Neutral Citation No: [2020] NICA 7 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC11158** ***Delivered:*** **24 /01/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

-v-

MARTIN NELSON

_____

Before: McCloskey LJ, O'Hara J and Huddleston J

_____

McCloskey LJ (delivering the judgment of the court)

Preface

[1] Lisa Gow ("the deceased"), the mother of two young children, was walking in a citywards direction in the area of a parking layby to the side of the Ballysillan Road, Belfast on the morning of 19 April 2018 when she was killed instantly upon being struck twice in quick succession by a stolen vehicle driven by Martin Nelson ("the offender") proceeding countrywards. For this offence and a series of five related offences the offender, having pleaded guilty, was punished by an extended custodial sentence comprising 11 years' imprisonment and an additional period of three years.

[2] Leave to appeal against sentence having been refused by the single judge (Colton J), the offender renewed his application before the full court. At the conclusion of the hearing on 17 January 2020 the court pronounced its decision, which was to refuse leave to appeal, with its detailed reasons to follow. These are set forth herein.

Factual Matrix

[3] On the morning of 16th April 2018 a burglary was carried out at a private house in north Belfast. Jewellery including watches (valued at £2000 plus), £400 cash and the spare keys of a parked vehicle were stolen. The vehicle was driven away some couple of days later. There was iPhone evidence of the offender offering watches for sale on 17 April 2018.

[4] On 19th April 2018 at about 1017 hours police became aware that the stolen vehicle was being driven on the Crumlin Road. The offender was the driver. Both aerial and ground resources were deployed. The vehicle's movements were captured from the police aerial platform from 1045 hours over a distance of about 8.8 miles and a time of about 9 minutes. The offender drove at an average speed of 117mph on the M2/M5 and at speeds between 60-72 mph on Shore Road, Whitewell Road, Antrim Road, North Circular Road and Ballysillan Road. He was observed travelling through red lights on three occasions and caused other road users to take evasive actions on occasions. He drove on the wrong side of the road and crossed hatched lines on numerous occasions. On the final approach to the scene of the fatality he was travelling at about 50 mph and at about 34 mph when he collided with the pedestrian. The immediate impetus for the fatal collision was an impact between the vehicle driven by the offender and a van which was performing a legitimate right turning manoeuvre with its offside indicators illuminated. The offender attempted a high speed overtaking manoeuvre, crossing the central hazard warning line. His vehicle collided with the front offside of the van. Loss of control followed resulting in two impacts with the deceased in quick succession. The lady died instantly.

[5] As described in the statement of the forensic scientist, which was based upon *inter alia*, a police helicopter video footage and dashcam footage:

> "*The Audi ….. continued further along the North Circular bound side of the road* (its "wrong" side) *overtaking a light coloured car and then attempting to overtake an orange Iveco van* (which) *turned right across the path of the Audi and the nearside of the Audi impacted the front offside of the van ….*
>
> *The Audi rotated in an anticlockwise direction as a result … and moved further onto the North Circular Road bound side of the road …*
>
> *There was a pedestrian walking along the parking bay to the nearside of the North Circular Road bound side of the road …*
>
> *The rear offside of the Audi impacted the pedestrian and projected her in the Crumlin Road direction and she impacted a wall. The Audi continued to rotate and the rear of the car also impacted the wall with the pedestrian positioned between the rear of the car and the wall when this impact occurred, such that the car impacted the pedestrian twice during the collision sequence…*
>
> *The Audi then rebounded from the wall, coming to rest ….*"

The Audi had been travelling at an average speed of approximately 51 mph along the relevant stretch of the road reducing to 34 mph immediately prior to the vehicular collision.

Arrest and Interview

[6] The offender was immediately arrested at the scene and was interviewed by police in the presence of a solicitor on 19 April 2018. He denied having committed or having knowledge of the burglary and stated that he had been given the key to the Audi vehicle by an unnamed male whom he stated told him where the car was parked. He claimed that he proceeded to collect the car. He stated that he had never held a driving licence and that he was disqualified from driving at the relevant time. Although he denied responsibility for the burglary, he was generally co-operative and accepting of responsibility with regard to questions about his driving and the crash causing the death of the victim. He knew the roads were busy; that police wanted him to stop; that a stinger device had been deployed against the vehicle he was driving; he wanted to get away from police; he accepted that his driving was dangerous and too fast.

