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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

SEAN KELLY

_____

Before: Morgan LCJ, Girvan LJ and Gillen LJ

_____

GILLEN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal against sentence imposed by the Crown Court sitting in Belfast following the appellant's pleas of guilty to six counts on a Bill of Indictment on which there were four defendants namely himself, Sharon Rafferty, Gavin Coney and Terence Coney.

[2] Ms Quinlivan QC appeared on behalf of the appellant with Mr McGarrity. Mr Murphy QC appeared on behalf of the prosecution with Mr Russell. We are grateful to counsel for the sharp focus of their skeleton arguments and the efficient economy of their oral submissions at the hearing before us.

Factual Background

[3] During the period leading up to the appellant's arrest he was under surveillance and recordings were made of conversations he had with his co-accused Sharon Rafferty. Transcripts of recorded conversations between the appellant and Ms Rafferty that took place over several months between 9 November 2011 and 27 March 2012 were provided to the court.

[4] Surveillance officers were deployed on 30 March 2012 in the Carrickmore and Creggan areas. Having detected phone contact between the appellant and Ms Rafferty, the officers followed them and they were observed walking with the co-accused Aiden Coney and another male into

Formil Woods. Gunfire was heard with bursts of single shots followed by pauses about 11.30 am which continued for about 40 minutes and at 12.41 the car in which the appellant and his co-accused had arrived at the Wood was seen to drive off. Examination of the Wood revealed strike marks on various trees and targets pinned to the trees, namely popped balloons and a tin with numerous holes in it. The impact damage was consistent with .22 calibre lead bullets. DNA profiles matching those of the appellant and Ms Rafferty were recovered from the balloons.

The appellant's pleas of guilty

[5] The basis of the pleas of guilty by the appellant was on certain agreed facts.

[6] Counts 2, 3 and 18 related to incidents on 30 March 2012 and constituted pleas to:

- Possession of a firearm in suspicious circumstances contrary to Article 64(1) of the Firearms (Northern Ireland) Order 2004.

- Count 3 namely attending a place used for terrorist training contrary to Section 8 of the Terrorism Act 2006.

- Count 18 preparation for terrorist acts contrary to Section 5 of the Terrorism Act 2006.

[7] The facts founding these three counts were that the appellant attended Formil Wood on 30 March 2012. While there he used a .22 Walther rifle and .22 ammunition to shoot at balloons and a can. He was not the owner of the weapon which was owned by a co-defendant who held a licence for the gun and ammunition. The appellant engaged in target shooting with the weapon and ammunition. He had not brought the firearm or ammunition to Formil Wood, did not remove them from the Wood, and only had use of the weapon and ammunition whilst at Formil Wood. He therefore admitted being at a place used for terrorist training (Count 3) and possession of a firearm and ammunition in suspicion circumstances (Count 2).

[8] The appellant admitted that he engaged in target practice with the weapon with the intention of seeing whether it could be used in terrorist training in the future. This constituted preparation for terrorists acts of an unidentified nature in the future (Count 18).

[9] Throughout interviews in connection with these counts, the appellant did not provide any explanation for his actions that day.

[10] Count 4 related to collecting personal details of a governor of the Northern Ireland Prison Service. During a meeting of February 2012 recorded between the appellant and Rafferty there was a discussion as to what had occurred at a recent meeting with the "leadership". The appellant was recorded as saying:

> "But did you hear then, did you see his face dropping whenever Colly says do you know anything about him. I says well Colly I says, I give them names, addresses, cars and photographs of the Governor of Maghaberry and took them to the house twice."

[11] The appellant also stated that if it had not been for the information coming out of "our two areas" the people asking if they were capable of doing things would have nothing. Earlier in the conversation the pair discussed the inaction of their colleagues and the appellant went on to say:

> "We can't worry about adverse publicity because well it's all we're going to get … who's going to give you publicity for killing people."

[12] The pair of them went on to discuss their views on targeting top Catholics. When interviewed about this conversation the appellant did not answer any questions.

[13] Count 7 related to a terrorist training event or camp. The agreed statement of facts set out extracts of a conversation between the appellant and Ms Rafferty on 2 March 2012 which contained an admission to having organised a training exercise the day before. The appellant referred to putting individuals through drills and said:

> "They're getting good with them, they're getting confident with them."

The appellant indicated that "the boys had wanted to go to a wet camp" but he had said there was no way they were going to get a wet camp because it was too much bother to set up for people who did not have a clue. He had said to them:

> "We'll organise another … because yous can't get enough training."

