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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **21/06/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

GLENN RAINEY, MARK RAINEY AND WILLIAM HUNTER

Mr S Devine (instructed by McConnell Kelly & Co Solicitors) for Glenn Rainey
Mr T McCreanor (instructed by McConnell Kelly & Co Solicitors) for Mark Rainey
Mr S Mullan (instructed by Sheridan & Leonard Solicitors) for William Hunter

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Before: Treacy LJ, O'Hara J and Kinney J

DISPARITY OF SENTENCING
&
SERIOUS CRIME PREVENTION ORDERS

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

Introduction

[1] This is an appeal, with leave of Fowler J, against custodial sentences imposed on 28 September 2022 and subsequent Serious Crime Prevention Orders (SCPO) imposed by HHJ Greene KC ("the judge") in respect of a number of drug offences set out below. The appellants are brothers Glenn Rainey and Mark Rainey and their co-accused, Mr William Hunter. Glenn and Mark Rainey were both sentenced to a total of four years' custody and made subject to a SCPO. Hunter was sentenced to a total of three years and four months' custody and made subject to a SCPO.

[2] The appellants were returned to Antrim Crown Court on 5 May 2022. At arraignment on 28 September, each defendant pleaded guilty. Glenn and Mark Rainey are appealing the custodial element of their sentence as well as the

imposition of the SCPO, while Hunter seeks to appeal the imposition of the SCPO only.

[3] We set out in the table below the sentences imposed in respect each of the appellants:

Glenn Rainey

Count	**Offence**	**Plea**	**Sentence**
1	Being Concerned in the Supply of Class A Drugs (Cocaine) – 22/9/20 – 5/11/20	Guilty	4 years' custody
2	Being Concerned in the Supply of Class B Drugs (Cannabis) – 22/9/20 – 5/11/20	Guilty	30 months' custody
7	Possession of a Class C Drug (Diazepam) – 23/8/21	Guilty	12 months' custody
8	Possession of a Class C Drug (Pregabalin) – 23/8/21		12 months' custody
21	Possession of a Class Drug (Cocaine) – 23/8/21	Guilty	12 months' custody
Total			4 years' custody – split 50/50

Mark Rainey

Count	**Offence**	**Plea**	**Sentence**
9	Being Concerned in the Supply of Class A Drugs (Cocaine) – 19/9/20 – 28/10/20	Guilty	4 years' custody
10	Being Concerned in the Supply of Class B Drugs (Cannabis) – 19/9/20 – 28/10/20	Guilty	30 months' custody
			Serious Crime Prevention Order imposed
Total			4 years' custody – split 50/50

William Hunter

Count	Offence	Plea	Sentence
11	Being Concerned in the Supply of Class B Drugs (Cannabis) – 1/6/20 – 15/10/20	Guilty	3 years & 4 months' custody
12	Being Concerned in the Supply of Class A Drugs (Cocaine) – 1/6/20 – 15/10/20	Guilty	30 months' custody
13	Being Concerned in the Supply of Class C Drugs (Pregabalin) – 1/6/20 – 15/10/20	Guilty	18 months' custody
15	Possession of a Class B Drug (Cannabis) – 15/10/21	Guilty	6 months' custody
22	Possession of a Class B Drug (Cannabis) – 23/8/21	Guilty	6 months' custody
			Serious Crime Prevention Order imposed
Total			3 years', 4 months' custody – split 50/50

Factual background

[4] Fowler J set out the factual background in his ruling on leave which we have largely adopted. The prosecution case was based primarily on the forensic interrogation of the applicants' mobile telephones. Many messages were exchanged between the applicants, indicating drug dealing. Significantly, Glenn Rainey engaged 'runners' on occasions to facilitate dealing.

Glenn Rainey

[5] On 5 November 2020, a search was carried out of Glenn Rainey's home address. Drugs, drug paraphernalia, £2000 cash and an iPhone were found and seized by police. An analysis of the iPhone was carried out, and messages were found on the phone, which suggested it was used for drug dealing.

[6] On 23 August 2021, police carried out another search of Glenn Rainey's home. Police seized more drugs, drug paraphernalia and SIM cards. He was arrested and interviewed by police. Effectively, he answered no relevant questions in interview and provided no assistance to the police in their investigation.

Mark Rainey

[7] On 27 October 2020 at 22.15 hours, police stopped a Skoda Superb driven by Mark Rainey and with William Hunter as a passenger. On searching Mark Rainey, he was found to possess a small quantity of cannabis. A further small amount of cannabis was seized from within the vehicle. An extendable baton was found under the driver's seat, and a mobile telephone was recovered. Mark Rainey admitted possession of the cannabis. All occupants denied ownership of the baton or phone. However, the phone rang while the police were there, and the caller asked for "Mark" and requested "…more of that stuff brought over mate."

[8] The phone was forensically interrogated. Telephone numbers attributable to "Buff" (William Hunter) and "Glenn" (Glenn Rainey) were found in the telephone contacts. There were also lists of names and numbers stored in the telephone, giving the appearance of dealer lists and messages indicative of drug dealing.

[9] On 23 August 2021, Mark Rainey's home was searched, he was arrested and taken to Musgrave PSNI station for interview. He essentially did not comment on police questions when interviewed and provided no assistance to the police in their investigation.

