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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

THOMAS McCAUGHEY AND MARTIN SMYTH

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Before: Morgan LCJ, Coghlin LJ and Weir J

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MORGAN LCJ (delivering the judgment of the court)

[1] These are applications for leave to appeal against 3 year determinate custodial sentences, comprising 18 months in custody and 18 months on licence, imposed by His Honour Judge Grant at Downpatrick Crown Court on 21 October 2013. McCaughey pleaded guilty to one count of attempted burglary and one count of obstruction while Smyth pleaded guilty to one count of burglary, one count of attempted burglary and one count of obstruction. In this judgment we review again the assistance that should be derived from guidelines issued by the Sentencing Guidelines Council in England and Wales. Mr Sayers appeared for McCaughey, Mr Devine for Smyth and Mr Magee for the PPS. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] On 22 November 2012, at approximately 12:15am, Alison Gibson, who lived at 16 Bests Hill Glen, was in her kitchen when she heard her front door open. She immediately went out to close it. She then looked out the window and saw a male standing at the end of her driveway. This male ran off. She then saw a second male run out of a neighbour's driveway.

[3] On the same night, at or around the same time, Susan Anderson was standing at the top of the stairs in her home at 6 Bests Hill Glen when she heard a loud crash from downstairs. She went down into the living room whereupon she saw a man climbing through the window with his foot on the inside windowsill. There was also a second male standing outside. Ms Anderson screamed and

pushed the intruder out. The two men then appeared to panic and run off. Ms Anderson was able to give police a description of the two men.

[4] At approximately 2:00am on the same morning police stopped two males at the junction of the Purdysburn Road and Bests Hill Glen who matched the descriptions given by the home owners. The older of the two males, who was later identified as Thomas McCaughey, was noted to be wearing black gloves, gave false details concerning his identity to the police and upon being arrested threw the gloves away. The younger male, who was later identified as Martin Smyth, had a cut to his right eye and when arrested became aggressive and verbally abusive.

[5] During his police interview McCaughey did not have a solicitor present. He answered 'no comment' except to deny that he had tried to enter a house, had witnessed anyone else entering a house or had helped anyone else enter a house. When Smyth was interviewed by police he answered 'no comment', joked or was abusive to police, although he did claim he had been drunk after watching football. The trainers worn by Martin Smyth at the time of his arrest were seized and compared to a footprint taken from the inside windowsill of 6 Bests Hill Glen. The opinion of an expert forensic scientist was that similarities between the two provided support for the proposition that the footprint on the windowsill was made by Smyth's trainer.

[6] On 24 June 2013 they were arraigned. McCaughey pleaded guilty to one count of obstruction but not guilty to a count of burglary and one of attempted burglary. Smyth pleaded not guilty to burglary, attempted burglary and obstruction. Smyth's solicitors were rather unusually approached by the investigating officer who suggested that the count of attempted burglary would be withdrawn in the event of a plea to the count of burglary. The solicitors obtained authority for that course after the arraignment but it then transpired that the investigating officer had made the suggestion without any authority from the PPS. A trial date was fixed for 18 September 2013 and on that date Smyth changed his plea in relation to each of the offences. The following day McCaughey was re-arraigned and entered a plea to the charge of attempted burglary. The prosecution accepted the plea and the remaining burglary count was left on the books not to be proceeded with.

Previous Convictions

[7] McCaughey has a total of 207 convictions dating back some 35 years. He has been convicted of theft 15 times, robbery once, going equipped 12 times, handling stolen goods five times and burglary 21 times. He spent numerous periods of detention in the Young Offenders' Centre for burglaries committed during the 1980s. Although there was then a break in this type of offending until 1997, he was convicted on five occasions of offences of theft during the first half of the 1990s, serving two periods of imprisonment. In 1998 he was sentenced to 150 hours community service for burglary of a non-dwelling and in 1999 he received a 7 month suspended sentence for burglary with intent to steal. In 2002 he was sentenced for a burglary committed in April 2001 and received a Combination Order of 3 years' probation and 100 hours community service. He was sentenced to 4½ years'

imprisonment followed by 2 years' probation for the offence of robbery committed in April 2003. This was his next conviction for an acquisitive crime. He was, however, convicted after his robbery conviction of a number of driving offences, three of which related to excess alcohol consumption.

