Neutral Citation No: [2017] NICA 38	*Ref:* WEI10345
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 26.06.2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

EAMONN MICHAEL O'BOYLE

-and-

KIERAN HUGH SMYTH

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Before: Morgan LCJ, Weir LJ and McBride J

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WEIR LJ (delivering the judgment of the court)

The Background

[1] O'Boyle and Smyth were jointly charged on eight counts on one Bill of Indictment. O'Boyle was re-arraigned and pleaded guilty at Newtownards Crown Court on 19 January 2015, the date fixed for his trial, to six of those counts, namely robbery, carrying a firearm or imitation firearm with intent to commit an indictable offence, three counts of false imprisonment and aggravated vehicle taking. The trial was adjourned and on 21 April 2015 Smyth was re-arraigned and pleaded guilty to the same counts, that also being the date fixed for his trial. The two other counts against each defendant were ordered to be left on the books.

The nature of the appeals

[2] O'Boyle seeks leave to appeal out of time against an order of His Honour Judge Grant refusing him leave to vacate his pleas of guilty, leave to appeal out of time having been refused by Gillen LJ, and also appeals with leave of the single judge against the indeterminate custodial sentence imposed upon him. Smyth appeals with leave of the single judge against the cumulative sentence imposed upon him. All the charges against both O'Boyle and Smyth arise from the same set of circumstances.

The circumstances of the offending

[3] On Wednesday 11 September 2013 just before 6pm a Peter Brown and his father John, who was aged 82 at the time, returned from their business premises near Ballynahinch to their home in a rural location between Ballynahinch and Carryduff. As they walked towards their house they were set upon by three men wearing balaclavas and armed with what appeared to be a handgun. The men shouted either "UDA" or "UVF". Peter Brown managed to get into the house but the men forced their way in. Mr Brown, his father and his mother, who was aged 76 at the time and who had been at home preparing dinner, were taken into the kitchen and put down on the floor. The men demanded car keys and the keys to the safes indicating that they knew that there were safes and one of the men pointed the gun at Mrs Brown's head and threatened to shoot her. Mr Brown Snr was separated from the others and handed over money. His son did the same. They were then tied up by their hands and legs using torn material, cord and duct tape. Peter Brown was kicked and punched to the face several times. One of the men threatened to cut his fingers off with a kitchen knife and they took his wallet, his Rolex watch and other valuables. The robbers left in Mrs Brown's Mercedes motor car. The Browns had been warned that there would be someone watching the house. Once the Browns had managed to free themselves the police were called at 6:45pm.

[4] At 7pm the police observed Mrs Brown's Mercedes travelling along the Upper Malone Road in Belfast with three males inside. The report of its theft had been received only minutes before. The police gave chase and the Mercedes drove up Dub Lane into the Queen's University playing fields and stopped. It was being driven by O'Boyle. The police drove up alongside in such a way as to seek to prevent the driver from getting out although the other two males did get out and ran off. The Mercedes then reversed and the driver, O'Boyle, managed to get out and ran off in the same direction as the others. They were chased on foot. O'Boyle was stopped nearby as he tried to get over a fence. He had banknotes and cheques made out to the Browns in the top left pocket of his jacket. More cash and cheques were found when he was searched at the police station as were two wallets, one of which was John Brown's and contained a cheque. Cash totalling £14,010 was later found on the waste ground beside the University playing fields. Peter Brown's Rolex watch was found lying in the car park as were three tie pins identified as having been stolen in the robbery and sets of keys also taken during the robbery. The kitchen knife used by the robbers at the house was found in the Mercedes car.

[5] Other police arrived to help locate those involved in the robbery. Smyth was seen coming out of a garden on Upper Malone Road close to the entrance to Dub Lane. He was acting suspiciously and when the police became aware of him he turned into the driveway of a children's nursery. When the police caught up with him he was arrested and identified himself. His clothes were wet and dirty and his face was scraped. There were banknotes sticking out of his trouser leg and silver duct tape such as that used in the robbery adhered to the sole of his shoe. Money was found in his pockets as were cheques relating to the Browns totalling £3,385 in

cash and £1,461.40 in cheques. When cautioned he replied "I want to see my solicitor".

[6] Police found banknotes, a mobile phone, a balaclava and rubber gloves on waste ground at the Dub playing fields. Bank notes were found in the back garden of an Upper Malone Road home next to where Smyth had been seen to emerge. There was a hole in the hedge between that home and the premises where Smyth was seen before he was arrested. The third male was never located. A total of £5,570 in cash and 20 cheques totalling £2,823 were found by police either upon the persons of O'Boyle and Smyth or in the locality where they had been arrested.

