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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT AT LONDONDERRY

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BETWEEN:

THE KING

v

ROBERT GILLESPIE

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Mr Kieran Mallon KC and Mr J Brolly (instructed by MacDermott & McGurk Solicitors) for the Appellant
Ms Catherine Chasemore (instructed by the Public Prosecution Service) for the Respondent

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Before: McCloskey LJ, Horner LJ and McFarland J

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

Introduction

[1] Leave to appeal having been refused by the single judge, Robert Gillespie ("the Appellant") renews his application before the plenary court. By this application he seeks to challenge the sentence imposed upon him on 26 August 2022 in respect of the following nine offices: possession of a firearm with intent to endanger life; dangerous driving; arson; arson, being reckless as to whether life would be endangered; criminal damage; threats to kill; failing to stop at the scene of a damage only accident; failing to remain at the scene; failing to report the accident to the police. All of these offences occurred on the separate dates of 24 June 2018 and 24 July 2018 and entailed quite separate transactions.

[2] The appellant's conviction in respect of the first of these offences followed a contested trial. As regards the other seven offences he had pleaded guilty.

[3] For these convictions the appellant was punished by the imposition of a commensurate sentence of 12 years' imprisonment, divided equally between custody and licensed release.

The Prosecution Case

[4] The prosecution case was that the offences were the manifestation of a campaign of violence and intimidation perpetrated by the appellant, firstly, against a lady ("M") with whom he had previously been in a romantic relationship. The injured party had terminated the relationship upon beginning a new relationship with a different man ("R"), who became the second main injured party. The previous relationship had been of some ten years duration, during which period the appellant lived the outward life of a married man with children. Those adversely affected by the appellant's offending extended beyond M and R to include her three children, two of whom were young teenagers at the material time. The prosecution case was that the appellant's offending had been motivated by a desire to destroy the new relationship by intimidation of M and R.

[5] The appellant's offending occurred on two dates separated by approximately one month. The offences of arson, criminal damage and threats to kill were committed on the first date, 24 June 2018. On this occasion, during hours of darkness, the appellant went to M's house, where R's car was parked. He set fire to the vehicle, destroying it completely. On the gable wall of the house, he painted the words "drug dealer scum", which were directed to R. He further posted through the letter box a note, accompanied by a bullet, warning R "next one is for your head", describing him as "dead man walking" and ordering him to "get out, stay out." During the weeks which followed the appellant maintained contact with M, feigning upset and concern.

[6] The six offences belonging to the second group were all committed on a single date one month later, 24 July 2018. At around 7.00am R was driving home from his nightshift, through a residential area. A vehicle driven by the appellant ploughed into the side of R's car. R observed that the attire of the appellant included a scarf, a balaclava and sunglasses. The appellant emerged from his vehicle brandishing a sawn-off shotgun and approached R's vehicle, discharging the weapon and damaging the vehicle in consequence. R sped away from the scene, chased by the appellant's vehicle. A further shot was discharged.

[7] R reached a police station, in a state of terror and shock. The appellant drove to a different location where he set his vehicle on fire, simultaneously damaging an adjacent parked vehicle. He proceeded at once to the police station where R was being interviewed. His pretext for doing so was that M had sent text messages about the preceding events to him. He went there on the pretext of providing support and comfort to R and M. Arrested two days later, the appellant provided a bogus story to the police.

[8] From the time of his arrest through to his arraignment the appellant's stance was one of outright denial. His pleas of guilty to the eight charges noted above were made upon rearraignment, some four years following the dates of his offending. The jury's guilty verdict in respect of the ninth offence (the first in the sequence above) was made following a nine-day trial. The jury acquitted him of the first count on the indictment, namely attempted murder.

Sentencing

[9] The appellant was sentenced some two months following termination of his trial. In his sentencing of the appellant the judge noted the following evidence in particular: first, the *ex post facto* report of a primary care social worker recording the appellant's self-reported claim of a single incident of suicidal ideation some three months before his offending and suggesting an "adjustment reaction"; second, another *ex post facto* report, compiled by a consultant psychiatrist opining that the appellant "… has been under significant stress in recent times in relation to chronic responsibilities [and] is currently suffering from a moderately severe depressive episode [and] is not actively suicidal"; third, the pre-sentence report containing the appellant's self-reporting of having been "in a dark place" and "breakdown" at the material time, noting his expressed remorse and assessing that he did not present a significant risk of serious harm to the public; and, fourth, some testimonial-type material favourable to the appellant.