William Hunter

[10] On 15 October 2020, Hunter's home was searched, and police recovered cannabis, drug paraphernalia, cash, an air rifle, and an iPhone. Hunter was not arrested at this time. However, the iPhone was taken and examined by police. A forensic download provided evidence of messages relating to dealing in class A, B and C drugs, including cocaine, cannabis, diazepam and pregabalin. Some messages referenced significant amounts, including a deal worth £2000 for cannabis.

[11] On 23 August 2021, a further search of Hunter's home resulted in a total of 89.21g of cannabis being seized by police together with cash. Hunter was arrested and interviewed. He claimed that the money in his house in October was for re-decorating. He denied lists with names and numbers related to drug dealing and did not know what 'deal bags' found in his house were used for. Scales recovered, he claimed, were to check he was not getting ripped off when buying personal use drugs. He refused to answer many questions about the iPhone seized and specific messages located on it. He denied the supply of drugs but accepted that he was a habitual cannabis user and an infrequent cocaine user. In the interview, he declined to answer questions about his relationship with his co-accused.

Previous convictions and pre-sentence report conclusions.

Glenn Rainey

[12] Glenn Rainey has nine previous Magistrates' Court convictions, including possession of a Class A drug with intent to supply and simple possession on 10 August 2015, for which he was sentenced to two months suspended for two years. He did not breach this suspended sentence. However, he awaits sentence, following a guilty plea, in the Crown Court regarding other drug offences for which he was on bail when he committed the present offences.

[13] In the pre-sentence report ("PSR") dated 15 August 2022 he is described as follows. Glenn Rainey is a 37-year-old male who lived with his mother before his sentence. He has, for a period, lived under threat in his local community and, in the past, has been subjected twice to punishment shootings. He reports being unemployed for ten years due to poor physical and mental health. He claims to be addicted to cannabis and misuses Lyrica (pregabalin) and cocaine daily when in the community. He appears to have settled well into the prison regime, remaining drug-free and working as an orderly on the enhanced regime. The applicant reports that the relatively recent death of his father is significantly impacting his mental health.

[14] The PSR reports Glenn Rainey claiming he was supplying a small amount of drugs to fund his habit. PBNI regarded this as minimising his offending.

[15] He is assessed as having a high likelihood of reoffending but does not pose a risk of serious harm to others.

Mark Rainey

[16] Mark Rainey has no convictions, but he, like his brother, was on bail at the time of the commission of these present offences. He has pleaded guilty to the offences for which he was on bail and awaits sentence in the Crown Court.

[17] In the PSR dated 16 August 2022, Mark Rainey is described as follows. A 42-year-old man presently remanded in HMP Maghaberry. While initially struggling to settle in prison, he is now an enhanced prisoner. He is married and in a stable relationship with his wife of over 22 years. They have four children aged 6 to 16 years old. He appears to have been in full-time employment up to the outbreak of the covid pandemic. He describes moderate alcohol consumption but has increasingly abused drugs, including cannabis and cocaine. This has been particularly so since his father's death, which remains an unresolved trauma for him.

[18] The PSR notes Mark Rainey's acceptance of his offending and remorse for his actions. It also mentions his impulsivity and lack of consideration of the consequences of his actions. He suggests his offending as primarily to fund his misuse of drugs.

[19] The PSR assesses Mark Rainey as presenting a medium likelihood of reoffending and not posing a risk of serious harm to others.

William Hunter

[20] William Hunter has a total of 118 previous convictions, 12 concerning drug offences, including possession with intent to supply offences. His first drug conviction was in the Crown Court in 2007, when he was fined £50. However, his drug offending escalated. In 2014 he was sentenced to a determinate custodial sentence of one year four months, and made subject to a SCPO for possessing criminal property, concealing criminal property, attempted possession of class A with intent and simple possession of a class B drug. Hunter breached his SCPO on 25 April 2017 and was sentenced to three months' custody. He was further sentenced for failure to comply with his SCPO on 3 October 2017 and given a one-year Probation Order. He was again before the Crown Court for drug-related offences in 2018, which included possession with intent to supply and possession of firearms. He received a total determinate custodial sentence of 18 months.

[21] In the PSR dated 15 August 2022 Hunter is described as follows. He is a 34-year-old man and is presently an enhanced prisoner in HMP Maghaberry. Before sentence, he had resided with his long-term partner for 18 years, and they have three children. He has a longstanding history of substance misuse and suffering from PTSD, having witnessed his father being subjected to a punishment shooting and his friend dying in a blast bomb.

[22] As also suggested by his co-accused, he claims his offending is essentially selling drugs to fund his cannabis addiction.

[23] Hunter is assessed by probation as possessing a high likelihood of reoffending and not posing a significant risk of harm, notwithstanding his previous violent offence convictions.

Grounds of Appeal

[24] There is considerable overlap in the appeals lodged in respect of Glenn and Mark Rainey; they argue that:

(i) the custodial sentence imposed was manifestly excessive; and

(ii) exhibits a marked disparity compared to the sentence imposed on their co-accused Hunter.

[25] Mark Rainey and Hunter submit that the imposition of the SCPO was:

(iii) unnecessary; and

(iv) disproportionate.