[7] Blood was recovered from the blade of the kitchen knife, Mrs Brown's duvet cover and a short length of white flex from a telephone cord which had been ripped out at the victims' home. A DNA profile obtained matched that held for Smyth. His profile also matched DNA profiles obtained from black gloves and a baseball cap found in the Mercedes car. Profiles matching O'Boyle were recovered from black rubberised gloves and a balaclava found on the pathway behind the gardens. At interview O'Boyle made no reply to almost every question put to him. Similarly, Smyth answered "No comment" to every question asked of him.

O'Boyle's application for leave to apply out of time to appeal the refusal to allow him to vacate his plea of guilty

[8] As noted above, O'Boyle was re-arraigned and pleaded guilty to the six counts on 19 January 2015. He was at the time represented by Ms McDermott QC and Mr Fox of counsel and his solicitors were Messrs Breen Rankin Lenzie. His case was adjourned for the preparation of reports and subsequent sentencing. However, within a day or so, O'Boyle had reflected upon his decision to alter his pleas and wanted to revert to pleas of "Not Guilty" as a result of which his then lawyers applied and were permitted to come off record.

[9] On 3 February 2015 a new legal team consisting of Mr Grant QC and Mr Tom McCreanor of counsel instructed by Messrs Harte Coyle Collins came on record. From their skeleton argument for the hearing before this court it appears that the applicant instructed his new legal team that he had felt under pressure to plead guilty, "took the head staggers" and so told his then counsel he would plead guilty. The next day having thought about what had occurred he had contacted his then solicitors and told them he wanted to change his pleas as a result of which they had told him they could no longer act for him.

[10] However the new legal team did not then apply to vacate the pleas. They obtained the original solicitors' contemporaneous handwritten notes relating to the consultation with Ms McDermott prior to the change of plea and wrote to Ms McDermott who provided a detailed account dated 30 March 2015 of her consultation with O'Boyle prior to his decision to be re-arraigned and plead guilty to

the six counts. It was not until 20 April 2015 that an application to vacate the pleas was moved.

The application to vacate the plea

[11] In accordance with what has become normal practice in these circumstances, O'Boyle waived his privilege in respect of the solicitors' notes and Ms McDermott's letter so that this material was available to Judge Grant upon the hearing of the application. The case made was that O'Boyle felt "overwhelmed" by the advice he had received about indeterminate and extended custodial sentences, the principles of joint enterprise and discount for pleas of guilty. In deciding the application the judge referred to the leading authorities including that of this court in R v White [2001] NI 172 and recognised accordingly that he had a discretion to be exercised:

> "….sparingly and rarely where the defendant has had legal representation, has pleaded guilty freely without pressure and has not been misled or mistaken about the meaning and impact of the plea of guilty".

[12] The judge then proceeded to note what had been said by Ms McDermott as to what had occurred prior to the change of plea and noted that Mr Grant QC had conceded in relation to Ms McDermott's description of the advice she had given that it was "a model of how this should take place and be carried out". The judge was satisfied that Ms McDermott, whom he described as a careful and experienced criminal counsel of many years' experience, had advised O'Boyle "properly and comprehensively as she was obliged to do on this occasion". He considered the matters which were being advanced in support of the application to vacate, principally an alleged alibi for the period of the offences, and noted that Ms McDermott had said in this regard that she had received no instructions that O'Boyle had been in the company of his mother on the evening and had not been at the robbery. The judge pointed out that this was supported by the failure to mention this alibi to the police during interview and that no notice of alibi had been served. The judge further pointed out that O'Boyle had very considerable experience of the criminal justice system and of what is involved when facing a charge, dealing with that charge and entering a plea. He concluded as follows:

> "Taking all these matters into account, I am satisfied that the plea entered at the material time on 19 January was a clear, unequivocal, fully advised plea and that he fully understood and I do not accept that he has made out any case which would properly permit me to exercise discretion in his favour and allow him, at this late stage, to vacate the plea."

