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COURT DELIVERS GUIDANCE ON DISCOUNT FOR A GUILTY PLEA

Summary of Judgment

The Court of Appeal[1] today dismissed appeals against the sentences imposed on John Maughan and Owen Maughan for a series of aggravated burglaries carried out in 2016.

Background

On arraignment on 14 September 2017, John Maughan and Owen Maughan ("the appellants") pleaded guilty to a series of offences committed over a three day period between 22 and 25 July 2016. The offences included aggravated burglary and stealing. John Maughan pleaded guilty to further offices including dangerous driving, attempted possession of a firearm, resisting police, possession of a Class B drug and failing to stop where an accident occurred. Owen Maughan pleaded guilty to three further offences, two of which were committed on 13 July 2015, including aggravated burglary and false imprisonment. The trial judge imposed concurrent sentences of fourteen years imprisonment on each of the appellants (seven years in custody and seven years on licence).

The offences committed by Owen Maughan in 2015 occurred in the Presbytery at St Peter's Cathedral, Belfast where a priest was punched, imprisoned and watches and money were stolen. Owen Maughan was arrested in Co Sligo the following day after the car he was driving crashed into a wall. The Gardai found a watch and money in the car. A pair of boots in the boot of the car matched prints taken from the scene of the robbery and Owen Maughan's DNA was found on the left boot. He did not co-operate during the police interviews but pleaded guilty on arraignment. The offences committed on 22 and 24 July 2016 were similar and involved attempted and aggravated burglaries of Parochial Houses in Holywood, Belfast and Castlewellan; a house adjacent to a Parochial Hall in Dungannon; a shop in Newcastle; and a house in Newcastle. Again in some of the incidents, persons were threatened with knives and an imitation firearm and barricaded into a room in the house.

On 25 July 2016, the police tracked the car stolen in the robbery in Newcastle and pursued it from Belfast to Templepatrick before stopping it and arresting the appellants. Upon arrest John Maughan appeared to slip his handcuffs and tried to take a police officer's firearm saying "If I had got it I would have killed you all to get away … I should have driven over you". The Court of Appeal said the totality of the driving from the point of detection to the point of arrest was highly dangerous and that John Maughan deliberately disregarded the safety of other road users, used the car to collide with police vehicles and used the car as a weapon driving it straight at a police officer. The appellants refused to be interviewed by the police and to facilitate the identification process which instead had to be carried out using their photographs.

John Maughan has 36 previous convictions in Northern Ireland, eight of which are for burglary and one for robbery. He has 34 further convictions in the Republic of Ireland, four of which are for

[1] The panel was Stephens LJ (who delivered the judgment of the Court), Treacy LJ and Keegan J

burglary. Owen Maughan has seven previous convictions in Northern Ireland and 32 in the Republic of Ireland including for robbery and attempted robbery. He was unlawfully at large when he committed the offences at St Peter's Cathedral in 2015.

The pre-sentence report in relation to John Maughan referred to a history of abusing alcohol and drugs from a young age. It said that excess alcohol led to depression after his brother's suicide in 2013 and he was admitted to a psychiatric unit. He was assessed as presenting a high likelihood of reoffending with risk factors including his unstable and unstructured lifestyle, alcohol and drug misuse, distorted reasoning and thinking skills, aggression and risk taking behaviour. The pre-sentence report in relation to Owen Maughan stated that he began drinking from the age of fourteen and by later in his teenage years was abusing cocaine and heroin. Previous breaches of supervision raised concerns about compliance with drug treatment programmes. He was also assessed as presenting a high likelihood of re-offending. A Clinical Psychologist presented two reports on Owen Maughan. She concluded he is severely learning disabled and had suffered a very serious head injury when he was five years of age.

The trial judge did not consider the appellants were entitled to full credit for their guilty pleas given the fact that for some of the offences they were either caught red-handed or the evidence against them was so overwhelming. He stated, however, that their pleas were at an early stage and warranted significant discount which he assessed at 25%. The trial judge considered that each of the aggravated burglaries would attract a double figure sentence and taking into account aggravating and mitigating features and totality, he concluded that had the appellants been convicted after a contested trial each might have expected a global sentence of not less than 18 years. He took that as his starting point from which he gave credit for the guilty pleas and imposed a total overall effective sentence of 14 years (which meant the percentage reduction for the guilty pleas was approximately 22.5% rather than 25%).

Grounds of Appeal

The appellants submitted that the starting point of 18 years was too high. They also claimed the discount of approximately 25% failed to properly reflect the credit they ought to have received for their guilty pleas. Owen Maughan further submitted that the trial judge failed to make any or adequate allowance for the fact that he had an IQ of 44 indicating that he is "severely learning disabled" and that he failed to allow mitigation in light of his personal circumstances which included genuine remorse and his drug addiction.

