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Judgment: approved by the Court for handing down | *Delivered:* **04 / 06 / 10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN –v- MICHAEL PATRICK CLARKE and STEPHEN PAUL McSTRAVICK

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SENTENCING JUDGMENT

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McCLOSKEY J

I General

[1] By the judgment of this court delivered on 19th March 2010,[1] the first Defendant, Mr. Clarke was convicted of the first count on the indictment, robbery, while the second Defendant, Mr. McStravick, was convicted of the fifth and sixth counts, false imprisonment, all committed on 28th May 2008. The Defendants must now be sentenced accordingly.

[2] As noted in the main judgment,[2] both Defendants were prosecuted as secondary parties and not principals. The projection of the prosecution case was that the leading gang members had escaped detection to date and, in consequence, were not before the court.[3] This prompted an earlier observation by the court that the secondary roles of the Defendants would, foreseeably, be ventilated at this stage of the proceedings and could sound on the court's evaluation of culpability, retribution and deterrence.[4] In the event, this became the centrepiece of the submissions advanced by counsel for both Defendants. These submissions were not contested by the prosecution which, during this phase of the proceedings, confined itself to highlighting the victim impact statement.

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[1] See [2010] NICC 13
[2] See paragraphs [3] and [43]
[3] See paragraph [90]
[4] See paragraph [90]

[3] As the offences were committed after the commencement date of Articles 13 and 14 of the Criminal Justice (Northern Ireland) Order 2008 ("*the 2008 Order*" – 15th May 2008, per SR 2008 No. 217) and robbery is a "*serious offence*" (per Article 12 and Schedule 1) while false imprisonment is a "*specified violent offence*" (per Article 12 and Schedule 2), the "dangerousness" provisions of Chapter 3 are engaged. This requires the court to consider, in accordance with Articles 13 and 14, whether there is "*a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences*". It was submitted on behalf of both Defendants that the formation of this opinion by the court would be unwarranted. The prosecution did not demur. As regards Mr. Clarke, under the rubric "Risk of Serious Harm", the Probation Officer states:

> "*The Defendant is not assessed as possessing a risk of serious harm at this time*".

As regards Mr. McStravick, the pre-sentence report is non-committal, on account of what is described as "*his total denial of the offences*". Notwithstanding, the Probation Officer notes that this Defendant has no previous record of violent offending, is not afflicted by alcohol or drug dependency and appears to have a settled and supportive family. On the basis of all the evidence available to the court, which now includes extensive information about the upbringing, antecedents, lifestyle, frailties and general history of both Defendants, I am of the opinion that there does *not* exist a significant risk to members of the public of serious harm occasioned by the commission of further specified offences by either Defendant. Having duly observed the requirements of Article 15(2), I propose to sentence both Defendants on this basis.

II <u>Mr. Clarke</u>

[4] This Defendant is now aged thirty years. He has eighty-four previous convictions. Approximately two-thirds of these relate to road traffic offences. Amongst the remainder, there are convictions for public order offences, assaults, criminal damage, drugs offences and theft. There is also a previous conviction for robbery. The uncontested assertion on behalf of this Defendant was that this was an unsuccessful venture designed to secure drugs for his own consumption, involving a pharmacy, giving rise to a conviction for attempted robbery. This can be related to other information available to the court about the previous lifestyle and antecedents of this Defendant.

[5] It is clear from the various reports available that this Defendant's upbringing and lifestyle were, respectively, dysfunctional and chaotic. He clearly developed a serious drugs dependency and this, in turn, was the stimulus for some of his previous criminality. He has no useful academic or vocational qualifications. He attributes his involvement in the index offence to a drug debt, generated by his continuing addiction. The threats which he claims to have received from sinister elements are corroborated by references in reports to his medical records and by two

Forms PM/1, emanating from the police, supplied to the court. He is considered to have a "*high likelihood*" of reoffending, having regard to his criminal record.

[6] The pre-sentence report contains a positive description of this Defendant's efforts in the realm of self-correction and rehabilitation:

> "*During his imprisonment the Defendant has sought help, using the prison's education, work and counselling facilities. He insists that he has made himself drug free, which in turn has allowed him to reflect and adopt a positive outlook for the first time. Mr. Clarke has expressed a wish to further his progress after release from prison, particularly in providing a good example for his two children and ultimately hopes to be able to care for them*".