Indictment and Prosecution

[7] The Appellant's committal to trial was conducted on 18 April 2019. He was arraigned on 03 June 2019. His indictment comprised eight counts in the following sequence:

(i) Causing death by dangerous driving.

(ii) Burglary.

(iii) Dangerous driving.

(iv) Causing death or grievous bodily injury when driving uninsured.

(v) Causing death or grievous bodily injury when driving disqualified.

(vi) Aggravated vehicle taking causing grievous bodily injury or death.

(vii) Driving while disqualified.

(viii) Driving without insurance.

As the indictment makes clear, the offence of burglary was alleged to have been committed on 16 April 2018, while the date of all the other alleged offences was 19 April 2018.

[8] When arraigned on 03 June 2019 the offender pleaded guilty to the first six counts. In respect of the remaining two counts his plea was not guilty and these were "left on the books". His sentencing followed on 03 July 2019.

Criminal Record

[9] The offender is properly described as a career criminal. He is now aged 40 years. His criminal career began when aged 12. There is no appreciable gap in his enormous criminal record. At the time of sentencing, he had accumulated 242 convictions. These included:

- 39 burglary convictions;
- 7 robbery convictions;
- 5 "going equipped" convictions;
- 10 handling stolen goods convictions;
- 26 theft convictions;
- 55 road traffic convictions including 7 offences of reckless or dangerous driving and 2 offences of careless driving;
- 14 breaches of road traffic regulations.

[10] Successive courts have attempted all manner of disposals to facilitate the offender's rehabilitation: imprisonment, suspended sentences, conditional discharges, custody probation and determinate custodial sentences combined with licenced release. The cycle of offending has continued, remorselessly. The offender has emerged as someone impenetrable and seemingly incurable.

[11] On 22 December 2016 the offender was sentenced at Belfast Crown Court in respect of a series of offences including 10 burglaries, aggravated taking and driving away and dangerous driving. He was sentenced to a determinate custodial sentence of one year and three months licenced release of two years and three months to follow. During the custodial period he committed the offences of being unlawfully at large and resisting police, attracting sentences of six months' imprisonment. He was released on licence on 09 March 2018. Less than six weeks later he committed the index offences. His licence was revoked six days later. He was sentenced for the index offences almost 15 months subsequently. Two further sentences of several months' imprisonment were imposed in respect of unrelated offences during this intervening period.

Sentencing

[12] On 03 July the offender was sentenced by the Recorder of Belfast. In respect of the first count he was punished by an extended custodial sentence, comprising 11 years with an extension period of three years. On the remaining counts determinate sentences of two years concurrent were imposed. He was disqualified for driving for a period of 15 years. Counts 1 and 6 are serious and specified offences for the purposes of the Criminal Justice (NI) Order 2008.

[13] The approach and reasoning of the sentencing judge were, in summary, as follows. The Recorder first gave consideration to whether the offender should be deemed dangerous, applying the statutory test of whether there was a significant risk of serious harm caused by further offending on his part. He considered this test to be satisfied, highlighting the professional assessment of the Probation Board members, the offender's criminal record, his egregious breaches of the licence upon which he had been released before committing the index offences, the nature of those offences, his age and his failure to respond to a series of previous criminal justice "*interventions*".

[14] Having made this assessment of dangerousness, the Recorder then identified the sentencing choice as lying between an extended custodial sentence and an indeterminate sentence. He applied the statutory test of whether an extended custodial sentence would be adequate to protect the public. His self-direction was that an indeterminate custodial sentence is primarily concerned with future risk and public protection (see *R v Pollins* [2016] NIJB 202 at [26]–[27]). He concluded that an extended custodial sentence would be adequate to protect the public in all the circumstances.

[15] Next the Recorder gave consideration to the guideline decisions of this court in *Attorney General's Reference Numbers 2, 6, 7 and 8 (Robinson and Others)* [2003] NICA 28 and *R v McCartney* [2007] NICA 41 at [35]–[36]. He noted the continuing currency of this guidance as evidenced by *R v Stewart* [2017] NICA 1 and *R v Finn* [2019] NICA 17. His assessment was that this was a case falling within the bracket of the most serious culpability (which was undisputed), thus warranting a sentence of 7 to 14 years' imprisonment.

