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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT AT BELFAST

BETWEEN:

THE KING

v

QING WEN LIN, LONG QUANG YU, LIN LIN ZHENG, ZHU LIN & YANG WU CHEN

Mr Stuart McTaggart (instructed by RP Crawford & Co Solicitors) for Qing Wen Lin
Ms Aileen Smyth (instructed by RP Crawford & Co Solicitors) for Long Quang Yu
Mr Declan Quinn, (instructed by RP Crawford & Co Solicitors) for Lin Lin Zheng
Mr Michael Boyd (instructed by RP Crawford & Co Solicitors) for Zhu Lin
Mr Ian Turkington (instructed by McCrudden Trainor Solicitors) Yang Wu Chen
Mr Robin Steer (instructed by the Public Prosecution Service) for the Respondent

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Before: McCloskey LJ, Humphreys J and Kinney J

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

Nomenclature

In view of the large number of appellants and the nature of their names it will be convenient to identify them in this judgment, following the order in which they are listed in the title, as QWL, LQY, LLZ, ZL and YWC respectively. No discourtesy is intended by this purely mechanical device.

Introduction

[1] Leave to appeal having been refused by the single judge, these five appellants renew their applications before the plenary court. By their applications they seek to challenge the sentences imposed upon them at Belfast Crown Court in respect of a series of offences involving criminal property, in vernacular terms a money laundering operation, contrary to the Proceeds of Crime Act 2002.

[2] The sentences which the appellants seek to challenge are the following:

(a) QWL: a determinate sentence of 24 months imprisonment.

(b) LQY: a determinate sentence of 20 months imprisonment.

(c) LLZ: a determinate sentence of 16 months imprisonment.

(d) ZL: a determinate sentence of 32 months imprisonment.

(e) YWC: a total determinate sentence of 28 months imprisonment comprising 24 months on count 24, and a consecutive sentence of 4 months on count 26.

In each case the determinate sentence was divided equally between an immediate custodial period and subsequent licensed release.

[3] Each of the appellants pleaded guilty. On the bill of indictment there were 12 accused persons altogether. Only these five appellants seek to challenge their sentences. The other seven accused persons were punished by sentences of imprisonment ranging from 12 to 36 months. The sentences of imprisonment imposed on four of the 12 accused were suspended for two years.

A brief chronology

[4] An unlawful money laundering operation founding all of the prosecutions unfolded largely between January and July 2019. All of the accused persons were arrested on 1 July 2019. Following charging and initial remand in custody they were granted bail at various stages of the ensuing four week period. They were committed for trial on 12 October 2021. "No bill" applications were made on 24 November 2021. The focus of these applications was the original first count, which alleged a conspiracy to convert criminal property. In response, the prosecution communicated its intention to present an amended indictment, omitting this count. Next, on 1 February 2022, the new indictment having been presented, all of the appellants pleaded not guilty. On 1 April 2022 they were rearraigned, entering new pleas of guilty. These appellants, together with five of the other accused, were sentenced on 18 July 2022. The remaining two accused were sentenced on 8 December 2022.

The prosecution case

[5] An investigation conducted jointly by the National Crime Agency ("NCA") and certain financial institutions revealed that significant quantities of cash were being laundered in Northern Ireland through bank accounts linked to Chinese nationals. Altogether 27 bank accounts were being used to receive cash deposits made through the Automated Service Devices ("ASD") machines. These deposits were then transferred to other bank accounts throughout the UK. These criminal activities unfolded between 31 January 2018 and 1 July 2019.

[6] The offending deposits were made at a single bank in central Belfast. The modus operandi involved two separate types of conduct which were labelled "primary liability" and "secondary liability" respectively. The "primary liability" element entailed the making of cash lodgements in the ASD machines. During the period of offending between 40 and 60 deposits of significant amounts of cash were made daily. The sums ranged from £1,000 to £4,000. CCTV and other evidence established that the accused persons normally made these deposits alone, but were sometimes in each other's company. Any one individual could lodge up to £40,000 cash daily without triggering an anti-money laundering alert by the bank.

[7] The "secondary liability" element of the offending entailed allowing one's bank account to be used for the purpose of receiving deposits or making money transfers. Three of the five appellants – QWL, LLZ and ZL engaged in this specific conduct. The sums of money to which <u>both</u> types of offending applied totalled just under £6 million. We shall consider infra the contextual setting to which this figure belongs.

[8] The money laundering operation was sophisticated and UK wide. The prosecution case was that all of the accused persons were "operating in broad terms

at a lower level." This denoted that they were not the godfathers, organisers, or masterminds. The cash deposited was not theirs and they did not benefit from the profits of the operation. However, they received payment for their criminal conduct. The amount of this payment could not be established. In passing, one of the co-accused, YC claimed that he was paid £3 for every £1,000 lodged (equating to £300 per £100,000 lodged). Another co-accused, GW, suggested that his financial gain from the criminality was £300: see para [69] infra.

[9] Six of the 12 accused persons are members of the same family (the Chens), being related by birth or marriage. Of the five appellants, YWC and ZL are two of these six family members. They are married to each other. We shall elaborate on the family circumstances dimension of these appeals infra.

The structure of this judgment

[10] Further to the above preface, a separate chapter will be devoted to each of the five appellants. The four principal ingredients of each of these discrete chapters will be (a) a more detailed outline of the prosecution case against each appellant, (b) the sentencing of each appellant, (c) the grounds of appeal and (d) the supporting arguments. We shall first address the issue of new material applications in general terms, to be followed by our consideration of the topic of hierarchy. We shall then address the individual appeals, followed by the governing legal principles and our conclusions.

The new material applications

[11] In *R v Ferris* [2020] NICA 60 it was held that this court's power to receive new material in a criminal appeal is not confined to the specific power to receive "any evidence which was not adduced at the trial" enshrined in section 25(1)(c) of the Criminal Appeal (NI) Act 1980 (the "1980 Act"): see paras [18]–[35]. Noting, inter alia, that resort to section 25(1)(c) rarely occurs in practice, it was held that this court is empowered to receive:

> "… fresh material without formality and without strictly applying the framework of section 25 of the 1980 Act …"

See para [29].

As to the criteria to be applied, the court stated at para [32]:

> "The principled approach which this court applies in determining whether to receive new information via the informal extra-statutory route … is broadly similar to the section 25 mechanism. The overarching test is whether receipt of the new material is necessary or expedient in the interests of justice. In its application of this test this

> court will take into account "inter alia" the section 25(2) factors namely whether the information appears capable of belief, whether it may afford a ground for allowing the appeal and whether its belated emergence can be reasonably explained. A key distinction between the section 25 mechanism and the informal mechanism is that within the latter the third of the statutory considerations specified in section 25(2) namely 'whether the evidence would have been admissible' at first instance, does not all to be applied."

[12] These appeals provide a timely opportunity to emphasise that in every case where an appellant seeks to invoke the *Ferris* mechanism some elementary formalities must be observed. These are not onerous. The application must be formulated in writing, specifying the grounds and attaching the new material which the appellant wishes the court to receive. This should be done at the earliest possible opportunity. There is an extant Form which can be employed for this purpose, namely Form 16, with minimal adaptation. The formulaic words in sub-para (d):

> "Leave to …. produce any document or thing as additional evidence" should be deleted and substituted by "Leave to present, in accordance with *R v Ferris* [2020] NICA 60, the new material attached hereto, on the following grounds: "……."

Practitioners should also be alert to the rule – Rule 18(1) – to which Form 16 is related.

[13] Ordinarily Form 16 should be completed and lodged together with Form 2 (Notice of Appeal) and Form 3 (Grounds of Appeal). In any case where this is genuinely impossible – typically because the new material is not available at this initial stage – two simple steps are required. First, the possibility of such application materialising should be expressly stated in Part 2 of Form 2, where an appellant is required to detail everything he/she is "applying for." It would also be good practice to draw attention to this briefly in the appellant's skeleton argument. Second, the application proper, in Form 16, should follow as soon as possible.

[14] In the present case four of the five appellants have made applications to the court to receive new material. We shall address each application in our consideration of the substance of each individual appeal.

The offender hierarchy

[15] The "Prosecution Summary of Case For Probation Board" (mirroring the "Prosecution Opening") states, inter alia, [at para 12]:

"The prosecution do not have any specific evidence with regard to the role played by each defendant. Aside from the defendants who are members of the Chen family by birth or marriage and in respect of whom the prosecution say it can be inferred that they must have had a wider knowledge of the entire operation, the prosecution can only differentiate the remaining defendants by reason of the amount of cash lodged by them and when they became involved in the offending.

(i) Zhi Qui Dong, Yun Chen, Zhu Lin and Yang Wu Chen can be regarded as being at the centre of the operation in Belfast and had some degree of an organisational role as they bring in other persons such as the parents Yangzhong Chen and Aihua He as well as Genqi Wang albeit it is accepted that they were not organisers of the entire operation and were still acting under the direction of others as stated above.

(ii) Next below them are Qing Wen Lin, Long Quang Yu and Lin Lin Zheng who are responsible for significant deposits using their own cards or cards belonging to other people.

(iii) Next below them are Wen Qin Lin, Yanzhong Chen and Aihua He who are depositing lesser amounts and/or are involved at a later stage.

(iv) At the bottom are Gengqi Wang and Shi Ming Chen who both appear to be brought into this offending by others and have a very limited role."

[16] A separate document sent by prosecuting counsel to defence counsel in advance of the sentencing hearing identifies a hierarchy of offending with four categories or groupings. The most serious offending was committed by those accused persons belonging to category 1, followed by the other three categories in sequence. The prosecution assessment was that the appellants ZL and YWC belonged to category 1, while the other three appellants were assigned to category 2. This document, which replicated what is reproduced immediately above, was not agreed, and was not reflected in any evidence before the sentencing court.

[17] In all of the aforementioned documents there is a list of the aggravating factors suggested by the prosecution, followed by suggested mitigating factors. We shall comment on this infra.

[18] In sentencing all of the accused persons the aggravating factors rehearsed by the judge were the following: professionally orchestrated offending by an organised criminal gang; the large total sum involved (some £20 million); the duration of the period of offending; and the inference of knowledge on the part of all defendants that they were part of a high scale criminal operation.

[19] The sentencing judge, addressing the general, or common, features of the offending of all 12 accused persons, took the following path. First, he considered the offending to belong to a level of gravity higher than that of what he described as "money mule cases." Second, he highlighted that "… the criminality and laundering arises … from the encouragement and nourishment it gives to crime in general." Next, the judge noted that on behalf of all of the accused it was accepted that the custody threshold was overcome.