The application to appeal the refusal out of time

[13] After that ruling of 20 April 2015 nothing at all was done to appeal it until after sentence had been passed on 11 November 2015. On 7 December 2015 a notice was lodged and grounds were provided on the following day seeking to appeal against both the ruling on vacating the pleas and the sentence. The complicated explanation therein provided for the delay was as follows:

> "This was a sensitive case in that counsel were dealing with a transfer from a legal team under whom the impugned plea of guilty had been entered. Clearly given the application to vacate the plea it was extremely difficult to fully advise this particular applicant on the judge's ruling until the conclusion of sentencing given that his plea and his version of events were going to be further rehearsed in further interviews with probation and Dr Pollock for the purposes of sentencing. The applicant's attitude to the offences and his degree of acceptance to those other parties, if any, could only be determined and advised upon on completion of those reports and receipt of final instructions for sentencing. When sentencing was complete instructions were received to enter an appeal against the ruling of the learned sentencing judge on the application to vacate as well as the sentence imposed. This was lodged with the sentencing appeal."

Consideration

[14] Upon the hearing of that application this court indicated that it saw no reason to interfere with the exercise by the judge of his discretion as to whether to permit the plea of guilty to be vacated for the reasons given by him. Further, it was clear from the reasons given for the delay in seeking to appeal that O'Boyle and those advising him wanted to wait to see what sentence the judge would impose before deciding whether to apply for leave to appeal against the judge's ruling and that instructions to so apply were not received until after sentence had been imposed on 11 November 2015.

[15] Applying the well-known principles in R v Brownlee [2015] NICA 39 it is clear that there has been considerable and deliberate delay in making this application. The "wait and see" explanation provided is not acceptable, the applicant had the benefit of the advice of his second legal team within a couple of weeks of entering his pleas of guilty and from that point continuously throughout the period both before and after the application to vacate his pleas. The only question remaining is whether the merits of the application are such that an appeal would probably succeed. This court is satisfied that it would have no prospect of

success. The trial judge correctly directed himself as to the nature and extent of his discretion and carefully considered the competing arguments and the material placed before him before refusing the application. For all these reasons this court declined to interfere with his decision.

O'Boyle's appeal against sentence

[16] Judge Grant imposed the following concurrent sentences:

- Robbery – an indeterminate custodial sentence.
- Carrying a firearm or imitation firearm – 6 years' imprisonment.
- False imprisonment x 3 – 5 years' imprisonment.
- Aggravated vehicle taking – 3 years' imprisonment and 5 years' disqualification.

A period of 8 years was specified as that appropriate to satisfy the requirements of retribution and deterrence in relation to the robbery.

[17] As noted, he imposed an indeterminate custodial sentence in relation to the count of robbery and the appeal against sentence is confined to that aspect. In essence, Mr Grant's submission was that in R v Pollins [2014] NICA 62 this court said at paragraph [26] that:

> "An indeterminate custodial sentence is primarily concerned with future risk and public protection."

and at paragraph [27]:

> "… an indeterminate custodial sentence should not be imposed without full consideration of whether alternative and cumulative methods might provide the necessary public protection against the risk posed by the individual offender. In that sense it is a sentence of last resort. The issue of whether the necessary public protection can be achieved is clearly fact specific. That requires, therefore, a careful evaluation of the methods by which such protection can be achieved under the extended sentence regime."

[18] Mr Grant submitted that the application of those principles to the attributes of this offender and the nature of his instant and previous offending did not warrant the imposition of an indeterminate sentence, that being a "sentence of last resort".

[19] The judge indicated in his sentencing remarks that he had carefully considered R v Pollins and indeed quoted the passages set out above, making clear that in reaching his decision he had considered what methods might achieve protection for the public under the extended sentence regime. His conclusions on that question he set out as follows:

> "I have carefully considered what methods might achieve protection to the public under the extended sentence regime. Regrettably, you failed to respond to the sort of supervision, monitoring and control that is envisaged by and available under the extended sentence regime. You have failed to address your underlying problems and Dr Pollock in his careful consideration of your case does not anticipate that your future conduct could be managed within the community-based setting. It is necessary to recognise that in the past you have been the subject of supervision but have failed or refused to abide by the orders imposed, breaching them at will. Neither the Probation Service, Dr Pollock nor your counsel Mr Grant QC have been able to identify any regime which might offer the necessary protection to the public or serve to rehabilitate you in a way which might remove or even mitigate the significant risk of serious harm that you pose to the public."

[20] In arriving at his conclusion the judge had available to him the pre-sentence report of the Probation Board and the report from Dr Pollock, consultant forensic clinical psychologist, both of which he carefully considered in his remarks. The probation report notes that the present offences were committed some 6 months after O'Boyle had been released from prison after completing the custodial element of a 13 year custody probation order imposed in 2007 for the robbery of a man living in an isolated part of Co Tyrone. This man had been threatened with a firearm, repeatedly immersed in a water-filled bath, punched, tied up and had petrol thrown over him. On release from prison O'Boyle did not comply with the probation element of that sentence so that breach proceedings were initiated. The probation officer concluded O'Boyle was assessed as being at a high likelihood of re-offending and that he represented a significant risk of serious harm, the latter for the following reasons:

> "1. He participated in an organised serious crime in which the victims experienced serious psychological harm as a result of their ordeal. Physical violence was used and threats of violence were made to intimidate and frighten during the course of the robbery.