[8] Smyth has a total of 147 convictions dating back to 2003. These include 6 convictions for theft, 10 for burglary, one for aggravated burglary and one for hijacking. His first burglary was of a dwelling in 2004 for which he was later given a 9 month suspended sentence. This suspended sentence was activated when he was convicted of a further burglary in 2006. In 2007 he was sentenced to 18 months' detention for aggravated burglary and hijacking. In 2007 he received a further 6 months' detention for burglary of a dwelling. The following year he again received a 9 month suspended sentence for burglary of a dwelling. In 2008 he was sentenced to 6 months' detention for burglary of a dwelling, and a further 21 months' detention in 2009 for attempted burglary of a dwelling. He has clearly not learned the error of his ways as he committed a further burglary 5 days before his arraignment on these charges for which he was sentenced to a period of 9 months' imprisonment in January 2014.

Pre-Sentence Reports

[9] The Probation Officer described McCaughey as a 47 year old unemployed man who lived with his girlfriend and their four children in the Lisburn area. His education was disrupted by periods in Training School and the Young Offenders' Centre. He has never been employed due to repeated offending behaviour and long periods in custody. He became addicted to alcohol and drugs at an early age and that has continued throughout his life. He claimed that until recently he was abusing Diazepam, Temazepam and other drugs purchased through the internet. The Probation Officer noted that, whilst McCaughey accepted the prosecution case against him, he accepted little in the way of responsibility as he said he could not remember much about the events due to his consumption of drink and drugs. He claimed he had opened the front door of 6 Bests Hill Glen looking for a party. The Probation Officer considered that McCaughey demonstrated distorted thinking and no personal responsibility for his offending behaviour. He attributed blame to both his nephew, Smyth, and his intoxicated state, claiming he no longer burgles. She noted that McCaughey had been subject to Probation supervision on six previous occasions and assessed that there was a high likelihood of reoffending but not a significant risk of serious harm.

[10] Smyth is a 25 year old unemployed man who has been in a relationship with his current partner for 8 years with whom he has three children. His mother died in a car crash when he was 6 years old for which his father was convicted of driving under the influence of drink/drugs. He and his siblings were then placed in the care of their maternal grandmother. Smyth would often run away in order to be with his father and was eventually placed in voluntary care. He was suspended from school, completed his education in a custodial setting and has never been employed. He admits to having misused alcohol and drugs for many years. The Probation Officer concluded that Smyth rationalised his actions and deflected responsibility from

himself claiming his offending occurred whilst intoxicated or on drugs. Whilst he was able to articulate, to a certain degree, the adverse impact of his offending on the victims and his own family, it had not been sufficient to stop him acting impulsively to meet his own needs. The Probation Officer noted that the index offences occurred the day after Smyth was released from prison having served a sentence for theft, that he has been convicted of further offences whilst on bail and that he is currently registered on the PBNI's register for dangerous offenders. He was assessed as posing a high likelihood of reoffending but not posing a significant risk of serious harm.

The Judge's Sentencing Remarks

[11] The judge said he was in no doubt that had the applicants been successful in entering the houses they would have "effectively robbed" the occupants. Moreover, the courts had made clear that the invasion of someone's house in this way is not just an offence against property but an offence against the individual. He considered the aggravating features to be the fact the offences occurred at night, that the properties were occupied at the time of the offences and that each of the applicants had extensive criminal records. In relation to McCaughey, he considered that his criminal record showed a lack of preparedness to abide by the law and a ready preparedness to commit serious offences. The judge noted his lack of response to Probation supervision in the past, Probation's assessment that he presented a high risk of reoffending, his significant problems with drink and drugs and that the present offences were committed while under the influence of drink or drugs. In relation to Smyth, the judge noted his criminal record, his limited response to sentencing despite various sentencing disposals in the past and Probation's assessment that he also presented a high risk of reoffending. The judge was of the view that there was not a significant degree of differentiation between either the offences or the applicants. In relation to McCaughey he imposed a 3 year determinate custodial sentence, comprising 18 months' custody and 18 months' licence, in relation to the attempted burglary and 6 months' imprisonment for obstructing police, to run concurrently. In relation to Smyth he also imposed a 3 year determinate custodial sentence, comprising 18 months' custody and 18 months' licence, for each of the burglary and attempted burglary, and 6 months' imprisonment for obstructing police, all to run concurrently.

