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| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **25/11/2022** |

**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE KING**

**v**

**LUONG BUI**

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**Mr Brendan Kelly KC with Ms Dempsey BL (instructed by Higgins, Hollywood and Deasley) for the applicant**
**Mr Samuel Magee KC with Ms Lauran Ivers BL (instructed by the Public Prosecution Service) for the prosecution**

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**Before: Keegan LCJ, Horner LJ and Fowler J**

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**FOWLER J (*delivering the judgment of the court*)**

## *Introduction*

[1] The applicant was convicted after an eleven day jury trial at Downpatrick Crown Court sitting in Belfast. This was in relation to offences of cultivation of cannabis, abstracting electricity, assisting unlawful immigration, and perverting the course of justice. This is the renewal of leave to appeal sentence following the refusal of leave by the single judge McFarland J.

[2] The indictment concerned the sourcing, equipping and operation of three cannabis factories with three pairs of counts reflecting cultivation and unlawful abstraction of electricity at each site. Together with one count of assisting unlawful immigration of a worker or "gardener" as they are commonly referred to and a count of attempting to pervert the course of justice subsequent to the discovery of the cultivation enterprise and in an attempt avoid conviction.

[3] The applicant was sentenced on 15 November 2021 by His Honour Judge Miller KC ("the judge") to a total determinate custodial sentence of 15 years' imprisonment, apportioned equally between custody and supervised licence. This sentence comprised the follows:

| Counts | Offence | Sentence |
|---|---|---|
| 1 | Cultivating cannabis | 12 years DCS |
| 2 | Abstracting Electricity | 4 years DCS concurrent |
| 4 | Cultivating cannabis | 12 years DCS concurrent |
| 5 | Abstracting Electricity | 4 years DCS concurrent |
| 6 | Cultivating cannabis | 12 years DCS concurrent |
| 7 | Abstracting Electricity | 4 years DCS concurrent |
| 8 | Assisting unlawful immigration | 6 years DCS concurrent |
| 10 | Perverting the course of justice | 3 years consecutive |

***Background Facts***

[4] The background facts of this case and the role of the applicant Bui are set out clearly in the trial judge's sentencing remarks. They may be summarised as follows: The applicant had control of a very substantial and highly profitable criminal enterprise capable of producing commercial quantities of cannabis within Northern Ireland. It comprised of two residential properties in Coalisland and Belfast, and a large commercial unit at La Mon Industrial Estate. Each factory had been rented by the applicant and each reconfigured to his exacting specifications in terms of internal configuration, heating, lighting, hydroponics and horticulture. The lighting and heating required very considerable consumption of abstracted electricity. The sophistication of these operations, the abstraction of the electricity and exploitation of an unlawful migrant worker made for highly productive and low running cost cannabis factories designed to maximise profit. The potential street value of the cannabis produced was estimated as being between £750,000 and £2,250,000. The estimated electricity abstracted was in the region of £35,000 and damage to the properties in the region of £16,000. While the conditions in which one of the gardeners was accommodated and fed could not as the prosecution said, 'be considered as acts of humanity.'

***Sentencing remarks***

[5] Having presided over the applicant's trial and dealt with the co-accused in the case the judge was well placed to come to an informed and reflective assessment of the applicant's role in this criminal enterprise. He concluded that the applicant was, to use his words, the 'lynchpin' in the entire criminal enterprise – the controlling mind of a substantial, sophisticated, and extraordinarily profitable network of cannabis cultivation factories. The judge in his sentencing remarks underlined this role by drawing attention to the applicant's sham business supposedly supplying hydroponic and gardening equipment to the public as a cover for his illegal operation. He considered the number and amounts of cash deposits to the applicant's bank account, some £195,000 deposited between August 2016 and November 2017. The cash figures are only a snap-shot at one particular limited point in time. These aggravating factors as identified, fortified the judge's view that

the jury were completely justified in dismissing the applicant's defence of being an innocent 'dupe' manipulated by others. Rather, the judge regarded the applicant as the person 'calling the shots' not only in terms of the strategic control of this operation but also to the extent of continuing to manipulate his co-accused after their arrest. That letters, sent by the applicant to his co-accused while they were remanded in custody, outlining a false narrative for them to adopt, were a cunning and devious attempt on his part to create for himself a viable defence to the cultivation charges. This being a concerted effort by the applicant in face of what the judge described as an overwhelming case against him.