All three applicants take issue with the imposition of specific clauses in the SCPOs as being disproportionate.

Consideration

[26] The prosecution opening note furnished to the sentencing judge details the messages that were retrieved from the telephones connected with this investigation and which form the basis of the most serious charges. In the case of Glenn Rainey ("GR"), for a period of approximately six weeks there are a large number of messages to and from him which show what the prosecution quite properly characterised as a "persistent and deep-rooted involvement in the supply of cocaine." There is no dispute that this appellant had a significant role in the supply of a substantial commercial quantity of class A and class B drugs. This is accepted at para [11] of the skeleton argument submitted on his behalf.

[27] It was submitted on GR's behalf that he was relatively close to the bottom of the scale which is reserved for those who supply a small amount of unlawful drugs without a commercial motive. This submission is quite unrealistic and impossible to reconcile with the scale of activity disclosed by the retrieved phone messages.

[28] The text messages reveal him boasting to his own brother about his success in selling cocaine and its financial rewards. We reject the submission that the messages reflect a degree of bravado. Rather, the messages to his brother convey his proud assessment of his success and the substantial financial benefit he received from the sale of cocaine.

[29] We also reject the submission that the judge sentenced on matters outside the indictment period. The judge made it explicitly clear that he was only sentencing in relation to the indictment timeframe.

[30] The judge correctly observed that the evidence showed that GR and his co-accused were well established in organised supply at the start of the indictment period. Further, the preferred use of 'Snapchat' over messenger – with the benefit that Snapchat automatically deletes messages after a short period of time - has the consequence that the retrieved messages are highly unlikely to reveal the full extent o his involvement in the supply of drugs.

[31] As to the submission that there were no trappings of wealth, we make the following points. First, the message to his brother discloses his gloating about him always having money and going on holidays everywhere. Secondly, he was found in possession of a substantial amount of cash. Thirdly, safe houses were used to put distance between himself and incriminating items.

[32] In relation to the significance the applicant invests in the use of the word wholesale/wholesaler in the judge's remarks, we reject that submission. We agree with the prosecution that the significance being attached to the word 'wholesale' or 'wholesaler' is a distraction. The appellant complains that the judge had determined that the appellant was a 'wholesale' supplier of Class A drugs and that this is not an accurate, fair or lawful way in which to regard him. The prosecution acknowledge that the term 'wholesale' or 'wholesaler' did feature heavily during exchanges between all parties and the judge at an earlier hearing. However, the sentencing judgment clearly reflects that the judge took on board the submissions made. Specifically, in his sentencing remarks he stated:

> "…my assessment of the available evidence in respect of Glenn Rainey is that he was significantly involved in the supply of class A and B drugs and there is an inference on the available evidence before me to be drawn that that supply also included quantities indicative of wholesaling, albeit I accept to a lesser extent than the evidence is in support of him being a retailer. The inference from all the messaging is that he would have been making substantial profits from his involvement of supplying. Even if one were to look at it solely on the basis of being a retailer, he was a significant player in that regard – that is significant in terms of drug dealing as a connotation. In my estimate, it was very significant bordering on if not well into what can be properly described as a leading role."

[33] We agree that this assessment is unimpeachable on the basis of the evidence. Specifically, as the prosecution pointed out, the relationship with 'Alana' was one within the definition of a 'wholesaler' in that, by November 2020, it is clear the appellant was providing cocaine to her for it to be sold onto other people (whom he complains are not paying her quickly enough). However, it is accepted by the prosecution that the evidence contained more references to direct supply to customers or the use of runners to facilitate this direct supply. Contrary to the appellant's argument the judge did not simply determine he was a 'wholesale' supplier of drugs. Rather his assessment is much more nuanced than the applicant's submission would allow and demonstrated that he had reflected on the position and taken on board the defence submissions.

[34] Whatever way one looks at it, he had a significant role in the supply of a substantial commercial quantity of class A and B drugs. This was organised crime supplying drugs into East Belfast.

[35] He and his co-accused Mark Rainey ("MR") were on police bail at the time following an investigation into the supply of cocaine involving a total of 14 defendants and both have now pleaded guilty to offences of being concerned in the supply of cocaine in relation to that investigation and await sentence on 22 June 2023.

[36] GR also has a previous conviction for possession with intent to supply cocaine the details of which are summarised by the PPS as follows:

> "10. This Appellant also has a previous conviction for an offence of possession with intent to supply cocaine. The facts relating to this offence were that the appellant was seen by police trying to discard two small bags of cocaine. Subsequent to this, a search of his home address was carried out and 8.42 grams, 12.39 grams of benzocaine and £1,400.00 cash were located."

[37] As far as mitigation is concerned the trial judge referenced and took into account the personal circumstances of GR and his co-accused, MR. The matter of the weight to be given to mitigation is a matter for the assessment of the trial judge bearing in mind the relevant principles that sentences for supply of class A and B drugs are deterrent in nature and that matters of personal mitigation carry little weight. We agree that it would have been wrong for the trial judge to have departed from well-established sentencing principles by attributing significant weight to personal mitigation.