Aggravating and Mitigating Features

The effect on sentence of the presence of several aggravating or mitigating features is not to be calculated simply by an arithmetical tally of the number of such features. The Court of Appeal said the degree must also be taken into account and that in the present case, not only were there numerous aggravating features present but a number were of substantial gravity. It was submitted on behalf of the appellants that whilst serious violence was repeatedly threatened only modest violence was used. The Court, however, said that modest violence can carry with it not only the victim's subjective perception of a risk of really serious violence but also the objective existence of that risk. It said the facts relating to the car chase and the arrest of the appellants provided very clear insight into what would have happened to the victims of the aggravated burglaries if they had challenged or tried to evade. The Court considered that all the victims of the aggravated burglaries were at objective risk of extreme violence from both of the appellants and that "John Maughan

demonstrated that he was totally reckless as to the lives or bodily integrity of members of the public and of police officers".

The Court of Appeal identified a number of aggravating features:

- As concurrent sentences were imposed, the gravity and number of the other offences had to be taken into account as aggravating features of the most serious offence. It was incorrect to concentrate solely on the aggravated burglary offences to the extent of obscuring the substantial sentences warranted for the other offences, for example attempted possession of a firearm and dangerous driving. The Court said these were serious offences putting the lives and bodily integrity of the victims at substantial risk;
- The extensive and relevant criminal records of both appellants;
- Pre-meditation and planning which involved targeted attacks on elderly and isolated victims;
- The invasion and ransacking of homes;
- The use of some degree of violence together with the objective risk of extreme violence from both of the appellants;
- Direct threats to the victims in a way that was extremely frightening putting the victims into significant fear, including threats to kill together with reference to a paramilitary organisation in order to add further menace to the threats;
- The use of weapons including knives, a screwdriver, an imitation firearm and a vehicle;
- The appellants were under the influence of drugs;
- The theft of property including items which caused a significant emotional loss to the victims;
- Commission of offences whilst on licence; and
- Failure to respond to previous sentences.

The Court considered the following mitigating features were present:

- The appellants pleaded guilty at arraignment;
- Imitation firearms rather than a real firearm were used;
- Serious violence was not inflicted;
- There have been expressions of remorse;
- Owen Maughan's cognitive abilities; and
- The appellants' personal circumstances although these were of limited in effect.

Discount for the Guilty Pleas

A discount for a guilty plea is necessary to encourage pleas of guilty in order to obtain a range of public benefits while ensuring that offenders are realistically punished for their offences. The public benefits including relieving witnesses, vindicating victims, saving court time and indicating remorse. There are two competing interests between encouraging those benefits and the imposition of realistic punishment. Generally the discount should be larger the earlier the indication of an intention to plead guilty. The level of discount is left to the sentencing court's discretion subject to the guidance of the Court of Appeal.

The issues for determination in this case were:

- Whether the attitude of the offender at interview should be taken into account in determining whether he is entitled to the full discount for a guilty plea. As a matter of principle, a person who faces up to his responsibilities at interview should receive a greater discount than a

person who does not do so. The question remains as to whether that should be by way of a separate and additional discount to the full discount or whether it should be included in that discount;
- Whether the present guidance of the Court of Appeal is consistent with the terms of Article 33(1) of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order"); and
- The impact on the level of discount if the defendant is caught red-handed or if there is no viable defence.

The Guidance in Northern Ireland as to these competing interests

The present guidance is that "the full discount for a plea is generally in or about one third where an offender faces up to his responsibilities at the first opportunity. In appropriate circumstances it can be higher or a non-custodial rather than a custodial sentence may become appropriate". If an offender is not entitled to a full discount then the present practice for a plea at arraignment is generally a discount of in or about 25% though again it can be higher. If an offender is caught red-handed or the evidence is overwhelming then the discount can be reduced. A plea at the door of the court is likely to obtain a significantly lower discount. However in circumstances where there is a late plea in a rape case the benefits may lead to a greater discount than those available in other cases because the victim is saved from the particularly distressing emotional trauma of giving public evidence as to the circumstances of the offence. The Court of Appeal said this guidance is sufficient to enable those who represent accused persons to know, at least in general terms, the extent to which a sentence is likely to be reduced in the event of a plea of guilty, so that they can advise the accused accordingly.

The Court then discussed the guidance as to when the full discount is available. It states that: "To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant *must have admitted his guilt* of that charge at the earliest opportunity. In this regard *the attitude of the offender during interview is relevant*. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset". The Court said there were important points to note:

- Article 33(1) of the 1996 Order provides for the offender "indicating his intention to plead guilty" rather than to him admitting his guilt. In practice there may be little difference between admitting guilt and indicating an intention to plead guilty. However the Court considered this should lead to a revision of the guidance so that it becomes:

  > "To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have *indicated his intention to plead guilty* to that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant *indicates his intention to plead guilty* at the outset."

  The indication can be given in different ways including by an admission to all the ingredients of the offence at interview.

