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ICOS No. 13/50403

IN THE CROWN COURT IN NORTHERN IRELAND

SITTING AT BELFAST

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REGINA

v-

SEAN KELLY AND
SHARON RAFFERTY

_____

Extempore Judgment

HIS HONOUR JUDGE McFARLAND, RECORDER OF BELFAST

[1] The two defendants before me have pleaded guilty to counts 2, 3 and 18, those are joint counts, and indeed they were jointly charged with Terence Coney and Gavin Coney who were sentenced yesterday in relation to those counts. Then Mr Kelly also has pleaded guilty to counts 4, 7 and 10. Just to recap, those counts relate to the following matters:

- Count 2 relates to the possession of a firearm, which was a .22 Walther rifle and ammunition on 30 March 2012.

- Count 3, which essentially is related to count 2, is the count of attending at a place used for terrorist training, and that of course was the Formil Wood incident.

- Count 18, again related to counts 2 and 3, is a count of preparation of terrorist acts.

- The separate counts that Mr Kelly faces and that he has pleaded guilty to are 4, 7 and 10. Count 4 relates to the collecting of information and that related to personal details relating to a Governor of the Northern Ireland Prison Service.

- Count 7, which was attending at a place used for terrorist training, that relates to a terrorist training event or camp that he had referred to in a conversation

with Ms Rafferty.

- Finally then for Mr Kelly, count 10, which is possession of two blank firing guns, again associated to and related to terrorist training, that is the use of blank firing guns.

[2] The maximum sentences in relation to these offences are: possession of the firearm in suspicious circumstances is 10 years; possession of articles under the Terrorism Act was 10 years, that was increased to 15 years; collection of information is 10 years; attending a place used for terrorist training is 10 years; and preparing acts, preparation of terrorist acts, the maximum is life imprisonment. Under the provisions of the Criminal Justice (Northern Ireland) Order 2008, the firearms offence, the preparatory acts offence and the collection of the information are serious and specified charges and the possession of articles useful to terrorism and attending at a place for terrorist training are both specified offences.

[3] I turn first to the Formil Wood incident which occurred on 30 March 2012. This was an incident in which the two of you and the two Coney brothers, Terence and Gavin, attended. I am of the view that one, or certainly both of you, could have some organisational role in relation to that, or facilitating role, I am not too sure if there was someone higher up the hierarchy, but you would have had some organisational role, although the defendant Gavin Coney provided the weapon which he owned and was licensed to use, although not clearly for the purposes for which it was used that day. You assembled in Formil Wood and then it is clear from the evidence that was recovered that there was some form of target practice where the weapon was used to fire at balloons and a mess tin and possibly some other objects. It is accepted that the purpose of this exercise was to test the suitability of the weapon for other purposes and clearly to acquaint the persons present with the use of this particular weapon and the use of weapons generally. Ultimately of course the purpose would have been to make people proficient in the use of weapons and the handling of weapons, the firing of weapons, and the suitability of this particular weapon for terrorist purposes.

[4] In relation to the three offences, specifically relating to you, Kelly, 4, 7 and 10 counts, the evidence in relation to this comes from recorded conversations that you had with Rafferty. Essentially these were confessions on your part where you admitted during the course of those conversations to certain conduct, that conduct of course was criminal in nature and by your plea you have accepted not only that you said those remarks, but that the remarks were accurate. Of course all these offences are serious matters, and as I said yesterday in my sentencing remarks to Mr Terence Coney and Mr Gavin Coney, it is a sad fact that there are still some people in Ireland who cling to the notion that political aims can be advanced by the use of violence.

[5] The issue of dangerousness is of course engaged, it was raised by both counsel, but specifically by Mr Duffy in relation to a discrete point and I am going to spend a little time dealing with the issue of dangerousness and how the courts are required to assess it. Now, the appropriate legislation is Article 15 of the Criminal

Justice (Northern Ireland) Order 2008 and it states that:

> "This Article applies where -
> (a) a person has been convicted on indictment of a specified offence; and"

And of course you have in this case. It continues:

> "(b) it falls to a court to assess ... whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences."

Sub-paragraph 2 states:

> "The court in making the assessment referred to in paragraph (1)(b)—
> (a) shall take into account all such information as is available to it about the nature and circumstances of the offence;
> (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and
> (c) may take into account any information about the offender which is before it."

[6] Now, as for the general assessment of dangerousness there has been some assistance provided by the Court of Appeal, both in England and in Northern Ireland. In England they have, or at some stage had, identical legislation and I refer specifically to the cases of R v Lang [2005] EWCA Crim 2864 in England and R v EB [2010] NICA 40 in Northern Ireland. Just to summarise how a Court should approach this issue, referring to the case of EB:

> "(i) The risk identified must be significant.
>
> (ii) In assessing the risk of further offences being committed the sentencer should take into account the nature and circumstances of the current offence; the offender's history of offending including not just the kind of offence but its circumstances and the sentence passed ... social and economic factors in relation to the offender ... the offender's thinking, attitude towards offending and emotional state. The sentencer would be guided, but not bound by ..." pre-sentence, probation and medical reports.
>
> "(iii) If the foreseen specified offence was serious, there would clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm.
>
> (iv) If the foreseen specified offence was not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant."

