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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **06/12/2023**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE KING

-v-

DIARMUID MCKEE

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Her Honour Judge Smyth
Recorder of Belfast

[1] The defendant is to be sentenced in respect of two counts:

Count 1 Common law Riot

Count 8 Throwing a Petrol Bomb

[2] The defendant was arraigned on 11 October 2021 and pleaded not guilty. On the 24 October 2022, being the date of his non-jury trial, he entered guilty pleas to both counts and asked that his bail be revoked. He has been in custody since that date.

[3] The facts, which are not in dispute, have been helpfully set out in the prosecution opening submission. In summary, these offences relate to an incident on 23 August 2020 in Kilwilkie estate, Lurgan. Police had been in Kilwilkie since 8.00am that morning dealing with a suspect device. The device was made safe and a pre-planned search then commenced of waste ground at the opposite end of the estate.

[4] A hostile crowd began to form and neighbourhood police were deployed to the area to explain to residents the reason for the police presence. These officers were

not wearing riot gear or protective clothing but were wearing normal police uniform.

[5] Between 2.15pm and 3.06pm there were four petrol bomb attacks aimed at police. At 2.15pm, the first two petrol bombs were thrown by two males, one of which struck a road sign and exploded very close to an officer. The second petrol bomb attack was at 2.30pm from the same two unidentified males. The third petrol bomb attack was at 2.44pm and involved the defendant and an unidentified male. These petrol bombs landed in the vicinity of the junction of Victoria Road and Levin Road towards a police evidential gathering landrover. The fourth attack occurred at 3.06pm from the roof of 74 Kilwilke Road and involved a co-accused Robert Rooney and an unidentified male. In all of the attacks, those involved were wearing balaclavas or similar face coverings.

[6] As well as an evidential gathering landrover, the police helicopter was also deployed. Some footage was recorded on bodyworn camera and the initial attack was also recorded by an unknown source and posted on social media. On the footage which recorded the third attack involving this defendant, members of the public can be seen running away from the area with their dogs.

[7] After the third petrol bomb attack, the defendant was next seen at 2.47pm in the area of the alleyway between 75/77 Kilwilke Road, removing the 11 degrees jacket worn in the course of the attack. At the back of the alleyway, on a green area, the petrol bombs had been stored and filled.

[8] The defendant was identified as the petrol bomber in the third attack by a comparison of clothing worn when he was stopped in the early hours of the following morning and the clothing worn by the petrol bomber. In interview, he accepted that he was stopped in the early hours of the morning and thereafter made no comment in respect of the earlier footage.

The aggravating factors

[9] There is no dispute that the aggravating factors are:

(i) The defendant was part of a group involved in a total of four petrol bomb attacks.

(ii) There was an element of planning, petrol bombs were stored and manufactured in a green area behind the houses at Kilwilke Road and accessed from the alleyway. The defendant made attempts to conceal his identity and change clothing.

(iii) The offending involved the deliberate targeting of the police who were acting in the course of their duty as public servants.

[10] Section 24 of the Counter-Terrorism and Sentencing Act 2021 (the 2021 Act) commenced on 30 April 2021. It inserted a new Article 15 A of the Criminal Justice (NI) Order 2008 -

15A(1) This Article applies where—

(a)a person is convicted after the commencement of section 24 of the Counter-Terrorism and Sentencing Act 2021 of—

(i) a serious terrorism offence;

(ii) an offence within Part 4 of Schedule 2A (terrorism offences punishable with more than two years' imprisonment); or

(iii) *any other offence in respect of which a determination of terrorist connection is made;*

[11] Schedule 2A of Part 3 of the 2021 Act contains offences which are capable of being determined as having a *terrorist connection* and the offence of riot is specified. If the court determines that there is a *terrorist connection,* a number of consequences flow. In particular, the court is required under Section 30 (4) of the Counter-Terrorism Act 2008 as amended by the Counter – Terrorism and Sentencing Act 2021 to treat that fact as an aggravating factor and must state in open court that the offence was so aggravated.

[12] In this case, the prosecution accepts that there is no evidence to suggest that the offence has a *terrorist connection* and I therefore determine that it does not have a terrorist connection. In those circumstances, there are no additional aggravating factors to be taken into account.

The mitigating factors

[13] The defence rely on the following mitigating factors:

(i) The guilty plea, albeit it was entered at a late stage on the morning of trial

(ii) The defendant's record is minimal, a single motoring offence dating back to 6 November 2015 and not relevant

(iii) A previous good work record

(iv) The impact on the defendant's family of the loss of a regular income

(v) The defendant was assessed as demonstrating insight into his offending on young people within the community

(vi) Delay in the case coming to trial and delay in sentencing as a consequence of the protracted trial and the defence submission that sentencing should await the conclusion.