[38] The appellants also make the case that the starting point of six years was too high. In making that submission they refer to the well-known case of *R v Hogg & Ors* [1994] NI 258 contending in effect that it imposes a rigid ceiling of four or five years for the supply of appreciable commercial quantities of class A drugs. We reject that submission. A judge is entitled to lower or increase the guideline (and it is only a guideline) starting point depending on the facts of the case. We agree, as the prosecution contend, that the facts point to the persistent supply of cocaine throughout the indictment period for commercial gain with aspects of sophistication and planning - including the use of runners to carry out deliveries, a safe house to store any stock, the use of Snapchat to avoid detection and the use of the female 'Alana' to sell to other people. Furthermore, as noted earlier, both were on police bail at the time of these offences for earlier offences of being concerned in the supply of cocaine to which they have now pleaded guilty. We agree that on the facts of this case a starting point of six years is far from manifestly excessive. As MacDermott LJ stated in *R v McIlwaine* [1998] NICA (11 March 1998):

> "…those who offend in this way will on conviction receive lengthy custodial sentences. The public is entitled to be protected from the evil of drug abuse and it is the duty of judges in this jurisdiction to make it clear that they will seek to discourage anyone from participating in that trade."

[39] To similar effect in *R v Darragh & Anor* [2001] NICA 3, Carswell LCJ observed that in relation to a professional drug dealer who supplied drugs for consumption by others for his own profit:

> "We have often categorised such offences as "a great scourge on the community" and made it clear that those who commit them will receive lengthy custodial sentences."

[40] As to MR, we agree that, like his brother, the messages show a persistent and deep-rooted involvement in the supply of cocaine frequently at levels of high purity. Although MR did not have any relevant previous convictions, he was on police bail at the time for activity of a similar nature to which he has pleaded guilty and is shortly to be sentenced.

Disparity

[41] We reject the contention that the sentences imposed were manifestly excessive or that there was any disparity between sentences such as might require or justify reduction in the sentences passed. On the contrary the sentences imposed on both GR and MR were appropriate sentences about which they have little to complain bearing in mind the generous discount for their plea despite their failure to co-operate with the police and the overwhelming nature of the evidence against them.

[42] There were differences relating to the factual basis underpinning the counts on the indictment most notably in relation to the supply of cocaine. In Hunter's case there were fewer messages re cocaine than those of his co-accused and more related to class B and C drugs. In his case, there were four messages or series of messages referring to cocaine which is to be contrasted and compared with those of his co-accused. This was a point relied on in submissions on behalf of William Hunter ("WH") and the judge stated:

> "But his dealing, on the face of what is available to me, seems to be predominantly Class B, although he also is dealing in Class A."

[43] Hunter has a significant and relevant criminal record. In contrast to his co-accused he was not on bail for similar offences. There were also matters of personal mitigation available to WH:

- The birth of his fourth child which occurred during his incarceration;
- Other issues relating to older children.

[44] We do not accept that it has been established that there was any unjustified disparity or that the disparity is so marked and the difference in treatment so glaring

as to amount to a justifiable grievance. If there is disparity it arose because Hunter's sentence was improper in the sense of being too lenient. Archbold makes it clear that an inexplicably lenient sentence in relation to one defendant does not justify the substitution of an improper sentence for a proper one in relation to a co-defendant. Archbold [2023] at para 5A99 states:

> "Disparity—the difference between the sentences imposed between co-defendants—is generally a difficult ground on which to achieve a reduction in sentence. While sentencers ought to be mindful of objectionable disparity between co-defendants, on appeal, disparity is unlikely to succeed as a sole ground. The view increasingly taken by the Court of Appeal (Criminal Division) is that an improper sentence in relation to one offender does not justify the substitution of an improper sentence for a proper sentence in relation to a co-defendant. The focus of the Court of Appeal (Criminal Division) is now, more than ever, concerned with principles and imposing the appropriate sentence. As such, disparity as a ground of appeal has rather fallen out of favour. The court has repeatedly commented that the test which must be satisfied before a reduction in sentence for disparity is made is a high one, see for example *Wilson* [2017] EWCA Crim 1860, [2018] 1 Cr. App. R.(S.) 25.
>
> That said, where the disparity is such that a right-thinking member of the public, with full knowledge of all the relevant facts and circumstances would consider that something had gone wrong with the administration of justice, a reduction may be appropriate: Fawcett (1983) 5 Cr. App. R.(S.) 158, CA. *Fawcett* was recently applied in *Rudd* [2017] EWCA Crim 2446 and *Abdallah* [2016] EWCA Crim 1868; [2017] 1 W.L.R. 1699, however, in *Saliuka* [2014] EWCA Crim 1907 the court noted that a strict application of this would result in a situation where an unduly lenient sentence being passed on one defendant necessitating an unduly lenient sentence being passed on co-defendants, which would conflict with the 'right-thinking member of the public' test. As to the 'right-thinking member of the public' test, see *Howells* [1999] 1 W.L.R. 307 in which the Lord Chief Justice criticised its utility. As to evidencing disparity between co-defendants, the court in *Planken* [2017] EWCA Crim 1807; [2018] 1 Cr. App. R.(S.) 24 commented that in multiple offence cases, it is very dangerous for the court to draw inferences from sentences which are passed on counts which are not the lead count."