[16] The next step in the Recorder's sentencing exercise was to identify the aggravating factors. His assessment was that there were five of these, namely:

(a) The offending entailed "*most serious and prolonged dangerous driving …. [at] excessive speed … [and] … aggressive driving*".

(b) Throughout much of the episode the offender had been attempting to evade apprehension by the police. Furthermore by his conduct the offender had placed the police "*in a very difficult situation*" having regard to the possibility of later investigation by the Police Ombudsman.

(c) The offender's criminal record.

(d) The commission of multiple road traffic offences simultaneously.

(e) The impact on the family of the deceased.

The judge elaborated on the latter factor in these terms:

> "*Lisa Gow leaves parents and two sisters but, significantly, there were two children aged nine and seven …*
>
> *Not only have they lost their mother, but they have been separated themselves, because 1 has gone to live with his father and the elder girl has gone to live with her grandparents … separation of those two children is, in my view, a particular and significant aggravating factor.*"

[17] Next the Recorder identified two mitigating factors, in the following terms:

> "*Obviously the plea of guilty. I accept, in addition to that, there has been an element of remorse which is more than self-pity. I don't regard it as particularly significant, but it is present and I will be taking it into account.*"

The judge next expressed the view that if the offender had been convicted following a contested trial he would have received the maximum sentence, namely 14 years' imprisonment. This was followed by the self-direction (upon which we elaborate *infra*) that the maximum sentence prescribed by statute is not reserved for the worst possible case imaginable but applies to cases identified as of the utmost gravity. The judge's assessment of the offender's plea of guilty was that he had acknowledged his guilt from the outset (though not fully, one must add), and had pleaded guilty at the first opportunity before the court. He added the qualification that the offender was "*… essentially caught red-handed and your plea of guilty does not really assist the prosecution in dealing with issues that perhaps would have been difficult to prove*".

[18] Having made this assessment the Recorder considered that the appropriate sentence was one of 11 years' imprisonment. This would be enhanced by an extension period of three years. The following reasoning is noteworthy:

> "*Now I have considered the approach that was potentially suggested by the prosecution and that is that I would impose a consecutive sentence for the burglary and I can see the logic and the force of that argument. However, I am taking into account the principle of totality and I am standing back and considering what is the appropriate sentence, taking into account your entire criminality, as it were, both in relation to the offences for which you received the earlier sentence and the sentence that I am passing today. I am going to start the sentence today, so that takes into account some of the issues of totality. I also bear in mind that you have already served 14 or thereabouts months and, as a result of that, you will receive no credit in respect of the sentence that I am passing today ….*

So bearing all those matters in mind and in particular the principle of totality that will be the sentence and it will be a concurrent sentence, starting today."

The "subsidiary" sentences were each punished by the imposition of two years imprisonment concurrently, divided equally between custody and licenced release. Finally the offender was disqualified from driving for a period of 15 years.

Determining the appeal

[19] There are four grounds of appeal:

(i) The sentencing judge's starting point of 14 years' imprisonment was excessive.

(ii) The judge erred in finding that the statutory regime of dangerousness applied to the offender.

(iii) The judge erred in identifying the "*Police Ombudsman*" factor as an aggravating matter.

(iv) The judge erred in his assessment of the impact of the offending on the family of the deceased.

Each of these grounds had its individual particulars, or elements. Some of these were pressed in argument at the hearing, while others were not. Mr Kieran Mallon QC (with Mr Luke Curran of counsel), representing the offender, was both realistic and measured in this respect.

[20] Developing and augmenting the brief reasons articulated for dismissing this application at the conclusion of the hearing, we draw attention to certain well - established principles of sentencing of application in this case:

(i) Sentencing is an art and not a science. Within this principle lies the discretion, or margin of appreciation, to be accorded to sentencing judges.

(ii) The maximum sentence for a given offence can be imposed even where the offender pleads guilty and is designed for cases of the utmost gravity but does not have to be reserved for the worst conceivable case: *R v McShane* [1998] NIJB 64 at 66f and *R v Bright* [2008] EWCA Crim 462 at [29] – [30].

(iii) The imposition of the maximum available sentence is not precluded by significant mitigating factors such as a plea of guilty, clear record and age: *The People v Daniels* [2014] 2 IR 813.