QWL

[20] This appellant is a member of "Category 2" (*supra*). The period of her offending was March to June 2019, during which she made cash deposits totalling some £695,000 (her "primary liability"). The amount of some £314,000 represented her "secondary liability." Some of these deposits could be connected with the conduct of another male person (not prosecuted in this indictment) who had made deposits totalling £3.65 million. This appellant is married to the fifth appellant, LQY. Upon her arrest, on 1 July 2019, she was carrying some £17,000 cash. A search of her home recovered cash of almost £700. Responding to the CCTV evidence during interview she accepted that she was the person depicted making certain cash deposits. She further accepted that she and her husband were in charge of certain bank cards recovered. She asserted that they had gambling debts giving rise to duress to act as they did. She acknowledged that all of the monies deposited were outside the tax system. The cash was supplied to her by a male person who, she claimed, she could not identify. HMRC has no record of any earnings of this appellant.

[21] Sentencing this appellant, the judge noted that the sum of the deposits made by her was some £695,000, while the laundering figure exceeded £1 million. Her offending related to four separate counts of the indictment. Next the judge dilated on the personal circumstances of this appellant: her two children of primary school age; her journey to Northern Ireland involving people smugglers; her 15 years residence in this jurisdiction; and the possibility that foster care might be rendered necessary for her children. He then acknowledged the Probation Service assessment of a low likelihood of reoffending. He was sceptical about any assertion of intimidation or fear for her family as mitigating factors.

[22] The judge then stated:

> "The starting point had you contested this case would have been … three years imprisonment. Considerable additional personal mitigation has been applied … because of the impact of your incarceration on your children."

The judge next made a transition from three years to two years, addressing each of the four counts (two years, two years, 12 months, and 12 months). The remainder of his sentencing decision is discernible from para [58]:

> "I consider that the finding of the substantial sums of money in your case and where they were found supports the view that you were a trusted lieutenant for those further up the organisation, and that you played a willing and profitable part in the knowledge that these were the proceeds of serious organised crime, although, already acknowledged, you are not aware of the exact offending that generated these funds. The vast sums of money involved do not support any other rational conclusion. You did all of this in the full knowledge that you had responsibility for two young children. In the eyes of some people, that may make your behaviour even more reprehensible. Let me make it clear. For the purposes of this sentencing exercise, I do not subscribe to that view, but it does throw into sharp focus the plea that you have made, that because of the impact on your children of your offending, you should avoid what would be inevitable consequences of your criminality. I have also considered the contents of the pre-sentence report in terms of the availability of alternatives to direct custody. But this offending is so serious, for all the reasons already set out, and need the retribution and general deterrence so strong, and I have been shown no exceptional circumstances relating to your involvement in this offending to justify a suspension of that sentence. Therefore, each of those sentences, one through to four, will be in the terms I have set out and they will be split … 50% in custody, 50% on license."

[23] Following some intensive case management this appellant's grounds of appeal (and, indeed those of the other appellants) evolved and were refined. The headline complaint, namely that the sentence is manifestly excessive, was expressed in the following specific contentions, developed by Mr McTaggart of counsel:

(a) The judge erred in principle by distinguishing this case from that of *R v Coleman* [2020] NICC 5.

(b) The judge unduly erred in law by restricting his consideration of exceptionality to the offence rather than the offender.

(c) The judge incorrectly attributed to this appellant a role exceeding her "Category 2" classification.

(d) The judge erred in failing to recognise that this appellant's circumstances were sufficiently exceptional to warrant the suspension of her custodial term.

[24] It is appropriate to preface any description of the new material with a reference to the report of Dr Aidan Devine, a Consultant Clinical Psychologist, which was prepared for the sentencing exercise. Her upbringing in China was marked by poverty and her flight from there to Ireland, undertaken in gruelling conditions, stimulated by her fear of debt collectors who, she claimed, had killed her brother-in-law. She was then aged around 18 years. She has since lived on the island of Ireland for in excess of 20 years. She has a son and daughter aged 10 and 5 years respectively. She is married to the second appellant, LQY. The children witnessed their parents' arrest at their home. Dr Devine made the unsurprising conclusion that in the event of custodial sentences being imposed the ensuing separation would have a detrimental impact on the children, particularly since both appeared predisposed to developing anxiety. There would be an adverse impact on their social, emotional, and educational development.

[25] The first element of the new material which the appellant wishes to bring before this court is an electronic communication from a social worker. This was generated about one-month post-sentencing in response to the solicitor's request. The author was involved with the family during an unspecified period in 2019. This was probably of some two weeks duration, having regard to the date when this appellant was granted following her initial remand in custody. The father (LQY) was granted bail one week later. It would appear that this social worker had experienced some further recent involvement with the children, given her description of their residual arrangements – being cared for by a family friend – following the sentencing. Concerns about the children's immediate and long term emotional and social wellbeing were expressed.

[26] The second element of the new material consists of two written statements of the family friend with whom the children are staying. This lady is about the same age as this appellant and has two children, aged 8 and 4 years respectively. She lives in public housing and her income consists of an asylum support payment of £120 weekly. The house has two bedrooms. Most of the children's clothes and belongings remain at their parents' nearby residential property. Prison visits can be traumatic. More generally, the trauma and anxiety experienced by the children is evident in various ways.

[27] The court accedes to the application to receive these new materials for the following reasons. First, their materiality is incontestable. Second, they relate to the welfare of two young children. Third, they pertain to events and circumstances which have materialised subsequent to the sentencing of this appellant and her husband. Fourth, all four members of this family have the protection of the right to respect for private and family life guaranteed by Article 8 ECHR via the Human Rights Act 1998 and this court, being a public authority, must avoid acting in a manner incompatible with their rights in this respect. Fifth, the material is prima facie credible. Finally, the overarching criterion of the interests of justice is clearly satisfied.

[28] We turn to consider the first of the grounds of appeal, which relates to *R v Coleman* [2020] NICC 5. This is a decision of Belfast Crown Court promulgated on 17 February 2020. Before proceeding further, it is necessary to draw attention to one discrete member of the always beguiling vocabulary of criminal practitioners. The term "money mule" (the court was informed) denotes a person who in some way holds or carries or otherwise possesses illicit money on behalf of another. A money mule plays a role in assisting in the "laundering" of the proceeds of crime, normally a fraud operation. Each of these five appellants attracts the appellation "money mule."

[29] In *Coleman*, the Recorder of Belfast, outlined typical features of the offending of "money mules" and the usual characteristics of the offender, typically a "vulnerable individual" of modest means and lack of resilience and sometimes subject to an element of coercion: see para [17]. Furthermore, they are typically "totally distant from the initial fraud" and "… will have no real knowledge of it", albeit they "… will have a knowledge, or suspicion, that the money has been unlawfully obtained …": see para [28]. The judgment adds at para [34]:

> "Typically, these are cases of potentially low culpability but with high levels of harm and with all cases of this type – be they crimes of violence, sexual offences, or fraud – sentencers should remind themselves …. that sentencing is an art not a science."

[30] Taking his cue from *R v Harrington Jack (DPP's Reference No 5 of 2019)* [2020] NICA 1, the Recorder formulated the following guidance, beginning at para [37], recommending the approach of:

> "… (identifying) a starting point based on value, then (increasing) it by any aggravating factors, (decreasing) it by any mitigating factors (save for any guilty plea) and then a final reduction for any plea of guilty."

The judgment continues at para [38]:

> "The Court of Appeal having established levels in *Jack*, it may be useful to maintain those levels in this guidance, with the addition of one further band of up to £10,000. The suggested ranges, on conviction after a contest, are as follows:
>
> Sums up to £10,000 (Community order);
>
> Sums between £10,000 and £30,000 (six months to one year's imprisonment);
>
> Sums between £30,000 and £175,000 (one year to two years' imprisonment);
>
> Sums between £175,000 and £400,000 (two years to three years' imprisonment);
>
> The guidance is not extended beyond this point given the unlikelihood of offending involving amounts in excess of £400,000 but if they do, then a suitable elevated range should be applied."

[31] The final part of the judgment is one upon which all five appellants place reliance. See paras [47]–[48]:

> "[47] I therefore consider that it is within the discretion of a sentencing judge to leave open the option of suspending a sentence, without the specific need to consider the existence of exceptional circumstances. The need for such circumstances would apply should this be a second money laundering offence, fraud, or other dishonesty offence.
>
> [48] Before leaving the matter of suspended sentences, defendants, and their legal advisors, should be aware that such an outcome would be unlikely after a finding of guilt by a jury. Suspended sentences are a means of expressing the seriousness of the offences with an acknowledgment that the custody threshold has been passed. The suspended sentence, however, allows the offender to remain in the community to assist in their rehabilitation, but still with a threat hanging over them should they re-offend. If there is no remorse or acknowledgement of guilt a suspended sentence could well be inappropriate …"

The underlying reason, expressed in para [44], is the suggestion that offending of the kind considered in the judgment ie typical "money muling" with the usual characteristics identified:

> "… is not a crime which calls for a sentence to satisfy a genuine and measured public reaction to the crime and which would be [a] retributive in nature."

In the next ensuing passage – para [45] – the Recorder raised the question of whether "these cases" required a deterrent sentence, without proffering any concrete answer.

[32] Coincidentally, the same judge, by his carefully compiled rulings, refused leave to appeal in all of these cases. He addressed the "*Coleman issue*" at paras [14]-[16] of his ruling in the case of LQY:

> "[14] The applicant's argument in relation to deterrence appears to be based on an application of the sentencing remarks in Coleman [2020] NICC 5 which offered some guidance in sentencing in 'money mule' cases. I reject the consideration of Coleman as the applicant's offending bears little resemble to the typical 'money mule' envisaged by Coleman. The recruitment of the applicant and his actual gain may bear some parallels, but his criminal activity did not involve a one-off transaction, but involved the actual handling of bank notes on multiple occasions over a significant period of time.
>
> [15] It cannot be argued that the references in Coleman to suspension of sentences and the reference to social security fraud cases has much relevance to this point.
>
> [16] I cannot find any fault in Judge Green's analysis and his conclusion that there is a need for deterrent sentences. I consider that it is not arguable that the applicant's offending does not call for a deterrent sentence."