[14] The agreed statement of facts made it clear that the nature of the training before the February conversation was to educate new recruits in the use of weapons.

[15] Count 10 related to possession of two blank firing guns which were associated with terrorist training. An extract of the appellant's conversation with Ms Rafferty on 28 February 2012 included the following:

> "Well I have a couple of blankers there, handguns, and I have plenty of rounds of them. Charlie is going to get me, I'm gonna take to get them used to it."

He later continued:

> "I've a wheen of blankers down there, two good blankers and a couple of reps but they don't fire blankers, but I have two good blankers, I'm going to start putting them through it, know to get used to the craic and that …"

The appellant's previous convictions

[16] The appellant had been convicted on 31 March 1993 of attempted murder committed on 29 May 1990 together with connected offences of carrying out an act with intent to commit an explosion likely to endanger life or property, possession of a firearm and ammunition/explosives with intent to endanger life or property, possession of a firearm and ammunition/explosives with intent to commit an indictable offence and conspiracy to rob.

[17] He had been sentenced to 24 years imprisonment and was released under the early release scheme agreed in the Good Friday Agreement. His recall expiry date was 4 October 2002 and he was subject to licence until 20 September 2014.

[18] The appellant had other convictions dating back to 1985-1990 for other much less serious matters which we do not consider relevant to this appeal.

The Sentence

[19] The appellant was sentenced to:

- an indeterminate custodial sentence with a minimum term of five years imposed in respect of Counts 2, 10 and 18.

- an extended custodial sentence of five years with an extended licence of five years imposed in respect of Counts 3, 4 and 7 concurrently.

Statutory background

[20] Article 12 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"), provides for the meaning of a "specified offence" within the Order if it is a specified violent offence or a specified sexual offence. A specified offence is a "serious offence" if it is an offence specified in Schedule 1 of the Order.

[21] Article 13 of the Order provides for the imposition of an indeterminate custodial sentence as follows:

> "13.-(1) This article applies where –
>
> (a) A person is convicted on indictment of a serious offence committed after 15 May 2008;
>
> (b) The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
>
> (2) If –
>
> (a) The offence is one in respect of which the offender would apart from this article be liable to a life sentence;
>
> (b) The court is of the opinion that the seriousness of the offence, or of the offence and one or more of offences associated with it, is such as to justify the imposition of such a sentence,
>
> the court shall impose a life sentence.
>
> (3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall –
>
> (a) Impose an indeterminate custodial sentence;
>
> (b) Specify a period of at least two years as a minimum period for the purposes of Article 18, being such a period as the court considers

appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[22] Article 14 of the 2008 Order deals with the imposition of an extended custodial sentence in the following terms:

"14.-(1) This Article applies where –

(a) A person is convicted on indictment of a specified offence committed after 15 May 2008;

(b) The court is of the opinion –

(i) That there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences;

(ii) Where the specified offence is a serious offence, that the case is not one which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence."

[23] The assessment of dangerousness is dealt with in Article 15 of the 2008 Order in the following terms:

"15.-(1) This Article applies where –

(a) A person has been convicted on indictment of a specified offence;

(b) It falls to a court to assess under Article 13 or 14 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.

(2) 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.

(c) May take into account any information about the offender which is before it."

The sentencing remarks of the learned trial judge

[24] Counts 2, 10 and 18 fell within the definitions in Article 12 of the 2008 Order. Invoking the judgment of Lord Phillips in R v Smith (Nicholas) (2012) 1 Cr. App. R. (S) the learned trial judge assessed the dangerousness of the appellant and whether he posed a significant risk of causing serious harm to members of the public on the premise that the appellant was at large at the date of sentencing.

[25] The learned trial judge considered the appellant to be dangerous because:

- The detailed recordings of his conversations, whilst there may have been an element of bravado, betrayed continuing support for acts of terrorism and involvement in such acts and their preparation.

- He had spoken of escalation of such activity.

- He had a significant previous conviction for attempted murder and had returned to active involvement in terrorism despite his release pursuant to the Good Friday Agreement.

[26] The learned trial judge took into account his plea of guilty which, in respect of Count 18 was entered at the first opportunity, and also his family responsibilities towards his children and grandchildren.

[27] Having carried out this exercise in relation to counts 2, 10 and 18, the learned trial judge concluded that an extended custodial sentence would not be adequate for the protection of the public. Although the appellant had expressed, through counsel, that he had changed his views on and attitudes to terrorism this could only be demonstrated over time.

