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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

ADAM POTTS

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Mr O'Rourke KC with Mr Colm Fegan (instructed by Emmett J Kelly Solicitors) for the Applicant
Ms McCullough KC (instructed by the Public Prosecution Service) for the Crown

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Before: Keegan LCJ, McBride J and Fowler J

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KEEGAN LCJ (*delivering the judgment of the court ex tempore*)

Introduction

[1] We are grateful to counsel for the submissions made in writing and orally in this case. We are in a position to provide a ruling which will issue later in writing. I will deliver the ruling of the court.

[2] This is a renewed application for leave to appeal a custodial sentence of 14 years with an extended licence of three years imposed after a guilty plea by His Honour Judge Kerr KC ("the judge").

[3] The sentence was imposed in relation to a number of counts, namely kidnapping, causing grievous bodily harm ("GBH") with intent, possession of a weapon – a hammer, and possession of a weapon – a knife. There are two co-accused, Mervyn Gibson and Connor Campbell. In this appeal the sentence imposed on Gibson is relevant as a disparity issue is raised in that he received an overall sentence of 11 years by way of determinate custodial sentence.

Factual background

[4] The factual background is set out comprehensively by the single judge. In his judgment he refers to the fact that this case concerns a sustained and horrific attack involving the systemic torture of the victim on 8 November 2020 by the three co-defendants. Just after midnight on that date in the presence of two of his friends, the victim was attacked in his home and then abducted by the applicant and Gibson. Both punched him. The applicant also struck the victim's knees several times with a hammer and after warning the victim's friends not to contact the police, they dragged him out of his flat. Gibson struck the victim on the face a few times before forcing him into a car being driven by Campbell. Gibson was in the back seat beside the victim and repeatedly punched and elbowed him during the car journey which lasted 5-15 minutes.

[5] The victim was taken to a house and on arrival the applicant made the victim place his hand on a windowsill and broke one of the victim's fingers by striking his hand twice with a hammer. He also used a knife to stab the victim's thigh. Further assaults involved punches by both the applicant and Gibson. The victim was then forced back into the car and driven into the Republic of Ireland over a period that lasted approximately 60 minutes. Gibson continued to hit, punch and elbow the victim in the back of the vehicle and the co-defendants discussed the victim and potentially getting rid of him. They arrived at another house but soon left it after the occupant of the house said that the victim had suffered enough and should be taken home. That did not happen immediately.

[6] There were further assaults in the car principally by Gibson. At one stage it seemed that the Garda in the Republic of Ireland became aware of them, as a Garda car followed their car for a short distance. They made the victim get out of the car. He was again kicked on his legs and punched on his face by Gibson. The victim was put back into the car and the group set off again. They arrived at Gibson's house. At this point Gibson used a crossbow to fire a bolt into the victim's left ankle. Gibson then removed the bolt from the victim's ankle and shot him in the right knee. Ultimately, the victim was taken back by car to Portadown in Northern Ireland where he was left in the middle of the road, early in the morning.

[7] The purported motive was that Gibson had told the applicant that the victim had allegedly raped two women and so it was decided to go to the victim's house to challenge him in relation to this. This was a particularly sinister attempt to exact some justice in a misguided way upon this vulnerable victim. Police confirmed that the victim was not involved in any such incident.

Victim impact

[8] We have read the personal statement in this case which is stark in its terms as it describes the effects of this assault upon the victim. He was a vulnerable autistic man. He was subject to a premeditated kidnapping which lasted nine hours and

serious injuries were inflicted upon him which will obviously have a life-long effect as he describes.

The sentencing remarks

[9] As would be expected, the sentencing remarks reflect the experience of this judge and the care and attention he applied to the issues. In summary, the judge deals with the factual background accurately. The latter part of the sentencing remarks deal also in some detail with the question of dangerousness.

[10] Plainly, the judge was faced with a difficult sentencing exercise given the interplay between another offence of causing GBH with intent for which he had been sentenced in advance of these offences albeit it occurred after this offence. Various expert reports on different issues as well were put before the judge and it was clearly a challenge to extract the core issues.

[11] In any event, Mr O'Rourke, who did not appear at the lower court, now raises four grounds on appeal as follows. Firstly, that the starting point of 18 years prior to reduction for the plea was too high. Secondly, that the judge failed to consider mitigation at all in his case. Thirdly, that there is a disparity with the sentence imposed on Gibson. Finally, as this applicant received a five-year sentence for GBH which occurred within a number of months of this offending the overall sentence offends the totality principle. All of these arguments are inter-related as both Mr O'Rourke and Ms McCullough said. And, so, we are going to deal with them with some element of overlap.

Our conclusions on the grounds of appeal

[12] There are two aspects of ground one, which is the 18 years' starting point. Firstly, is how the facts feed into the starting point in any case. But, before we deal with that issue, we do wish to say something about the appropriate range for this type of offending.

