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IN THE CROWN COURT OF NORTHERN IRELAND
SITTING AT CRAIGAVON

_____

THE KING

v

ROBERT ATKINSON

_____

SENTENCING REMARKS

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HHJ LYNCH

Introduction

[1] The defendant stands to be sentenced for one count of Conspiracy to do an act with intent to pervert the course of public justice namely to give false information to the police making enquiries about a telephone call

Facts

[2] The background facts of the case are that on Sunday 27 April 1997 Mr Robert Hamill along with a number of friends were walking home at around 01.45 hours when they were set upon by a number of individuals. Mr Hamill receive serious injuries from which, sadly, he succumbed to dying on 8 May 1997.

[3] The defendant was at the time a serving member of the Royal Ulster Constabulary Reserve, on duty that day and a member of a crew in a Land Rover in close vicinity to the scene of the attack. One of the persons alleged to have been involved in the attack was Allister Hanvey, whose father Kenneth had been a co-accused on the present indictment. The defendant was a friend of the Hanvey family.

[4] At 08.37 hours, on the same date, a call was made from the defendant's home to the Hanvey household, inferentially to Mr Hanvey Senior. The call lasted

1 minute 35 seconds. A second call was made at 16.24 hours on the second of May lasting 1 minute 41 seconds.

[5] The police commenced an investigation into the allegation that the defendant had tipped off Allister Hanvey and consequently he was interviewed on 9 September 1997. He denied the suggestion that he had made the calls to alert Hanvey and advise him to get rid of the clothes he had been wearing at the time of the attack.

[6] He was interviewed again after the evidence about the fact of the calls had been discovered. By this time he had created a false scenario to explain the calls in an innocent way.

[7] Just pausing there to reflect upon the deliberation, indeed the gravity of this move. The defendant was a Police Officer now planning to falsify evidence to escape the consequences of his own actions. This is in the context of what now was a murder investigation.

[8] His lying explanation, and his inducing others to support it caused a lengthy investigation and court proceedings that have taken some 27 years culminating in his pleading guilty in April 2024.

[9] He conspired with Michael and Andrea McKee to give the police a false account of who made the call to the Hanvey household on the morning of 27 April 1997. This account was to the effect that Mr McKee rang from the defendant's home in order to ascertain if his niece, who was the girlfriend of Allister Hanvey was OK. This was in the context of the disturbances in the town on the previous night/early morning. There had then to be an explanation as to why he would be ringing at that time of the morning, so a story was concocted to the effect that the McKee's had been socialising the previous night in the Atkinson home and had stayed over.

[10] The McKee's agreed to go along with this subterfuge and made false statements supporting the defendant's version of events.

[11] Lying about who made that telephone call was the act tending and intended to pervert the course of justice. The defendant was only too well aware that police were investigating the murder of Robert Hamill, and that this telephone call was a line of enquiry that police were following. The telephone call was made to the home of someone who was present at the scene of the violent disorder that led to Mr Hamill's death, and therefore was an obvious suspect from the home of a police officer who had also been present at the scene.

[12] The McKee's resiled from their original untrue statements and asserted that they had made them in order to assist the accused and the false case he was making. They made confession and witness statements to that effect. On 7 May 2002, Michael McKee was sentenced to six months' imprisonment and Andrea McKee to

six months' imprisonment suspended for two years. Their pleas were entered on the basis that they knowingly provided false explanations for the telephone call.

[13] I shall deal, briefly with the chronology of events below but the case was eventually set down for trial in Ballymena Courthouse, without a jury, to commence on 15 April 2024. On the second day of the trial Mr Atkinson pleaded guilty and the Crown discontinued the case against his wife and Mr Hanvey senior and verdicts of not guilty were recorded by the court.

[14] In mitigation the defence have relied upon the fact that the accused in entitled to credit for having pleaded guilty, the delay in the case coming to trial, his health and personal circumstances including his clear record.