The submissions of the parties

[12] Mr Sayers submitted that this was a case in which the definitive guidance in respect of domestic burglary provided by the Sentencing Guidelines Council was of assistance. He accepted that one of the indicators of greater harm was the presence of the occupier at the home and he accepted that this factor was present in McCaughey's case, albeit that the factor was aimed at the presence of the offender in the occupier's home in the course of the completed burglary rather than an attempt. There was no confrontation in this case, no property was taken and there was no indication of premeditation or sophistication about the commission of the offence. Accordingly, he submitted that this was a case of lower culpability. The Sentencing Guidelines Council suggested in such cases a starting point of one years' custody

and a range of sentencing beginning with a high level community order up to 2 years' custody. He accepted that there were aggravating factors in this case in that the offence took place at night and the applicant had a significant previous record but he submitted that those factors did not take it outside the identified category.

[13] Secondly, it was submitted that the learned trial judge failed to recognise the distinction in sentencing terms between the substantive offence of burglary and the offence of attempted burglary. We accept the proposition that the sentence for an attempt should almost always be less than the sentence which would have been imposed if that offence had been completed. We also recognise, however, that much will depend on the circumstances in which the attempt failed (see *Blackstone's Criminal Practice (2014)* at A5.71). Although there is no direct evidence as to why McCaughey did not cross the threshold it seems likely that on opening the door he would have been aware of a light in the back kitchen. He withdrew before there was any confrontation and it is of the essence of an attempt that no property was taken.

[14] The third submission on behalf of McCaughey was that the court erred in sentencing the applicant as if he had been involved in both offences. The principle was established in R v Kidd, Canavan and Shaw [1998] 1 WLR 604 that the defendant cannot be sentenced for offences which have not been proved or admitted. In failing to draw a distinction between McCaughey and Smyth it was submitted that the learned trial judge had offended this principle.

[15] Mr Devine on behalf of Smyth noted that the judge made no reference to the credit to which either applicant should be entitled for his guilty plea. The judge did not indicate what the starting point was (see R v McKeown and others [2013] NICA 28). He also noted that the judge did not make reference to this applicant's difficult personal circumstances, although it is clear that he did refer to the pre-sentence report in relation to the assessment of risk.

[16] He also submitted that the guidelines produced by the Sentencing Guidelines Council were exceptionally helpful. He suggested that this might be judged a case of lesser harm since the only factor indicating greater harm was that the occupiers were at home at the relevant time. On the other hand nothing was stolen and no damage or disturbance was caused to property, he maintained, which would indicate lesser harm. If the submission on lesser harm was accepted, the starting point should have been a high level community order with a range of up to 26 weeks custody.

[17] In relation to the applicant's guilty plea he noted that the case had been made that the applicant believed that the disposal discussed with the police officer would be acceptable. When it was indicated the day before the trial that this would not be so, counsel for the applicant had indicated that a jury would not be required in his case.

[18] For the prosecution Mr Magee submitted that guidance to the approach which a sentencer should take in burglary cases in this jurisdiction was given in R v Megarry [2002] NIJB 271. Generally speaking, domestic burglaries are more serious if they are of occupied houses at night and if they are committed by

persistent offenders. In R v Martin [2010] NICA 26 this court upheld a sentence of five years' imprisonment and one years' probation for a single offence of burglary in relation to an offender with 13 convictions of a similar nature and a significant persistent record for dishonesty despite his timely plea of guilty. He noted that in R v Saw [2009] EWCA Crim 1 the Court of Appeal concluded that the presence of the victim at home in bed at night when the burglary occurs may well occasion trauma, that a degree of planning may be demonstrated when burglars work in a group and that the criminal record of the offender is of more significance in the case of domestic burglary than in case of some other crimes. Although counsel had opened the brackets suggested by the Sentencing Guidelines Council in burglary cases, he submitted that the learned trial judge was not bound by those brackets.

Sentencing Guidelines

[19] Consistency in the sentencing process is an important aspect of fairness. Fairness also requires that the particular circumstances of individual cases are taken into account in determining the appropriate outcome. Occasionally there can be a tension in seeking to satisfy these requirements. Sentencing guidelines seek to resolve that tension by encouraging uniformity of approach while at the same time recognising the flexibility that is necessary in the individual case.

[20] The approach to be taken to the promulgation and content of guidelines needs to take into account the particular characteristics of the jurisdiction. In England and Wales the Sentencing Council can issue definitive guidelines in relation to various categories of offences. Where it does so, by virtue of section 125 (1) of the Coroners and Justice Act 2009 every court must follow any sentencing guideline which is relevant to the offender's case unless the court is satisfied that it would be contrary to the interests of justice to do so.