2. The defendant has an established offending history in regard to robbery, with his most recent robbery conviction in 2007 also involving the targeting of a vulnerable individual in an isolated location who was subjected to physical harm and serious psychological harm.

3. His conviction in the current matter highlights his lack of effective internal self-control/risk management skills and his inability to comply with external controls (supervision) designed to address and manage his behaviour when in the community.

4. Any further risk management plan needs to address the defendant's poor self-management and consequential thinking skills as well as alcohol/drug abuse. However, no risk management plan will be effective until Mr O'Boyle is prepared to severe his associations with other offenders and individuals involved in organised serious criminal activity."

[21] Dr Pollock then reported at some length having had the benefit both of seeing the probation report and of his own clinical assessment of the applicant. It had been indicated in his instructions that the risk of serious harm was not disputed which Mr Grant confirmed to this court. He accordingly focused as the solicitor had asked upon whether or not O'Boyle may be able to deal with his issues/risk by way of an extended rather than an indeterminate sentence. Dr Pollock concluded as follows:

"Regarding Mr O'Boyle's likely ability to manage personal issues and risk, a number of observations are made in his case.

Mr O'Boyle was probably acutely intoxicated by alcohol intake at the material time, based on his self-reporting. Substance intake has been a consistently and particularly germane factor in Mr O'Boyle's criminal history. In recent months, Mr O'Boyle has failed drugs tests within the controlled environment of the prison whilst on remand. He has also failed drugs test following ADEPT intervention whilst in prison. He has history of repeated abstinence and relapse within his typical pattern of substance misuse. It is more likely than not that he will relapse to some form of substance misuse in the future. It is questionable as to whether he will show positive response to future interventions to address addiction, given his response to such service thus far.

> When considering Mr O'Boyle's probable response to interventions that might be put into place to assist him to manage his personal difficulties and risk, it is observed that Mr O'Boyle has historically shown a generally poor pattern of engagement with and response to services in the community to assist him to address mental health and addiction conditions.
>
> It is noted that Mr O'Boyle committed the index offences within a relatively short period of time since release from custody for a robbery. It is also noted that Mr O'Boyle has history of breaching conditions whilst in the community and tendency to re-offend, despite interventions or punishments. These observations do not auger positively when debating his likely response to interventions and conditions of supervision and monitoring.
>
> On balance, it is here the opinion that Mr O'Boyle needs to demonstrate that he can engage with services, can demonstrate internal self-control over his difficulties and can abide by external conditions before it is possible to be confident that he can self-manage risk and personal issues to a satisfactory degree within the community whilst under supervision. On this basis, it is unlikely that Mr O'Boyle's case could be managed with a community-based element at this juncture in time."

[22] The judge expressly took account of these conclusions and also of O'Boyle's earlier convictions for robbery both in this jurisdiction in 1999 and in the Republic of Ireland for attempted robbery in 1999 and the robbery of a bank there in 2002 in which a gun was produced and staff and customers threatened.

Consideration

[23] This court considers that in the circumstances the judge was right to take the exceptional step of imposing an indeterminate custodial sentence. There was no indication from Probation Service, Dr Pollock or counsel that O'Boyle's admitted dangerousness and the assessed significant risk of serious harm from him to others could be managed in any way short of the sentence imposed. He had failed to demonstrate any real willingness to co-operate with agencies or in programmes in the community or in the prison setting and even while in custody on the present offences had failed drug tests and shown no willingness to alter his way of going. It may be, and is greatly to be hoped, that during the course of the custodial element of his present sentence he will reflect, as he has failed to do in the past, upon whether

he wishes to continue to spend much of his life in prison. It will be for him to in due course demonstrate the necessary changes to the parole commissioners in a manner that sufficiently inspires their confidence. Meanwhile, this court is satisfied that this is a case in which the imposition of an indeterminate custodial sentence was on its facts appropriate and that it was not either excessive or wrong in principle. The appeal against that sentence is accordingly dismissed.

The appeal of Kieran Smyth against sentence

[24] Smyth appeals with the leave of the single judge against the sentence of 12 years imposed on the count of robbery. The other custodial sentences imposed were identical to those imposed upon O'Boyle and again are to be served concurrently.