[33] At this juncture it is necessary to consider how the sentencing judge dealt with the *Coleman* decision. First, he stated at para [16]:

> "In my view, the offending is very different to and more serious than the case contemplated in Coleman; even by reference to the amount of money involved only 3 of the 12 defendants come within the range identified in Coleman and even they sit in the highest tier.

> This case, therefore, involves classic money laundering of criminal property on behalf of an organised criminal gang. The defendants received frequent bundles of cash and followed instructions on where to transfer the funds. A measure of the huge sums involved and the trust bestowed on these defendants can be gauged from the staggering amounts of cash seized from many of the defendants when their properties or person were searched. Whilst it cannot be said with certainty whether this money was to be lodged or illegitimate earnings – either way it indicates the seriousness of the enterprise in which they were engaged.
>
> Even at the low level acknowledged in which they operated, this required planning, avoidance of anti money laundering procedure, trust in them by these criminal gangs and persistence in all but a few defendants. The concession as to the level of offending does not extend to one that characterises the offending as other than very serious."

Elaborating, the judge highlighted the factors of an organised criminal gang, the likely provenance of the illicit funds (drug supply, human trafficking, prostitution, and tax evasion) the factors of primary and second liability (as explained above). The foregoing was the impetus for the following conclusion, at para [21]:

> "The sentencing landscape must therefore be more serious than money mule cases, as discussed in *Coleman*, for all of these reasons."

Finally, returning to this issue at para [21], in the specific context of considering whether a suspended sentence of imprisonment might be appropriate, the judge stated:

> "It is generally regarded that exceptionality, if required, must normally relate to the offending and not the offender's personal circumstances."

It is convenient at this point to interpose the observation that the grounds of appeal advanced by all appellants include the contention that this discrete statement betrays an error of law on the part of the sentencing judge.

[34] It is also necessary to address what the judge stated at para [27]:

> "As already stated, in my view this offending is more serious than money mule cases. It required each defendant's direct engagement with members of serious organised gangs on a regular basis, the money was the product of very serious criminal activity rather than a one off fraud (even if none of the defendant [sic] was aware of the precise nature of the crimes involved, the sums involved are massive, £20m, the laundering was industrial, and it was repeated.
>
> There is in my view a significant harm to the community arising directly from this offending from the misery inflected [sic] on those who are the victims of the organised gang. The sheer scale and harm to the community calls for a sentence to satisfy a genuine and measured public reaction to the offending and which would be a retributive [sic] and deterrent in nature."

Followed by para [28],replicating the short passage in para [21] already reproduced:

> "Therefore, for any custodial sentence deemed appropriate, a suspension of that sentence must have exceptionality in the offending established before one sentence of that nature can be passed."

[35] Given the intrinsic elasticity of the term "money mule" this court is disposed to accept that it applies to this appellant (and indeed all appellants). Furthermore, giving effect to well established principles, this court is prepared to accept that any offender who does not fall within any of the four *Coleman* bands is not thereby precluded from being sentenced in accordance therewith. Strait jackets and "boiler plating" are antithetical to the judicial discretion involved in every sentencing exercise. This court has consistently eschewed the arithmetical and the mechanistic in sentencing decision making.

[36] The second of this appellant's grounds of appeal may be formulated, in shorthand, as "exceptionality misdirection." We have drawn attention to the relevant passages in the sentencing decision. Arising out of the previous decisions of this court, all of which were correctly identified and considered by the judge, the principle that in the jurisdiction of Northern Ireland a sentence of imprisonment, once determined, can be suspended only in exceptional circumstances was recognised.

[37] The third ground of appeal entails the contention that the sentencing judge, in substance, assigned this appellant's offending to a level in the hierarchy (outlined above) exceeding the prosecution's "Category 2" assessment. In part, this ground resolves to a complaint that the judge erred in his description of this appellant as "a

trusted lieutenant for those further up the organisation …" The contention embedded in the final ground of appeal is that the impugned sentence is manifestly excessive as it should have taken the form of a suspended sentence of imprisonment having regard to this appellant's personal circumstances. These grounds too will be addressed infra.

[38] In the abstract, grounds of appeal against sentence couched in the immediately preceding terms will rarely prosper. However, it is in this context that one discrete aspect of the decision in *Ferris* has particular purchase. At paras [37]-[43] this court addressed the principle of review/restraint:

> "[41] The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus, s10(3) of the 1980 Act does not pave the way for a rehearing on the merits. This is expressed with particular clarity in the following passage from the judgment of McGonigal LJ in *R v Newell* [1975] 4 NIJB at p2, referring to successful appeals against sentence:
>
> > 'In most cases the court substitutes a less severe sentence …the court does not substitute a sentence because the members of the court would have imposed a different sentence. It should only exercise its powers to substitute a lesser sentence if satisfied that the sentence imposed at the trial was manifestly excessive, or that the court imposing the sentence applied a wrong principle.'
>
> Pausing, this approach has withstood the passage of almost 50 years in this jurisdiction. The restraint principle is also evident in a range of post-1980 decisions of this court, including *R v Carroll* [unreported, 15 December 1992] and *R v Glennon and others* [unreported, 3 March 1995].
>
> [42] The restraint principle operates in essentially the same way in both this jurisdiction and that of England and Wales, where it has perhaps been articulated more fully. In *R v Docherty* [2017] 1 WLR 181 Lord Hughes, delivering the unanimous judgment of the Supreme Court, stated at [44](e):

> 'Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-hearing ab initio, as is the rule in some other countries; on appeal a sentence is examined to see whether it erred in law or principle or was manifestly excessive …'

In *R v Chin-Charles* [2019] EWCA Crim 1140, Lord Burnett CJ stated at [8]:

> 'The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would a public law decision. Its task is to determine whether the sentence imposed was manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored it, rarely prosper. Judges take into account all that has been placed before them and advanced in open court and, in many instances, have presided over a trial. The Court of Appeal is well aware of that.'

This approach was reiterated more recently in *R v Cleland* [2020] EWCA Crim 906 at [49]. Also, to like effect are *R v A* [1999] 1 Cr App (S) 52, at 56; and *Rogers* (ante) at [2]. To summarise, through the decided cases in both jurisdictions the function of the Court of Appeal in appeals against sentence has been described, in shorthand, as one more akin to review, rather than appeal, in the typical case. This is the essence of the restraint principle."

[39] At paras [44]–[46] the outworkings of this principle in a case where new material is considered on appeal were addressed. This culminated in the following conclusion, at para [47]:

> "The effect of our exposition of the governing statutory provisions and applicable legal principles set forth above is that in an appeal against sentence where this court exercises its discretion under s 25 of the 1980 Act to admit new evidence, or receives new information informally, it follows that having regard to the breadth of the formulation of this court's powers in s10(3) it is

> empowered as a matter of law to review the impugned sentence and make its decision as if it were a sentencing court of first instance. No constraint on this power is discernible from either the applicable statutory provisions or any legal principle contained in any authority binding on this court. The alternative would entail some hybrid, intermediate species of approach lacking clarity and accessibility and running the risk of not taking fully into account all material evidence, with resulting injustice to the offender or victim, furthering no public interest. This court will, of course, pay close attention to the approach and reasoning of the sentencing judge, which will attract varying degrees of weight depending on the individual case."

This was followed by the formulation of the following test, at para [48]:

> "Accordingly, in the instant case the task of this court falls to be expressed in the following terms: taking into account the new evidence received on appeal, in the estimation of this court is the sentence under challenge either manifestly excessive or wrong in principle or a combination of both?"

[40] In the great majority of cases the principle of appellate court restraint, or review, as expounded in *Ferris* at paras [38]–[43], applies. However, in any case where this court determines to receive new material, or new evidence, this court reviews the impugned sentence and makes its decision "as if it were a sentencing court of first instance": *Ferris*, para [47]. While close attention will be paid to the approach and reasoning of the sentencing judge, these will "… attract varying degrees of weight depending on the individual case": *Ferris* para [47].

[41] This appellant's second ground of appeal is common to all five appellants. It resolves to the contention that the sentencing judge, in determining whether there was any identifiable exceptionality, erred in law by concentrating on the offending rather than the offender. In the sentence decision various expressions can be found: "exceptional circumstances" at para [23], " exceptionality in the offending" para [28] and "exceptional circumstances … relating to your involvement in this offending" paras [61], [64], [65], [71] and [76] (with minor linguistic variations).

[42] In the last two of the 12 cases, in which sentencing was carried out at a later date and neither of which is before this court, the judge stated (transcript, p 2):

> "As I indicated in the sentencing of the other eight defendants, for any custodial sentence deemed appropriate a suspension of that sentence must have

> exceptionality in the offending established before one can be passed …
>
> However, I accept that there may be circumstances relating to personal mitigation that can amount to such exceptionality. It is contemplated that such exceptionality in personal circumstances will be more difficult to establish and therefore a rare occurrence … *McKeown* … at para [11] ……"

The judge continued:

> "As I did in the sentencing exercise of the other defendants who had the same personal mitigation in the form of an impact on their family of incarceration, I did consider that issue for each of them in an overall sense to see whether individually there were exceptional circumstances in this feature …"

The judge next stated, at p 9:

> "In essence, the plea is made that there are exceptional circumstances to avoid a term of imprisonment. Normally, as I have said, such exceptionality is required to be found in the offending itself, rather than the personal circumstances of the offender. In my view … this is too narrow a construct and, in appropriate circumstances, exceptionality can be found elsewhere."

The remainder of this discrete passage indicates that in this particular context "elsewhere" denoted the impact which the incarceration of these two parents would have on their 16 year old child.

[43] In the preceding paragraphs we have considered it appropriate to subject the terms in which the sentencing judge expressed himself to careful scrutiny, given the contours of this ground of appeal. In the case of this appellant, as indeed in all five cases, the point of departure being the uncontroversial one that the custody threshold had been overcome, the decision whether to suspend any of the ensuing sentences of imprisonment was of not less than monumental importance to the persons concerned. Furthermore, it would have a direct impact on the rights to family and private life not only of all of the appellants but also family members, consisting mainly of young children and, in the particular cases of ZL and YWC, extending to elderly grandparents of Chinese nationality.

[44] This court must also take into account that the judge's sentencing decision bears the hallmarks of a carefully prepared text (for which he is to be commended).

