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Judgment: approved by the Court for handing down | *Delivered:* **24/11/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

STEPHEN McCAUGHEY, IAN WEIR AND JASON WEIR

Before: Gillen LJ, Deeny J and Sir Patrick Coghlin

GILLEN LJ (delivering the judgment of the court)

Introduction

[1] Stephen McCaughey and James Seales were convicted of the murder of Philip Strickland ("the deceased") together with the offence of possession of a firearm with intent to endanger life on 17 February 2014 and 18 February 2014. Previous to this on 6 January 2014 Ian Weir and Jason Weir had pleaded guilty to the same murder and, in the case of Ian Weir, the ancillary offence.

[2] On 10 April 2014 Ian Weir was sentenced to life imprisonment with a minimum tariff term of 4 years on the count of murder and a determinate custodial sentence of 8 years (comprising 4 years' imprisonment and 4 years on licence) for the firearms offence to run concurrently. Jason Weir was sentenced to life imprisonment with a minimum tariff term of 9½ years and count 2 was left on the books. On 11 April 2014 Stephen McCaughey was sentenced to life imprisonment with a minimum tariff term of 10 years for the murder and an 8 year determinate custodial sentence (comprising 4 years custodial period and 4 years licence period) for the firearms offence. On that same date James Seales was sentenced to life imprisonment with a minimum tariff term of 15 years for the murder and a 12 year determinate custodial sentence (comprising 6 years custodial period and 6 years licence period) for the firearms offence.

The Court of Appeal

[3] The Director of Public Prosecutions ("DPP") seeks leave to refer the sentences imposed on Ian Weir, Jason Weir and Stephen McCaughey to the Court of Appeal pursuant to Section 36 of the Criminal Justice Act ("1988") (as amended by s 41 of the Justice (Northern Ireland) Act 2002) on the grounds that they are unduly lenient.

[4] Stephen McCaughey sought leave to appeal his sentence on the grounds that the learned trial judge had erred in not beginning with a lower starting point to reflect his lower culpability in the offence.

The Factual Background

[5] On the evening of 11 January 2012 the deceased had been recognised by Jason Weir as someone who had quarrelled with his father, Jimmy Seales. Jason Weir then alerted his father to the presence of the deceased at the property of a Mr Gill in Comber. Shortly thereafter Jason Weir, accompanied by McCaughey and, in a separate vehicle or vehicles, Ian Weir and Jimmy Seales assembled at the property in Comber where the deceased was present. Jimmy Seales brought with him a shotgun which he thereafter used to wound Mr Strickland in the leg before he was bundled into a car and removed from the scene. Present at the scene of this abduction were Seales, McCaughey and the two Weirs. McCaughey, who the judge found had not engaged in any physical contact with the deceased, then accompanied the other three in vehicles, one of which contained Mr Strickland in the boot of the vehicle. Shortly after they left the property at Comber, a struggle ensued with the deceased and he was shot in the face with the shotgun brought to the scene by Jimmy Seales. Arising out of his death as a result of these gunshot wounds, the four persons were convicted of his murder.

[6] Stephen McCaughey and James Seales failed in their application for leave to appeal their convictions on 12 June 2015 (see R v McCaughey and Another [2015] NICA 42).

The sentencing remarks of the learned trial judge

[7] When sentencing Ian Weir and Jason Weir on 10 April 2014, the learned trial judge said at paragraph [4] et seq:

> "The approach that I follow in assessing the minimum term that you each must serve before being eligible to be considered for release was prescribed by the Court of Appeal in R v McCandless & Others and it involves the application of the guidelines contained in the English practice statement. Although it has been agreed between prosecution and defence that your respective culpabilities vary as between you, I

have determined that such can be adequately reflected by reductions or additions where appropriate, to the relevant starting point which I consider to be the higher one of 15 to 16 years because of those features which in my judgment make this crime especially serious.

…..

[5] I turn now to consider your individual culpabilities. Dealing with you, Ian Weir, you pleaded guilty to these charges at a relatively early stage and you gave evidence for the prosecution in the trial of your father and Stephen McCaughey. In your case it is agreed between prosecution and defence, as it is also in the cases of your brother Jason and Stephen McCaughey, that the maximum tariff figure should be 12 years having regard to the fact that you were each secondary parties who remained at the scene after the first shot was fired and who failed to disassociate yourselves after the firearm had been discharged on the first occasion by Jimmy Seales."