[13] We can well understand that all counsel were relying upon the case of *R v McAuley and Seaward* [2010] NICA 36 to assist the judge in this sentencing exercise. That was a case where the Court of Appeal laid down a range of 7-15 years for GBH with intent aggravated by kicking a victim in the head in a public place. Rightly, both counsel recognise that this authority cannot capture the full range of offending that occurs in a case involving kidnapping as well as GBH aggravated by the possession of weapons.

[14] Accordingly, we take the opportunity in the written judgment to highlight two subsequent cases from the Court of Appeal in England & Wales which are more on point: *R v Mahmood* [2015] EWCA Crim 441 and *R v Saqib (Harris)* [2022] EWCA Crim 213. In particular, we endorse the factors set out at para [24] of *Saqib* which refers to the aggravating elements of a kidnapping:

> "24. Finally, in *Attorney General Reference (No 92 of 2014)* [2014] EWCA Crim 2713, this court said that relevant factors in assessing the gravity of cases of this kind would include the length of detention, the circumstances of detention, including location and any method of restraint, the extent of any violence used, the involvement of weapons, whether demands or threats were made to others, the effect on the victim and others, the extent of any planning, the number of offenders involved, the use of torture and humiliation, whether what happened arose out of previous criminal behaviour, and any particular vulnerability of the victim."

[15] It follows that there is a wide range of circumstances in which this type of offending arises, and sentences must be tailored to the facts of a specific case. A starting point of 7-15 years will be likely in most cases. However, in the most extreme cases of kidnapping the range may increase up to the 18 years that applied in *Mahmood* given that kidnapping attracts a maximum sentence of life imprisonment.

[16] So, in fact, the judge's instinct was right not to feel bound by *McAuley and Seaward*, because of the constellation of offending that was apparent, not just GBH with intent. However, nothing we have said detracts from the flexibility open to a sentencing judge when dealing with this type of very serious offending as a sentence must reflect the facts of a particular case.

[17] The point at issue in the case really amounts to whether in the particular circumstances, the 18 years before reduction for the plea was an error of law or manifestly excessive. On this issue, Mr O'Rourke has made some valid points. In particular, we consider that the judge over-estimated the criminal record of the applicant which has been explained to us in a more forensic way by Mr O'Rourke and cannot be described in the same way as the judge described it as a significant record of violence. That is the first error which feeds into the starting point. Although the judge reflected the evidence that was put before him, we think, that some reduction in the starting point should be made on appeal because of this overestimate of the criminal record.

[18] The second issue which is overlapping is mitigation. The judge was very clear not to allow for any mitigation. It is obvious that the judge was not addressed on whether any potential mitigation related to the offence rather than the offender. As to the offender we have seen an impressive letter he sent to the victim expressing his remorse. Given the remorse he expressed the judge's assessment may be viewed as somewhat harsh. However, this was serious offending and so on balance given the judge's unique position in hearing this case at first instance we will not interfere with that assessment. We note that the judge did allow mitigation in Gibson's case

and as Ms McCullough said there are valid distinctions in background between these two defendants.

[19] We are also unattracted to the new argument that there was mitigation, due to the applicant's mental health issues, in relation to the offence itself, which should have led to a reduction in the sentence. Firstly, it was not put before the court. Secondly, the expert reports do not actually support the point. The report provided by Dr Bownes is in relation to different offending. Dr Harding's report is in relation to dangerousness. Even if there is a point to be made that Dr Harding's report can be utilised to support this argument, we are not impressed by it as Dr Harding does not clearly and consistently opine how culpability was reduced due to the applicant's mental health issues to a sufficient degree. Ultimately, the judge having considered all of the evidence, preferred the evidence of probation rather than Dr Harding's opinion. He was entitled to do so and so we reject this ground of appeal.

[20] The third argument is in relation to totality. We consider that there is considerable merit in this point because a sentence of five years was imposed for a GBH with intent for offending within a very short period of this offending. That fact should lead a court to step back and consider the overall proportionality of a sentence. The judge was aware of the other sentence, as is apparent from his sentencing remarks but applying the totality principle further account should have been made for this in arriving at a proportionate sentence.

[21] If the judge had conducted this exercise properly, he would also have reached a sentence more in line with the co-defendant Gibson. We need say no more on the disparity point save that the judge does not fully explain any hierarchy of roles in his sentencing remarks.

[22] Therefore, having examined the arguments we find that the starting point was, in fact, too high. We consider that the appropriate starting point which takes into account all aggravating factors and totality should have been in the region of 16 years rather than 18 years. That in our view leads to a reduction in sentence to 12 years rather than 14 years plus the extended custodial sentence which will remain in place.

[23] None of what we have said detracts from the very serious nature of this offending. This relatively young man has now served a sentence of five years for one GBH with intent and will now serve another significant sentence of 12 years for this offending. He has also been deemed dangerous and so he will have to be assessed at the relevant point as to whether he continues to present a risk to the public.

[24] We grant leave, allow the appeal, and adjust the extended custodial sentence to one of 12 years' custody plus an extension period of three years.