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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

CLIVE WEIR

Applicant

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Mr Ian Tannahill (instructed by the Public Prosecution Service) for the Crown
Mr M Chambers KC with Ms A Macauley (instructed by McNamee McDonnell Solicitors) for the Appellant

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Before: Keegan LCJ, McCloskey LJ and McLaughlin J

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

Introduction

[1] Leave to appeal having been granted by the single judge, the appellant challenges before this court a determinate custodial sentence of three years, equally divided between custody and ensuing licenced release.

The guilty pleas

[2] The appellant pleaded guilty to the following counts:

Count	Offence	Sentence imposed – all concurrent	Maximum sentence
1	Cultivation of cannabis contrary to section 6(2) of the Misuse of Drugs Act 1971	Concurrent sentences of three years imprisonment were imposed,	14 years
2	Converting criminal property, namely funds in the sum of £100,000 in a clear bank account contrary to section 327(1)(c) of the Proceeds of Crime Act 2002		14 years

4	Using criminal property, namely £184,536.66 for the purchase of fuel, contrary to section 329(1)(b) of the Proceeds of Crime Act 2002	divided equally between an 18 months custodial term and 18 months licensed release	14 years

The evolution of the indictment

[3] Initially, the arraignment comprised four counts. Upon arraignment, the appellant pleaded not guilty to all four counts. A re-arraignment followed some nine months later. This coincided with an amendment of count 2, which consisted of the substitution of "£41,495" by "£100,000." This larger sum was promptly challenged by the appellant and herein lies the genesis of this appeal. The appellant then altered his initial not guilty pleas, replacing them with a plea of guilty to counts 1, 2 and 4 (see above), with the significant qualification noted. Count 3 "left on the books." There were two co-defendants, whose role was in essence that of cultivating the plants, (or "gardeners" in the jargon favoured by many) giving rise to lesser sentences accordingly.

[4] With the exception of the qualification noted, the appellant was sentenced on the following basis. He resides in a rural location in a dwelling house adjacent to which is a farm building. The latter was used for a substantial and sophisticated cannabis cultivation operation during a period of around 18 months. This building was effectively leased by the appellant to a person who evidently has not been apprehended or prosecuted.

[5] The appellant's criminality had essentially three elements. First, he provided the premises for the illicit activity. Second, he purchased the generator required for the operation. Third, he facilitated the purchase of fuel for the generator from time to time in the total amount of some £185,000. Mr Chambers KC augmented the underlying factual matrix upon informing this court of his client's acceptance that he received an initial payment of £5,000 followed by monthly payments of £2,000. The appellant's guilty pleas, made at the advanced stage noted above, followed a persistent stance of outright denial of any criminality.

[6] The amendment of the indictment, noted in para [3] above, came about in the following context. The appellant maintained his innocence until a very late stage of the proceedings. Inter alia, further disclosure was pursued by him and a section 8 application was listed. There was also an issue of late service of prosecution evidence. In this process two trial dates were vacated. The amended indictment then materialised.

The disputed factual issue

[7] The second count, in both its original and amended incarnations, was designed to reflect the financial benefit accruing to the appellant arising out of the illicit

operation. What was the genesis of the amended figure of £100,000? This court was informed that a higher figure which was contained in count 3 represented the approximate total of lodgements made to the appellant's bank account during a specified period. The prosecution evidently contended that all of these credits represented financial benefit to the appellant. Significantly, the fact of this dispute was ventilated prior to the amendment of the indictment and communicated to the judge. At this stage the appellant's counsel contended that a "Newton" hearing would be necessary. Written submissions on this issue were directed by the judge.

[8] Both parties provided written submissions. That on behalf of the appellant elaborated upon the aforementioned suggestion. It contained the following noteworthy passage:

> "The Crown assert that the £100,000 figure represents an amalgamation of [counts 2 and 3]…although mathematically that does not make sense. No factual basis or otherwise has been proffered by the Crown as to how they have reached the figure of £100,000, let alone how they might evidence such a figure beyond all reasonable doubt. There is certainly no evidential basis present on the papers which could invite such a conclusion."