This means that the latitude which an appellate court might allow in the case of an ex tempore sentencing decision or for possible errors of transcription does not arise. In short, detailed scrutiny of a judicially prepared text is more appropriate than the parsing of one that is orally composed by the *ex tempore* mechanism. See further, in this context, *Lazarov v Bulgaria* [2018] EWHC 3050 (Admin), para [11], per Holman J:

> "I wish to stress, first, that most judges, and certainly I myself, may and do make slips or minor errors of fact in the course of delivering oral ex tempore judgments. These may be corrected if the judgment is later transcribed, and it must be rare indeed (if ever) that such slips could afford any ground of appeal. Higher standards of accuracy are, however, required and expected of judgments or reasons which are typed and which should be checked before being handed down or delivered. Second, I wish to stress that I am deeply conscious of the huge pressure of work under which the judges of a court such as the Westminster Magistrates' Court are labouring. I was told that there are typically listed three substantive extradition hearings a day before a given judge, and the judge may then have to wait an appreciable time before he has any opportunity to prepare his judgment. In those high pressure circumstances, which are not the fault or responsibility of the judges, it is small wonder if muddle or confusion may sometimes take place."

[45] Following careful analysis of the two sentencing decisions in their entirety, the conclusion of this court is that in his consideration of whether any of the impugned sentences of imprisonment could be suspended the judge excluded the offenders' personal circumstances. This was wrong in principle. It may also be viewed through the lens of an approach which had the potential of contributing to a manifestly excessive sentence. It does not automatically follow from this conclusion that any of these appeals must succeed. We shall elaborate on the out-workings of this conclusion infra.

[46] The further ground of appeal advanced by this appellant is that the judge, in substance, incorrectly elevated the level of this appellant's offending to a plain which did not form the basis upon which she pleaded guilty. That basis, as already highlighted, was set out particularly in prosecuting counsel's compositions noted in paragraphs [5]–[8] and [15]–[17] above. Within these this appellant was unequivocally assigned to the second of the four categories identified by the prosecution. Only ZL and YWC were identified as being "at the centre of the operation in Belfast" and having "some degree of an organisational role", thus being suggested "Category 1" offenders.

[47] It appears to this court from para [6]ff of the sentencing decision that the judge was giving effect to the prosecution presentation. There was no suggestion to the contrary before this court. There are three striking features of what the judge said in the operative passage of his sentencing of this appellant, at para [58]. First, he described her as "a trusted lieutenant." Second, he attributed to her a "profitable part" in the criminal enterprise. Third, he ascribed to her "knowledge that these were the proceeds of serious organised crime."

[48] One of the main issues thrown up by this ground of appeal is the judge's characterisation of this appellant as a "trusted lieutenant." Before this court it was common case that this description denoted a person belonging to somewhere above the notional lower ranks but below the top level. The question is whether this went beyond the prosecution's assessment of this appellant's role and, hence, the basis of her acceptance of guilt. We shall revisit this issue infra.

LQY

[49] LQY is the husband of QWL By the mechanism of concurrent sentences he was punished by an effective sentence of 20 months imprisonment, divided in the usual way.

[50] The amounts of cash deposited by this appellant in the bank during a period of some months totalled £562,000. This appellant is one of two of the five appellants (the other being YWC) whose offending involved no "secondary liability." Of the aforementioned sum £46,000 was deposited in the account of this appellant's wife, QWL. In sentencing this appellant, the judge noted his denials that he could be seen in the CCTV footage and his refusal to comment about the cash seized in his home. The judge specifically took into account the evidence relating to and all that had been said on behalf of this appellant's wife concerning the impact of a custodial sentence on their children.

[51] The Probation Service assessment that he presented a medium risk of re-offending and no significant risk of serious harm was noted, as was his gambling addiction. The judge considered that this appellant must have been aware that the cash lodged was the proceeds of "very serious, organised criminal behaviour." He and his wife had "laundered" over £1.5 million in a period of some four months. Unquantified financial benefit to him was also highlighted.

[52] The judge's assessment was that a sentence of 30 months imprisonment would have been appropriate following a contested trial. He continued:

> "Considerable additional personal mitigation has been applied in your case because of the impact of incarceration on your family."

Next the judge made an allowance of one third for the guilty pleas. He imposed a dominant sentence of 20 months imprisonment in respect of the most serious offence (count 6 – converting criminal property) accompanied by lesser concurrent sentences in respect of the other two counts. The judge concluded:

> "Given the level of criminality involved, the need for retribution and general deterrence and the fact that no exceptional circumstances have been found relating to your involvement in this offending, those sentences cannot be suspended."

[53] On behalf of this appellant there is an application to this court to receive fresh material, in accordance with *Ferris*. These are identical to those involved in the equivalent application of the first appellant, QWL. For the reasons given in acceding to the latter application – see para [27] above – we make the same order in this case.

[54] This appellant's grounds of appeal in substance mirror the grounds advanced by his spouse, QWL: see para [23] above. The additional submissions advanced by Ms Smyth, of counsel, on behalf of this appellant were the following. First, the judge's assessment that a deterrent sentence was required is undermined by his attribution of undue weight to the "umbrella" figure of circa £20 million involved in this criminal operation as a whole. This, it was submitted, should not have been treated as an aggravating factor. In this context Ms Smyth highlighted that whereas the indictment had originally included a count of conspiracy this had been withdrawn subsequently (see para [4] above).

[55] Ms Smyth developed a discrete submission based on exceptional circumstances (see further infra) and further submitted that the effect of the sentencing judge's concentration on "exceptionality in the offending" was to preclude him from considering this appellant's personal circumstances at the final stage of the sentencing exercise when he addressed the question of whether the custodial term could be suspended. Finally, Ms Smyth emphasised that this offender belongs to the prosecution's Category 2.

LLZ

[56] In sentencing this offender the judge noted that during the four month period in question (a) she had deposited some £329,000 cash using her own account and (b) further cash deposits totally some £1.9 million had been "… facilitated through this account from March 2018 to March 2019, for which you have secondary liability", with the result that he was "… responsible for laundering almost £2.3 million through your account in a 15 month period." Almost £7,000 cash had been found. When interviewed by police she made no comment.

[57] The judge took into account that this appellant is the mother of two children, aged 11 and 9 years and that she is a single parent, with resulting adverse impact on

her children in the event of a custodial disposal. He noted the low reoffending risk assessment in the probation report. His assessment was that an effective sentence of 24 months imprisonment would have been appropriate following a contested trial. He continued:

> "Considerable additional personal mitigation has also been applied to your case because of the impact on your children and you will get a third discount for your pleas of guilty."

The judge opted to impose a dominant sentence of 16 months imprisonment in respect of the leading offence of converting criminal property supplemented by two lesser sentences in respect of the other two counts, all to operate concurrently.

[58] The judge next addressed the question of whether the sentence of imprisonment could be suspended, identifying the following facts and factors: the impact on the appellant's family; the assessment that she would be a suitable candidate for probation; the criminal enterprise involved laundering "huge sums of money"; her personal responsibility was in the amount of some £330,000; her account had been "facilitated for almost £2 million"; substantial sums were recovered from her home when arrested; she had "… played a willing and profitable part in the knowledge that these were the proceeds of serious organised crime"; and she was a "trusted lieutenant for those further up the organisation." Weighing all of the foregoing, the judge concluded that to suspend the term of imprisonment would be inappropriate.

[59] On behalf of this appellant there is an application to this court to receive fresh material in accordance with *Ferris*. This consists of, in the main, two statements of a lady who describes herself as this appellant's best friend and who has been looking after her two young children, girls aged 12 and 9 years respectively, since their mother's incarceration. This lady, who is Chinese, is married with three sons aged 6, 10 and 12 years. Her husband is a full time chef. These seven people are residing in a three bedroom house. These statements describe the adverse impact on the children of their mother's incarceration and the upset which they suffer when visiting her in prison. Symptoms described include sleep disturbance and withdrawal. The other element of the new material is a Home Office Notice of Intention to deport the appellant.

[60] For the reasons expressed in para [27] above, this court grants the application for reception of these new materials.

[61] This appellant's grounds of appeal for the most part mirror those of the first two appellants. Some additional submissions were developed by Mr Quinn of counsel. First, he drew attention to the consideration that there was no agreed fact relating to the prosecution representation to the sentencing judge that the monies involved in the offending were "… linked to an Asian organised crime gang … [and]

… are likely to be derived from the supply of drugs, human trafficking, prostitution and tax evasion."

[62] The sentencing judge rejected the suggestion that some of the monies to which the appellants were linked were "the proceeds of tax evasion" (at para [20]). He did not explain why. Nor did he explain why, by implication, he accepted the representation relating to the other sources. In this context Mr Quinn also drew attention to the fact that all of the appellants had pleaded guilty on the basis that they had no knowledge of the origins of the funds.

[63] It appears to us that the foregoing submissions require this court to reflect on the correctness of the judge's assessment – in para [20] – that all of the appellants attracted "additional culpability" by reason of the so-called "antecedent" offending of unspecified persons in unspecified terms. We address this specific issue at para [119]ff infra.

[64] Mr Quinn further challenged the judge's characterisation of this appellant as a "trusted lieutenant", submitting that this was incompatible with the prosecution's "group 2" categorisation on which their case had been presented to the sentencing judge and upon which this appellant had pleaded guilty. Mr Quinn's submissions further called into question the next ensuing statement in the sentencing decision:

> "You also played a willing and profitable part in the knowledge that these were the proceeds of serious organised crime."

[65] This appellant advances a discrete ground of appeal formulated as "disparity and inconsistency in approach to sentencing." This ground is formulated with particular clarity in the skeleton argument of Mr Quinn (reproduced almost verbatim):

> "For the reasons in the applicant's skeleton argument for leave, it is respectfully submitted that, in fact, she was treated less favourably and could be distinguished for the following reasons:
>
> (i) comparator co-defendants deposited large and/or comparable amounts of cash personally and one personally deposited significantly more money than the appellant.
>
> (ii) the extent of secondary liability offence for this appellant (£2,299,580) was a very significant factor in the judge discounting the notion of a suspended sentence for her - it is submitted that in view of the concessions of the

prosecution regarding the secondary liability offending for the appellant (and in fact all of the defendants facing that allegation), there was no insufficient basis for the judge treating this appellant less favourably than those lodging comparable amounts (and in one case significantly more).

(iii) the judge effectively utilised the separate permitting count (Count 9) as an aggravating feature of the appellant's personal liability offending (Count 8) but did not afford her the benefit of the doubt afforded to another defendant (GW) at para [65]

(iv) the judge afforded more weight to the personal circumstances of a co-defendant (again, GW) where the appellant's circumstances were at least as equally compelling as the co-defendants.