[10] The judge, noting that the most serious of the appellant's offences was that of possessing a firearm with intent to endanger life, took cognisance of, and applied, the criteria formulated in the decision of this court in *R v O'Keefe*. Next, the judge characterised the appellant's offending as "both deliberate and premeditated." He then acknowledged the absence of any criminal record. Developing his assessment, he highlighted the factors of "considerable planning, some forensic awareness and a great deal of premeditation." He described the sawn-off shot gun used as "a lethal weapon", capable of causing death by a single pellet. He also highlighted various features of the circumstances prevailing on the two dates in question. The judge doubted the appellant's professed remorse, noting also both the lateness and limited nature of his guilty pleas.

[11] Focusing on the last mentioned issue the judge stated:

> "As far as credit is concerned the defendant is not entitled to any at all. He did enter pleas of guilty to a number of counts a week before trial but this was four years after the event and until then he had persisted in denying all matters. The trial proceeded in relation to the two most significant counts. The defendant made the case throughout the trial that he was only trying to scare [the new male partner] not to kill him. The jury thought otherwise."

As the submissions of Mr Mallon KC demonstrated this appeal involves an intensive focus on this passage.

[12] The Judge's sentencing methodology was the following. With regard to the three offences committed on the first date, the device of concurrent sentences was employed, giving rise to an effective sentence of three years imprisonment. With regard to the six offences committed on the second date, the same approach was employed, with the imposition of a sentence of nine years imprisonment in respect of the headline offence – possession of a firearm with intent to endanger life – to be served consecutively to the aforementioned three year period, with lesser concurrent sentences for the remaining counts. In this way a total effective period of 12 months' imprisonment, with the division noted in para [1] above, was imposed.

This Appeal

[13] The grounds of appeal as formulated originally may be described as creative and wide ranging. In essence, their focus was on the judge's approach to starting point, mitigating factors, delay and guilty pleas. Mr Mallon KC having responded sensibly to judicial encouragement at a pre-hearing review listing, the grounds were ultimately refined to the following two complaints:

(i) Error of law in allowing no credit for the guilty pleas,

(ii) Inadequate consideration of the conduct of the defence case.

The two grounds are overlapping.

[14] Bearing in mind the terms in which the judge expressed himself, juxtaposed with the written sentencing submissions of counsel for the appellant, the judge was plainly alert to the absence of any terrorist ingredient in the appellant's offending. Furthermore, his approach reflected the fact specific nature of the offending and does not betray any error of a "sentencing straitjacket" kind.

[15] The judge clearly took into account the mitigating considerations advanced on behalf of the appellant. He was sceptical about the remorse which the appellant professed to have. Further, the judge was clearly alert to the issue of delay: some four years had elapsed between the dates of the offending and the trial.

[16] The appellant's limited pleas of guilty could not have been more heavily delayed. They emerged only upon re-arraignment. Furthermore, they did not operate to prevent a trial. The necessity of M, one of the principal injured parties, having to give evidence was obviated only at an acutely late stage. Furthermore, R was not spared the ordeal of giving evidence. It is the clear view of this court that this was far from unavoidable. When one considers, in tandem, the amended defence statement, the schedules of agreed facts and R's description of the series of

events on the second of the dates of the offending, we consider Mr Mallon's submission that there was no realistic way of avoiding R having to testify unsustainable. This requirement was a direct consequence of a trial strategy which the appellant adopted by choice and not compulsion. Furthermore, the defence statement did not materialise until after the trial had begun.

[17] We are also unpersuaded by Mr Mallon's further submission that the trial which eventuated was shaped by, *inter alia*, the appellant's effective acceptance of his guilt in respect of the second count. This is confounded by his failure to plead guilty to this count, another trial strategy. In addition, this failure cannot be justified by Mr Mallon's suggested explanation, namely that (a) the jury might become confused by the different intents to be proven in respect of the first and second counts and (b) a plea of guilty to the second count would have given the prosecution a "free run" regarding the first count. The proper analysis in this court's view is that the appellant exposed himself to certain risks in adopting these strategies. One specific risk was that in sentencing at a later stage he would incur the disfavour of the court on a series of issues surrounding the lateness of his limited pleas, his failure to plead guilty to the second count and the consequences which all of the foregoing had for both injured parties and otherwise.