The written submission on behalf of the prosecution addressed the Newton hearing issue in the following way. Having acknowledged the fact and dimensions of the financial dispute, it was submitted, in terms, that a Newton hearing would not be required if:

> "…the court is content that there is no significant difference in terms of the sentencing outcome between the two figures…"

This was followed by the contention that, on the prosecution case, the cultivation of cannabis (ie count 1) "…has always been the 'headline' offence in this case." The remainder of the submission was devoted exclusively to the appellant's suggested role in the operation.

[9] In the final sentence there is a puzzling, and unexplained, suggestion that the difference between the two figures may prove to be "…so small (if extant) that it would have no bearing on the final overall sentence…". In particular, the scenario in which the financial dispute between prosecution and defence could evolve into something "small" or even non-existent was not described with any clarity in the prosecution submission and was not elucidated before this court. Furthermore, and notably, the prosecution submission made no reference to evidence capable of substantiating the markedly increased figure of £100K, either at first instance or on appeal.

The sentencing process

[10] Next, the parties received the following written communication from the judge:

> "I do not require a Newton Hearing…so we can move straight through to the sentencing exercise."

This was reiterated by the judge at the next review hearing, on 2 October 2024. There was no written ruling. The sentencing hearing was held several weeks later.

[11] The written submissions on behalf of the prosecution invited the court to sentence the appellant on the following basis: he was one of three defendants, the other two being Vietnamese nationals who were "the gardeners"; the cannabis factory was located in two levels of a farm building owned by the appellant and adjacent to his dwelling house; the financial benefit to him comprised payments made directly by those controlling the cannabis growing operation; the appellant's "…level, duration and frequency of involvement, physical proximity, taking of payment by way of rent and for the provision of a generator and fuel all point to a level **directly equivalent to that envisaged for managers of such premises**…he does not fall within the lower end of the relevant starting point of between 3 and 7 years…" [emphasis added].

[12] In the submissions on behalf of the appellant there was a particular focus on his role, including a specific challenge to any suggestion that it was that of a "manager." It was further submitted that he did not fall neatly into any of the *R v Bui* [2022] NICA 78 categories; on the prosecution case he had no "directing hand"; this was closely analogous to a section 8 MDA 1971 case, ie the offence of an occupier of premises permitting certain activities to take place therein; and the appellant did not "provide" the fuel for the generator, rather he "…arranged to forward on the payment received by him from the orchestrators/cultivators." Finally, it was stated succinctly:

> "The defendant had a peripheral albeit necessary role in the operation."

[13] The major part of the sentencing decision under challenge consists of a rehearsal of the written submissions of the parties. There follows a passage which must be reproduced in full:

> "The amended count 2 which the defendant pleaded guilty to was an amalgam of the pre-existing counts 2 and 3. He pleaded guilty, according to his counsel, on the basis that he was not accepting the figure of £100,000 but was rather accepting somewhere in the region of £40,000. I accept that both prosecution and defence were agreed that this count represented payments made directly to the defendant by those controlling the cannabis growing operation inside his premises. There was initially a dispute as to whether or not

> the court required a Newton hearing and ultimately it was decided that a Newton hearing was not required. The prosecution assert that the cultivation of cannabis has and always [sic] been the headline offence in this case and I accept that."

Having diverted to the decision of this court in *R v Bui*, the judge recorded the specific submission on the part of the prosecution that:

> "…the court should take into account the value of the operation overall and of the specific benefit to the defendant."

The judge then expressed acceptance of the appellant's contention that the *Bui* categories are not hermetically sealed.

[14] In the passages which follow, the judge noted once again the contested financial benefit figure:

> "…The defence assert that he received £40,000 in payment for his role in the enterprise. They assert that he did not set up the factory, had no role in operating it and didn't share in the product. I accept that. He did of course receive a financial benefit in the form of payment from the cultivators…"

The judge then turned to the issue of the appellant's role:

> "Each participant's role is fact specific. I accept that as a proposition. The court is invited to proceed on that basis and I am so doing."