(v) the judge's different approach to the sentencing of SMC (primarily liable for over £185,000 and secondarily for a sum in excess of £600,00) was more favourable in circumstances where this appellant too was introduced to the offending (in circumstances of vulnerability), was open and honest and was not aware of the sums of money involved in the "secondary liability" element of her offending.

[66] The two co-accused with whom this appellant seeks to compare herself, GW and SMC, were sentenced as follows:

(i) GW: concurrent sentences of 16 months imprisonment, suspended for a period of two years.

(ii) SMC: concurrent sentences of 12 months imprisonment, suspended for a period of two years.

[67] It behoves this court to turn its attention to the sentencing of these two persons. As a preface to doing so, it is appropriate to highlight that whereas the offending of this appellant belonged to the prosecution's category 2 in the descending order of the hierarchy each of these co-accused was assigned to the fourth, and lowest, category.

[68] At the sentencing stage the prosecution presented the following case against GW. Between 24 and 29 June 2019 there were cash deposits of almost £12,000 to her account opened some eight months previously. This conduct was reflected in count 19 (converting criminal property). There was also a so-called "secondary liability",

constituted by total deposits of some £2.8m in cash in another person's account during an eight month period. This related to count 20 (entering into an arrangement to acquire criminal property). When interviewed by police he asserted that his criminal conduct was simulated by an approach from ZL and YWC involving a representation that he would profit in the amount of £300. He further admitted to having received three parcels for ZL and conveying these to her.

[69] The judge's sentencing of GW took the following path: during a period of six days he made cash deposits of some £12,000; his bank account card "… was well used extensively by others and a total of £2.8m almost was deposited between November 2018 and June 2019"; he identified two of the co-accused (ZL and YWC) in police interviews; his role was "very limited"; he "… would not have known about the vast sums of money moving through [his] bank accounts"; his account had been used as a conduit for money laundering before he made any deposits; his personal circumstances entailed living in a Simon Community Hostel where from there were positive testimonials; he benefited from positive community and church support; he had been professionally assessed as naïve and vulnerable; and conviction following trial would have attracted a sentence of two years imprisonment. With full allowance for his pleas of guilty the effective sentence would be one of 16 months imprisonment. The judge's determination to suspend the custodial period was expressed in these terms:

> "… In your case given your particular personal involvement of under £12,000, the circumstances in which you came to be involved, which was at the behest of others, your vulnerability to exploitation … [and] you would have been oblivious to the huge volumes of cash being processed through your account ... you [are] a person of good standing in the community and … your involvement in this was wholly out of character …"

[70] The prosecution case against SMC was outlined in the following terms. Between March and June 2019 he had made total cash deposits of some £185,000 in his personal account (count 30: converting criminal property). He also had a "secondary liability" involving cash deposits totalling some £612,000 which had been "facilitated" by his bank account (entering into an arrangement etc: count 31). He and QWL were arrested together. They were carrying some £20,000 cash (see count 32: possessing criminal property). He was silent during police interviews. In summary, the co-accused SMC had a so-called "primary liability" of some £185,000, representing cash deposits made during a period of some four months and a soi-disant "secondary liability" exceeding £600,000.

[71] In sentencing this accused person the judge, having decided that the appropriate punishment was 12 months imprisonment, then determined to suspend this for a period of two years. His expressed reasons for doing so were the following:

> "By sheer dint of the fact in your case that you are the next lowest amount in terms of personal converting criminal property and that there seems to be substance in the submission that you were brought into this at the behest of others, and your offending was for a relatively short period, by a very narrow margin circumstances that I consider just about exceptional just about apply. In your case and those sentences will be suspended for a period of two years."

This is a noteworthy passage in the sentencing decision as it is couched in terms which focus exclusively on the offending and encompasses nothing relating to this offender's personal circumstances.

ZL

[72] The case against this appellant outlined by the prosecution to the sentencing court was that during a period of some four months she had made cash deposits to her bank account and the accounts of others totalling just over £1m. Furthermore, she had a "secondary liability" of some £311,000 relating to cash deposits to her account made by others (the being concerned offence: count 22). On two separate occasions there was CCTV evidence of this appellant demonstrating to GW (see above) how to use the ASD machine.

[73] Upon her arrest this appellant was in possession of a note specifying a particular bank account which had received almost £70,000 in cash deposits which she tried, unsuccessfully, to destroy. A search of her residence uncovered three bank cards in her name, certain bank documents and almost £1,000 in cash (count 23: possessing criminal property). When interviewed her stance was one of outright denial and non-cooperation.

[74] The judge sentenced this appellant in the following terms. Having rehearsed what is set forth in the immediately preceding two paragraphs, he identified an aggravating factor:

> "An aggravating feature in this case is your apparent involvement of [sic] the previous defendant [GW] from June 18th 2019, whose account up to this point had only been used by others. You showed him how to deposit cash using the ASD machine."

Next, the judge noted that this appellant is aged 35, living with her partner and two children aged 9 and 12 respectively. He recorded the low re-offending risk assessment. He continued:

> "… your motivation is suggested in submissions as being to deal with gambling debts of your husband. I do not accept that this mitigation is made out."

Elaborating, the judge referred again to this appellant's interaction with GW, highlighting also:

> "… the level of your offending and the volume of money personally laundered by you …."

Next, he acknowledged the adverse impact that a custodial disposal would have on her children. His assessment was that following a contested case an effective sentence of four years imprisonment would have been appropriate.

[75] The judge continued:

> "Now, considerable personal mitigation has been applied in your case because of the impact of incarceration on your children. You will receive a full discount for the pleas of guilty entered."

The judge proceeded to impose a sentence of 32 months imprisonment in respect of the headline offence (count 21), supplemented by two shorter custodial terms regarding the other two counts. He continued:

> "Given the level of criminality involved by [sic] you, the involvement of others by you places you at the heart of this laundering operation, in terms of the lower level concession already made by the prosecution and already factored into the sentence. Because of the need for retribution and general deterrence and the absence of any exceptional circumstances relating to your involvement, there is no basis [sic] justifying a suspension of those sentences."

[76] On behalf of this appellant there is an application to the court to receive new material in accordance with the *Ferris* decision. This material consists of a statement of this appellant's mother-in-law. The statement explains that this appellant is married to the fifth of the five appellants, YWC. In summary, it outlines the prevailing family circumstances in the following terms. This lady and her husband, who are aged 65 and 71 years respectively, came to Northern Ireland in 2019. They formed part of the cohort of defendants in the prosecution, receiving suspended sentences of imprisonment. Their income consists of asylum financial support totalling £50 weekly. They take care of the two children of this appellant and the fifth appellant, a girl and boy aged 13 and 11 years respectively. The household at present includes this appellant's daughter, her husband and a girl aged 17 years.

These grandparents do not speak English, do not drive, and have no employment income. They describe the emotional impact on the children of the incarceration of their parents. For the reasons elaborated in para [27] above we accede to the application to admit this new material.

[77] Six grounds of appeal have been formulated on behalf of this appellant. Recognising the overlap of these grounds with those advanced by other appellants, coupled with the desirability of refinement, the submissions of Mr Boyd of counsel highlighted the following additional arguments specific to his client. First, he submitted that the judge's rejection of the assertion in mitigation that this appellant's husband had a gambling addiction was blunt and unreasoned. Second, he submitted that this was not consistent with the judge's acceptance of comparable explanations advanced on behalf of other accused persons, in particular YC and SMC [**sentencing transcript, paras 93 and 94**]. Third Mr Boyd highlighted that while the judge had expressly mentioned "the impact of incarceration on your children", he failed to engage with <u>other</u> aspects of this appellant's personal circumstances.

[78] Mr Boyd challenged two particular aspects of the sentencing judge's approach to mitigating circumstances vis-à-vis this appellant. First, he drew attention to the judge's unreasoned rejection of the assertion that this appellant's offending had been stimulated by her husband's gambling addiction. Mr Boyd contrasted this with the judge's willingness to accept exculpatory explanations, equally framed in the terms of bare assertion, in the case of two of the other accused (SMC – drawn into his offending by others) and his spouse, WC (exploitation). Mr Boyd's final submission was that the <u>only</u> aspect of this appellant's personal circumstances considered by the judge was "the impact of incarceration on your children."

[79] All of the grounds of appeal canvassed on behalf of this appellant must, of course, be considered in the context of her membership of "Category 1."

YWC

[80] The prosecution case against this appellant was that during a period of some four months he made cash deposits to various bank accounts, including his own, totalling some £608,000. His criminality involved no "secondary liability." There was CCTV evidence that on two separate occasions he demonstrated the use of the ASD bank machine to his mother and father (co-accused). When arrested at his home he was in possession of £7,760 cash (count 25: possessing criminal property). One month later, when arrested on suspicion of having breached his bail conditions, he was found to be in possession of £1,560 cash (count 26: possession of criminal property). He was effectively silent throughout his police interviews.

[81] This appellant was sentenced in the following terms. First, the judge rehearsed the outline in the immediately preceding paragraph. Second, he assessed the conduct surrounding the breach of bail as a "seriously aggravating factor", sufficient to warrant a consecutive sentence as regards this discrete offence. The

judge gave specific attention to his family circumstances. He expressly noted his "role at the lower level in terms of this organisation." He further acknowledged the "very short duration" of his offending. This (the judge observed) had to be balanced with the very substantial laundered amount of money, namely some £600,000. The judge's assessment was that a contested trial would have attracted an effective sentence of three and a half years imprisonment. He then stated:

> "Considerable additional mitigation personal to you has been applied because of the impact of incarceration on your children."

[82] The sentencing methodology applied was to impose a headline sentence of 24 months' imprisonment in respect of the most serious count, namely converting criminal property, a consecutive sentence of four months imprisonment relating to the further offence committed while on bail (possessing criminal property) and, in respect of the other count (possessing criminal property) a lesser custodial term to operate concurrently. The effective sentence of imprisonment was, therefore, one of 28 months.

[83] As regards those grounds of appeal advancing error of principle which have been addressed and dismissed, above there is nothing to add. The specific grounds of appeal which remain are the following:

(i) The sentencing judge erred in principle in failing to adopt the *Coleman* approach to deterrence.

(ii) The judge's approach to exceptionality was erroneous in law.

(iii) The sentence imposed on this appellant is manifestly excessive "… given the much lesser sentences imposed on co-accused involved to a greater degree."

(iv) The sentence was manifestly excessive on account of the judge's impermissible attribution to this appellant of an "elevated" role in the criminal operation.

