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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

ALLEN KENNEDY

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Before Deeny LJ, Treacy LJ and O Hara J

DEENY LJ

[1] The appellant, Allen Kennedy, has been given leave to appeal a determinate custodial sentence of 11 years comprising 5½ years in custody and 5½ years on licence imposed on 14 December 2017 by His Honour Judge Grant at Downpatrick Crown Court following the applicant's pleas of guilty to a number of counts on two indictments including counts of perverting the course of justice, attempted possession of a firearm and ammunition, possession of ammunition and the possession and supply of drugs, with the fraudulent evasion of customs prohibitions on the importation of goods. He was arraigned at different dates on two separate bills of indictment. On 25 August 2016 he pleaded not guilty to four counts. He was re-arraigned on 11 November 2016 when the bill of indictment was amended by leave of the judge and the applicant pleaded guilty to one of four counts on the first indictment, that of perverting the course of justice. The other counts on this indictment were left on the books.

[2] The applicant was arraigned on a second bill of indictment which comprised 16 counts on 26 July 2017. He pleaded to a number of counts including various drug offences. He was then re-arraigned on 6 October 2017 when he vacated his plea in respect of one count with the court's permission and entered a plea to attempted possession of a firearm and ammunition with intent to endanger life. The learned trial judge imposed a two year determinate custodial sentence in respect of perverting the course of justice. A six year consecutive sentence in respect of the attempted possession, that is the attempt to purchase the 9 mm firearm and a four year sentence also consecutive in respect of the possession of Class A drugs with intent to supply. The learned trial judge then looked at the sentences together,

including some concurrent sentences that were imposed and taking into account the totality principle he reduced the overall sentence of 12 years to 11 years.

[3] It is not necessary for us to go over the facts of this matter which were fully set out in the papers before the court which have been helpfully prepared. We are obliged for that and for counsel's learned written and oral submissions.

[4] The first matter on which Mr Harvey QC for Kennedy addressed us in his oral submissions was the count of perverting the course of justice. This appellant had been involved at least in an incident where another police officer's car was damaged. He then was apparently driving his BMW motor car and crashed it into the pillars of a house, the neighbour of a friend of his. It seems fairly clear drink had been taken. But he then comes back and sets fire to the car with the intention of claiming as he then did to his fellow police officers that he had had the car stolen from him and it had been destroyed, presumably by some kind of joyriders. Mr Harvey emphasised the drunken nature of these offences, but Mr Magee in his response pointed out that the car doors had been deliberately left open, as the fire officer pointed out, something that a civilian might not have thought to do, that his coat was left by the appellant in the car, that was to be set on fire, that he lied to the police about not having the phone, but the police officers in fact found him with it later in the day after the incident. Mr Harvey rightly draws our attention to two English Court of Appeal decisions where a lesser sentence was imposed and we note that, but having carefully considered the matter, although we acknowledge that a starting point of 30 months and a sentence of two years was at the upper end of the range, we cannot say that it was either manifestly excessive or wrong in principle and we do not interference with that separate sentence.

[5] The most important matter for which Kennedy got the longest sentence was his conduct in operating on the dark web to attempt to buy a fireman and Mr Harvey sought to draw a distinction between this dark web, as he called it a surface web and a deeper more criminal web, but certainly this man spent some time trying to arrange the purchase of a firearm and attended at an agreed place in Belfast to hand over the money and receive a 9 mm pistol from somebody who was in fact an undercover police officer. That is a serious enough matter, but he was also buying 10 rounds of ammunition with the gun and he was also buying a silencer. He has pleaded guilty to possession with intent to endanger life, a very serious offence. Furthermore, when the police searched him home they found 50 more rounds of ammunition which he said he bought at a gun club. But these rounds of ammunition had been doctored and are described by the judge as dumdum bullets to increase their impact on anybody unlucky enough to have been hit by them. Taking this into account and the other factors, including the fact that it is an attempt and counsel rightly drew attention to the decision of this court in *The Queen v McCaughey*, but taking these factors into account again we cannot say that seven years was an excessive sentence or wrong in principle. The sentence was in fact discounted to six years which might seem a discount on the low side, but he was of course caught red-handed by the police and had really no defence to the case.