This may be juxtaposed with an equally positive report from the "Adept" organisation, which is concerned with drug and alcohol dependency. Mr. Clarke has been engaging with this Agency for approximately six months. His engagement has been active and, apparently, fruitful. He is described as "*currently drug free*", working in certain prison workshops and pursuing some educational courses. These are considered to be a reflection of his commitment to avoid drug consumption and any risk of relapse. Dr. Weir's report describes a previous lifestyle of alcohol abuse, addiction to drugs (cocaine) and paramilitary threats and beatings. As regards the future, certain positive factors are highlighted, which have been largely covered above. Dr. O'Kane's report is in similar vein.

[7] It was submitted by Mr. Campbell (of counsel) on behalf of this Defendant that his offending was remote from the ugliest aspect of the events viz. the kidnapping and false imprisonment of the three family members concerned. This Defendant's consistent accounts regarding his recruitment and the underlying motivation were highlighted. This insulates him from any suggestion of involvement in the planning of the operation. He is described as an unenthusiastic participant. It is conceded, realistically, that a robbery of a large sum of money must have been within his reasonable contemplation. The video evidence is said to demonstrate his restricted involvement and the limited state of his knowledge. It is suggested that he is a "low grade" secondary party, far removed from the "masterminds", an expendable lower level participant. A degree of personal mitigation is urged by those aspects of his upbringing, lifestyle and private circumstances already summarised above.

[8] The portrayal of this Defendant's limited involvement and confined state of knowledge was not disputed by the prosecution and I shall proceed on this basis. The court was informed that, at his first remand hearing, a police officer testified that his role was "*minimal, but pivotal*". This neatly encapsulates the depth of his involvement and the extent of his criminality. The prosecution do not seek to identify any specific aggravating factors. I concur with this assessment, except as

regards his criminal record, taking care to distinguish factors intrinsic to the offences from additional freestanding and truly aggravating factors. Of the latter variety, none is put forward. Further, as noted by Lord Bingham CJ in ***R –v- Craig and Others*** [1999] 1 Cr. App. R(s) 335, the court is "*… inclined to look more favourably on an offender who has already demonstrated (by taking practical steps to that end) a genuine, self-motivated determination to address his addiction*". I consider that this applies to the present case. The reports generated for the purpose of sentencing, coupled with certain evidence adduced at the trial, suggest that this Defendant is remorseful for his conduct. On the other hand, his criminal record must be viewed as an aggravating factor.

[9] There are certain decisions of the Northern Ireland Court of Appeal which must be considered. These include, in particular, ***Attorney General's Reference No. 1 of 2005*** [2005] NICA 44, where the court stated:

> *"[19] We wish, therefore, to make absolutely clear that for a commercial robbery carried out as a well planned venture, where firearms or imitation firearms are used and where the perpetrators use or are prepared to use violence, the starting point for sentence after a contest should be fifteen years. On a plea of guilty at the earliest opportunity the appropriate starting point is ten years' imprisonment. Where a plea is made later than the first opportunity the reduction should be adjusted to take account of the lateness of the plea and the reasons that it was not entered earlier.*
>
> *[20] It follows that we regard the sentences imposed in the present case as unduly lenient. Prosecuting counsel's view that the sentencing range for robberies of this type was between four and ten years was plainly wrong. We do not consider that his suggestion that this is the 'historical' range can be supported by reference to guideline cases in this court."*

Bearing in mind the context in which these pronouncements were made, it seems to me that in these passages the court had in contemplation primary participants. Having regard to the characterisation of both Defendants as secondary parties, I consider that an earlier pronouncement of the Court of Appeal in ***Attorney General's Reference No. 1 of 2004*** [2004] NICA 6 is of closer application to the present matrix:

> "*[19] The normal starting point for robbery where the Defendant has not played a central role should be in the range of five to seven years on a plea of guilty*".