This was repeated in substance in a later passage. The appellant was then sentenced in the following terms:

> "I have concluded that had you continued to contest these matters, and been convicted by a jury of your peers, the minimum term I could have imposed would have been one of four years imprisonment. I am prepared to reduce that by 25%, bringing it down to a period of three years imprisonment. There will be a determinate custodial sentence of which 18 months will be served in custody and the remaining 18 months will be on licence. That is in respect of the first offence and the same penalty will apply in respect of the others, to run concurrently taking into account the principle of totality."

The judge added a destruction order and, finally, deferred the matter of confiscation.

The appeal

[15] The omnibus ground of appeal is couched in the terms of "wrong in principle and manifestly excessive", with two accompanying particulars:

> "(a) The judge selected too high a starting point given her erroneous assessment of the [appellant's] 'role';
>
> (b) The judge's failure to rule on the extent of the benefit."

The single judge, in granting leave to appeal, acknowledged the force of the appellant's argument which was formulated thus:

> "…The amount of the appellant's compensation and/or profit was, therefore, a defining feature of <u>his role</u> which inevitably would have impacted upon his sentence, so as to make the <u>amount</u> of his benefit a significant feature."

In the words of Kinney J, at para [27]:

> "…The applicant's level or role in relation to count 1 would clearly depend on the value of the operation and specific benefit to the applicant."

[16] The "wrong in principle" element of the grounds of appeal is essentially formulaic and makeweight. The gravamen of this appeal unquestionably lies in the contention that the impugned sentence is manifestly excessive and that this is attributable to the selection of an inappropriately elevated starting point.

Newton hearings: The correct approach

[17] The correct approach to be applied in cases where, in the context of an acceptance of guilt, there are factual disputes between prosecution and defence about what the defendant actually did, is well settled. The *locus classicus* is *R v Newton* [1982] 77 Cr App R 13. The context was a plea of guilty to sexual offences associated with a significant dispute about whether the alleged sexual acts had been consensual. Lord Lane CJ, at page 15, canvassed three procedural possibilities namely (a) requiring the jury to determine the disputed factual issue/s, (b) the making of such determination by the trial judge and (c) he formation of a view by the trial judge, without any hearing, having considered the representations of the parties. Lord Lane added the important caveat:

> "But if he does that…where there is a substantial conflict between the two sides, he must come down on the side of the defendant. In other words where there has been a substantial conflict, **the version of the defendant must so far as possible be accepted.**"
> [Emphasis added.]

[18] The doctrinal underpinning of the *Newton* principles rests on elementary dogma: the onus of proof rests on the prosecution and the standard of proof is that of beyond reasonable doubt. The defendant's inalienable right to a fair trial is also engaged. It is appropriate to highlight that this right extends to every aspect of the trial process, including sentencing.

[19] We summarise the main principles thus:

(i) In the language of Lord Lane, a Newton hearing is appropriate where there is a "substantial" dispute between prosecution and defence relating to some factual issue.

(ii) I consider that "substantial" has two dimensions. The first is that it excludes the trivial and peripheral.

(iii) The second is that the disputed factual issue must be material. In this context, "material" denotes something which could foreseeably have a bearing on the sentencing of the defendant. The threshold of materiality is significant, but not unduly elevated. A reasonably foreseeable possibility is what is required.

(iv) There is a judicial discretion to be exercised in every case. In common with every discretion known to the law, this entails a judicial duty to take into account all material facts and factors and to disregard the immaterial. This duty once discharged, considered evaluative judgement on the part of the trial judge is then required.

(v) Subject to the preceding principles, where a judge declines to convene a Newton hearing in order to resolve a disputed factual issue or issues the sentencing of the defendant must be effected on the basis that the defendant's version of the relevant factual matter/s is correct.

[20] The subject of Newton hearings has featured in the jurisprudence of this court from time to time. Our decisions have not deviated in any material way from what *R v Newton* decided.

[21] It is timely to draw attention to what this court stated in *R v QWL and Others* [2023] NICA 11, at paras [115]–[119]. There is nothing novel about these strictures. They feature prominently in *R v Sangermano* [2022] NICA 62, at paras [64]–[75] especially. Furthermore, as the bench observed during the hearing of this appeal, this

court has had occasion to record its concerns about the approach at first instance to *Newton* basis of plea issues in a significant number of appeals.