[14] The defence submit that the guilty plea was entered in difficult circumstances against a background of a degree of peer pressure and that the delay in entering it should be seen in that light. By pleading guilty, he saved the court considerable time in what became a very protracted trial.

[15] The prosecution accepts that although there was video evidence in this case, there were triable issues with regard to identification and that should be reflected in the reduction in sentence for the guilty plea. Mr Steer on behalf of the prosecution has helpfully referred me to *R v McCartan* [2004] NICA 43 where the court considered this issue at paragraph [13] -

"[13] The applicant has pleaded guilty…. It is open to us to consider whether, if the charges had been contested, the prosecution would have faced significant difficulty in establishing his guilt. Mr Murphy for the Crown did not suggest otherwise and we have concluded that, if Mr McCartan had pleaded not guilty, his conviction was far from certain….In these circumstances, the applicant is entitled to a greater discount by reason of his plea of guilty than would have been appropriate had the evidence against him been clear."

[16] The prosecution also accepts that as a consequence of the protracted trial of the co-accused, sentencing has been delayed and coupled with the delay in the case coming to court, this is a matter that should be factored into the sentencing exercise.

[17] Having revoked his bail, the defendant has been housed within the general prison population and he has not sought to be placed with other paramilitary prisoners. The defence submit that this is indicative of a man without political or ideological motivation and the lack of a criminal record coupled with a good work history is relevant to the sentence that should be imposed. The defence also point to the defendant's engagement with the probation service and the insight that he has shown in contrast to the approach often taken by others in similar situations.

[18] He is assessed as a low risk of re-offending and not assessed as posing a significant risk of serious harm in the future. He told the probation officer that he had a problem with alcohol and had been drinking heavily the previous night and into the morning of 23 August. He had an argument with his wife when he returned home and left the house "*in a bad mood* ". He said his involvement in offending was "*a moment of madness*". He accepted responsibility for his offending and

demonstrated insight into the impact of the offending on the community, in particular young people and his family. The defence submit that the way in which the defendant has met these charges, along with this insight demonstrates remorse. Whilst there is always a debate about remorse or regret at the situation a defendant finds himself in, it is correct to say that the defendant has accepted full responsibility for his actions.

The Sentencing Principles

[19] The guideline authority for common law in this jurisdiction is Att-Gen's Ref (Nos. 13, 14 & 15 of 2013) *McKeown, Lynn & Ferris* [2013] NICA 63. The court referred to the decision of His Honour Judge Burgess in *Heagney & others* where he reviewed the guidance in relation to offenders involved in riotous behaviour. Although mindful of the fact that the offence in Northern Ireland carries a maximum sentence of life imprisonment, Judge Burgess did refer, with approval, to the decision of the English Court of Appeal of *R –v- Najeeb and others* [2003] 2 Cr App R (S) 69. That case set out a suggested range of sentences in the following terms –

- Ringleaders - at or near what is the English maximum of 10 years
- Active and persistent participants who throw petrol bombs or use a crossbow or drive a car at the police - 8 – 9 years
- Participants for several hours who throw missiles less dangerous than petrol bombs, but potentially more damaging than stones – 6 – 7 years
- Participants for a significant period who repeatedly throw bricks or stones – 5 years
- Participants to a lesser degree would attract sentences at a lower level.

These sentences would be after a contest.

[20] In *McKeown,* the Court stated that both *Heagney* and *Najeeb* were helpful in approaching these cases. In selecting the appropriate starting point the court observed that the gravamen of the offence was the decision to participate in the assembly thereby causing fear and alarm to the public affected and that the following factors should be taken into account:

(i) the size of the group of offenders;

(ii) the nature of the violence used;

(iii) the duration of the riot;

(iv) whether the riot is associated with any other disorder occurring before or after the incident in question;

(v) the harm caused;

(vi) the nature and extent of interference with the public;

(vii) any likely effect on community relations; and

(vii) the likely cost to the public purse.

[21] At paragraph [14] the court said -

"[14] It has been argued that the Bradford riots were of a larger scale than some of those that we are dealing with here. That is balanced, however, by the recurrence of this offending behaviour in this jurisdiction across the community. Where there is any participation, including participation by way of presence and encouragement, in large scale riots involving the use of serious violence and extensive public disruption a deterrent sentence of immediate custody is required other than in highly exceptional circumstances. In the case of those present for a significant period and repeatedly throwing missiles such as bricks or stones, a sentence of five years following a trial is appropriate. Ringleaders should expect sentences of 10 years following a trial and those who instigate or organise those present or use more serious violence should expect sentences between 5 and 10 years after a trial. We do not consider that we need to be any more prescriptive."