[18] Thus, while the trial which eventuated was of a refined and focused kind neither this consideration nor its outcome entails anything for which the appellant can claim credit as regards sentencing. His case in this respect derives no support from the fact sensitive decision of this court in *R v McGuigan* [2014] NICA 78. Furthermore, we draw attention to the demonstrably narrow terms in which the principle invoked was formulated by the court at para [42]:

> "The manner in which a defendant conducts his defence can, in certain limited circumstances, result in a degree of mitigation (see **R v Katab** [2008] EWCA Crim 541)."

We would add that the fact sensitive nature of *Katab*, elaborated particularly at p533 of the report, also warrants careful attention.

[19] On the specific issue of credit for guilty pleas, the starting point is Article 33 of the Criminal Justice (NI) Order 1996:

> "**Reduction in sentences for guilty pleas**
>
> 33.—(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

> (b) the circumstances in which this indication was given."
>
> (2) If, as a result of taking into account any matter referred to in paragraph (1), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so."

It is both appropriate and timely to formulate in unequivocal terms the two propositions which flow from Article 33:

(i) Where an offender has pleaded guilty the sentencing judge must, as a matter of obligation, take into account the stage of proceedings when the offender indicated his intention to do so and the circumstances in which such indication was given.

(ii) If, having discharged this obligation, the sentencing court decides to make an allowance for the guilty plea in the sentence which it proceeds to impose it must state in open court that it has done so.

We consider it impossible to distil from Article 33 any right to credit enjoyed by an offender who has pleaded guilty. The critical word in this context is "If." The sentencing judge has been endowed by the legislature with a discretion which has two elements, namely (a) whether to make a favourable allowance for a guilty plea and (b) if so, to what extent.

[20] We are unaware of any previous decision of this court or of any decision binding on this court undermining the analysis in the immediately preceding paragraph. On the contrary, we consider it entirely consonant with the recent decision of the Supreme Court in *R v Maughan* [2022] UKSC 13 at paras [42]–[44]. We recognise, of course, that as indicated in *Maughan*, para [12], sentencing policy in this jurisdiction is devised both by statute and certain decisions of this court.

[21] It follows that we reject Mr Mallon's submission that the judge impermissibly penalised the appellant for contesting part of the indictment. The unspoken premise in this ground of appeal is the fallacious one that the judge was bound to make some favourable allowance for the limited guilty pleas. There is no principle of sentencing law to this effect.

[22] The principles set out in the recent decision of this court in *R v Ferris* [2020] NICA 60, at paras [41]–[42] must also be reckoned:

> "[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 p, 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."

[23] Giving effect to the principle of review, or restraint, this court must recognise the margin of appreciation available to the sentencing judge – who was also of course the trial judge – in his evaluation of the issue of credit for the appellant's limited guilty pleas. While other judges might have made some limited allowance in this respect, it was clearly open to the trial judge to decline to do so. The appellant chose to maintain a blanket denial of guilt throughout almost the entirety of the period under scrutiny and, when he made the later choice of altering his stance, he did so in limited terms which did not avert the need for a lengthy trial with all of its implications, in particular the prolonged stress and distress of the injured parties, and resulted in his conviction in respect of one of the most serious counts on the indictment.

[24] Further to all of the foregoing, this court considers that there are three particular considerations worthy of emphasis. The first, highlighted by the single judge, is that the sentence of nine years imprisonment for the headline offence – the firearms offence – is three years below the lower point in the range identified in *R v Haslett* [2004] NICA 28 and *R v McGuigan* (supra). Second, there is no suggestion in the grounds of appeal of any failure by the sentencing judge to have regard to something of a material nature. Finally, there is no question of any impermissible factor intruding.

Conclusion

[25] Standing back and taking the appellant's case at its zenith, this court is satisfied that the impugned sentence withstands the vigorous challenge which has been mounted. In agreement with the single judge we refuse permission to appeal and affirm the sentence in all respects.