[28] The learned trial judge clearly fell into error both in concluding that Counts 3, 4 and 7 were specified offences pursuant to Article 12 and Schedule 2

of the 2008 Order and in imposing concurrent *extended* custodial sentences of five years custody and five years on licence.

The grounds of appeal

[29] The first ground of appeal in essence amounted to a contention that the learned trial judge had departed from the agreed basis of the plea. This can be dealt with in short compass by stating that we found no factual justification for such a contention and indeed counsel at the hearing did no more than refer to the broad principles set out in her skeleton argument without addition before us. We reject this ground.

[30] Secondly, counsel wisely abandoned the ground of disparity with the sentences imposed on the co-accused. It is thus unnecessary to dilate upon their sentences.

[31] Thirdly, it was common case that the appeal had to be allowed on the erroneous extended custodial sentences imposed on Counts 3, 4 and 7. We set aside such sentences on the basis that these were not specified offences pursuant to Article 12 and Schedule 2 of the 2008 Order and accordingly did not lend themselves to extended custodial sentences.

[32] The thrust of this appeal focused on counts 2, 10 and 18. Ms Quinlivan contended that the learned trial judge:

1. made a material error of law or principle and a misapprehension about fact in determining that there was a significant risk to members of the public of serious harm occasioned by the commission by the appellant of Counts 2, 10 and 18. In short, the finding of dangerousness was unjustified.

2. had failed to give sufficient credit for the early plea of guilty on Count 18 at a time when the other defendants were still bent on contesting the matters.

3. would have been unaware there was now fresh information lending further weight to the submission made before the learned trial judge that the appellant was no longer likely to be involved in this kind of offending (see para [33] et seq below). Hence Ms Quinlivan contended that there was now much stronger evidence than hitherto had been the case before the learned trial judge of the appellant's determination to eschew terrorism. Such a step was not without risk to him personally.

4. had failed to give proper regard to the fact that an indeterminate custodial sentence was concerned with future risks and that the level of risk should be judged on the basis of the risk the appellant would

present upon release from prison as opposed to making a risk assessment on the basis that the appellant is presently at large.

5. had failed to assess the tenor of many of the covertly recorded conversations which revealed that the appellant was someone who displayed a tendency to exaggerate his own importance and engage in hyperbole e.g. he had claimed to have been an officer commanding in the Maze which was palpably untrue. Moreover there was a gap in excess of two years and four months between the date of the last recorded conversation and the date of sentencing. The appellant was subject to extensive covert surveillance for many months (at least between November 2011 to May 2012) and the absence of any offending during this period, coupled with the fact that he was allowed to remain at large after the commission of the offences dated 30 March 2012 until his arrest on 12 May 2012, indicated that he was not a dangerous person.

6. had afforded insufficient weight to the fact that no attempt was made to injure any person including the Governor of the Northern Ireland Prison Service who was neither compelled to move home nor "inconvenienced" as a consequence of the appellant's conduct.

[33] Before this court, Ms Quinlivan furnished further information on the appellant's behaviour and intentions since his arrest. She produced a psychological report of Dr Phillip Pollock. He is a specialist in forensic clinical psychology who had carried out a structured assessment of protective factors. These provided a formalised method to consider the presence and relevance of 17 protective factors that are established "to mediate and buffer against future violent and potentially harmful conduct." He identified the presence of several such factors leading him to conclude that the appellant did not meet or satisfy the threshold for significant risk of serious harm to members of the public by the commission of certain offences. Dr Pollock judged the appellant's statements to be sincere and counsel contended that this provided some measure of his sincerity in eschewing terrorist offences.

[34] However Dr Pollock in the course of that report stated as follows:

> "It is imperative to state at the outset of the risk assessment conducted here that the approach taken during current assessment is one that excludes terrorist-related violence as a factor for consideration when predicting future likelihood of re-offending in Mr Kelly's case. Therefore, findings of risk assessment as stated here refer solely to the future likelihood of non-terrorist violence and/or offending. There does not exist any instrument, measure or tool that shows scientific or empirical

validity to predict whether or not an individual will revert to organised group based violence or criminality in the future."

[35] Hence this report was of little if any assistance in the context of this case. Similarly the report from the Probation Service which came before this court (not having been available at the lower court) made no assessment of terrorist offences.

[36] Ms Quinlivan also produced a letter from the Northern Ireland Prison Service dated 5 February 2015 which confirmed that:

- The appellant had relocated from separated conditions in HMP Maghaberry back to the integrated population.