[7] Now, Mr Duffy specifically referred to the Supreme Court decision in R v Smith [2012] 1 Cr.App.R(S.) 83 and that related to when should, it related to the issue of when the judge, when sentencing, should consider the issue of dangerousness. In other words, should it be at the time of the sentence or should it be at some future time potentially when an offender was going to be released from prison. Mr Duffy referred me to the paragraph in Archbold which is 5-515. It says:

> "In R v Smith it was held that the issue of risk must be determined on the premise that the offender is at large and that it would place an unrealistic burden on a judge to expect him to decide whether there would be a significant risk from the offender at the point when he would be released from the appropriate determinate sentence. Whilst the decision of the Supreme Court, it is submitted that this is out of line with the consistent practice of the Court of Appeal over the years since the commencement of the dangerousness provisions in the 2003 Act."

That Act in its then form is pretty much identical to our 2008 Order.

> "It is submitted that all such cases have proceeded on the basis that the question to be answered has been as to the risk that the offender would present when he would otherwise be released. If this was not the case ..."

Then it refers to certain references to the need to take account of the greater capacity of young offenders to mature over years would have been irrelevant, as would the injunction in R v Tyrrell to take account of the potentially positive effects of other sentences or orders that may be imposed and which may have the effect of sufficiently mitigating the risk presented by the offender as to avoid the need for a finding of dangerousness.

[8] One has to consider exactly what the Supreme Court said in the case of Smith, and of course I remind myself that the Supreme Court is a binding precedent as far as this court is concerned.

Lord Phillips, who gave the judgment of the Supreme Court said at paragraph 14:

> "Section 225(1)(b) ..." (and that is the English equivalent) "... is in the present tense, and that the sentencing judge is permitted to impose a sentence of IIP ..." (which is the equivalent of the Northern Irish indeterminate custodial sentence) "if 'there is a significant risk' that members of the public will suffer serious harm as a result of the commission by the defendant of further offences. The construction for which Mr Barnes contends requires the sentencing judge to factor in, when considering the question of risk, the fact that the defendant is and will remain detained in prison for a significant period, regardless of the type of sentence imposed. Plainly, the defendant will pose no risk to the public so long as he remains in custody. Mr Barnes submits that the judge must consider whether he *will* pose a significant risk when he has served his

sentence."

Then Lord Phillips continued:

> "If this is the correct construction of section 225(1)(b) it places an unrealistic burden on the sentencing judge. Imagine, as in this case, that the defendant's conduct calls for a determinate sentence of 12 years. It is asking a lot of a judge to expect him to form a view as to whether the defendant will pose a significant risk to the public when he has served six years. We do not consider that section 225(1)(b) requires such an exercise. Rather it is implicit that the question posed by section 225(1)(b) must be answered on the premise that the defendant is at large. It is at the moment that he imposes the sentence that the judge must decide whether, on that premise, the defendant poses a significant risk of causing serious harm to members of the public."

[9] Now, there is a clear direction given by Lord Phillips as to how that particular piece of legislation should be interpreted. If one actually goes back to the decision of Lang, and this is a point that is raised by the authors of Archbold, and I am referring to the report in the All England Reports which is volume 2, 2006, page 419, which is paragraph 17 of Lord Justice Rose's decision, (vi). This is where he sets out nine factors, but this was the sixth one which is the pertinent one in relation to the quotation in Archbold.

> "In relation to offenders under 18 and adults with no relevant previous convictions at the time the specified offence was committed the Court's discretion under 229(2) is not constrained by any initial assumptions such as, under 229(3), applies to adults with previous convictions. It is still necessary when sentencing young offenders to bear in mind that within a shorter time than adults they may change and develop. This, and their level of maturity, may be highly pertinent when assessing what their future conduct may be and whether it may give rise to significant serious risk of harm."

[10] Obviously the Court is bound by the directions as are set out in the case of Smith. It is, however, a discretionary decision, the Court is asked to consider all the evidence that is before it. One of those factors may be a capacity to change. Obviously in a young person that is particularly relevant as they mature more so, in my view, in relation to a person of mature years. But dealing specifically with the point raised by Mr Duffy, I consider myself bound by the decision and the judgment of Lord Phillips in the case of Smith. So I am going to assess the issue of dangerousness as of today's date on the assumption that both defendants are at large.

