offer positive contradictory evidence": para [8].

(l) "The judge must, of course, direct himself in accordance with ordinary principles such as, for example, the burden and standard of proof. In short, his self-directions should reflect the relevant directions he would have given to the jury. Having reached his conclusions, he should explain them in a judgment."

(m) "There will be occasions when the Newton hearing will be inappropriate. Some issues require a verdict from the jury": para [10](a).

(n) "At the end of the Newton hearing the judge cannot make findings of fact and sentence on a basis which is inconsistent with the pleas to counts

which have already been accepted by the Crown and approved by the court": para [10](b).

(o) In joint enterprise cases involving several defendants the judge should be alert to assess the relative seriousness of the defendant's individual conduct and to guard against treating a written basis of plea on behalf of one defendant as evidence adverse to another: para [10](c).

(p) Unsupported assertions about a defendant's degree of culpability may require the sentencing judge to invite the advocate to adduce evidence from his client: para [10](d). This would entail a species of Newton hearing.

(q) A Newton hearing in a sentencing context can have a range of possible consequences. One of these is that the credit in principle due for the defendant's plea of guilty may be reduced or, indeed, wholly dissipated: para [11]."

[51] The admirably and carefully crafted judgment in *Underwood* was designed to provide guidance of the most extensive nature in the areas which it addresses the Northern Ireland Court of Appeal has previously considered this decision in relatively limited terms only: see *R v Caswell* [2011] NICA 71 at paras [8] and [9]; *R v Thompson & McAfee* [2014] NICA 74 at para [24]; and *R v Sangermano* [2022] NICA 62 at para [42] (indirectly) . We take this opportunity to make clear that both the legal principles and the practical guidance in *Underwood* should be applied by sentencing courts in this jurisdiction in appropriate cases.

[52] The other decision of the English Court of Appeal which featured in the underlying sentencing proceedings is *R v Kerrigan* [1993] 14 Cr App R(s) 179, considered by this court in *R v Fenton* [2000] NICA 27 at para [13]. There the appellant pleaded guilty to a count of causing grievous bodily harm with intent in a context where there were marked differences between the prosecution case and the appellant's account. The sentencing judge conducted a Newton hearing involving sworn evidence from various witnesses. Having done so he made findings adverse to the appellant. One of the main themes of the judgment of the English Court of Appeal is that a judge in such cases must apply the criminal standard of proof and should expressly direct himself as to the onus and standard of proof. The appellate court, having subjected the judge's findings to appropriate scrutiny, concluded that he had erred in his approach to onus and standard of proof, with the result that the appellant should have been sentenced on the basis that the account which he had given in evidence "might have been true": p 182. The court quashed the sentence of

three years and four months' imprisonment, substituting one of two years' imprisonment.

[53] The main lesson from *Kerrigan* – reiterated in decisions of this court - is that the burden of proof rests on the prosecution throughout the entirety of the criminal trial process, including the sentencing phase. This court has recently drawn attention to this, in *Sangermano* at para [40].

[54] The decisions in *Tolera* and *Underwood* contain much trial management guidance of an intensely pragmatic kind which Northern Irish judges will apply and/or adapt according to the case specific context. Trial management guidance in appellate court decisions is not to be confused with, or portrayed as, inflexible legal rules or principles.

[55] Practitioners and sentencing judges alike will also draw assistance from the procedural course adopted by HHJ Gilpin in the present case. We have outlined this at some length above. With the exception of the single feature highlighted in para [24] the judge is to be commended for the procedural course which he pursued throughout the sentencing process. He was painstaking, patient, alert to his responsibilities and scrupulously fair to both parties. While the sentencing process overall became drawn out, we consider that this was unavoidable in the circumstances which we have detailed.

Omnibus Conclusion

[56] For the reasons given the renewed application for leave to appeal is refused and the impugned sentence is affirmed.