- He had been relocated following a verbal request made to staff while returning from a visit and the move was "actioned on 25 November 2014".

- He formally requested a move to HMP Magilligan on 13 January 2015 and was transferred there on 15 January 2015. The letter referred to the unique nature of his request.

[37] Finally we had before us a letter written to the court from the appellant in which he underlined his determination to extract himself from the cycle of terrorism that he had been caught up in and emphasising the gravity of the step he had taken in removing himself from the Separated Conditions.

[38] Invoking R v Pollins (2014) NICA 62, Ms Quinlivan asserted that in a case in which a life sentence is not appropriate, 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. In this instance the necessary public protection could be achieved by acceptance of the plaintiff's intention to turn away from terrorism.

Discussion

[39] It is clear that the counts 2, 10 and 18 constituted specified offences under the 2008 Order.

[40] We consider that the assessment made by the learned trial judge that the appellant was dangerous seems to us unimpeachable.

[41] There is now a substantial body of authoritative case law on the concept of dangerousness. We can be sparing in citation and refer only to R v Lang

(2005) EWCA Crim. 2864, R v EB (2010) NICA 40, R v Pedley and Others (2009) EWCA Crim. 840, R v Wong (2012) NICA 54, R v Beesley and Others [2012] 1 Cr. App. R.(S.) 15 and R v Cambridge [2015] NICA 4. Principles that can be distilled from these authorities include:

(1) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and can be taken to mean "noteworthy, of considerable amount or importance".

(2) Factors to be taken into account in assessing the risk include 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, whether the offending demonstrated any pattern and the offender's thinking and attitude towards offending.

(3) Sentencers must guard against assuming there was a significant risk of serious harm merely because the foreseen specified offence was serious. 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.

[42] Without conducting an audit of all the factors set out in these authorities, we are satisfied that this appellant clearly comes within the category of Article 13(1)(b) for all the reasons the learned trial judge set out including:

- The appellant's previous convictions betrayed a strong terrorist bent. He had been sentenced to 24 years imprisonment on these charges and although released under the early release scheme agreed in the Good Friday Agreement, his recall expiry date was 4 October 2004 with him being subject to an Article 6 licence until 20 September 2014. He was therefore subject to such licence when the instant offences occurred.

- The nature and circumstances of the current offences reasserted the pattern of offending and demonstrated a continuing strain of terrorist thinking and attitude despite his release from his earlier incarceration.

- The steps he had taken to distance himself from terrorism by his removal from the separated conditions in Maghaberry were all rather late in the day. They would have carried substantially more weight had they occurred before his pleas of guilty. They had now occurred merely a matter of weeks before his appeal before this court i.e. did not occur until November 2014.

- Whilst it may well be that he was prone to exaggerate his role in the recorded conversations (and courts must be wary of this per R v Khan

and Others (2013) EWCA Crim. 468), this appellant had shown himself to be a determined and dedicated terrorist in the past.

[43] Turning now to the next stage in this process conducted under Article 13(3) of the 2008 Order, we consider that the learned trial judge was justified in his eventual conclusion that an extended custodial sentence would not be adequate to protect the public from serious harm in this instance.

[44] In coming to this conclusion we are conscious of what Morgan LCJ said in R v Pollins (2014) NICA 62, a case dealing with the concept of indeterminate custodial sentences at [27]:

> "[27] However, in a case in which a life sentence is not appropriate 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."

[45] The concept of future risk in the context of indeterminate custodial sentences passed by a judge became the focus of much attention in this case. The essential issue was whether the level of risk should be judged on the basis of the risk the appellant would present upon release from prison or whether his risk should be assessed on the basis that he is presently at large at the time of sentencing.

[46] Counsel carefully explored R v Smith (Nicholas) (2012) 1 Cr. App. R. (S) 83, SC from which the learned trial judge clearly took his lead in addressing this issue of risk.

[47] Smith dealt with the special case of the imposition of an indeterminate sentence upon an offender who had re-offended following release from a life sentence. In the context of Section 225(1)(b) of the Criminal Justice Act 2003 (and the imposition of imprisonment for public protection orders (IPP)) which is the comparable section in England and Wales to Article 13 of the 2008 Order, Lord Phillips said at paragraphs 14 and 15:

> "14. Section 225(1)(b) is in the present tense. The sentencing judge is permitted to impose a sentence of IPP 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.
>
> 15. If this is the correct construction of s. 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 s. 225(1)(b) requires such an exercise. Rather it is implicit that the question posed by s.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."