[22] The principles expounded above explain and illuminate the three options adumbrated in para [23] infra. Pausing, bearing in mind that the common law develops incrementally, on a case by case basis, it is possible in principle that this court might endorse some further option or, indeed, some modification of the options identified in an appropriate future case. This does not arise in the present case.

Conclusion

[23] In the circumstances prevailing, the following three optional courses were available to the sentencing judge:

(i) To convene a Newton hearing and, having done so, to make appropriate findings, giving effect to the criminal burden and standard of proof. This would almost invariably have entailed a formal ruling.

(ii) Alternatively, to sentence the defendant on the basis that the sentence would be the same accepting either of the contested factual issues. This would either have been the subject of a formal ruling or, alternatively, clearly expressed in the sentencing decision.

(iii) Without convening a Newton hearing, to sentence the defendant on the basis of rejecting the prosecution version of the contentious facts and/or expressly accepting the defence version: again, this would have entailed a formal ruling or a clear statement in the sentencing decision.

Each of these courses would have required a reasoned ruling. None of them was adopted by the judge. The mechanism which was utilised, namely the enunciation of a bare unreasoned judicial statement, is not an available option.

[24] The contest between the prosecution figure of £100k and the competing defence figure of £41k was not resolved by the sentencing court. Indeed, the judge did not advert to it at all in the operative part of the sentencing decision. In the written submissions of the parties, the defence contention that the prosecution figure had no evidential foundation was in essence unchallenged: see para [9] above. It would have been open to the judge, in the sentencing decision, to state that the sentence being imposed on the appellant would have been the same irrespective of whether the court preferred either of the two figures in play – and to explain why. This did not occur. Equally, it would have been open to the judge to state that the factual dispute was considered to relate to something peripheral or trivial – and to explain why. This did not occur either.

[25] In circumstances such as these, in the abstract, it is possible for this court, on appeal, to <u>infer</u> that the sentencing judge made one or other or, indeed, both of the

foregoing assessments. However, it is not possible to identify any grounds upon which such an inference could legitimately be made.

[26] Paras [13]–[14] above reproduce certain passages from the sentencing decision. The main submission advanced by Mr Tannahill on behalf of the prosecution is that these passages should be construed to the effect that the approach enunciated by the judge was that the sentence of the appellant would have been the same irrespective of whether it was based on a financial benefit to him of circa £41,000 or £100,000.

[27] There are two reasons why this submission must be rejected. First, there is no clear statement by the judge to this effect, either in making the Newton ruling or in the sentencing transcript. The relevant passages are, at best, ambiguous, particularly when considered as a whole in their full context. The stand-out ambiguity is found in the pithy sentence "I accept that" (para [13] above) which (a) followed four separate assertions and (b) was accompanied by a statement that the appellant did receive a financial benefit, the amount whereof is specified nowhere in the decision. It is not possible to divine which of the four assertions was "accepted" by the judge. Furthermore, given the degree of ambiguity in the judge's decision, there is no legitimate basis upon which an inference supporting Mr Tannahill's submission can be made.

[28] The second reason for rejecting Mr Tannahill's submission is succinctly expressed in para [27] of the considered decision of Kinney J granting leave to appeal:

> "However, the applicant's level or role in relation to count 1 would clearly depend on the value of the operation and specific benefit to the applicant."

This passage was in substance adopted in the submissions of Mr Chambers to this court. In particular, we acknowledge the merit in Mr Chamber's submission that the amount of the appellant's financial benefit was a defining feature of his role which must have influenced the sentence imposed.

[29] Accordingly, the approach of the sentencing court to the issue of the financial benefit to the appellant was flawed. The question to be addressed is whether this has given rise to a manifestly excessive sentence. In my judgement, this question invites a negative answer, for two fundamental reasons.