***The Pre-sentence report***

[6] The judge having considered the background to offending and the aggravating factors above, then considered the applicant's personal circumstances as set out in the pre-sentence report. He noted the applicant was a 44 year old married man with two teenage children. He was born in Vietnam and had settled in the UK with his parents when he was 12 years old. He had no relevant criminal record. He claimed to probation he has a £60,000 debt owed by his sham business which he did not appear all that troubled by. He maintained his position that he was 'stupid and naïve' lacking in any criminal intent and manipulated by others. There were no indications of remorse and he continued to deny the offences.

[7] Before moving to consider his sentencing approach the judge reflected:

> "I shall keep to the forefront of my mind the determination of a global figure that satisfied the seriousness of the offending and the need for due consideration of whether any terms should be consecutive or concurrent, whilst being alive to the requirement of totality."

After considering the agreed relevant sentencing authorities placed before him the judge dealt with the cannabis factory counts and unlawful immigration count together and imposed concurrent sentences resulting in effective sentence of 12 years in respect of these offences. He dealt with the attempted perverting the course of justice count separately and imposed a sentence of 3 years consecutive to the 12 years giving a total sentence of 15 years.

***Arguments on appeal***

[8] Commendably, only two of the grounds of appeal were advanced in a concise and focused manner. The first ground was that the sentence of 12 years for the cannabis factory related counts was too high on the basis:

- The selected starting point was too high.

- There was inappropriate consideration of the applicant's 2015 acquittal on cannabis cultivation charges, and

- Disparity in sentence between the applicant and his co-accused Hamilton.

[9] The second ground pursued was that imposing the attempted perverting the course of justice sentence consecutively to give a global sentence of 15 years renders the sentence manifestly excessive and offends the totality principle.

***The selected starting point***

[10] The maximum sentence for cultivation of cannabis contrary to section 6(2) of the Misuse of Drugs Act 1971 is 14 years' imprisonment. The guideline cases that we have been referred to concerning sentence in cases involving cannabis cultivation are this court's decision in *McKeown & Han Lin* [2013] NICA 38 and the England and Wales Court of Appeal decision in *R v Xiong Xu and others* [2007] EWCA Crim 3129. The applicant's counsel accepts that by virtue of the jury's verdict it must be accepted that the applicant had an organisational role in relation to the cannabis factories. That being the case and in reliance on the authorities of *McKeown & Han Lin* and *Xiong Xu* they argue that the proper sentence for organisers in the circumstances of the present case is in the region of 6–7 years. That both this applicant and his co-accused Hamilton should have the same starting point. This court is of the view that this is an over-simplification of what is contained in both of those decisions.

[11] In *Xiong Xu* which was cited with approval in *McKeown* the Court of Appeal in England and Wales indicated at paragraph 6 that they did not intend to lay down any guidelines with regard to sentencing in commercial cannabis cultivation cases, but rather to indicate brackets to achieve consistency in sentencing. The court went on the suggest:

> " … we consider that for those involved at the lowest level, the starting point should be three years before taking into account any plea of guilty and personal mitigation … For those who set up and control individual operations, the organisers, the starting point should be 6 to 7 years depending upon quantity of cannabis involved … The starting point for managers will be somewhere between three and seven years depending on the level of their involvement and the value of the cannabis being produced. ***Severer sentences may be appropriate for those who control a large number or network of such operations…***"

[12] In *McKeown* this hierarchical structure in relation to cannabis factories was repeated. It referred at the lowest level to workers/gardeners, then managers and

above the managers were the organisers, those who secured the premises, the workers and equipment. Then a top echelon of offenders who controlled a substantial number of such operations.

[13] This court recognises a tier or sentencing bracket above organisers of a single cannabis factory. A bracket for those involved in a 'network of operations' which must be higher than the 6-7 years starting point. Depending on the scale of the network of such operations that range must be between 7 – 14 years. The judge would have been well aware of this tier applicable to those above an organiser of a single operation having considered both these authorities in his sentencing remarks. The argument that as the applicant is an organiser he therefore fell into a 6–7 year starting point is not sustainable. The judge identified the applicant had 3 sophisticated, profitable cannabis factories producing commercial quantities of cannabis. The number, output and profitability of these operations is particularly concerning in what is a relatively small jurisdiction.

[14] Clearly the judge regarded this case as one requiring the deterrence of others from involvement in commercial cultivation of cannabis. In these circumstances personal mitigation is of little moment as this court has often observed (see *McPhillips [2014] NICA 77 [13]*).