(iv) Thus "*… judges should not use their imagination to conjure up unlikely worst possible kinds of case …* [rather] *…. ask themselves whether the particular case they are dealing with comes within the broad band of that type*": *R v Amber and Hargreaves* [Unreported, 24 November 1975], per Lawton LJ.

(v) The essence of the principle of totality is that the total global sentence should be just and appropriate: *Attorney's General Reference No 6 of 2006* [2007] NICA 16 at [24] – [28].

(vi) All of the applicable aggravating and mitigating factors must be identified and reckoned in the court's determination of the starting point, following which the assessment of credit for a plea of guilty is to be undertaken: *R v H(J)* [2016] NICA 49 and *R v McKenzie* [2017] NICA 29.

(vii) The court's evaluation of aggravating and mitigating features does not entail an arithmetical tally and must take into account any aggravating features of substantial gravity: *R v Maughan* [2019] NICA 66 at [61].

(viii) Where the court considers that there is genuine remorse this is generally reckoned in the credit allowed for a guilty plea and should not be the subject of a double allowance when personal mitigation is being considered: *R v Stewart* [2017] NICA 1 at [31].

(ix) The credit for a plea of guilty is reduced in the "*caught red-handed*" cases: *Stewart* at [32].

(x) Where the dominant aim of sentencing for particular types of offending is that of deterrence of the offender and others there is little scope for personal mitigation: *Stewart* at [33].

(xi) Where concurrent sentences are being imposed the quantity and gravity of the subsidiary offences rank as a factor which aggravates the dominant offence: *Maughan* at [64].

(xii) Where punishment is by concurrent sentences in circumstances where consecutive sentences could be justified, the court may properly increase the level of the overall sentence to reflect the principle of totality: *Attorney General's Reference No 9 of 2003 (Thompson)* [2004] NI 111.

(xiii) Linked to (xiii), the consequences of the offending in question and the circumstances of wider society are admissible considerations: *R v Doole* [2010] NICA 11 and *R v Shoukri* [2008] NICC 20.

(xiv) The impact of the offending on the family of the injured party can properly be reckoned as an aggravating factor: *Stewart* at [6] and [34].

(xv) The "*dangerousness*" assessment to be carried out under Article 13 of the Criminal Justice (NI) Order 2008 entails the application of the test of whether there is a significant risk to members of the public of serious harm, namely death or serious personal injury whether physical or psychological, occasioned by the commission by the offender of further serious offences. The threshold of significant risk requires something more than a mere possibility: *R v EB* [2010] NICA 40 at [10].

(xvi) The decisions in *R v EB (ante)* at [10], *R v Wong* [2012] NICA 54 at [15] (adopting *R v Lang* [2005] EWCA Crim 2684), *R v Cambridge* [2015] NICA 4 at [28] and *R v Mongan* [2015] NICA 65 at [21] demonstrate that the assessment of dangerousness is a highly fact specific exercise. We would add that this is not arithmetical or scientific in nature, entailing rather the exercise of evaluative judgement on the part of the sentencing court. In this context, the following quotation from *R v Johnson and Others* [2007] 1 Cr. App. R (S) 112, which has been adopted in the previous decisions of this court noted above, is apposite. The President of the Queen's Bench Division, Sir Igor Judge, delivering the judgment of the Court of Appeal (Criminal Division) in England and Wales, said at [10]:

> *"We can now address a number of specific issues:*
>
> *(i) Just as the absence of previous convictions does not preclude a finding of dangerousness, the existence of previous convictions for specified offences does not compel such a finding. There is a presumption that it does so, which may be rebutted.*
>
> *(ii) If a finding of dangerousness can be made against an offender without previous specified convictions, it also follows that previous offences, not in fact specified for the purposes of Section 229, are not disqualified from consideration. Thus, for example, as indeed the statute recognises, a pattern of minor previous offences of gradually escalating seriousness may be significant. In other words, it is not right, as many of the submissions made to us suggested, that unless the previous offences were specified offences they are irrelevant."*

[21] We are satisfied that the sentences imposed in this case are harmonious with all of the principles detailed above. This was a thoughtful and carefully structured sentencing decision. The judge did not exceed the margin of appreciation available

to him. No material fact or consideration was left out of account. No error of principle trespassed at any point.