[25] Mr Kelly QC who appeared with Mr Toal realistically accepted that the offences were very serious and called for a considerable period of imprisonment. He recognised that the appellant and his accomplices had invaded the home of an elderly couple with the intention of using fear to steal money from the family business. The couple's son had been assaulted and all three had been tied up. This latter factor together with the vulnerability of the couple due to their age is what he described as a "significant aggravating factor". He further accepted that the following factors identified by the judge as aggravating were indeed such:

- This was a pre-planned robbery.
- The victims were vulnerable by reason of their age.
- The victims have lasting effects from the incident.
- Some violence was used.
- An imitation firearm was used to engender fear.
- The offence involved the invasion of the family home.

[26] Nonetheless, he submitted that the effective total sentence of 12 years was manifestly excessive and that there were errors in the approach to sentencing taken by the judge, namely:

(i) The judge did not state a starting point so that his reduction for mitigation and the pleas of guilty could not be ascertained.

(ii) The same length of sentence as that imposed in R v Mongan [2015] NICA 26 had been arrived at when, it was submitted, Mongan was "more serious in many material aspects".

(iii) In the same vein, it was submitted that the facts and gravity of R v Cambridge [2015] NICA 4 were similar to the present. An analysis of the aggravating factors in Cambridge when compared with the present case in his submission supported the conclusion that the starting point after taking account of the relevant aggravating factors should have been 10 years from which there should have been "some discount" for the pleas of guilty and "the substantial gap in his offending".

[27] Mr Kelly rightly acknowledged that the comparison of the facts in sentencing cases has been deprecated by the Court of Appeal and that sentencing is an art rather than a science but was not thereby deterred from embarking upon a detailed analysis of what he said were the differences and similarities between the present case and his two purported comparators. This exercise led him to submit that the effective sentence of 12 years was excessive.

Consideration

[28] This was, as is frankly conceded, very serious offending involving a carefully pre-planned and executed attack upon an elderly couple and their son. It was a "hybrid" commercial and domestic robbery in that the robbers lay in wait for the father and son as they returned home from their business with, as the robbers had correctly calculated, their business takings for the day. In carrying out the robbery by invading the family home they were able to isolate the victims from any potential intervention that the customers at their hardware store might have made while at the same time obtaining full access to their business takings just as if they had run the much greater risk of trying to rob their victims at their place of business.

[29] Many of the serious aggravating factors have been candidly acknowledged by Mr Kelly and need not be repeated. In addition to those we add the fact that the robbers wore balaclavas and represented themselves as being from a paramilitary organisation which must have added significantly to their victims' fear as to what fate might befall them given the notorious propensity of such organisations to visit severe and gratuitous violence upon their victims.

[30] Mr Kelly is quite right to submit that the trial judge should have identified a starting point so that the extent of any discount for the last minute plea could be accurately identified. This court has repeatedly urged sentencing judges to take that course. It did so, for example, in DPP's Reference No: 2/2013 (McKeown and Han Lin) [2013] NICA 28. It did it again more recently in R v Braniff [2016] NICA 9. The failure to do so makes the task of this court and of those whose role is to advise clients on the merits of any contemplated appeal much more difficult. To examine whether a sentence is wrong in principle or manifestly excessive is a much more accurate exercise when judges "show their workings" rather than just giving their "final answer". All this court can do is to yet again urge this obviously sensible and fair course upon those judges who have not yet heeded the call.

[31] In the present case the judge indicated that he was giving "very limited" credit for the late pleas. He took the view, with which this court entirely agrees, that there was never a working defence to these charges. The appellant was literally caught "red-handed" and the debate relating to the attributability to the appellant of DNA found in the balaclava could have had no effect upon the overwhelming strength of the rest of the prosecution case had that question been resolved in Smyth's favour. In those circumstances and in the light of the very late pleas we agree that any reduction could only be minimal. The judge also says that he was treating as a mitigating factor the fact that the appellant's criminal behaviour had diminished in gravity in the period between 1995 and the present offences. While again the credit allowed for that factor is unspecified it cannot have weighed other than minimally.

[32] Doing the best we can to deconstruct the sentence from the information contained in the sentencing remarks it appears to this court that the judge probably took a starting point of 14 years before allowing a reduction of 15% for the mitigating factor and the very late pleas. While we consider that starting point to represent probably the height of the potential range for this offending by this offender we cannot characterise it as manifestly excessive or wrong in principle. The same must be said of what we surmise to have been the reduction of about 15%. In those circumstances the appeal is dismissed.