Notionally, the range would be around six and a half to nine years where guilt is contested. I have also considered the Sentencing Advisory Panel's consultation

paper, published in April 2003, bearing in mind its endorsement by the Northern Ireland Court of Appeal in each of the aforementioned decisions.

[10] The court is frequently reminded that sentencing is an art and not a science. Moreover, it is trite to observe that each case is fact sensitive and every sentence is unavoidably contextualised in nature. In my view, the effect of the Court of Appeal guidance is that the primary participants in this robbery would, following a contested trial, confront a probable starting point of fifteen years imprisonment . This provides a useful point of departure for this Defendant, who is to be sentenced as a relatively low level secondary party, one who achieved no personal gain and acted under threats, albeit falling short of duress. The starting point for him, in my estimation, is eight years, taking into account that he contested the trial. In the reckoning of aggravating and mitigating factors, it is incumbent on the court to balance particularly Mr. Clarke's criminal record (on the one hand) with his evident remorse and genuine and determined rehabilitation efforts (on the other). From this equation, giving particular weight to the latter factor, I consider that a modest credit balance in his favour emerges.

[11] The available reports provide ample foundation for concluding that this Defendant should undergo a substantial period of probationary supervision and support following his release from prison. By virtue of Article 5(2) of the 2008 Order, the term of every custodial sentence shall be what the court considers commensurate with the seriousness of the offence. Taking into account Article 24(3) of the Criminal Justice (Northern Ireland) Order 1996, the court has been informed that this Defendant will consent to undergoing probation. I conclude that the appropriate sentence of imprisonment for Mr. Clarke is seven years, of which the last three years will take the form of probationary supervision. In the absence of the necessary consent, in accordance with Article 24(5) of the 1996 Order, the sentence would have been one of seven years imprisonment.

III <u>Mr. McStravick</u>

[12] The pre-sentence report relating to this Defendant is of brief dimensions. This may, in part, be a reflection of his relatively unexceptional upbringing, previous lifestyle, work record and family circumstances. It also reflects what is described as his "*denial and unwillingness to take responsibility for the crimes*" and an associated determination to challenge his convictions on appeal. As a result, no question of credit for remorse arises. This Defendant has committed three previous road traffic offences and, in the context of the present convictions, is to be treated as a person of effectively previous good character. He is considered suitable for probationary supervision.

[13] According to Dr. Bownes, Mr. McStravick is suffering from a moderately severe reactive depressive episode , precipitated by his arrest and ensuing trial and convictions. He is not clinically depressed and has no active mental illness. There is now an exacerbation of his psychological condition , to the extent that, per Dr

Bownes' evidence, he requires medication. It was confirmed by counsel that this is not advanced as a mitigating factor. I would not have ranked it thus in any event. The report of Dr. Davies highlights two particular themes. The first is this Defendant's sense of anxiety arising out of his trial and convictions. The second is described as "*a marked sense of angry indignation that he has been found guilty of these offences*". Mr. McStravick is assessed as a man lacking resilience when confronted with stress and resistant to the acceptance of responsibility. The impact of the convictions on his wife and family also features prominently. His wife has also been afflicted by stress related anxiety symptoms and suffers from fibromyalgia, for which anti-depressant medication is necessary. I accept that she has a progressive dependency on her husband.

[14] The submissions of Mr. Pownall QC (appearing with Mr. McAlinden) laid emphasis on the reduced role of this Defendant in the overall operation. It is stressed that he was acquitted of the counts of robbery and kidnapping. His offending belongs to the "*bottom rung*" of the operation. He had no involvement in the selection of victims, vehicles, locations or methodology. His conduct exhibited a significant lack of sophistication, evidenced by the use of a vehicle registered to his wife. It is submitted that his role was neither integral nor central and that his convictions are consistent with relatively unplanned and spontaneous involvement. This is supported by the evidence of his conduct during certain phases of the morning in question. His preparedness to identify one of the perpetrators is also highlighted as both a source of some credit and an indicator that he is not a gangster. Finally, there is no suggestion that he secured any gain from his offending.