[8] At paragraph [7] with reference to Ian Weir the judge said:

"I now consider what credit you ought to receive for the assistance that you have provided to the police and prosecution by giving evidence in this trial. Undoubtedly that co-operation must have contributed significantly to the success of the prosecution against your father and must have been very difficult for you to render, especially in view of the strong psychological grip in which you have been held by him. You have also as a result exposed yourself to the danger of recrimination within the prison and I have been informed that you are presently subject there to certain protective arrangements. Accordingly, I reduce the starting figure of 12 years by approximately 60% to reflect your level of co-operation to a resulting figure of five years. I further reduce that figure by 20% to reflect your plea of guilty which was not entered at the earliest opportunity, and accordingly determine that the tariff in your case is one of four years following which period you will be eligible for consideration for possible release."

[9] Dealing with Jason Weir, the learned trial judge said at [9]:

> "As I have said, the prosecution and defence have agreed that the starting point for you as a secondary party in this murder should be not more than 12 years. The family circumstances and working record that I have described in relation to your brother Ian pertain equally to you. You both had a miserable childhood under the thumb of your bullying, domineering father. Arguably your responsibility for these events was somewhat more than that of your brother Ian as it was you who initiated them by telling your father where Philip Strickland was to be found, and you also enlisted Stephen McCaughey to the joint enterprise and drove Philip Strickland's car on to the road. However, as against those factors, I take account of the finding by Dr Davies, consultant clinical psychologist, that you are of limited intellectual ability. … I therefore adopt for you the same starting point of 12 years.
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> [10] You also entered a plea of guilty in advance of trial but, unlike your brother, felt unable to assist the prosecution by giving evidence against your father. Accordingly, I can only reduce the 12 year starting point by an allowance for your plea of guilty, which was somewhat later than that of your brother. I do not propose to materially distinguish between the two of you in the allowance that I make for your plea and accordingly reduce the starting point by 20% giving a tariff of nine years and six months in your case."

[10] Dealing with Stephen McCaughey on 11 April 2014 the learned trial judge said as follows:

> "Turning to you, Stephen McCaughey, you are 26 years of age, you became involved in this matter due to a phone call from your friend Jason who asked you to come to the scene to back him up if necessary in his intended altercation with Philip Strickland. You say that you merely stood and watched as events unfolded, and it is right to say that there is no evidence of your actually doing anything physical in the course of them. The jury must however have rejected your defence, and have found you guilty as a

> secondary party, the role that the prosecution says that you played. Similarly, when your car was used to go back to attempt to burn Philip Strickland's car there is nothing to gainsay your assertions that you did not want to go back and refused to drive your car, instead sitting in the passenger seat and taking no part in the attempted burning.
>
> [10] Your previous convictions are for drug offences and dishonesty and I do not take them into account by way of aggravation. You did not even know the victim and became involved from a foolish mistaken sense of loyalty to your friend that has resulted in serious consequences for you. I judge your culpability to be marginally less than that of the two Weir brothers and therefore take as my starting point a period of ten years. As you contested the matter you can obviously receive no reduction for admitting your guilt. Accordingly I fix the period that you will be required to serve before being eligible to be considered for parole at ten years."

Double discounting

[11] It was common case that the learned trial judge had acted in error in asserting that it had been agreed between prosecution and defence counsel that the maximum tariff figure should be 12 years *having regard to the fact that each was a secondary party.* It seems clear that the learned trial judge misunderstood the written agreement entered into between counsel which in terms accepted that "the upper scale *on a plea* (our emphasis) in these circumstances is that of 12 years". The prosecution had always asserted that the correct starting point for a sentence in each instance was 15/16 years and it was counsel's submission that there was a discernible difference in culpability between McCaughey and the Weir brothers. In believing that the maximum tariff was related to the accused being secondary parties, and thereafter in the case of the Weirs allowing a further discount for their plea the learned trial judge had in effect awarded double discount to them. So far as McCaughey is concerned, the figure of 12 years was to apply in the event of a plea which of course he did not enter.

[12] In fairness to the learned trial judge we should make it clear that the agreement that had been entered into between counsel may have been less than clear in its terms. It may be that that he did not receive the necessary degree of assistance from counsel as to the application of the agreement or the relevant citation of legal authorities in the differing circumstances of the individual defendants especially where the sentencing took place on separate dates.