[21] There is, therefore, a very strong legislative steer towards uniformity. That reflects the fact that the jurisdiction is very large, that the opportunity for discussion between experienced judges about sentencing issues is consequently limited and that, although sentencing is often carried out by some of the most experienced criminal judges in the United Kingdom, there is also a long tradition of sentencing being carried out by Recorders and Deputy Judges who have had no or limited experience in the criminal law.

[22] In Northern Ireland we have a small Crown Court judiciary who have the benefit of regular meetings with colleagues where sentencing issues can be discussed both formally and informally. Sentencing is carried out exclusively by full-time judges most of whom have had considerable experience of criminal law before going on the Bench. We recognise the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance but we have discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance.

[23] We set out the rationale for that approach at paragraph 25 of R v McKeown, R v Han Lin (DDP's Reference Nos 2 and 3 of 2013).

> "The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing worthy of consideration depending on the precise circumstances of the individual case."

[24] Despite this clear statement of principle we note that the submissions in the court below and in this court have sought to place considerable emphasis on the bracket into which these cases fall. We have also noted in other appeals that there has been some tendency to interpret the remarks of this court at paragraph 16 of R v SG [2010] NICA 32 that assistance may be derived from the final report of the Sentencing Guidelines Council as somehow indicating a different approach in sexual offences. We wish to make it clear that the approach set out at paragraphs 22 and 23 above applies in those cases also.

Conclusion

[25] It follows that we commend the learned trial judge for declining to involve himself in an examination of the brackets of culpability and harm within the definitive guidelines of the Sentencing Council but focussing on the significant issues arising on the facts of this case. In the case of Smyth the important aggravating features were that the houses which were the subject of the burglary and attempted burglary were occupied, that there was a confrontation with the householder, that the offences were committed at night, that the two offences were committed within a very short time of each other suggesting a degree of determination, that the offender was under the influence of alcohol at the time of the commission of the offences and that he had an appalling record for offences of this kind. Not content with committing 8 previous burglaries and one aggravated burglary he carried out a further burglary some five days before his arraignment. He was entitled to credit for his plea albeit that it came at a late stage. There was little sophistication in the carrying out of the offences and there was no evidence of

any significant planning. He had a difficult upbringing but in serious offences of this kind personal circumstances are unlikely to weigh heavily.

[26] The learned trial judge must have selected a starting point somewhere between 3 1/2 and 4 years before making an appropriate allowance for the applicant's plea of guilty. Although this was not the most sophisticated burglary we consider that in light of the applicant's appalling record the learned trial judge was entitled to take that view of the case. Accordingly, we refuse leave to appeal in his case.

[27] In the case of McCaughey the central point advanced by Mr Sayers was that the learned trial judge sentenced the applicant on the basis that he was a participant in both offences. We consider that there is some substance in that submission. At one stage in his sentencing remarks the learned trial judge said:

> "I am satisfied, beyond any doubt whatsoever, that if these defendants had not been disturbed at the material time, I have no doubt that they would have completed what they intended on that occasion and that is to enter the houses and enter with the purposes of stealing and effectively robbing the occupants of these premises of either their money or their goods contained in the house."

[28] There may be some room for argument as to whether the learned trial judge was there expressing the view that each of them was involved in each offence but the applicant's case is further enhanced by his remarks at a later stage:

> "I am satisfied that in this case each of you was attempting to and each of you would, by way of a joint enterprise, have entered these houses if the opportunity had been available to you in the sense that you had not been disturbed. I have no doubt that on both of these occasions the homes of the individuals who were owners of those properties was significantly disturbed. It has been greatly upsetting to each of these individuals, inevitably as a result of what occurred."

[29] Those comments were the precursor to the conclusion that the learned trial judge did not see any significant degree of difference between the offenders. We cannot accept that conclusion. McCaughey pleaded guilty only to one count of attempted burglary in circumstances where he did not cross the threshold of the premises shortly after opening the door and seeing a light which would have indicated that the premises were occupied. Smyth accepted responsibility for involvement in both burglaries and was directly responsible for criminal damage and a confrontation with the householder in the burglary which he carried out on his own. We also consider that the absence of a relevant recent record for offences of this kind suggests some further distinction in respect of McCaughey. In all those circumstances we consider that the appropriate starting point in the case of

McCaughey was somewhere between 2½ and 3 years. In his case we grant leave and substitute a determinate custodial sentence of two years comprising 12 months' imprisonment and 12 months on licence.