[45] We were also referred to *R v Alan Stewart* [2009] NICA 4 which stated:

> "[23] The clarity of that principle may have become somewhat blurred by interpretations placed on some later judicial pronouncements on the same issue. In *R v Delaney* [1994] NIJB 31, the applicant had been convicted on several charges of burglary after admitting offences, some of which had been committed with an associate. He had been sentenced to the same term of imprisonment even though he had committed fewer crimes and had received less property. It was therefore argued that there should have been a clear difference in sentence, to reflect the disparity in the offences and that therefore Delaney had a justified sense of grievance. Of this argument Carswell LJ said at page 33:
>
> > 'In so arguing counsel was invoking the well-known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, 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: see *R v Brown* [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: *R v Bell* [1987] 7 BNIL 94, following *R v Towle and Wintle* (1986, The Times, 23 January). 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, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification. The examples in the decided cases where reductions have been made are generally cases of very considerable disparity. Where the disparity is

> not of such gross degree the courts have tended to say that the appellant has not a real grievance, since his own sentence was properly in line with generally adopted standards, and if his associate was fortunate enough to receive what is now seen as an over-lenient sentence that is not something of which the appellant can complain.'

[24] The statement that 'right thinking members of the public looking at the respective sentences would say that something had gone wrong' has tended to become isolated in some submissions made to this court in appeals where a disparity of sentencing has occurred. Even in those cases where it is accepted that the appellant has received a perfectly proper sentence, it is nevertheless argued that a member of the public would think that something had gone wrong where a co-accused had received a significantly lesser sentence. And, of course, it is in one sense true that something has gone wrong. What may have gone wrong, however, is the passing of an unduly lenient sentence on the co-accused. In those circumstances, we do not consider that any interference with the proper sentence is warranted for this would do no more than compound the error. It is clear that the court in Delaney was of a similar view because at page 34 Carswell LJ said:

> 'It is only if a fair-minded and right-thinking person would feel that the disparity involved *some unfairness to the appellant*, as distinct from a possibly rueful feeling that his associate has been more fortunate in his treatment that a court should intervene: cf *R v Ellis* [1986] 10 NIJB, per Lowry LCJ' (emphasis added)

[25] It is not unfair to an appellant who receives a perfectly proper sentence that a co-accused is punished less severely. It is therefore important to recognise that the two concepts of 'something having gone wrong' and 'unfairness to the appellant' are inextricably linked in this exercise. In this context, we should say that the degree of disparity does not inevitably supply the answer to the question 'has there been unfairness to the appellant?' Some cases (such as *Delaney* and *R v Murdock* [2003] NICA 21) suggest that a disparity in sentences will not be regarded as requiring to be redressed unless the difference

> in treatment is marked. One can understand that the question of unfairness to an appellant cannot arise where the disparity is less than marked but it does not follow that solely because the discrepancy is substantial, unfairness to an appellant will inevitably accrue."

[46] Accordingly, applying the above principles, we reject the ground based on disparity.

SERIOUS CRIME PREVENTION ORDERS

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[47] The defendants argue that a SCPO should not have been imposed. Hunter was previously made the subject of a SCPO in 2014. He breached this in 2017 and continued to commit further serious drugs and firearms offences in 2018. He argues that for the period October 2020 until August 2021, less than one year, he has not been involved in serious crime. Mark Rainey complains that a SCPO was not necessary or proportionate in circumstances where he had no previous history of offending and we have also considered the proportionality and necessity of the SCPO in the case of Glen Rainey.

Statutory Regime

[48] The Serious Crime Act 2007 (the SCA 2007) at Part 1 introduced the serious crime prevention order (SCPO) upon conviction for a 'serious offence' in the Crown Court by section 19, which provides:

> "(3) … where the Crown Court in Northern Ireland is dealing with a person who has been convicted by or before the Crown Court of having committed a serious offence in Northern Ireland.
>
> (4) The Crown Court may, in addition to dealing with the person in relation to the offence, make an order if it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in Northern Ireland.
>
> (4A) A court that makes an order by virtue of subsection (4) in the case of a person who is already the subject of a serious crime prevention order in Northern Ireland must discharge the existing order.
>
> (5) An order under this section may contain—

(a) such prohibitions, restrictions or requirements; and

(b) such other terms;

as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in Northern Ireland.

(6) The powers of the court in respect of an order under this section are subject to sections 6 to 15 (safeguards)."

[49] Being concerned in the supply of drugs under section 4(3) of the Misuse of Drugs Act 1971 is a 'serious offence' by virtue of being listed in Part 2 of Schedule 1 of the SCA 2007 (paragraph 17). Accordingly, each applicant may be subject to a SCPO under section 19 of the SCA 2007, provided the court has reasonable grounds to believe that such an order would protect the public by preventing, restricting or disrupting their involvement in serious crime in Northern Ireland. The order may contain prohibitions, restrictions or requirements and other terms the Court considers necessary.

[50] A non-exhaustive list of the type of prohibitions that may be included in a SCPO is set out in section 5 of the SCA 2007. These include prohibitions, restrictions or requirements on an individual's financial dealings, working arrangements, access to premises and travel arrangements. A SCPO may also regulate how an individual communicates or associates with others and may require the individual to answer specific questions and produce certain documents, for example, concerning financial, property or business dealings.