(v) The sentencing is infected by double counting because the judge's treatment of the circumstance of breaching bail was (a) assessed as an aggravating feature and (b) punished by a consecutive sentence.

[84] Mr Turkington's submissions in respect of the first and second grounds largely mirrored those already advanced to the court by other counsel. The substance of the third ground of appeal entailed a challenge to the judge's assessment of "internal recruitment" and "involvement of others" on the part of this appellant. The essence of the fourth ground of appeal was that there can be no rational justification for a determinate custodial sentence of 24/28 months imprisonment in respect of the headline count, converting criminal property

amounting to some £608,000, when compared with the following sentences of three co-accused:

(a) LLZ: 15 months imprisonment for converting criminal property amounting to some £2.2m.

(b) GW: concurrent sentences of 16 months imprisonment suspended for two years for converting criminal property amounting to some £2.8 million.

(c) SMC: a sentence of 12 months imprisonment suspended for converting criminal property of some £800,000.

[85] The essence of this appellant's final ground of appeal relates to the prosecution of this appellant for, and his plea of guilty to, the freestanding offence of having in his possession criminal property namely cash in the amount of £1560 (count 26), which also constituted a breach of his conditions of bail. The essence of this ground is that the judge lapsed into impermissible double counting by (a) assessing this to be "a seriously aggravating feature of the general case against you" and (b) his imposition of a sentence of four months imprisonment to operate consecutively to the dominant sentence of 24 months imprisonment.

The framework of sentencing principle

Mercy in sentencing

[86] It has long been recognised in the world of sentencing that there is scope for a merciful disposal. In the jurisdiction of Northern Ireland this is illustrated in *Attorney General's Reference (No 2 of 1993)* [unreported, 28 June 1993]. In that case a suspended sentence of imprisonment was imposed on an offender who had been found guilty by jury verdict of one count of burglary and one of causing grievous bodily harm with intent, committed after he had broken into the home of and physically attacked an elderly man. His sentence was referred, unsuccessfully, by the Attorney General to the Court of Appeal. The factors which combined to merit the assessment that the suspended sentence was an appropriate disposal were the offender's age (21), his clear record and a psychologist's assessment that he was of low intelligence and would be vulnerable in a prison setting.

The Article 8 ECHR dimension

[87] Since 2 October 2000, which marked the advent of the Human Rights Act 1998, Article 8 ECHR has given rise to certain sentencing issues. This prompted the English Court of Appeal to publish a Practice Note in *R v Petherick* [2013] 1 WLR 1102. The following passages are especially noteworthy:

> "[17] We do think however that we ought to say these brief things by way of general observation. First, the

sentencing of a defendant inevitably engages not only her own article 8 family life but also that of her family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for whom a male or female defendant is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment interferes with, and often severely, the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially heart-rending effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be turned upside down by crime.

…

[21] Fifth, in a criminal sentencing exercise the legitimate aims of sentencing which have to be balanced against the effect of a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence (see section 142 Criminal Justice Act 2003) and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. Moreover, as Sachs J pointed out in the South African Constitutional Court in *N v The State* [2007] ZACC 18, in a case in which there was under consideration a specific provision in the Constitution which required the interests of an affected child to be 'the paramount consideration', not only society but also children have a direct interest in society's climate being one of moral accountability for wrongdoing. It also needs to be remembered that just as a sentence may affect the family life of the defendant and of his/her innocent family, so the crime will very often have involved the infringement of other people's family life. There is a good example afforded by the striking facts of the second defendant *Solliman* in *Kayani and Solliman* [2011] EWCA Crim 2871 at paragraph 54. He, by his crime of abduction of children, had utterly destroyed the abducted children's relationship with their mother and his well-deserved imprisonment was now to punish them again by depriving them of his own care as their otherwise unexceptional remaining parent. This present case is also

one in which article 8 rights are affected not only in the defendant and her child but in the deceased and his family.

[22] Sixth, it will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.

[23] Seventh, the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver and *M v South Africa* is again a good example. Even with the express Constitutional provision there mentioned, the South African Constitutional Court approved the result in which in one of the cases a sentence of four years was necessary upon a fraudulent mother, despite the fact that she was the sole carer for a number of children who were likely to have to be taken into care during her imprisonment - see paragraphs 43 to 44. Likewise, in HH, the majority of the Supreme Court was satisfied that there was no basis on which the extradition to Italy could be prevented of a father who was in effect the sole carer for three young children, but who had been a party to professional cross border drug smuggling. His extradition of course meant not only his imprisonment, but his imprisonment too far away from the children's home for there to be more than the most rare of contact.

[24] Eighth, in a case where custody cannot proportionately be avoided, the effect on children or other family members might (our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges."

[88] In *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338, decided just a few months before *Petherick*, which concerned the proposed

extradition to Italy of two married British citizens who had children aged 12, 9 and 3 respectively, Lord Judge CJ drew attention to the following at para [127]:

> "Long before the enactment of the Human Rights Act 1998, sentencing courts had taken account of the likely impact of a custodial sentence on children dependent on the defendant, not in his or her interests, but in the interests of the children. The history can be traced in the first and second editions of Principles of Sentencing, first published in 1970, and by the date of publication of the second edition in 1979, based on a study by Dr David Thomas of the Institute of Criminology at Cambridge University of many thousands of judgments in sentence appeals, beginning in 1962. Dr Thomas identified what he described as a "marked difference" in the approach to sentences imposed on mothers with caring responsibilities."

[89] The Lord Chief Justice observed that there were numerous examples of such cases. He continued at para [130]:

> "The principle therefore is well established, and habitually applied in practice. However, it should not obscure the reality that in the overwhelming majority of cases when the criminal is convicted and sentenced for offences which merit a custodial sentence, the innocent members of his family suffer as a result of his crimes. Although custodial sentences are sometimes avoided altogether where the level of seriousness is relatively minor and are sometimes reduced by reference to the needs of dependent children, care must also be taken to ensure that considerations like these do not produce injustice or disparity as between codefendants with different family commitments, or undermine the thrust towards desirable consistency of approach to sentencing decisions on a national basis…"

At para [131] the Lord Chief Justice adverted to the inevitability of "distressing cases where the interests even of very young children cannot prevail." Similar sentiments are expressed in the judgment of Lord Wilson JSC, who at para [150] referred to "… the conclusion, heart-rending in the light of its devastating effect upon [the father's] three children …" and at para [172]:

> "My conclusion, firm if bleak, that the public interest, not identical but no less powerful, in the extradition of [the

> father] to Italy outweighs the interference with the rights of his children."

As a footnote, this discrete aspect of the Supreme Court's decision was reached by a majority of 4/1, while the court unanimously dismissed the mother's appeal against her extradition order.

[90] In any sentencing case where Article 8 rights are engaged a structured analysis is necessary. By virtue of section 21 of the Extradition Act 2003 the court must order the requested person's discharge in any case where an extradition order would not be compatible with any of the protected Convention rights. In a sentencing context, the test is precisely the same, by reason of section 6 of the Human Rights Act. In *HH* Baroness Hale of Richmond JSC formulated the following structured approach, at para [30]:

> "… the court would be well advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in article 8.2. Third, it asks whether the interference is "necessary in a democratic society" in the sense of being a proportionate response to that legitimate aim. In answering that all-important question, it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale."

In many sentencing exercises it is the last of these questions which will assume most importance, requiring of the court a balancing exercise which may be complex and challenging. See, in this context, para [18] of *Petherick* and para [152] of *HH*, per Lord Wilson JSC.

The exceptional circumstances principle

[91] Ms Smyth drew to the attention of the court the decision in *R v Weston* [1996] 1 Cr App R(s) 297. There the Court of Appeal concluded that the sentencing judge, in the specific context of considering whether to suspend a sentence of imprisonment, had misdirected himself by adopting the approach that the search for exceptional circumstances should be confined to the offence and not extend to the offender. In thus concluding, the court endorsed its earlier decision in *R v Lowery* [1993] 14 Cr App R(s) 485, at 489:

> "… The expression 'the exceptional circumstances of the case' is of sufficiently wide construction so as to allow the court to take into account all the relevant circumstances surrounding the offence, the offender and the background circumstances."

Notably, in determining to substitute for the immediate custodial term a suspended sentence of the same duration, the court described its act as one of "compassion and humanity", driven by the "pitiable" health condition of the appellant and his spouse.

[92] Ms Smyth further submitted that the effect of the sentencing judge's concentration on "exceptionality in the offending" was to preclude him from considering this appellant's personal circumstances at the final stage of the sentencing exercise when he addressed the question of whether the custodial term could be suspended.

[93] The principle that sentencing is an art and not a science also has some purchase in this context. So too the truism that in any Article 8(2) ECHR balancing exercise opinions, one no less legitimate and reasonable than the other, may differ. This is the very essence of evaluative judgement and discretionary choice in whatever context.

[94] We take cognisance of the decisions of the English Court of Appeal in *Lowery* and *Weston*. The consideration that in those cases the court was concerned with the phrase "the exceptional circumstances of the case" in the specific context of a provision of primary legislation, namely section 22 of the Powers of Criminal Courts Act 1973, as amended, is of no moment given that the terms of this statutory provision do not differ from the formulation of the exceptional circumstances principle to be found in several previous decisions of this court. The key sentence is found in *Lowery* at page 489 and we repeat it:

> "…. The expression 'the exceptional circumstances of the case' is of sufficiently wide construction so as to allow the court to take into account **all the relevant circumstances surrounding the offence, the offender and the background circumstances.**" [Our emphasis.]

We take this opportunity to make clear that this court endorses this statement. Summarising, exceptional circumstances are clearly capable of embracing facts and factors relating to the individual offender, coupled with facts and factors relating to the actual offending. There is no disharmony between this principle and its relative that the personal circumstances of an offender will rarely rank as a mitigating factor

The offender's personal circumstances

[95] Some of these appeals engage one particular established sentencing principle, namely that an offender's personal circumstances will rarely qualify to be accorded much weight, particularly in a context where a deterrent sentence is required. However, this principle has a notional reverse side, or corollary. It has been recognised in previous rulings of this court that an offender's personal circumstances are, in certain instances, capable of attracting weight: see *R v Sloan* [2000] NICA 18 at para [9] and *Attorney General's Reference No 1 of 2006* [2006] NIJB 424 at para [40]. Once again, there is judicial discretion to be exercised.