[6] The third aspect of the matter on which he was sentenced, again as a consecutive sentence as I have said, was a series of drugs offences. Again counsel quite properly sought to minimise the impact of those, but they included two counts of possession of Class A drugs, one of those with intent to supply, possession of cannabis resin, Diazepam without a prescription, BZB and as Mr Magee reminded us in his submissions the importation, apparently from Canada, by post of 228 gms of cannabis. Importation has always been a factor that exacerbated the gravity of drug dealing. The learned judge at page 115 in his sentencing remarks sets the matter out in a way that I think it is my duty to quote:

> "Your vehicle was searched and a considerable quantity of drugs secreted in hides shaped as everyday items were discovered. Nine self-sealed bags of cocaine containing 21.87 gms at 11% purity, 4 self-sealed bags of cocaine containing 55 gms, one self-sealed bag of cocaine of 0.22 gms with an additional 42 mgs of cannabis resin and a pair of plastic gloves were all found in the vehicle. A USB stick to access the dark web was also found with a clear indication of your access of alphabay concerning firearms. Your home at 16 Cairndore Avenue was searched for an array of drug paraphernalia and a significant quantity of illicit drugs was discovered. These included self-sealed bags contains benzocaine, a cutting agent which is used with cocaine to bulk it out, a sell-sealed bag containing 1.95 gms of MDMA, a plastic bag containing empty self-sealed bags. A self-sealed bag containing 77 BZB tablets and 9.71 gms of TFMPP, 24 mgs of cannabis plant material, further cutting agents, MDMA, Diazepam, cannabis resin, amphetamine and cocaine were also discovered. In your bedroom police located 50 rounds of 9 mm jacketed hollow point ammunition commonly known as dumdum bullets. Such ammunition has no legitimate purpose. Also within this room a further silencer, black gloves and a balaclava were discovered. And then as I have mentioned on 25 August 2016 a package addressed to your home or to your parents' address to add a further element of discredit was found to contain cannabis."

[7] So these are all the marks of sophisticated dealing. The prosecution are not inclined to disagree with the submission made on behalf of the appellant, that he was dealing among a relatively small circle of friends, about 4 to 10 persons. But it does not escape the court's attention and I am sure it did not escape the attention of

the learned judge, that this was all being done while he was suspended as a police officer and while he was on bail for the 2014 offences. These are aggravating factors. Counsel submitted to us that his being a police officer was not an aggravating factor but we cannot accept that contention. It was a very grave breach of trust that at time when he was sworn to uphold the law, he was breaking it, not in a single moment of madness, but in a careful and elaborate way over a period of time. He had the advantage of a degree of familiarity with the police's attempts to detect crime which may have assisted him in avoiding detection which indeed he had done for some years and he was perhaps less likely to be investigated because he was a police officer.

[8] So in all those circumstances and bearing in mind the submissions, written and oral submissions of counsel, we find that the five year starting point of the learned judge was a justified one and we could not say it was either wrong in principle or manifestly excessive and the discount, though again perhaps not unduly generous, is again within the discretion of the judge. The judge then looked at the totality principle, that has been a part of our sentencing law since at least *The Queen v Stephen Frank Koyce* [1979] Cr App R (S) 21. It is right that the court should do so.

[9] Now a court looking at the totality here which was 12 years was entitled to take a look at that and say it was excessive and individual judges might have reduced it more. But it is the duty of this court to ask itself was the judge's reduction to 11 years, rather than any lower figure, was that manifestly excessive and we find we cannot properly say that. We would consider it was within the range of the judge's discretion, nor was it wrong in principle and so while, like counsel, we acknowledge that the sentence was on the stiff side it is not one with which this court can properly interfere.