Health

[15] The defence have submitted two reports concerning the health of the defendant. Dr McAneaney, Consultant Cardiologist, opines:

> "This 71 year old man has been under my care for cardiac rhythm abnormalities for over 20 years. His arrythmias (atrial fibrillation and flutter) have been particularly difficult to control despite multiple medications and procedures. Some of these procedures require referral to other centres in the UK as the procedure was not available in Northern Ireland. In recent years he has developed significant cerebrovascular disease in addition (strokes), These may in part be related to his underlying cardiac rhythm disorder. However, recent investigations have revealed a narrowing of one of the arteries supplying the brain…which may be responsible for a recent stroke. He is under review by the stroke team who are likely to seek a vascular surgical opinion regarding corrective surgery. He also awaits review by myself regarding further management of cardiac arrythmia. The latter may require a further radiofrequency ablation procedure…This procedure is performed in Belfast."

[16] Professor of Ageing and Geriatric Medicine Peter Passmore saw the defendant on 16 April 2024 and concludes:

> "Mr Atkinson has probably had two cerebrovascular events. It sounds like he has had a (TIA) and a stroke. He does not have a dementia…These clinical events have affected his speech and memory. His verbal fluency is reduced, and he has a problem with delayed recall. There was no evidence of nominal issues during formal testing

> but there were a few occasions during the conversation when he was stuck for the right word and the conversation stopped as a result as he worked around the issue. Mr Atkinson is awaiting speech and language therapy assessment at the Trust. He likely has some higher level speech impairment which would require formal document from a speech and language therapist or neuropsychologist."

[17] The approach the court should take was addressed in *R v Bernard* [1997] 1 Cr App R (S) 135, where Court of Appeal allowed an appeal against a sentence for importation of cannabis, (27.7 kilogrammes) and reduced the sentence in length, in part because of the appellant's medical condition. He was 63 years old and suffered from a narrowing of his oesophagus, which caused difficulty in swallowing; hypertension; and diabetes which was not, and probably could not be, controlled in the prison environment. He was at particular risk of heart attack and stroke. The court reviewed earlier caselaw and drew from it the following four principles:

(i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this court to interfere with an otherwise appropriate sentence;

(ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence;

(iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;

(iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

[18] The Guidelines in England and Wales state the following:

> "The court can take account of physical disability or serious medical conditions by way of mitigation as a reason for reducing the length of sentence either on the ground of the greater impact which imprisonment will have on the offender or as a matter of general expressed mercy in the individual circumstances of the case.

> However, such a condition, even when it is difficult to treat in prison, will not automatically entitle the offender to a lesser sentence than would otherwise be appropriate. There will always be a need to balance issues personal to the offender against the gravity of the offending (including harm done to the victim) and the public interest in imposing appropriate punishment for serious offending
>
> A terminal prognosis is not in itself a reason to reduce the sentence even further…"

[19] In the Court of Appeal in Northern Ireland the principles were reiterated by McCloskey LJ in *R v Connor* [2021] NICA 3. The facts (a serious terrorist case) are of little relevance.

[20] There is one particular issue of sentencing principle which arises in the present case. This court has recognised that in sentencing an offender it may be permissible in appropriate cases to have regard to any physical disability or illness which will subject the offender to an unusual degree of hardship in prison. It is timely to emphasise the precision and restraint with which this court formulated this, in *Attorney General's Reference (No 1 of 2006) (McDonald and Others)* [2006] NICA 4 at [39]. First:

> "It is permissible to have regard to any physical disability or illness which will subject the offender to an unusual degree of hardship if he is imprisoned…"

[21] There is a second passage of substantial importance in *McDonald*. In the same paragraph this court endorsed without qualification the following statement of Rose LJ in *R v Wynne* [1994, unreported]:

> "It is always to be born in mind that a person who has committed a criminal offence, especially one who has committed a serious criminal offence, cannot expect this or any other court automatically to show such sympathy so as to reduce, or to do away with altogether, a prison sentence purely on the basis of a medical reason. It is only in an exceptional case that an exceptional view can be taken of a sentence properly passed."

[22] In short, there is a substantial threshold to be overcome.

[23] I have considered the health problems suffered by the accused and accept that they can be taken into account on the basis that imprisonment may have a more

deleterious effect upon this individual than with other accused although this is not determinative of the nature of the sentence to be passed.

Delay

[24] The prosecution have set out a timeline the most salient dates are as follows:

27 April 1997	The assault in Portadown. Defendant rings the Hanvey house.
8 May 1997	Mr Hamill dies.
9 September 1997	The defendant is interviewed about the call and claims that it had been made by Michael McKee.
October 2003	Committal proceedings to commence. Adjourned and when relisted in December Andrea McKee fails to attend and proceedings are discontinued in March 2004.
2009	The Hamill Enquiry.
June 2012	The second preliminary investigation commences. Proceedings are stayed by the District Judge in July which ruling was overturned by the High Court
August 2014	Fresh committal proceedings and again stayed by the District Judge and once more overturned by the High Court.
April/May 2021	After further proceedings the defendant and two co-accused are returned to the Crown Court for trial.