[22] The only possible exception to the immediately foregoing assessment concerns the judge's treatment of the "Police Ombudsman" issue. We consider that, his sentencing decision properly construed, the judge did not identify this as a freestanding aggravating factor. Rather, he considered it to be an "*aspect*" of the second of the five aggravating factors namely flight from police arrest. The judge correctly recognised that the conduct of the offender placed the police officers concerned in "*a very difficult situation*". The single judge questioned whether this aggravated the offending. This court is inclined to share his reservations. The legal system in which the police officers concerned were operating at the material time entails scrutiny by the Police Ombudsman and the exercise by that agency of a range of statutory powers and functions. Difficult operational decisions and judgments are part and parcel of the duties of every police officer. This is confirmed by section 32 of the Police (NI) Act 2000, considered recently by this court in *Re McGuigan's Application* [2019] NICA 46. Furthermore, Mr Mallon was correct to point to the evidence of the special training of these officers.

[23] However, the question for this court is whether the impugned sentence infringes the totality principle, as expounded above. In *Johnson* Sir Igor Judge at [11] stated:

> *"At the risk of stating the obvious, the final consideration to which we draw attention, is that this court will not normally interfere with the conclusions reached by a sentencer who has accurately identified the relevant principles, and applied his mind to the relevant facts. We cannot too strongly emphasise that the question to be addressed in this court is not whether it is possible to discover some words used by the sentencer which may be inconsistent with the precise language used in Lang or indeed some failure on his part to deploy identical language to that used in Lang, but whether the imposition of the sentence was manifestly excessive or wrong in principle."*

We are satisfied that, considering the Recorder's sentencing decision as a whole and in the context of the factual summary at [3]–[5] above, coupled with the egregious aggravating factors in play, no incompatibility arises.

The Licence Revocation Issue

[24] The extant framework at the time of the sentencing of the offender was somewhat complex. The index offences were committed when the offender was on licenced release from prison. The material facts can be stated succinctly:

(i) Following his arrest on 19 April 2018 the offender was in police custody.

(ii) On 20 April 2018 the Magistrates' Court remanded him in custody.

(iii) The Prison Service treated him as a remand prisoner until and including 24 April 2018.

During the first days of the offender's custody the relevant statutory agencies, namely the Parole Commissioners and the Department of Justice ("DOJ") discharged their statutory duties and functions as follows:

(iv) By a written determination dated 24 April 2018 the single Parole Commissioner recommended to DOJ that it revoke the offender's determinate custodial licence.

(v) The formal revocation of licence was made by DOJ on 25 April 2018 and communicated to the offender by a letter of the same date.

(vi) With effect from 25 April 2018 the Prison Service classified and treated the offender as a sentenced prisoner. This has been his classification ever since.

(vii) The scheduled expiry date of the licence which the offender breached is 12 April 2020.

[25] Section 49(1) of the Judicature (NI) Act 1978 provides:

> "*A sentence imposed, or other order made, by the Crown Court when dealing with an offender shall take effect from the beginning of the day on which it is imposed or made, unless the court otherwise directs.*"

Pausing, in this case the Recorder stated:

> "*I am going to start the sentence today, so that takes into account some of the issues of totality. I also bear in mind that you have already served 14 months or thereabouts and, as a result of that, you will receive no credit in respect of the sentence that I am passing today.*"

We consider that the judge was correct in his assessment. The effect of section 26 of the Treatment of Offenders Act (NI) 1968 clearly was that the term of imprisonment imposed by the court fell to be reduced only by the five day period during which the offender was in remand custody. The reason for this is that by virtue of the revocation of the offender's licence, effective from the sixth day, he could not satisfy the "*only*" test enshrined in section 26(2)A(b)(i).

[26] Given the "*unless*" clause in section 49(1) of the Judicature Act, it would have been open to the Recorder, having first obtained the relevant information, to direct that the sentence should not take effect until the expiry of the licence period on 12 April 2020. We consider it evident that the judge was alert to his powers in this respect. The choice which he made was one which clearly lay within the margin of discretion available to him. The effect of this is that the offender is the beneficiary of something of a windfall, the net benefit to him being a period of just over nine months.