The prosecution's submissions

[13] Mr McCollum QC, who appeared on behalf of the DPP with Mr McDowell QC, asserted that the sentences on the Weirs and McCaughey were unduly lenient in light of the facts that:

(i) The starting point for sentencing on a contest ought to have been 15 to 16 years.

(ii) As indicated above Ian and Jason Weir had been given a double discount for their pleas and McCaughey had erroneously been given a starting point of 12 years reflecting a plea which he never entered.

(iii) Ian Weir had not given the full degree of assistance that could have been expected in his evidence against Jason Weir and McCaughey

(iv) Although making the point somewhat more faintly in his oral submissions than in his written submissions, Mr McCollum drew attention in his skeleton argument to the apparent conflict between the guidelines on discount for offenders who assisted set out by the Northern Ireland Court of Appeal in R v Hyde [2013] NICA 8 (where the court adopted the approach of R v P: R v Blackburn (2008) 2 Cr. App. R. (S) 5) and the contrary approach in R v Sehitoglu and Ozakan [1998] 1 Cr. App. R. (S) 89 and R v King [1985] 7 Cr. App. R. 227. In Hyde the discount for the guilty plea was held separate from and in addition to the appropriate discount for assistance provided by a defendant. The King line of authority was to the effect that "invariably, in such cases, the offence or offences are admitted and the defendant has pleaded guilty" and thus discount is not added in for the plea. We are bound by and accept the approach of the Court of Appeal in Northern Ireland in R v Hyde on this matter.

Mr O'Donoghue's submissions on behalf of Ian Weir

[14] Mr O'Donoghue QC, who appeared on behalf of the Weirs with Mr Devine, in essence advanced the following points on behalf of Ian Weir:

(i) Notwithstanding the error of double counting on the part of the learned trial judge, there was ample authority for the proposition that the "going rate" for assistance of the nature provided by Ian Weir could have been up to two thirds on the authorities cited and in the event was 60% in the learned trial judge's view. If the starting point for the plea reduced the starting figure to 12 years, then the proper tariff itself would have been in or about four years particularly in light

of the fact that he had taken the very unusual step of giving evidence against his father.

(ii) This was a case that merited such a high discount given his early plea of guilty, his evidence incriminating his father and McCaughey and the fact that his giving evidence had led him being at significant risk of reprisal to the extent that he is now held in protective custody in the hospital wing HMP Maghaberry for his own safety.

Mr O'Donoghue's submissions on behalf of Jason Weir

[15] Mr O'Donoghue advanced the following contentions on behalf of Jason Weir:

- Whilst once again the learned trial judge was in error in double discounting the plea, the fact of the matter is that a figure of ten years can be easily justified in the circumstances of this case.

- The reduction to 12 years would have reflected the maximum on a plea, but in addition to that there was no reason why it could not also be further reduced to take into account the fact that he was a secondary party.

Mr O'Rourke's submissions on behalf of McCaughey

[16] Mr O'Rourke QC, who appeared on behalf of McCaughey with Mr McCreanor QC advanced the following submissions:

- This accused was very much a secondary party and at the periphery of this murder. The learned trial judge was less than generous to him in describing his role as "marginally less" than that of the Weirs.

- Whilst he had contested the case and thereby lost the benefit of a discount for a plea, given his role as a secondary party, which on the face of it was singularly less than that of the Weirs, this sentence was far from unduly lenient.

Principles governing the sentencing of assisting offenders

[17] The leading case on this matter, not cited to the learned trial judge, is R v Hyde in this jurisdiction. At paragraph [13] Morgan LCJ invoked the guidance in sentencing an offender under the Serious Organised Crime and Police Act 2005 (SOCPA) found in Blackburn's case as follows:

> "The first factor in any sentencing decision is the criminality of the defendant, weight being given to such mitigating and aggravating features as there may be. Thereafter, the quality and quantity of the

> material provided by the defendant in the investigation and subsequent prosecution of crime falls to be considered. Addressing this issue, particular value should be attached to those cases where the defendant provides evidence in the form of a witness statement or is prepared to give evidence at any subsequent trial, and does so, with added force where the information either produces convictions for the most serious offences, including terrorism and murder ... Considerations like these then have to be put in the context of the nature and extent of the personal risks to and potential consequences faced by the defendant and the members of his family. In most cases the greater the nature of the criminality revealed by the defendant, the greater the consequent risks. …the discount for the guilty plea is separate from and additional to the appropriate reduction for assistance provided by the defendant … Accordingly, the discount for the assistance provided by the defendant should be assessed first, against all other relevant considerations, and the notional sentence so achieved should be further discounted for the guilty plea…. Finally we emphasise that in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental. In this court, on appeal, focus will be on the sentence, which should reflect all the relevant circumstances, rather than its mathematical computation."