Relevant Case Law

[51] In approaching the imposition of a SCPO, the decision in *R v Hancox & Duffy* [2010] EWCA Crim 102 at para [9] observed:

> "It follows that the court, when considering making such an order, is concerned with future risk. There must be a real, or significant, risk (not a bare possibility) that the defendant will commit further serious offences…"

[52] In *Hancox* the court said that an SCPO is not designed to punish but is directed towards future risk. At para [20], it makes clear that the assessment of future risk is ultimately for the judge to determine. This is informed by the evidence before the court and any available probation or other reports. Lord Hughes, at para [10], went on to state:

> "… that it is not enough that the order *may* have some public benefit in preventing, restricting or disrupting involvement by the defendant in serious crime; the interference which it will create with the defendant's freedom of action must be justified by the benefit; the provisions of the order must be commensurate with the risk."

[53] *R v McGrath* [2017] EWCA 1945 underlined this position stating that the imposition of any SCPO must be necessary and proportionate, with any terms of such an order required to be practical, enforceable, precise, and restricted to those which are absolutely necessary.

[54] From the foregoing examination of the relevant authorities we derive the following principles:

(i) The court when considering making such an order is concerned with future risk;

(ii) There must be a real, or significant risk (not a bare possibility) that the defendant will commit further serious offences;

(iii) An SCPO is not designed to punish. It is directed towards future risk.

(iv) The assessment of future risk is for the judge to determine informed by the evidence;

(v) It is not enough that the order *may* have some public benefit in preventing, restricting or disrupting involvement by the defendant in serious crime;

(vi) The interference with a defendant's freedom of action must be justified by the benefit;

(vii) The provisions of the order must be commensurate with the risk;

(viii) The imposition of an SCPO must be necessary and proportionate;

(ix) Any terms of such an order must be practical, enforceable, precise and restricted to those which are absolutely necessary.

The Court of Appeal's Powers on an appeal in respect of an SCPO

[55] The Court of Appeal's powers on an appeal in respect of a SCPO are prescribed by section 24(1) of the SCA 2007. Under Article 4(1) of the Serious Crime Act 2007 (Appeals under Section 24) Order 2008 (the "2008 Order"), every appeal will be limited to a review of the decision of the Crown Court and under Article 4(2) of the 2008

Order, the Court of Appeal will allow an appeal where the decision of the Crown Court was wrong or unjust. The Court of Appeal, under Article 5 of the 2008 Order, has all the powers of the Crown Court. Article 5(2)(b) of the 2008 Order allows the court to affirm, set aside or vary any order or judgment made or given by the Crown Court if satisfied that Article 4(2) of the 2008 Order applies. [See Blackstone 2024 D25.68].

Hunter

[56] While the judge dealt with the issue of future risk in relatively short compass, in respect of Hunter, it is apparent that given his previous breaches of a SCPO and his involvement in the present serious organised drug enterprise, that the judge was correct to conclude that there were reasonable grounds to believe that an order in respect of Hunter would protect the public by preventing, restricting or disrupting his involvement in serious organised drug crime. This included:

- Involvement in serious drug and gun crime;
- High likelihood of reoffending.
- His previous addiction to drugs.

These considerations are without more, indicative of future risk of becoming involved in serious offending on release from custody. The judge was correct to conclude that a SCPO would protect the public by preventing, restricting or disrupting involvement by Hunter in serious crime.

Mark Rainey

[57] However, it is a less clear picture regarding Mark Rainey. At the same time, part of the risk element for the public is the objective fact of the pernicious drug offending in which he has determined to involve himself. Another element is that drug offending is highly lucrative, and it is the experience of the courts that those involved in drug dealing in commercial quantities often return to their trade despite the risk of increasingly condign punishment. Further, the PSR noted that Mark Rainey is a medium risk of reoffending due to several risk factors. These include impulsivity, lifestyle, negative peers, and poor decision-making. He has also admitted to having a significant cocaine and cannabis addiction for the past five years. Mark Rainey, at the time of the commission of these offences, was on bail for other offences which are referred to in the main judgment above and to which he has now pleaded guilty and is awaiting sentence.

Glen Rainey

[58] Glen Rainey has relevant previous convictions and has been previously subject to an SCPO. At the time of the commission of the offences subject to this appeal, he

was, like his brother, on bail for very similar offending to which he has now also pleaded guilty and is awaiting sentence.

Proportionality

[59] Each applicant seeks leave to appeal the proportionality of specific individual terms of the SCPOs. The terms sought to be appealed relate to the wide-ranging power available to police to search the applicants' persons and vehicles and the term preventing any communication or association between Hunter and the Rainey brothers. Hunter took issue with a clause preventing him from possessing small zip-lock bags but this, realistically, was no longer pursued.