[15] In ***R –v- Spence and Thomas*** [1983] 5 Cr. App. R(s) 413, the English Court of Appeal made some notable pronouncements on sentencing for kidnapping. In particular, Lord Lane CJ stated, at p. 416:

> "*It seems to this court that, as with many crimes so with kidnapping, there is a wide possible variation in seriousness between one instance of the crime and another. At the top of the scale, of course, come the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than eight years imprisonment or thereabouts. Where violence or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that.*"

The broad spectrum of offending in cases of false imprisonment is illustrated by ***R –v- Lucas*** [2000] 1 Cr. App. R(s) 5, where the sentence was one of two years imprisonment in a case involving, in my view, significant aggravating factors. In contrast, in ***R –v-McKeown and Others*** [unreported, 19th September 1997], which involved a gang breaking into a family home and holding family members hostage,

as a prelude to a Post Office robbery, an appeal against a commensurate sentence of twelve years imprisonment for conspiracy to rob and two counts of false imprisonment, upon a plea of guilty, was dismissed. In ***R –v- Devenney*** [2001] NICA 47, the Court of Appeal dismissed an application for leave to appeal against, inter alia, a commensurate sentence of eleven years imprisonment, incorporating one year of probationary supervision, imposed for two counts of robbery and two counts of false imprisonment.

[16] I consider that, following a contested trial, the primary perpetrators of the kidnapping and false imprisonment of the victims in the present case would probably have been sentenced to prison for terms in excess of ten years. Bearing in mind the evidence upon which this Defendant was convicted of the fifth and sixth counts, it is essential to isolate and expose his role in terms that are both fair and realistic. In short, his actual conduct, by inference, was, firstly, to drive one of the primary kidnappers from the hostage house to a nearby retail outlet and back again. This conduct provides the first foundation for his convictions. It would be inappropriate to speculate about any other kind of improper conduct in which he may have engaged at other stages of the events in question. On this basis, he was not involved in the initial kidnap of the victims or the act of transporting them to the hostage house. Nor had he any active role in their confinement there. I agree with the submission that the need to make the retail purchases probably arose spontaneously, this being consistent with the evidence of EL. However, this is counterbalanced by the inference that this Defendant and the vehicle driven by him must have been readily available to provide the ensuing service. Some reflection on the service duly provided is also appropriate. It was neither essential nor central to the operation. Perhaps ironically, it entailed providing some degree of comfort to the victims and ameliorated, rather than exacerbated, the conditions of their detention. Furthermore, the conduct involved in providing this service would have been of only some minutes' duration. In my view, Mr. McStravick's conduct is properly assessed as peripheral to the overall criminal operation, taking into account also the second dimension thereof, forming the basis of his convictions, as recorded in paragraph [85] of the main judgment.

[17] In common with their approach to his co-accused, the prosecution do not attribute any specific aggravating factors to this Defendant. I concur with this, while taking into account the victim impact statement, the contents whereof depict the kind of effects and consequences which would predictably arise in a false imprisonment case of this nature and seem to me intrinsic, rather than superimposed exacerbating, features. I also remind myself that Mr. McStravick is implicated in the periphery of the false imprisonment, rather than the initial detention and kidnapping which, based on the evidence, was the most traumatic and distressing aspect from the family's perspective. Bearing in mind Article 5(2) of the 2008 Order, a term of imprisonment is inevitable. While this must be of not insubstantial proportions, its measurement has to be related to the court's assessment of Mr. McStravick's relatively peripheral role during the false imprisonment phase of the operation. Having regard to his family circumstances

and his willingness to identify a perpetrator, some mitigation is appropriate, especially as his imprisonment will have a severe impact on his wife and children. I conclude that the appropriate sentence of imprisonment is four years, to operate concurrently in respect of both counts. In view of the assessment contained in the pre-sentence report, I shall incorporate a period of probationary supervision, particularly since this will facilitate a better understanding on the part of this Defendant of the consequences of his offending, especially its impact on the victims, for whom he has displayed limited empathy and should increase his resistance to the forces which stimulated his involvement in this criminality.

[18] It is confirmed that this Defendant will consent to probation. In my view, the appropriate breakdown of his sentence is two-and-a-half years imprisonment, to be followed by one-and-a-half years probationary supervision. In the absence of the necessary consent, in accordance with Article 24(5) of the 1996 Order, the sentence would have been one of four years imprisonment.