[18] R v King [1985] 7 Cr. App. R. (S) 227 is an authority which deals, inter alia, with the appropriate approach to be taken in a situation where the court is considering a suitable discount to reflect the significant assistance and information given to police. In the course of giving judgment Lord Lane C.J. said this:

> "It is of course impossible to lay down any hard and fast rule as to the amount by which the sentence upon a large scale informer should be reduced by reason of the assistance which he gives to the police. ….
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> One then has to turn to the amount by which the starting figure should be reduced. That again will depend upon a number variable features. The quality and quantity of the material disclosed by the informer is one of the things to be considered, as well as its accuracy and the willingness or otherwise of the

> informer to confront other criminals and to give evidence against them in due course if required in court. Another aspect to consider is the degree to which he has put himself and his family at risk by reason of the information he has given, in other words the risks of reprisal. No doubt there will be other matters as well.
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> ……..
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> Consequently, an expectation of some substantial mitigation of what would otherwise be the proper sentence is required in order to produce the desired result, namely the information. The amount of that mitigation, it seems to us, will vary, from about one half to two thirds reduction according to the circumstances as outlined above."

[19] This proposition is cited with approval in Banks on Sentence, Volume 1, 10th Edition at 77.4.

Principles Governing References

[20] The leading authority governing such references is found in Attorney General's Reference (No. 17 of 2013) (R v McDowell) [2014] NICA 6 which restated the general principles to be applied where the DPP refers a sentence to the court as unduly lenient. The principles can be stated briefly as follows:

(i) Sentencing can only be increased if it is unduly lenient i.e. falls outside the range of sentences which the judge, having regard to all relevant factors including case law and Court of Appeal guidelines, could reasonably consider appropriate.

(ii) The trial judge is well placed to balance all factors and leniency and mercy are not necessarily wrong.

(iii) Even if unduly lenient the court has a discretion to refuse an increase e.g. where events since the sentence have justified the leniency or made an increase unfair.

(iv) On a reference the court can vary or reduce the sentence as well as increase it. Having heard the evidence in a contest, the trial judge is well placed to judge the desirability of a merciful sentence.

(v) A sentence is not unduly lenient merely because each member of the presiding Court of Appeal would have given a higher sentence.

(vi) Sentencing is an art rather than a science.

(vii) In increasing an unduly lenient sentence the court usually imposes a sentence a little less than that deserved because of the unfairness of "double jeopardy". Double jeopardy is but one aspect of the exercise of the court's discretion to vary an unduly lenient sentence. Where a defendant has had no responsibility for the unduly lenient sentence, the court should have some regard to the stress and anxiety of having his sentence re-opened and increased.

Conclusions

[21] We have come to the conclusion that these sentences are not unduly lenient. Our reasons for so concluding are as follows:

Ian Weir

[22] Despite the error in double discounting which clearly happened in this case, we consider that the learned trial judge did not err in fixing a tariff of four years in this defendant's case.

[23] The first factor in any sentencing decision is the criminality of the defendant, weight being given to such mitigating and aggravating features as there may be. Clearly the learned trial judge was correct to place the relevant starting point as 15 to 16 years because of those features in his judgment which made this crime especially serious. It is noteworthy however that the prime mover in this matter Seales -- in so far as he had brought the gun and at the very least initially wounded the deceased ---had received a 15 years minimum tariff after a contest. The DPP chose not to review this tariff, which inevitably set the bench–mark for other sentences.

[24] Thereafter, the quality and quantity of the material provided by this defendant in the investigation and subsequent prosecution of crime falls to be considered. The measure of his cooperation should not be underestimated. Particular value has to be attached to the fact he made a statement and proceeded to confront and give evidence against *his father* (a man who had bullied and dominated him and his brother for many years) with the added force that this evidence substantially contributed to his conviction of murder. Such evidence against a close family member is unusual, invaluable and not easily obtained by law enforcement officers. This far outweighed any inadequacy that may have attended on his evidence against Jason Weir or McCaughey.