[27] One of the specific elements of the first ground of appeal in this case was expressed thus in counsels' skeleton argument:

> "*The total sentence imposed and starting point did not take account of the fact* [that] *no remand time had been accumulated due to the fact that he had been returned to custody subject to recall. This was it is accepted of his own making but the notional sentence imposed taking this into account* [was] *approaching 16 years.*"

Upon the hearing of the appeal Mr Mallon expressly did not pursue this discrete challenge. However, it does raise the question, one of principle, of whether a sentencing judge is entitled to take this factor into account in this type of case. It was indicated to this court that some guidance on this issue would be helpful. What follows is subject to the qualification that, in the events which occurred in this case argument on this issue has been limited. A fuller examination of the issue may therefore be undertaken in an appropriate future case.

[28] An appropriate starting point is that the calculation of periods of sentenced imprisonment (a) is regulated by statute and (b) is a matter for the appropriate public authorities, namely the Prison Service and the DOJ and not the court. See in particular section 26 of the 1968 Act (*ante*) and Articles 32 and 33 of the Criminal Justice (NI) Order 2008 which, respectively, regulate the release of offenders who have been sentenced to concurrent or consecutive terms of imprisonment. Furthermore the sentencing court has no role in matters pertaining to the discretionary release from custody of an offender. This, rather, is a matter for the Prison Service/DOJ under Rule 32 of the Prisons and Young Offenders Centre (NI) Rules 1995. Equally the sentencing court has no role to play in the calculation of remission under rule 25 of the 1995 Rules, which provides:

> "*(1) A prisoner serving a sentence of imprisonment for an actual term of more than 5 days may, on the ground of his good conduct, be granted remission in accordance with the provisions of this rule, but this rule shall not permit the reduction of the actual term to less than 5 days.*

(2) The remission granted shall not exceed half the total of the actual term and any period spent in custody which is taken into account under section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 (which relates to the duration of sentences).

(3) <_____>

(4) <_____>

(5) The foregoing provisions of this rule shall have effect subject to any disciplinary award of loss of remission and shall not apply to a sentence of imprisonment for life.

(6) A prisoner who would otherwise be discharged on any of the following days, that is to say –

(a) a Sunday, Christmas Day, Good Friday; holiday in Northern Ireland;

(c) in the case of a person who is serving a term (as pronounced) of more than 7 days, a Saturday;

(d) a day on which he would be granted temporary release under rule 27; may be discharged on the next preceding day which is not one of those days.

(7) In this rule "actual term" means the term of a sentence of imprisonment as reduced by section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 and, in the case of a sentence pronounced outside Northern Ireland, any reference to the said section 26(2) includes a reference to any corresponding provision having effect where the sentence was pronounced.

(8) For the purposes of this rule -

(a) consecutive terms of imprisonment and, in the case of terms of imprisonment imposed before 1st March 1976, terms which are wholly or partly concurrent shall be treated as a single term;

(b) a person committed to prison in default of a payment of a sum adjudged to be paid by a conviction shall be treated as serving a sentence of imprisonment;

> *(c) a person ordered to be returned to prison under article 3 of the Treatment of Offenders (Northern Ireland) Order 1976 shall be treated as serving a sentence of imprisonment.*
>
> *(9) Paragraphs (1) and (2) of this Rule have effect subject to sections 14 and 15 of the Northern Ireland (Emergency Provisions) Act 1991 which restrict the remission available to prisoners convicted of scheduled offences."*

[29] By the same token issues of licence conditions, release on licence, revocation of licence and parole fall exclusively within the remit of the statutory agencies concerned, namely DOJ and the Parole Commissioners. There are no rigid rules or rights in play.

[30] Developing this discourse, it is worth noting that in England and Wales it was formerly the duty of the sentencing court to calculate and apply remand custody discount to any sentence of imprisonment, by virtue of section 240 of the Criminal Justice Act 2003. However, section 240 was repealed. Section 108 of the Legal Aid, Sentencing and Punishment of Offenders Act inserted a new provision, section 240ZA of the 2003 Act.