[15] In arguing that the starting point was too high, the applicant asks this court to look at the disparity between the sentence passed on Hamilton and his sentence. The starting point in Hamilton's case being a 10 year sentence reduced by 3½ years for his plea of guilty. He was found to be a manager in the two factories located in residential properties which were smaller than the commercial unit in La Mon Industrial Estate. This would have had a starting point somewhere between 3–7 years. Evidently, his previous relevant drug offending would have had a very significant aggravating impact on this, and no doubt reflects the suggested 10 year sentence had Hamilton contested the charges. This was reduced by approximately 1/3 for an early plea. The judge recognised he was subordinate to the applicant, he was a trusted lieutenant, a manager, below the applicant in the hierarchy of offenders identified in *McKeown*. The judge was entitled to and indeed justified in drawing a distinction between Hamilton and the applicant. On a comparison between the sentence imposed in respect of the cultivation offences, Hamilton had he contested the cultivation charges would have received 10 years, the applicant on the same charges 12 years. Leaving aside the question of consecutive sentences, which will be considered later, there can be no suggestion the applicant could feel a sense of justifiable grievance or that an objective observer on consideration of all the facts would feel that the applicant has been treated unjustly.

[16] The applicant further argues that that the judge erred in improperly taking into account or allowing himself to be influenced by the defendant's previous acquittal on directly similar charges. The applicant links what he regards as an inflated sentence with the detail of the previous acquittal and to a remark made by the judge at the end of paragraph 12 of his sentencing remarks, where he says 'This

further underscores the opinion of this court that Bui is a dedicated and committed criminal.' The prosecution responded by saying that the context of this sentence has to be looked at closely. It is made at the end of a paragraph where the judge is dealing with the content of the pre-sentence report and the applicant's lack of remorse. That it is this lack of remorse and the applicant's persistent denial of guilt claiming, as he did in the previous case, he was stupid and naïve. It was this the prosecution argued, in the face of an overwhelming case, which caused the judge to come to the view the applicant is a 'determined and committed criminal.' In light of the present jury's rejection of this 'stupid and naïve' defence, the applicants lack of remorse and the judge having heard the evidence and observed the defendant over the course of the trial, he was entitled to form the view that the defendant was indeed a determined and committed criminal. We do not consider that the judge, either consciously or sub-consciously, inflated the sentence.

***Totality***

[17] The final ground of appeal is based on totality, namely that the impact of a consecutive sentence of three years upon the 12 year sentence for the cultivations offences rendered the total sentence of 15 years manifestly excessive. It is clear from the decision of this Court in *R v Brannigan* [2013] NICA 39 that because offences involving perverting the course of justice undermine the whole process of justice and therefore the rule of law, they must be taken seriously and will in most cases merit a custodial sentence to run consecutively to any other sentence. As recognised in *Brannigan* at paragraph 9:

> "It is absolutely clear from the authorities particularly in relation to the offence of perverting the course of justice that almost invariably a sentence in relation to such activity will be an immediate sentence of imprisonment consecutive to the sentence that needs to be imposed in respect of the offence itself."

[18] It is accepted that the judge was entitled to impose a consecutive sentence for the offence of attempting to pervert the course of justice and that a sentence of three years was not manifestly excessive on its own.

[19] As already stated the judge started his sentencing considerations by reminding himself of the importance of a consideration of the appropriateness of the global sentence, whether sentences should be concurrent of consecutive and the need to be alive to the requirement of totality. The principle of totality was clearly articulated but what this court is concerned with is its application in the circumstances of the present case.

[20] The prosecution readily and realistically accepted that the sentence of 12 years for the headline offence was a stiff sentence when taking into consideration the maximum sentence for cultivation of cannabis is 14 years. However, this court is of

the view that a sentence of 12 years given the network of sites and the aggravating factors set out above was wholly merited. In this case a significant deterrent sentence was entirely appropriate.

[21] However, the question is whether the imposition of a 3 year consecutive sentence on top of an already stiff sentence was manifestly excessive. In considering this aspect of the case it is necessary to stand back and look at the overall sentence in this case. In carrying out this exercise, this court is of the view that while a consecutive sentence was inevitable and necessary to mark the gravity of the attempted perverting the course of justice, the proper global sentence in this case is a sentence of 13 years imprisonment. The imposition of a term of three years consecutive makes this sentence manifestly excessive. In these circumstances leave is granted and the appeal will be allowed to the limited extent that the sentence on count 10, perverting the course of justice, will be reduced to one year consecutive to counts 1, 2, 4, 5, 6, 7 and 8, giving a total determinate custodial sentence of 13 years.