Disparity in sentencing

[96] The legal principles to be applied in determining disparity of sentencing as a ground of appeal are well established. They are conveniently rehearsed in the recent decision of this court, *R v Coulter* [2023] NICA 8, at para [28]:

> "There is a separate body of principles charting the correct approach for an appellate court in cases [where a sentence is said to be manifestly excessive by reason of a comparison made with the sentencing of some other offender. This issue was addressed *in extenso* in *R v Stewart* [2009] NICA 4 at para [19]. At para [22] the Lord Chief Justice formulated the following principle:
>
> > 'An appellant who has been properly sentenced cannot benefit from an inadequate sentence wrongly passed on a co-defendant.'"

At para [25] it is stated:

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

The court endorsed fully the approach of Carswell LJ in *R v Delaney* [1994] NIJB 31 at page 33:

> "… the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered….

> **It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity …**"
>
> [*Emphasis added*]"

[97] In advancing the disparity of sentencing ground of appeal LLZ's two chosen comparators are GW and SMC. As our rehearsal of the governing principles indicates, the question for this court is whether the differences between the sentencing of this appellant (on the one hand) and her co-accused GW and SMC (on the other) give rise to a "glaring" disparity. This entails a self-evidently elevated threshold which will not be easily overcome in any case. It is a reflection of the appellate sentencing principle of review, or restraint, which falls to be applied in challenges to sentences advanced on the ground that they are manifestly excessive: see *Ferris* above. It simultaneously recognises the margin of appreciation available to the sentencing judge. Furthermore, it is a reflection of the entrenched principle that sentencing is an art and not a science which does not entail a mechanistic, arithmetical exercise.

[98] This court must also reflect on whether the three sentences under scrutiny lie within the notional band, or range, of sentences which the first instance judge could reasonably impose. We would add that every appellate determination of this species of complaint will entail paying close attention to the terms in which the sentencing court expressed itself. Finally, and for the avoidance of doubt, the test which this court applies is an objective one, that is to say that this species of challenge to a sentence will not be determined on the basis of an appellant's subjective sense of disgruntlement or rancour.

Deterrent sentences

[99] The concept, or theory, of deterrence and the theme of deterrent sentences have, as demonstrated above, featured in certain previous decisions of this court. One of the earlier examples is *R v Blaney and others* [1989] NI 286 which concerned the appeals against sentence by several young men who had pleaded guilty two charges of making petrol bombs, hijacking and arson of vehicles. The summary of the facts in the judgment of the Lord Chief Justice discloses a situation of comparative anarchy in certain areas of West Belfast enduring for some six days. The scale of offending included the hijacking and burning of around 100 vehicles. Having emphasised the grave social mischief posed by conduct of this kind, the LCJ stated, at p 5:

> "The very grave consequences of the appellants' criminal conduct cannot and will not be tolerated by the courts and clearly requires punishment by way of custodial sentence to deter the appellants and others from similar behaviour in the future."

[100] In a later passage the need to impose passage the need to impose "stiff and deterrent sentences" is highlighted. Notably, the sentencing judge had opted for the mechanism of suspended sentences in some of the cases. The appellate court did not criticise this. The appellants' submission that their sentences should be suspended was robustly dismissed. It is possible to identify in this judgment the origins of the sentencing theme that's where deterrent sentences are required it will rarely be appropriate to suspend the custodial term. This recurs in later decisions of this court.

[101] It is of note that in the case of *Coleman*, the sentencing aims of deterrence and retribution were debated. It is necessary to bear in mind that in every case of a suspended sentence the court must first determine that a custodial term is required. The proposition that it will be more difficult to justify suspending a custodial term in cases of more serious offending is unexceptional. The Recorder instanced several such cases in para [43] of his judgment. Correctly, he did so in inexhaustive terms. It is in such cases that, as a general rule, the suspension of the custodial term is warranted only where the court considers that there are exceptional circumstances. The further proposition to be derived from *Coleman,* namely that in cases of less serious offending the threshold of exceptional circumstances warranting suspension of the custodial term will normally not apply follows logically. But, we would emphasise, in such cases a suspended sentence will never follow as a matter of course. The breadth of the discretion which the sentencing judge must exercise in every case precludes this.

[102] In the present case the sentencing judge declared that a deterrent sentence was required. The judgment, however, does not spell out either the reasoning underpinning or the precise meaning of this declaration. What is clear is that this declaration was clearly influenced by the prosecution recitation of certain suggested aggravating features which were clearly questionable. As a matter of good sentencing practice, the underlying reasoning, and the precise meaning of declarations of this kind should be articulated.

[103] Adherence to the immediately preceding discipline will have one beneficial effect in particular. It will challenge the judge, in preparing the sentencing decision, to reflect on whether this species of declaration is appropriate. This will entail giving careful consideration to what the concept of deterrence actually means, together with the kind of case in which it should properly be given emphasis. One of the reasons for this is that, as a matter of long-standing sentencing theory, every sentence presumptively has elements of retribution and deterrence. This will be a given in the minds of those who examine or reflect on any given sentence. This truism should prompt the sentencing judge to consider carefully whether any "added value", in the form of such declarations, is appropriate as a matter of sentencing principle or good sentencing practice.

[104] The need for particular caution before resorting to this kind of declaration is reinforced by the following consideration. Sentencing theory and principle, in common with every area of legal practice, are not static. Rather they evolve in response to new and different societal circumstances and learning. They are also

responsive to the world becoming wiser as it grows older. In this context, a recent publication of the Sentencing Council of England and Wales is worthy of study. It draws together a review by certain academics of all the existing sentencing literature. Of particular interest is the chapter devoted to deterrence (see paras 4.1–4.4). This calls into question what was previously the widely accepted notion that a more severe sentence has general or specific deterrent effect. Notably, the view that suspended sentences are more likely to have deterrent effect is canvassed. The need for further research is acknowledged.

Culpability

[105] As noted in para [64] above, the phrase "additional culpability" features in the judge's sentencing decision. The relevant passage, at para [20] is in these terms:

> "… permitting their accounts to be used and then later lodging personally large sums of money cannot totally absolve a defendant of some additional culpability for what was done previously. It impacts criminality in general terms."

The words "done previously" denote the unspecified and unidentified presumed anterior criminality of unknown godfathers, or masterminds, generating the funds which were subsequently laundered by these appellants and others by the mechanism of bank account deposits and permitting their accounts to be used by other unidentified persons (the so-called "secondary liability").

[106] Phrases such as "additional culpability" and "heightened culpability" trip easily off the tongue and fall readily from the pen in sentencing decisions. What these terms signify and why and when it is appropriate to invoke them are matters which require some reflection. The starting point is that every offender who pleads guilty or is convicted is culpable ie guilty of the offence in question.

[107] However, "culpability", in certain contexts, can denote a person's responsibility for their criminal conduct. The word is sometimes employed synonymously with accountability, or reprehensibility. A clear illustration is found in the offence of manslaughter by diminished responsibility. It is the essence of this offence that the offender's responsibility was substantially impaired. Determination of the appropriate sentence requires the court to consider the offender's level of responsibility. This exercise is spelled out in some detail in the Sentencing Council publication "Manslaughter" (2018) p22.

[108] Culpability is to be distinguished from the gravity of the offending and the harm inflicted or risked by the offender's criminal conduct. Writing in 1986, the renowned criminologist Professor Andreas Von Hirsch stated the following:

> "Harm refers to the injury done or risked by the criminal act. **Culpability** refers to the factors of intent, motive and circumstance that determine how much the offender should be held accountable for his act. **Culpability**, in

> turn, affects the assessment of harm. The consequences that should be considered engaging the harmfulness of an act should be those that can fairly be attributed to the actor's choice."

("Deservedness and Dangerousness in Sentencing Policy", Criminal Law Review 1986.)

[109] As is recognised by Professor Andrew Ashworth and Dr Rory Kelly in Sentencing and Criminal Justice (7th Edition), p137, there is a close nexus between culpability and intention. Thus, the authors contrast the second, impulsive crime with its carefully planned and premeditated counterpart. Reflecting on the legal concept of recklessness, they add:

> "… The degree of culpability surely varies accordingly to what is being risked, the degree of probability of the risk materialising and the amount of calculation involved."

[110] The deliberations of Professor Ashworth and Dr Kelly at pp137-139 are a reminder of the truism that the decision on criminal liability ie the verdict of the judge or jury "… does not supply the sentencer with the fine detail necessary for an estimate of culpability" (p138). The authors' thoughtful reflections include that culpability "… is a more elusive concept than that of harm" (p137) and "a more difficult concept than it may at first appear" (p139). Recognising the centrality of culpability in the determination of proportionate sentences they highlight the need for further critical analysis (presumably of an academic and judicial nature).

Our Conclusions

[111] There are five appellants before the court in these appeals against sentence. They are members of a cohort of twelve accused persons. In addition to the cases of these appellants the court has received, belatedly, a quantity of information relating to the prosecution of ten other persons under a separate bill of indictment. These appeals have proven to be organic in nature and, following a two-day hearing, the court finds itself in possession of a significant quantity of unindexed documents. Finally, by virtue of the length of the custodial terms imposed and the impending sentencing hearing in the related prosecution it has been necessary to compile this judgment within a period of two working days.

[112] Given all of the foregoing considerations it will simply not be feasible to address every aspect of the individual appeals. Rather, the main focus of our attention will be on certain features and considerations common to all five appeals. We make clear at the outset that we identify no merit in the disparity ground of appeal espoused by certain of the appellants.

[113] The following factors, considered in combination and, we would emphasise, in no special order of priority, impel to the conclusion that the sentences of all appellants are manifestly excessive. First, the judge's self-direction that exceptional

circumstances sufficient to warrant suspending any of the sentences of imprisonment imposed must relate exclusively to the offending, to the exclusion of the offender's personal circumstances, is erroneous in law. There is no previous decision of this court formulating a principle of sentencing in these restrictive terms. As our review of the relevant jurisprudence demonstrates, this court has consistently held that in order to merit the suspension of a sentence of imprisonment exceptional circumstances, without any limitation of this kind, must be demonstrated, particularly in cases where a deterrent sentence is required. Such circumstances are clearly capable of embracing facts and factors relating to the individual offender, coupled with facts and factors relating to the actual offending. Indeed, they could potentially have a broader reach, to encompass matters such as the compassionate views of the victim or the recently published research of eg a criminologist or a psychologist. The judge's approach did not faithfully give effect to this principle. We would add that there is no disharmony between our formulation of this principle in these terms and its relative ie that the personal circumstances of an offender will rarely rank as a mitigating factor.