[25] This consideration then has to be put in the context of the nature and extent of the personal risk faced by this defendant in prison which was accepted by the learned trial judge. These factors were such that it was not unreasonable for the

learned trial judge to determine the discount to be accorded as being in the range of 60% which would in itself have reduced a 15 year tariff to 6 years.

[26] The discount for the guilty plea is separate from and additional to the appropriate reduction for assistance provided by this accused. Accordingly if the learned trial judge had then deducted a further 20% for his plea the figure for the tariff would have fallen below 5 years.

[27] Finally we emphasise that in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental. Before this court, on appeal, focus will be on the overall tariff set, which should reflect all the relevant circumstances, rather than its mathematical computation. On a reference the concept of double jeopardy must also be borne in mind in standing back and considering whether the sentence was unduly lenient. We consider that in this instance the sentence, albeit lenient, does not fall into the category of unduly lenient and we dismiss the reference before us.

Jason Weir

[28] This defendant did not cooperate with the police to the extent of giving evidence alongside his brother. Hence he did not enjoy the level of discount accorded to his brother save for that element arising out of his plea of guilty. The learned trial judge fell into error in granting a double discount for the plea.

[29] Once again we must eschew the strictly mathematical approach, invoke the totality principle and ask if this tariff of 9.5 years is unduly lenient bearing in mind that any proposed variation in his tariff by this court must acknowledge the principle of double jeopardy.

[30] The overall tariff set should reflect all the relevant circumstances. The fact of the matter is that the role of this defendant, whilst important, was very much secondary to that of his father who received a 15 year tariff on a contest. We consider that there is strength in Mr O'Donoghue's argument that even if one starts from a 15 years tariff for the crime it is not unduly lenient to make a further deduction to reflect the secondary role he had played and to accommodate the fact that Dr Davies, consultant clinical psychologist, found him to be of limited intellectual ability. We also take into account, as we did with his brother at [25] above, the personal risk he is under in the prison which causes them to be isolated. He may be even more isolated after his brother is released but he is serving the remainder of his sentence. These factors might on a lenient approach reduce the figure to 12 years and thereafter the added discount for the plea would easily find the minimum tariff imposed by the learned trial judge.

[31] In all the circumstances we do not find the sentence to have been unduly lenient and dismiss the reference.

[32] Our approach in this case bears some of the hallmarks of the previous two matters. In particular once again we avoid a strictly mathematical approach, invoke the totality principle and ask if this tariff of 10 years is unduly lenient bearing in mind that any proposed variation in his tariff by this court must acknowledge the principle of double jeopardy.

[33] McCaughey contested the case and thus receives no discount for his plea and in so far as the learned trial judge adjusted the starting point to reflect an agreement which was based on a plea, he was again in error.

[34] However on an overall view of this case it does seem to us that McCaughey was in a somewhat different category from the other accused. As the learned trial judge observed he became involved in this matter arising from a foolish mistaken sense of loyalty to his friend Jason Weir following a telephone call from him requesting his attendance at the scene to back him up if necessary in his intended altercation with Philip Strickland. Arguably he merely stood and watched as events unfolded, and it is right to say that there is no evidence of him actually doing anything physical in the course of them.

[35] The judge went on to remark that the jury must have found him guilty as a secondary party in circumstances where he had chosen to accompany the others after leaving Gill's yard and his car was used to go back to attempt to burn Philip Strickland's car. There was nothing to gainsay his assertions that he did not want to go back and refused to drive his car, instead sitting in the passenger seat and taking no part in the attempted burning.

[36] Whist the starting point for this horrendous offence still had to be 15 years, we consider that the learned trial judge was perhaps being less than generous to him in characterising his culpability to be "marginally less than that of the two Weir brothers and therefore take as my starting point a period of ten years". His role seems to have been considerably less than the other miscreants and whilst a reduction of 5 years, thus reducing the tariff after a contest to 10 years, does seem lenient and might not have reflected the sentence that the members of this court would have imposed, we are not satisfied it was unduly lenient and thus dismiss the reference.

[37] Finally, although boldly asserted in his skeleton argument, Mr O'Rourke wisely pursued the appeal by McCaughey against his sentence with rather less vigour before us. For the reasons adverted to in paragraphs [35] and [36] above we find no substance in the appeal and accordingly dismiss it.