[11] Now, of course when I ask myself are either or both dangerous, I am looking at each individually and I propose to do that now. However, I will say or make a few comments about the recorded conversations. To some extent they are unique, in my experience it is the first time that I have come across a case where there has been

detailed and prolonged recordings of various conversations and they do give an insight into the then current thoughts of both you, Kelly, and you, Rafferty, and the aspirations that you were expressing. I do take into account the need to exercise some caution when one is considering words alone. I specifically refer to the observation of Lord Justice Leveson in the case of R v Khan and Others (2013) EWCA Crim. 468 which is reported in 2013 at paragraph 73 where he states:

> "Although potentially highly relevant both to culpability and potential harm ... in our judgment, when assessing the future risk to the public, too much weight should not be placed on conversations for the purpose of ascribing comparative sophistication: it is not implausible that some self-publicists will talk 'big' and other, more serious plotters, may be more careful and keep their own counsel. Suffice to say, on the question of comparative risk, we do not consider that a distinction can safely be drawn between the London and the Stoke defendants."

[12] He of course was referring specifically to the defendants in that case. So I do bear in mind, despite the content of these various conversations, there may be an element of talking big, there may be an element of bravado, of exaggeration, and there may be an element of Mr Kelly trying to impress Ms Rafferty and Ms Rafferty trying to impress Mr Kelly, although as to the motivation as to why they would do that I would be slightly uncertain. But it is clear that both were expressing a support for acts of terrorism, both, and particularly Mr Kelly, were indicating their own involvement in such acts and preparation. They do not appear to have expressed any doubts or remorse about terrorist activity and the results of terrorist activity, and indeed some of the conversations were speaking of escalating such activity.

[13] Specifically in relation to you, Kelly, you have a relevant conviction and it is a significant conviction. It is of some vintage, the incident itself occurred in 1990 and you were sentenced in 1993 to a sentence of 24 years in custody. It was a case, as I understand it, where you were involved in the targeting of an individual, at some stage you came into possession of an explosive device and then you planted that device, but fortunately, for whatever reason, and that hasn't been explained to me, it did not explode. You were charged with attempted murder. As I understand it, at the time of your arrest you were cooperative with the police, made other certain admissions, and there were other charges against you in relation to those admissions. But it was a serious matter, you did receive a sentence of 24 years. You of course would have been released under the provisions of the Good Friday Agreement, but sadly though, which is clear from the evidence in this case, you have returned to active involvement in acts of terrorism. I have taken everything into account, not only your involvement in these particular offences, your previous convictions and the views that you have expressed during the various telephone conversations, and in all the circumstances I do consider you to be dangerous. As to the ramifications of that finding, I will deal that shortly.

[14] Now, in your case, Rafferty, you clearly are in a different category. You come before the Court, you are in your late 30s, you have a completely clear record so there

is no history, unlike Kelly, of offending. Obviously the offences that you are involved in now are serious matters, although the Court of Appeal in the case of R v Wong [2012] NICA 54 recently cautioned judges in not finding someone dangerous just purely on the basis of the offences of which they had committed and the judge was actually dealing with. In all the circumstances, given the lack of criminal record on your part, notwithstanding the seriousness of the offences, and the comments that you were expressing in the various conversations, I am not satisfied that you satisfy the test of dangerousness so I am not going to find you dangerous.

[14] Now, returning back to you, Kelly, you have been found to be dangerous. There are no specific aggravating factors, obviously these offences are serious in themselves. In mitigation I am taking into account your plea of guilty. I am also taking into account the fact that as regards the major count in my view, that is count 18, the plea was entered at the first opportunity and, finally, I am taking into account your age. You are in your late 40s now and have some family responsibilities, both in relation to your own children and your grandchildren.

[16] Under the legislation I am obliged to consider whether an extended custodial sentence is adequate in all the circumstances. Given your previous conduct and your current state of mind as expressed in the various conversations, I would be of the view that an extended custodial sentence would not be adequate. I know your counsel has expressed that you have told her that you wish to change your views and attitudes, that may be an accurate view on her part, however the proof is very much often in the pudding and time will just have to tell and in my view an extended custodial sentence would not be adequate. So in all the circumstances you are going to receive an indeterminate custodial sentence. This is in relation to counts 2, 10 and 18. The minimum term that you will serve is one of 5 years. That is based on a sentence of 10 years for deterrence and retribution, which is reduced by the notional 50%, as is the practice. So the minimum term you will serve is 5 years and that will be less any remand time that you have served. In relation to counts 3, 4 and 7, you will receive an extended custodial sentence, that will be for 5 years with an extended licence of 5 years. All those sentences are concurrent. I have to advise you that the provisions of the counter-terrorism legislation will apply to you and they will apply to you for a period of 30 years.

[17] Now, in your case, Rafferty, you will receive a determinate custodial sentence. There are no aggravating factors, for the reasons that I have mentioned in the case of Kelly, these are serious matters in themselves. In mitigation I take into account your plea, I take into account your clear record and your age, 39 years of age, and your own family responsibilities. The appropriate sentence in my view in relation to your offences is one of 8 years. That is a determinate custodial sentence of which the custodial term will be 4 years and the licence will be 4 years and the counter-terrorism provisions will apply to you for a period of 15 years.

[18] Then finally there will be a Forfeiture Order in respect of the items, I do not propose to list them but they are set out in the document that was handed to me during the sentencing hearing.