[60] If satisfied that the SCPOs were properly made in principle, it is essential for the Court imposing such orders to analyse the nature of the restrictions imposed and whether or not they were proportionate to the risk identified. In *Hancox* the Court said:

> "…it is not enough that the order *may* have some public benefit in preventing, restricting or disrupting involvement by the defendant in serious crime; the interference which it will create with the defendant's freedom of action must be justified by the benefit; the provisions of the order must be commensurate with the risk.' [para 10]

[61] Regarding the power to stop and search, the applicants submit that: this could be subject to abuse by police, given the lack of requirement for suspicion of an offence; the need to stop and search is covered by existing legislation; that it is arbitrary and disproportionate and that it is too open-ended and ambiguous. Hunter refers to the case of *Fox, McNulty & Canning* [2013] NICA 19 which raised issues relating to the lawfulness of the power of the PSNI to stop and question and to stop and search individuals under the provisions of section 21 and section 24 of the Justice and Security (NI) Act 2007.

[62] The applicants also argue that the prohibition preventing association between Hunter and the Raineys, is not proportionate nor enforceable given that the applicants all reside within a short distance of each other and are lifelong friends. They could meet innocently and be in breach of the SCPO if the police happen to see them at such a point.

[63] The prosecution argued that the challenged restrictions are necessary to ensure the SCPO is enforceable, for example, the prohibitions preventing Hunter from possessing more than one registered mobile phone or possessing small zip lock bags could not be detected without the ability of police on the ground to search the applicants or associated vehicles. Restrictions of this nature (section 5 SCA 2007) are permitted and essential to ensure the effectiveness of the SCPOs imposed after

conviction and designed to protect the public, unlike the stop and search provisions directed at the prevention and detection of crime. While not engaging in an analysis of the individual prohibitions, the judge did conclude that the restrictions sanctioned by the SCA 2007 are different in nature to the ordinary powers of the police. He stated the restrictions are:

> "… a further protection to the public to nip things in the bud, I think it is the easiest expression that comes to mind, and therefore by virtue of the fact that it is an order restricting the defendants and empowering the police, it is contemplated that it is different to the normal powers of the police to investigate crime and that the threshold for intervention is somewhat lower."

[64] We recognise the importance of restricting and preventing the applicants' future involvement in serious drug crime. That it is in the nature of the drug trade that criminals use communication devices and encrypted platforms extensively. Transportation of drugs in vehicles, on the person and commonly packaged in zip lock bags are a necessary part of being concerned in the supply of drugs. That commercial scale drug dealing of necessity involves trusted gang members, and who better to trust than close friends who frequently encourage and help each other in what is organised commercial drug supply enterprise. These features are regrettably all too common and evident in the present case.

[65] However, each provision must be proportionate and necessary. An amended SCPO has been agreed and we are satisfied that these terms are necessary and proportionate. We are attaching as an appendix to this judgment the amended SCPO.

[66] All appellants assert that the Serious Crime Prevention Order should not have been imposed. In the alternative, all three argue that certain terms are disproportionate. The power to impose such an Order in the crown court emanates from section 19(3) and (4) of the Serious Crime Act 2007 ("the 2007 Act"). Section 19(4) provides:

> "The Crown Court may, in addition to dealing with the person in relation to the offence, make an order if it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in Northern Ireland."

[67] It is important to note that the proceedings in respect of such an application are, by virtue of section 36 of the 2007 Act, civil in nature. The standard of proof is civil, not criminal. The court is not restricted to considering evidence that would have been admissible in the criminal proceedings in which the person concerned was convicted. In this regard, the prosecution submits that the judge would have been

entitled to consider the fact that Mark and Glenn Rainey had been on police bail for matters of a similar nature at the time of the index offences which had been committed to the Crown Court.

[68] Whilst it did not form part of the 'prosecution opening note for sentence' which had been drafted prior to the finalisation of the proposed Orders, the Judge and the parties were provided with a copy of the authority of *R v Hancox and Duffy* [2010] EWCA Crim 102 and a weblink to the CPS legal guidance in relation to the making of a SCPO via email dated 4 July 2022. *Hancox and Duffy* was, and is, informative with regard to the relevant considerations for the making of such an Order. The key question for the judge was whether there were reasonable grounds to believe that an order would protect the public by preventing, restricting or disrupting involvement by the appellants in serious crime. The test in relation to a SCPO is that there must be a real or significant risk (not a bare possibility) that the intended subject will commit further serious offences in Northern Ireland. The legislation does not use the term 'necessity' or 'necessary' as the legislative platform for other preventative orders does. However, in *Hancox and Duffy*, the Court doubted that this made significant difference in practice.

[69] Furthermore, para [9] of the judgment sets out that the jurisdiction on appeal is limited to review. An appellate court does not substitute its own view for that of the judge. It is only if the appellate court is satisfied that the order is wrong or is unjust because it has been made after serious procedural or other irregularity. This is a high bar. The evidence and information before the judge was ample to allow him to form the belief that such orders would protect the public in relation to each appellant.

[70] We agree with the prosecution that considerable thought was divested into the drafting of the orders to tailor the terms in such a way as to try and ensure that each of the appellants would not be unduly restricted with regard to their day-to-day activities. The limitations placed upon them were targeted at their modus operandi in relation to the supply of drugs. It is not accepted that the terms are disproportionate considering the prolific nature of each of their offending behaviour. However, following discussions the terms have been adjusted and are appended to this ruling.

Procedure for the supervision of SCPOs

[71] The prosecution has set out the de facto procedures for supervision of these orders. This has not been set out in affidavit but in the skeleton argument and we will proceed on the basis that this is a correct statement on instruction of the procedures for the supervision of these orders.