[31] In *R v Murray* [1995] NIJB 108, where the appellant challenged a commensurate sentence of 25 years' imprisonment for serious terrorist offences other than murder, one of the grounds of appeal was couched in these terms, noted at 109h:

> "*The first submission was that a sentence of 25 years imprisonment meant that under the present rules for remission the appellant would serve 16 years and 8 months before he was eligible for release, whereas* [in contrast] *under the present practice followed by the Secretary of State for Northern Ireland in respect of the release of prisoners serving life sentences for murder, a person convicted of a terrorist murder and sentenced to life imprisonment might serve less than 16 years before release pursuant to section 23 of the Prison Act (NI) 1953.*"

Rejecting this submission in robust terms Hutton LCJ noted firstly that it had failed in a previous and recent decision of the Court of Appeal, *R v Glennon* (03 March 1995, unreported) per MacDermott LJ who had stated:

> ***"It has long been an axiomatic principle of sentencing policy that the court should decide the appropriate sentence in each case without reference to questions of remission or parole ….***

> *In all cases it is the duty of the sentencing court to impose the sentence which it considers to be appropriate or which it is required to impose by statute."*

[Emphasis added]

[32] In *Murray*, the Lord Chief Justice then noted the Practice Statement (Crime: Sentencing) [1992] 4 All ER 307 made by the Lord Chief Justice of England and Wales which altered in that jurisdiction –

> *"… an axiomatic principle of sentencing policy … that the court should decide the appropriate sentence in each case without reference to questions of remission or parole."*

The impetus for this change of practice was the landmark reforms effected by sections 32 – 40 of the Criminal Justice Act 1991 which reformed the parole regime in England & Wales and abolished remission of sentence. Thenceforth parole was reserved only to those sentenced to four years or more imprisonment, while the Home Secretary became subject to a duty to release all "sub four years" prisoners upon completion of half their sentences. The central aim of the Practice Statement was to prevent sentenced prisoners from being incarcerated for too long. Hutton LCJ continued, at 110g:

> *"Those sections did not apply to Northern Ireland and therefore that Practice Statement does not alter the principle applicable in this jurisdiction which remains as stated by this court in* ***R v Glennon.****"*

[33] The rationale of the *Murray* principle must be, at least in part, that post-sentence remission and post-sentence parole are unrelated to the central considerations for every sentencing court namely (in brief compass) retribution, deterrence, protection of the public and the identification and evaluation of aggravating and mitigating factors, in the quest for the sentence which best fits the case in question. Viewed through this prism the issues of post-sentence remission and possible post-sentence parole have nothing to do with the task of the court. Furthermore, in our legal system remission of sentence and parole lie within the province of the executive and the Parole Commissioners, being regulated by instruments of both primary and subordinate legislation, and not the judiciary. These instruments do not establish any role for the sentencing court. Their fundamental focus is, rather, the post-sentencing period.

[34] In addition, under the relevant legal rules neither remission of sentence nor release on parole is capable of unerring arithmetical accuracy at the time of sentencing. The former is subject to the prisoner's future good behaviour in custody (see [28] above) while the latter entails the future exercise of discretionary powers and functions conferred on the Parole Commissioners, to be exercised in

circumstances necessarily unforeseeable at the time of sentencing. One further consideration is that accurate information relating to the offender's pre-sentencing remand custody may not be available or, alternatively, the calculation may be contentious. The scope for controversy in calculations of this kind is demonstrated in the large number of judicial review decisions which have been generated during recent years, exemplified by *Re MacAfee* [2009] NIQB 216, *Re Millar* [2013] NIQB 132 and *Re Rea* [2010] NIQB 63.

[35] Realistically, of course, it will be extremely difficult to exclude from the mind of the sentencing judge the factors of remand custody, section 26 of the 1968 Act, future remission of sentence and possible future parole. However, judicial knowledge or awareness of any of these matters is to be distinguished from falling into error of principle. Such error will occur only if the judge is influenced by any of these matters in determining the appropriate sentence.

[36] The qualification and observation in [27] above belong to a context in which four factors are identifiable. First, the decisions of this court in *Glennon* and *Murray* are now of some 25 years vintage. Second, sentencing law and practice are nothing if not organic. Third, in this jurisdiction statutory developments comparable to those noted in the English Practice Statement of 1992 have materialised. Finally, there is the totality principle.

[37] The approach in principle set forth in [31]–[35] above will remain correct for so long as the decisions of this court in *Glennon* and *Murray* continue to apply unabated.