[48] This approach has not earned the approval of some academic commentators or for that matter of Lord Mance JSC in obiter dicta comments in Regina (Faulkner) v Secretary of State for Justice and Anor, Regina (Sturnham) v Parole Board and Anor (Nos 1 and 2) [2013] 2 AC 254.

[49] Invoking the principle that the "predictive" assessment should be made when sentencing as to the risk of dangerousness at the expiry of the tariff period adverted in e.g. R (Walker) v Secretary of State for Justice (Parole Board Intervening) [2010] 1 AC 553, R v Johnson (Practice Note 2007) 1 WLR 585 and R vPedley [2009] 1 WLR 2517, Lord Mance said at [37] and [38]:

> "Logically, it is also difficult to see why it was necessary at all in (Smith) to address the question whether the sentencing judge's assessment was of present risk or predictive. If the fact that the offender was in prison was relevant at all, it would exclude any present as much as any future risk of the offences to which he was evidently prone. … More generally, unless the judgment required in the case of an IPP is predictive, it must logically follow that, even though the fixed (tariff) period would in the judge's view be sufficient to eliminate any further future risk before the tariff expired, the judge would still be required

> (even after the time when the imposition of IPP became discretionary) to impose a sentence of IPP, although convinced that there was no point in doing so. The concept of a long determinate sentence sufficient to eliminate future risk would be largely superseded.
>
> 38. In these circumstances, I have grave reservations about the reasoning in para [15] in R v Smith even in relation to sentences of IPP. But since it was not challenged on this appeal and is not in my opinion ultimately decisive, I say no more on this."

[50] Archbold "Criminal Pleading, Evidence and Practice" 2015 Edition at 5-5.15 echoes the concerns of Lord Mance.

[51] For our own part, we are content to adopt the observations of Lord Judge CJ in the Court of Appeal (Criminal Division in R v MJ [2012] 2 Cr. App. R. (S) 73(MJ). This was a case concerning an appellant who had raped a two year old boy and in consequence had been sentenced to imprisonment for public protection (IPP) with a specified period of seven years as the minimum term.

[52] Refusing to share some of the academic concerns about the impact of the observations of Lord Phillips in Smith's case, Lord Judge said at [26]:

> "As a matter of principle and practice Smith underlines that the decision whether IPP should be ordered is made, and can only be made at the date of the sentencing hearing. This is the date when the sentencing court is required to form its opinion whether, in the language of s. 225(1)(b), there is a significant risk to members of the public … of serious harm occasioned by the offender committing any further specified offences."

[53] Accordingly this confirms our own view that in considering whether an indeterminate sentence should be passed, a judge, as occurred in the instant case, should determine whether or not an accused is dangerous within the terms of the legislation at the date of the sentencing hearing.

[54] Turning then to the issue of public safety, Lord Judge said:

> "27. On the issue of public safety, the decision made at the sentencing is required to address the

> future. This involves an assessment of the risk to the public posed by the commission of further offences by the offender, that is, offences which the offender would or might commit subsequent to the current sentencing hearing. Lord Phillips' observations underline that the judge must decide whether the defendant 'poses' the risk envisaged by the statute, not on the basis that he is already in custody at the date of sentence … but on the basis that he is not.
>
> 29. We can find nothing in the observations of Lord Phillips which suggests or implies that when making the assessment for future risk at the date when sentence is passed the judge should not or may not take account of every piece of relevant evidence or material which may bear on the predictive decision. Apart from disregarding the fact that the defendant happens for whatever reason to be in custody at the date of sentence, nothing in them excludes from consideration, for example, questions about the likely impact on a young offender of the process of maturation … or the possible impact of alternative sentencing options which would sufficiently address the risk posed by the defender so as to make an indeterminate sentence unnecessary or inappropriate. … In short, the decision in Smith is focused on the date when the judge is required to make the assessment of future risk and not on the processes which inform and by which he reaches his decision."

[55] We are equally satisfied that in considering the issue of public safety, the judge must address the future and take into account in so doing all the relevant circumstances, evidence or material which will inevitably bear on this predictive decision.

[56] In the instant case, the learned trial judge declared himself bound by the decision and judgment of Lord Phillips in the case of Smith and declared that he intended to assess the issue of dangerousness at the date of sentencing on the assumption that the defendant was at large.