[72] Management of the SCPO, as with SOPO and VOPOs will be the responsibility of a single Detective. Such management includes the monthly review of any incidents and any stops or searches of the subject. The use of a single Detective to oversee the Order, will ensure that there is a consistent approach to its review. The overseeing Detective will be able to quickly ascertain the number and nature of any interactions

with the subject that have taken place in the preceding four-week period, if any. If during a review, it becomes apparent that there may be an excessive or disproportionate exercise of the condition, the detective can issue further guidance to the rest of the police service. This acts a safeguard to the disproportionate exercise of the power to stop and search.

[73] Any individual who is stopped and searched by police, including the subject of such an order, are entitled to a copy of a 'Stop and Search' record. In turn, the fact of a 'Stop and Search' is logged with police systems. Consequently, a police officer is able to ascertain from this database what previous 'Stop and Searches' there have been of a subject prior to stopping the subject.

[74] Any police officer is bound by a code of ethics which is used to regulate the conduct of conduct which surround issues such as professional duty, police investigations, integrity and equality. Compliance with the code of ethics needs to be demonstrated in relation to the exercise of the power to stop and search and any such interactions with any of the subjects of such orders.

Rationale

[75] A central feature of the challenge was to the stop and search power. The rationale for the stop and search term is to ensure compliance with other terms within the order and particularly the term which seeks to control the mobile telephones that are in the subject's possession. The use of mobile telephones was an integral part of the offending behaviour both in relation to the sourcing of drugs and their onward supply. 'Burner' telephones are frequently used in offending connected to the supply of drugs. Without the ability to 'stop and search' the subject to ensure compliance with the term, the term restricting the possession of a mobile telephone device that has not been registered with the PSNI becomes largely ineffective.

[76] Whilst it is fully accepted that the standard stop and search powers require a constable to have a reasonable grounds to suspect that an offence is being committed by a member of the public, the SCPO only applies to an individual for whom there are reasonable grounds to believe that there is a risk that they will be involved in serious crime in Northern Ireland.

[77] We were referred by the prosecution, as an example of an analogous power, to section 165 of the Police, Crime, Sentencing and Courts Act 2022 with the introduction of a Serious Violence Reduction Order. This inserts into the Sentencing Code the power to make such an order where:

(i) an offender has been convicted of an offence that, on the balance of probabilities, involved the use of a knife or a bladed article by the offender or the offender had a knife or bladed article or was used or in the possession of another person and the offender knew or ought to have known this fact in their possession at the point of a commission of an offence; and

(ii) the court considers it necessary to make a serious violence reduction order in respect of the offender to (a) protect the public in England and Wales from the risk of harm involving a bladed article or offensive weapon, (b) protect any particular members of the public in England and Wales (including the offender) from such risk, or (c) prevent the offender from committing an offence involving a bladed article or offensive weapon.

[78] The provisions will enable a constable to detail and search an offender who is the subject of a serious violence reduction order to ascertain if they have a bladed article or an offensive weapon with them. Statutory guidance as to this power is currently in draft form. Para 42 of the guidance explains:

> "SVROs will not replace existing stop and search powers, but will instead build on them. They are intended to make it easier for the police to search those who have been convicted of an offence involving a bladed article or offensive weapon with the aim of deterring continued offending among those subject to an order."

[79] In relation to ensuring proportionate and appropriate use of the power, the draft guidance sets out:

> "50. In exercising the stop and search power, the provisions of section 2 and 3 of PACE will apply to the conduct and recording of the search. These are reflected in PACE Code A, the statutory code of practice that governs the use of stop and search.
>
> 51. Failure to comply with the Code could result in evidence obtained during the search being excluded in subsequent criminal proceedings arising from the search. It could also support separate criminal and/or civil proceedings against the police for assault/unlawful detention.
>
> 52. PACE Code A also requires that stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. Force may only be used as a last resort to conduct a search or to detain a person. Officers must maintain the highest standards of professional behaviour and there must always be an objective and rational basis for conducting a stop and search. In these circumstances, this is based on the fact that an SVRO is in force. Please see: Code of Ethics | College of Policing.

> 53. However, the use of the SVRO stop and search power is also discretionary and police officers are expected to use their professional judgement when deciding in what circumstances and how many times an individual issued with an SVRO is stopped and searched. Officers should therefore consider all the circumstances that appear relevant to that decision as officers remain accountable for use of the power. For instance, the particular location in a public place, its proximity to the offender's home and other family members, as well as other locations and individuals known to be associated with or linked to their offending history.
>
> 54. Following a stop and search, the police must make a record of the search and provide the offender with a copy of the record in accordance with PACE Code A, section 4. Where available, the searching officer should use body worn cameras when carrying out an SVRO stop and search, in accordance with the chief officer's operational guidance.
>
> 55. Please refer to the College of Policing Authorised Professional Practice on Stop and Search."

[80] We have been reassured by the prosecution that the same standards, such as the application of PACE Code A, and the need to exercise professional judgement similarly apply in the exercise of any such power in the SCPO. Accordingly, we conclude that the SCPO in each case was necessary and proportionate and that each of the terms of the amended order meets the same test.