[25] The delay from the time the defendant was first made aware that he was a suspect therefore goes back to September 1997 so therefore ~~there~~ the delay is approaching 27 years from the date the defendant was "prejudiced" within the meaning of the ECHR. In the case of *R v Dunlop* [2019] NICA 72 McCloskey LJ quoting Bingham LJ:

> "26. In criminal matters, the 'reasonable time' referred to in Article 6(1) begins to run as soon as a person is 'charged'; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. 'Charge', for the purposes of Article 6(1), may be defined as 'the official notification given to an individual by the competent

> authority of an allegation that he has committed a criminal offence'…
>
> [27] As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him…the reasonable time requirement(is)…to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods."

[26] Applying this criteria the time for consideration as to whether there has been a breach of the defendant's right to have a fair trial, I deem to be September 1997. Another possible date is the commencement of the first preliminary enquiry in 2003. The chronology supplied by the Crown explains the delay but does not, since it is not attributable to the defendant, excuse it. Referring back to the case of *Dunlop* McCloskey LJ summarised as follows.

[27] The most important general principles to be distilled from the binding decisions of the House of Lords and UK Supreme Court considered above are the following:

(i) The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed.

(ii) In determining whether a breach of the reasonable time requirement has been established the court will consider <u>in particular but inexhaustively</u>, the complexity of the case, the conduct of the defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap.

(iii) Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration.

(iv) In cases where a breach of the reasonable time requirement is demonstrated the question of remedy must be considered: see in this context section 8 of the Human Rights Act 1998.

(v) The appropriate remedy is <u>not</u> to discontinue the prosecution or to stay it as an abuse of process, much less to launch judicial review proceedings.

(vi) The appropriate remedy (or "just satisfaction") will depend upon the nature of the breach, considered in conjunction with all relevant circumstances, including particularly the stage of the proceedings at which the breach is established. Other case sensitive facts and factors may feature.

(vii) Remedy options include a public acknowledgement of the breach, steps to expedite completion of the trial process and the release of the accused on bail.

(viii) Specifically, one of the remedy options is "a reduction in the penalty imposed on a convicted defendant."

[28] Given the delay referred to, I determine that there has been a breach of the defendant's article 6 rights under the ECHR (right to a trial in a reasonable time) and the appropriate remedy is to reflect this by a reduction in what otherwise would be the appropriate sentence.

Personal circumstances

[29] The accused is now 70 years of age. He has a clear criminal record. At age 21 he joined the RUC as a full time Reserve Officer retiring 29 years later. After retirement he worked as a tiler but after 8 years had to retire due to ill health. He is now estranged from his wife (former co-accused) and has two children. Other than this conviction he has led an exemplary life. The defence have waived the right to have a pre-sentence report and I am satisfied that I have all relevant information before me to sentence the accused.

[30] I should acknowledge that I have received and read a victim impact statement from Ms Hudson sister of the deceased.

Sentence

[31] In the case of *R v McAllister & 2 others* [2018] NICA 45 Chief Justice Morgan summarised as follows:

[32] The test in relation to these cases of this sort was set out in the *R v Tunney* [2007] 1 Cr App R (S) 62 and it is agreed that there are really three features which need to be taken into account when looking at the appropriate sentences. The first is the seriousness of the substantive offence, the second is the nature or degree of persistence in the conduct and the third is the effect of the attempt in relation to the administration of justice.

[33] In the present case the seriousness of the substantive offence is a requires some analysis. The prosecution have not sought to rely upon the allegation made by Andrea McKee to the effect that the telephone call in question was to warn Allister Hanvey to dispose of his clothing. This would be in anticipation that the police would, inevitably, regard Hanvey as a suspect, which indeed they did, and would conduct investigation into his alleged involvement in the attack on Mr Hanvey. This would likely involve seizure of his clothing for forensic examination. At the stage of the phone call the investigation was into a serious assault as Mr Hamill was still alive at this stage.