[22] In *McKeown*, as in *Najib*, the court was dealing with large scale riots in which police were attacked with stones and petrol bombs over sustained periods and large numbers of them were injured. The extent of damage to property, and the impact on local businesses was extensive. In dealing with mob violence, the court said each participant adds to the weight of numbers in the mob, and the culpability of those who participate by presence and encouragement only must be judged by the total picture of the disorder and violence used.

[23] Cases such as these require deterrent sentences. In *Rehman and Wood* [2006] Cr App R 77 Lord Woolf CJ stated at paragraph [4] that by deterrence was meant "sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely, so as to deter others, than he would be were it only his personal wrongdoing which the court had to consider."

[24] I have considered the matters set out at paragraph [13] of *McKeown*. This was not the type of large-scale public disorder the court was dealing with in either *McKeown* or *Najeeb*. This was a relatively small group of offenders but the situation had the potential to escalate with the gathering of a hostile crowd. Petrol bombs are potentially lethal weapons because they can cause serious burns, which may lead to death. The seriousness of petrol bomb attacks in Northern Ireland has long been recognised (See *R v Dean* 1997 Lexus Citation 6180; *R v Leiper* 2001 Lexus Citation 3596). It is fortunate that no officer was injured, the duration was limited, with all

four attacks taking place within an hour, there was no associated disorder and no details have been given of any damage or cost to the public purse. No doubt, the offending caused anxiety amongst those members of the community who want no part of such violence.

[25] In this case, whilst the riot was of a different nature to that in *McKeown*, it was nevertheless serious and the principles set out are broadly applicable. The importance of ensuring that Kilwilkie Estate does not become a "no-go" area and that the police can safely patrol the area to protect the public cannot be overestimated. A deterrent sentence is required and therefore, the hardship visited on the defendant's family as a consequence of his incarceration, in particular the loss of a steady income can only impact the sentence in a limited way. Similarly, the absence of a criminal record which in normal circumstances is an important mitigating factor cannot be attributed significant weight.

The starting point

[26] The prosecution submits that this case falls within the second category identified in *Najeeb* with a starting point of eight years. The defence submit that the court should not adopt such a mechanistic approach and relies on the judgment of His Honour Judge McFarland, as he then was, in *R v McMullan* and *Brophy (*unreported 11 October 2012). That case involved serious public disorder involving wide-scale sectarian violence, the intimidation of community representatives who were attempting to calm the situation and petrol bombs and missiles thrown at police.

[27] Both defendants were identified as ringleaders and although aged 20 and 18 respectively, had appalling records for violence and public disorder. Additional aggravating factors included pre-planning and the motive of stirring up community tension. In mitigation, their age, a plea at the first opportunity, remorse, background and other personal circumstances were taken into account. The court took a starting point of eight years and reduced the sentence by a third to reflect the early guilty pleas.

[28] Applying the guidance in *McKeown,* the court has to decide where this case falls in the range between five-ten years, after a contest. Taking into account both the aggravating and mitigating circumstances, I consider that the appropriate starting point is seven years.

[29] In terms of the guilty plea, the defendant in this case effectively "broke ranks" with his co-accused and this court is not blind to the realities of this situation or the pressures involved. Whilst it came late in the day, the way in which the trial was conducted by the co-accused is relevant. Every aspect of the prosecution case was challenged, many of the challenges were without merit and no positive case was

made. Consequently, whilst only one of the co-accused was ultimately convicted, the trial was unnecessarily protracted which impacted on the availability of court time for other cases. A defendant is, of course, entitled to test the prosecution case in full and defend himself as he chooses. He is not penalized for doing so, but a defendant who admits his guilt, thereby saving valuable court time will be entitled to a reduction in his sentence. Against all of that background, this defendant is entitled to a significantly greater reduction in sentence than would normally be the case.

[30] The prosecution view is that a reduction in sentence of between 20-25% reduction is appropriate in this case, in view of the triable issues and the delay in passing sentence due to the protracted trial process. The defence submit that the court should afford 25%, taking into account the additional factor of peer pressure to contest the case. In the particular circumstances of this case, I accept the defence submission and am reducing the sentence by 25%.

[31] I therefore sentence the defendant to a determinate custodial sentence of five years and 3 months divided equally as follows: two years and seven months in custody and two years and seven months on licence.