[114] The next consideration which we would highlight relates to the issue of aggravating features and factors. At the sentencing hearing on behalf of the prosecution it was contended that the judge should take into account the aggravating factors which we reproduce here:

> "In terms of the aggravating factors the prosecution say that the relevant factors are:
>
> (i) This was professionally organised offending by an Asian based organised crime gang exploiting a vulnerability at Barclays Bank.
>
> (ii) The overall amount of funds deposited in the entire operation was very large being approximately £20 million pounds, albeit it is accepted that the prosecution cannot prove that each defendant personally lodged the funds linked to their account card apart from the period for which CCTV evidence was available.
>
> (iii) The offending was committed over a period of time ranging from several months up to fifteen months in total and required the defendants to visit Barclays bank up to twenty times a day to deposit cash using either their own cards or the cards of other people. All defendants must have known that they were part of a larger operation although the extent of this knowledge varied.

(iv) The defendants at the centre of the offending namely Zhi Qui Dong, Yun Chen, Zhu Lin and Yang Wu Chen would have had knowledge of the extent of the entire operation, it is accepted that the other defendants may not have been aware of the full extent of the offending.

(v) The only evidence of unexplained wealth is the purchase of the BMW car by Zhi Qui Dong, whilst cash seizures were made at addresses linked to some defendants, given the nature of the offending it is difficult to establish if these funds represented cash to be lodged or the defendants' illegitimate earnings.

(vi) There is some evidence that the Chen siblings and their partners namely Zhi Qui Dong, Yun Chen, Zhu Lin and Yang Wu Chen bring others into the offending such as the parents Yanzhong Chen and Aihua He as well as Gengqi Wang and Shi Ming Chen."

[115] It is clear to this court that the judge acceded to the prosecution invitation and sentenced the appellants accordingly. Properly analysed, the elements of "Asian based organised crime gang", coupled with the suggested generation of some £20m, resolved to mere assertion. These were not agreed facts. Nor was any evidence led to establish them as facts. Furthermore, there was no attempt to lay before the sentencing court the origins or basis of either assertion. At the hearing before this court careful judicial questioning failed to illuminate in any satisfactory way either matter. It is abundantly clear from the sentencing transcript that the judge was particularly influenced by the £20m figure. The interrogation of this discrete issue by this court has established that this figure had, and has, to be treated with reservation and circumspection. The judge, however, accepted it fully and without question.

[116] It is necessary to emphasise in this context that the onus of proof on the prosecution and the criminal standard of beyond reasonable doubt apply at all stages of the criminal trial process, including sentencing. Facts can of course be agreed and such agreement can be conveyed to the court in various ways, most typically via an agreed basis of plea document. Where facts are agreed the onus and standard of proof do not arise. See Ashworth and Kelly (op cit), pp 405 – 407.

[117] In this discrete context, there were no basis of plea documents in any of these cases. This was unsatisfactory and no exculpatory explanation was offered from any quarter. Properly formulated bases of plea could well have avoided at least some of issues which have given this court cause for concern. It is timely to draw attention to

the recent decision of this court in *R v Sangermano* [2022] NICA 62 at paras [64]–[75] especially.

[118] The further consideration which troubles this court is the manner in which the issue of hierarchy of offending, or ranking, was handled at first instance. This is directly linked to the third and fourth of the prosecution list of six aggravating factors (para [115] *supra*). This issue cried out for a careful, structured approach involving no equivocation or doubt. This, however, did not occur. It is plain that the exchanges among the parties' counsel in advance of sentencing did not yield agreement. This court accepts that the prosecution characterisation of the hierarchical ranking set forth in the list of aggravating factors was challenged on behalf of certain of these appellants. This issue, however, was not addressed in the judge's sentencing decision. For the reasons rehearsed in the preceding paragraphs any doubts about this issue should have been resolved in the appellants' favour. This, however, did not occur. The consideration that a *Newton* hearing would probably have been inappropriate, the issue being one of impression and evaluative assessment and not fact is of no moment in this context. Carefully probed evaluative assessment is to be contrasted with bare assertion and undeveloped subjective opinion.

[119] This court's analysis of the foregoing issues highlights the great care which must be undertaken by the prosecution in both the planning and conduct of every sentencing hearing. Any temptation on the part of investigating police officers or prosecuting counsel to depict the offending of accused persons in the most serious light possible, in the absence of unequivocal agreement or a clear foundation in the committal papers, must be resisted. Equally, where anything untoward of this nature unfolds, it is incumbent upon defence counsel to bring it to the attention of the sentencing judge.

[120] We turn to consider the fourth of the six aggravating factors in the prosecution list. This court is prepared to accept, in the abstract, that it might have been possible for the prosecution, in its presentation to the sentencing judge, to carefully draw together the various strands of the evidence in the committal papers with a view to constructing a persuasive basis for the contention that the judge could properly <u>infer</u> the "guilty knowledge" attributed to the four accused persons named in this passage, who included ZL and YWC. This exercise, however, was not undertaken. In these circumstances it was incumbent upon the judge to view this suggested aggravating factor as a matter mainly of assertion, or purely subjective opinion or, indeed, speculation, to be mindful of the absence of any relevant agreed fact or facts and to apply the burden and standard of proof. The judge, however, did not do so.

[121] The theme of the fifth of the prosecution's six aggravating factors is that of "unexplained wealth." The terms of this subparagraph demonstrate beyond peradventure that it had no place whatsoever in this list. It could well have tainted the judge's thinking. We repeat all that is stated above.

[122] Turning to the sixth of the prosecution's six aggravating factors, the words attracting the most attention are "some evidence." The judge evidently accepted this mere assertion without question or qualification. Furthermore, there was no interrogation of the quintessentially vague words "such as." Absent any relevant agreed facts this contention could only be properly advanced by reference to compelling evidence in the committal papers. This required the kind of rigorous approach specified at paras [119]-[121] above. However, his exercise was not undertaken.

[123] This court also has reservations about the judge's approach to what he described as "additional culpability" see para [106] ff supra. This concern has two elements. First, the judge did not explain what this meant, and, as demonstrated above, the meaning of this term is not fixed and, of course, is context specific. Second, as we have already highlighted, the foundation upon which the judge was building for this discrete purpose is, duly analysed, both flimsy and dubious. Independently, the assessment of incompatibility with burden and standard of proof also arises in this context.

[124] We summarise our concerns in these terms:

(i) The judge's self–direction on the issue of suspending any of the sentences of imprisonment was erroneous in law as it confined the exceptional circumstances which could be considered to the offending itself, to the exclusion of the offenders and their personal circumstances.

(ii) The aggravating factors upon which the sentencing was carried out contained some highly prejudicial assertions which were neither agreed nor proven.

(iii) The prosecution portrayal of the roles and knowledge attributed to the appellants was inconsistent and had no clear evidential foundation.

(iv) The roles/rankings which the judge attributed to certain appellants were neither agreed nor proven. The judge did not resolve these contentious issues and sentenced on the bases most unfavourable to each appellant.

(v) The judge's approach to the foregoing issues was incompatible with the burden and standard of proof.

(vi) This court has significant reservations about the sentencing court's adoption of certain aggravating factors for the reasons explained above.

(vii) The judge's determination that deterrent sentences were required has no sustainable basis.

(viii) For the reasons explained this court has reservations about the sentencing court's approach to "additional culpability."

[125] All of the considerations addressed in paras [106]–[125], considered together, point to the assessment that the sentencing of all five appellants involved the imposition of manifestly excessive terms of imprisonment. It is not necessary for this court to embark on the purely theoretical exercise of considering whether in any of these five cases the sentence of imprisonment should have been suspended for the simple reason that all five appellants have, at this juncture, been in sentenced custody for some 7-8 months (equating to a determinate sentence of 14/16 months imprisonment).

[126] The further ingredient in the manifestly excessive sentence assessment is the new material received by this court. In the cases of QWL and LLZ, mothers of young children, all of this points inexorably towards the imposition of the most compassionate sentence reasonably feasible, consistent with the sentencing principles adumbrated above.

Sentencing outcomes

[127] Leave to appeal is granted in all five cases and the appeals succeed to the following extent:

QWL: This appellant is aged 42, is the wife of LQY and they have two young children, aged 11 and 6. She was sentenced to 24 months, imprisonment. Her EDR is 27 June 2023. As of today, she has served a determinate custodial sentence of imprisonment notionally expiring on 11/02/23. Her sentence is reduced to 15 months (ergo, time served within 48 hours).

LQY: We reduce his sentence from 20 months to 15 months (ergo, time served).

LLZ: This appellant is aged 38 and the mother of two daughters aged nine and we reduce her custodial sentence from 16 to 10 months (ergo, time served).

ZL: Her EDR is 20 October 2023. We reduce her determinate custodial sentence of 32 months imprisonment to 24 months.

YWC: This appellant's EDR is 9 August 2023. We reduce this appellant's determinate custodial sentence of 24 months to 16 months, to which must be added the four-month term of imprisonment imposed consecutively in respect of count 26. We would observe that the sentencing judge's determination that a consecutive sentence was appropriate is unassailable.

Epilogue

[128] We would encourage those who read this judgment to resist the temptation of excessive parsing and analysis. There are at least two reasons for this. First, this court has determined to give effect to the principle of mercy regarding the two

mothers concerned, QWL and LLZ. This is not applicable to any of the other appellants. Second, the principle that sentencing is an art and not a science resonates So too the truism that in any Article 8(2) ECHR balancing exercise opinions, one no less legitimate and reasonable than the other, may differ. This is the very essence of evaluative judgement and discretionary choice in whatever adjudicative context. It follows that arithmetical, or comparable, interrogation of this judgment would be inappropriate. Much of our analysis highlights the real risk of overlap and double counting in sentencing exercises. Furthermore, all parties must take great care in their formulation of suggested aggravating and mitigating facts and factors, disregarding matters which are neutral ie. No-aggravating and non-mitigating. Any agreement between prosecution and defence on these issues is not binding on the sentencing judge, who must make their own evaluation.

[129] We would make two concluding observations. First, the issues, arguments, and considerations before this court differed in certain significant respects from how the appellants' cases were presented to the sentencing judge. This is a comment and not a criticism, in a context where this was a sentencing exercise of a challenging and complex nature and one in which the judge clearly invested much care and effort. Second, the framework of these appeals in their final form, which was shaped, in part, by this court's interventions at the case management stage and further interventions at the substantive hearing, differed significantly from those which were before the single judge.