[34] Since the Crown cannot say what was said in the call, on credible evidence, it cannot be established that the call frustrated, or was an attempt to frustrate, a proper line of enquiry into the assault on Mr Hamill.

[35] It was, however, an attempt to frustrate an enquiry into a phone call that the accused was aware was connected to the investigation into the serious assault upon Mr Hamill. He has never sought to provide an explanation for the call, he, being the only person in the court, (Mr Hanvey having been discharged) who can, from first-hand knowledge, tell us it's content. I pointedly asked Mr Gibson KC (who appears for the accused along with Mr Wray BL) if his client wished to indicate any reason for the call or what was said. Mr Gibson indicated that he has no instruction in the matter. Therein, the court is entitled to come to a common sense conclusion. The accused as a serving police officer must have been well aware of the gravity of deliberately misleading the investigators into a serious criminal offence, which should it be discovered would end his career in the police and may well end in a sentence of imprisonment. This is compounded by his engaging others to assist in the cover up with the risk that that entailed and which, of course, was ultimately his undoing. The court can only assume that it had to be a serious matter that he was covering for and that it was in connection to the assault enquiry. That being the case I can only conclude that the substantive offence was the serious assault on Mr Hamill.

[36] I accept that it cannot be established that he did, in fact, impede the investigation into the murder of Mr Hamill.

[37] I now consider the nature and degree of the persistence of the conduct. There was but one phone call the subject of the charge, but it set in train the elaborate conspiracy to it cover up. I regard the fact that he involved two other persons to commit a criminal offence, not in any way to their benefit, in order to preserve his personal position, as a serious aggravating factor and relevant to the persistence of the accused's culpable conduct.

[38] The third issue is the effect of the attempt in relation to the administration of justice. As stated, the Crown cannot link the attempt to any specific obstruction of justice other than frustrating attempts to get at the truth of the making of the call itself.

[39] Chief Justice Morgan also observed (supra):

> "There are no sentencing guidelines for this offence, given the multiplicity of ways in which it can be committed."

[40] The offence being under common law the sentence is at large. There are no comparable cases that I have been able to find, nor have I been referred to any.

[41] I have taken into account in your favour the following

(i) Your erstwhile clear record.

(ii) Your medical condition. I accept the proposition that because of the matters I have referred to that an immediate custodial sentence will be harder for you to endure than a younger person in good health. I have however no reason to suppose that your condition cannot be properly managed in the prison environment.

(iii) The delay. I have already indicated that your Article 6 rights have been breached and that an appropriate reduction because of the lengthy delay and the pressure of this hanging over your head for over two decades must be made. I cannot pass without commenting that had this case been brought before the court at a time close to the commission of the offence you would not have had the opportunity to serve your full term (or thereabouts) in the RUC with the salary and importantly the pension rights that you have accumulated since immediate dismissal would have been inevitable.

(iv) All the matters put before me by your counsel in their comprehensive oral and written submissions.

[42] It is a disgrace that you as a serving police officer should stoop so low as to deliberately mislead an investigation which you knew concerned a serious assault that you had witnessed. Ultimately, it turned into a murder enquiry in which a son of the household you contacted was a suspect. The public are entitled to expect the highest degree of probity in those entrusted to police and enforce the law. You have been a disgrace to your uniform and have continued to serve as a police officer for years afterwards as a criminal – for there is no other description for you.

[43] Exacerbating this conduct you induced others to be involved in assisting your criminality to their detriment. It would seem to me, and the wider general public, to be an affront if you, the progenitor and beneficiary of the conspiracy should escape the fate of Mr McKee who ended up in prison serving a sentence of six months. He pleaded guilty at, as seems, the earliest stage. He was co-operating with the police in unmasking this sordid story which no doubt were matters much in his favour. You have never shown such co-operation and even now will not shed light on that fateful phone call.

[44] Had you not pleaded guilty the sentence of the court would have been one of three years. Discount for a plea, given it late stage, must be limited but is your entitlement reducing the sentence to 27 months. The breach of Article 6 I allow a nine month discount and the hardship of the immediate prison sentence I also take into account. The result and the sentence of the court is 12 months' imprisonment. I have considered whether probation should be an element of the sentence (A

Custody Probation Order) imposed and have concluded that it would serve no useful purpose in this case.

(Sentencing is under the Criminal Justice (NI) Order 1996 (NI 24) Arts.18-28)