[30] The first is that the judge's approach to the role played by the appellant in the drugs production enterprise was in our view unimpeachable. The judge was informed by the *Bui* brackets. Correctly, she recognised that the appellant's case did not fit neatly into any of these. It was, rather, something of a hybrid. The judge twice stated that every participant's role is fact specific. With reference to the *Bui* categories, the judge considered that the appellant was neither a gardener (the lowest category) nor a manager (the intermediate category). The prosecution formulation was, in substance, that the appellant's role was akin to or analogous to that of a manager. It

was not contended that he was a manager. The defence submission, properly analysed, was to like effect. Thus, the sentencing judge, the prosecution and the defence were all on the same wavelength as regards this issue. The judge's assessment involved no error.

[31] The further reason for concluding that the "Newton error" has not given rise to a manifestly excessive sentence is that, assuming that the financial benefit to the appellant was the lower amount of £40/41,000 claimed by him and taking into account the scale and duration of the operation and his indispensable role therein, the sentence is entirely appropriate. Indeed, it entailed two features which may be considered reasonably generous, namely the positioning of the appellant towards the lower end of the *Bui* intermediate category and the reduction of 25% for a plea of guilty which was on any showing heavily delayed.

[32] It is appropriate to draw attention to the exacting nature of the threshold which must be overcome in this court in order to establish that a sentence is manifestly excessive: see *R v Ferris* [2020] NICA 60, paras [36]–[43] and [56]–[59]. As stated in para [58]:

> "A sentence which, in the opinion of the appellate court, is merely excessive and one which is manifestly excessive are not one and the same thing. This simple statement highlights the review (or restraint) principle…and simultaneously draws attention to the margin of appreciation of the sentencing court. Thus, it has been frequently stated that an appeal against sentence will not succeed on this ground if the sentence under challenge falls within the range of disposals which the sentencing court could reasonably choose to adopt."

It is also timely to highlight the cautionary words of this court in *R v QWL* [2023] NICA 11, paras [115]–[116], regarding prosecution claims about financial benefits enjoyed by defendants, in whatever context. Monetary figures must always have a solid evidential foundation capable of discharging the prosecution onus of proving the relevant amount beyond reasonable doubt.

[33] In this context, the wise words of Lord Bingham in *R v H and C* [2004] UKHL 3, para 13, resonate:

> **"The duty of prosecuting counsel**, recently considered by the Judicial Committee of the Privy Council in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237, para 10**, is not to obtain a conviction at all costs but to act as a minister of justice.** As Rand J put it in the Supreme Court of Canada in *Boucher v The Queen* [1955] SCR 16, 24-25:

> 'Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly.'"
>
> [emphasis added]

This sage exhortation, which is in essence an expression of ethical duty, can be easily overlooked in the heat of battle. It repays frequent reading.

Sentencing language

[34] The use of labels featured prominently before both the sentencing court and, on appeal, this court. This prompts the following observations. In every sentencing exercise, resort to labels, boilerplates and the in-house vocabulary, jargon, acronyms and nomenclature favoured by criminal practitioners and other actors in the criminal justice system is commonplace. This specialised vocabulary becomes the mode of communication between bar and bench. It may also feature in the questioning of witnesses. Furthermore, it stands out in both oral and written advocacy. It is convenient to all concerned and, thus, its use is understandable.

[35] However, it has certain disadvantages. First, it has the potential to generate erroneous outcomes, as the use of specialised or unusual words my create obscurity or ambiguity. In-trial, those misled may include jurors and lay witnesses. Second, it risks generating misunderstandings about aspects of the prosecution case, the defence case, the court process and the sentencing outcome. In particular, key members of the immediate audience, especially injured parties, their supporters and the defendant may not correctly understand the process, the outcome or its rationale. Other members of the interested audience may include press reporters, broadcasting organisations, public representatives, victims' groups, law academics, law students and other judges and legal representatives involved in pending or future cases. The use of plain and simple language, comprehensible to everyone with a legitimate interest in judicial sentencing decisions, is imperative in the present era. Amongst other advantages and benefits, this will have the supreme merit of promoting respect for the judiciary and the rule of law.

Disposal

[36] The appellant deserves credit for his positive post-sentencing conduct, as described in the further information received by this court. However, for the reasons given, the appeal is dismissed and the sentence of the lower court is, thus, affirmed.