[57] However the learned trial judge did not go on to expressly consider the second stage as adumbrated by Lord Judge in MJ and, on the issue of public safety, address the future by assessing the risk to the public posed by the commission of future offences by the offender i.e. which he would or might commit subsequent to the current sentencing hearing.

[58] On the other hand he did emphasise that the court should consider all the evidence before it and one of the factors might be a capacity to change.

[59] Whilst we entertained some misgivings about the absence of reference to MJ in this judgment and the adoption of the principled approach contained therein that when making the assessment for future risk at the date when sentence is passed the judge should or may take account of every piece of relevant evidence or material which may bear on the predictive decision, nonetheless we are satisfied that the learned trial judge could have come to no other conclusion save that at which he finally arrived. Other than the appellant's own ipse dixit, expressed through counsel, that he intended to change his ways and resile from his previous terrorist connections, coupled with a plea of guilty on Count 18 when arraigned on 4 June 2014, we can find no material whatsoever upon which the learned trial judge could have based a finding that he had evinced a capacity for change.

[60] On the contrary, there was a wealth of material indicating a complete lack of capacity for change. As the learned trial judge pointed out, his previous conduct and conviction and his reassertion of terrorist thinking as expressed in the various conversations which had been recorded all provided ample justification for his conclusion that an extended custodial sentence would not be adequate. Any element of hyperbole or inaction in the event was subsumed in the reality of the chilling expressions of enthusiasm for terrorist activity. The learned judge was entirely justified in concluding, as he did, that despite the expression on his behalf by counsel that he wished to change his views and attitudes, it was too soon to determine if there was any value in these assertions. We conclude that the conclusion reached by the judge in this instance was unimpeachable.

[61] As outlined at paragraphs [33] et seq of this judgment Ms Quinlivan invited this court to consider further information about the appellant garnered since the indeterminate sentence was passed. Beesley's case at [38] is authority for the proposition that where an appellate court is considering the assessment of dangerousness for the purpose of the Criminal Justice Act 2003, its task is to assess dangerousness at the time the trial judge made his decision and "subsequent progress is unlikely to be of assistance in that determination". The court cited with approval Gisanrin [2010] EWCA Crim 504 where the court observed:

> "If it was proper on the material before him or her for the trial judge to pass an IPP based upon dangerousness, the fact that since there have been apparent improvements as a result of undergoing courses in prison or for whatever reason, is not reason for this Court to interfere with the sentence. The

> whole point of a sentence which will…enable a defendant to undertake any necessary courses will be to result in improvements ……. again that is something which will no doubt avail the individual when it comes to be considered whether he should be released on licence …… In exceptional cases improvements have been held by this Court to be properly taken in to account in reducing determinate sentences. The same principle will no doubt apply in relation to tariffs in IPPs, but normally they will not affect the correctness of the imposition of the IPP itself."

[62] Notwithstanding the further information that came before this court and which was not before the learned trial judge, we are satisfied that the pattern of terrorist offending in which this appellant has engaged in the past, coupled with the chilling expressions of terrorist commitment which he evinced in the course of the surveillance recordings, all make it clear that there is neither an alternative nor cumulative method of dealing with him at this stage, other than an indeterminate sentence, which will provide the necessary public protection against the risk which he poses of engaging in further terrorist offences.

[63] As earlier indicated, the developments which have occurred since November 2014 are all too late in the day to convince this court that we should be deflected from approving the course taken by the learned trial judge. For many years he has clearly not changed his views or attitude to terrorism and was a danger to the public of the sort described in the Order. Only the passage of time can test the sincerity of his recent assertions.

[64] To avoid the reproach that a belated determination to change is not worthwhile, the appellant can be assured that once he has served the minimum period he may require his case to be referred to the Parole Board who may then proceed to direct his release if they are satisfied that it is no longer necessary for the protection of the public that he should be confined. Doubtless the step he has now taken may be seen as an important one in this context in light of his further behaviour as time passes. If the Board is not so satisfied, he will remain in custody. It should be noted that the Parole Board may direct the Secretary of State to order that his period of licence shall cease to have effect ten years after the prisoner's release from custody.

Conclusion

[65] In all the circumstances therefore we affirm the decision of the learned trial judge to impose an indeterminate sentence on Counts 2, 10 and 18 with a minimum term of five years. On Counts 3, 4 and 7 we remove the extended period of five years licence which was imposed in each instance leaving a

determinate sentence of five years imprisonment on each count to be served concurrently with each other and with the indeterminate custodial sentence.