- The attitude of the offender during interview is "*relevant*" rather than "*decisive*." The Court said the trial judge was not correct to state that "the maximum reduction *is only due* to those who admit *their guilt* when first confronted with the allegations." The position is more nuanced and in any event this is general guidance not tramlines. Each case must be assessed by the trial judge on its own facts. There may be cases where even if the facts are known

there is a need for legal advice as to whether an offence is constituted by them. In such cases if the offender admits all the relevant facts at interview, whilst still maintaining his innocence, and then subsequently pleads guilty he could still be entitled to the maximum discount. Another example of a more nuanced approach is a case where at interview an offender genuinely has no recollection of events. Furthermore there can be cases where a defendant genuinely does not know whether he is guilty or not and needs sight of the evidence in order to decide. The Court said there can be many reasons for giving full credit despite the defendant not indicating an intention to plead guilty at interview. However those reasons would generally not include a defendant refusing to be interviewed and certainly would not include the type of refusal to be interviewed exhibited by these appellants.

- When considering the appropriate level of discount a distinction should be borne in mind between (i) the first reasonable opportunity for the defendant to indicate his guilt; and (ii) the first reasonable opportunity for his lawyers to assess the strength of the case against him and to advise him on it. Ordinarily it is the first which is most relevant to assessing the amount of the discount. The Court said it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the prosecution to proof at trial). However in the scenario set out at (ii) the defendant may not require sight of the evidence in order to know whether he is guilty or not; he may require it in order to assess the prospects of conviction or acquittal, which is entirely different. Each case must be assessed by the trial judge on its own facts and factors such as these may be appropriate for consideration in a specific case.

- At arraignment a guilty plea is not *indicated* but is *entered* which means that a defendant "indicating his intention to plead guilty" must be at an anterior stage to arraignment which in this jurisdiction is at interview.

The position in England and Wales and the differences between practice there and in this jurisdiction

The relevant sentencing guidelines in England and Wales ("E&W") are not applicable in this jurisdiction unless expressly approved by the Court of Appeal however it was felt appropriate to consider the position. In 2017, the guidelines in E&W were changed[2] to provide that "the guilty plea should be considered by the Court to be independent of the offender's personal mitigation. Factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should not be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors." The position in E&W is therefore that admissions at interview will bring additional mitigation. The procedure in criminal cases in E&W therefore differs from the procedure in Northern Ireland.

The Court of Appeal noted that the guidance in E&W stated that a higher reduction is available if the offender indicates at the preliminary hearing his intention to plead guilty. This preliminary hearing can take place within a week of the offender's first court appearance. The absence of committal reform in this jurisdiction means there are no preliminary hearings in the Crown Court and the time spent before the matter reaches the Magistrates' Court and the time spent in that court is far longer. The Magistrates' Court in Northern Ireland does not ask a defendant to indicate his plea in a matter which is going to the Crown Court. The streamlining provisions introduced in E&W mean that the public benefits of a plea can be secured at an early stage even if the defendant does not make admissions at police interview. That is not the position in Northern Ireland as those streamlining

[2] Following the decision of the Court of Appeal in *R v David Caley & Ors* [2013] 2 CR App R (S) 47

provisions, which ought to be but have not been introduced mean that the public benefits (of relieving witnesses, vindicating victims, saving court time and indicating remorse) cannot be secured at an early and appropriate stage if the first reasonable opportunity is stated to be on arraignment. Rather for instance witnesses and victims would have to endure a long period before there was any indication from a defendant as to an intention to plead guilty:

> "The criminal justice system must reflect the vital interests of amongst others victims and this would not be achieved by permitting a defendant to obtain full discount for a guilty plea despite delaying indicating his intention to plead guilty."

A further important distinction between the process in E&W and Northern Ireland is the level of representation at police interview. In E&W representation at police interview is not limited to qualified solicitors. This has led to concerns as to the mixed quality of advice at interview. In this jurisdiction, the Police and Criminal Evidence (Northern Ireland) Order 1989 together with Code of Practice C states that when a person is brought to a police station under arrest or arrested at the station having gone there voluntarily, the custody officer must make sure the person is told clearly about a number of rights including their right to consult privately with a solicitor and that free independent legal advice is available.

The Court noted a third important distinction between E&W and this jurisdiction which is that the length of the custodial sentences there can be greater in some instances so that the discount in E&W still facilitates appropriate punishment given a higher starting point.

The Court of Appeal concluded, therefore, that the guidance in relation to the first reasonable opportunity in E&W cannot be read across to Northern Ireland in view of the differences between the jurisdictions.

The proper construction of Article 33(1) of the 1996 Order

The Court of Appeal next considered the proper construction of Article 33(1) of the 1996 Order. It made the following comments:

- There is a difference between the statutory provision in E&W[3] and this jurisdiction. It could be suggested that in E&W the proceedings are identified by the words "in proceedings before that or another court" so as to enable an indication of an intention to plead guilty to be taken into account whether it was given in the Magistrates' Court or in the Crown Court. The contrast in Northern Ireland is that these words are not contained in Article 33(1) of the 1996 Order and there is therefore no express or implied exclusion of anterior proceedings by way of interview or of the proceedings in the Magistrates' Court. Furthermore, at arraignment a guilty plea is not *indicated* but is *entered* which means that a defendant "indicating his intention to plead guilty" must be at an anterior stage to arraignment which in this jurisdiction is at interview. The word "proceedings" must be construed consistently with the ability to indicate rather than to enter a plea of guilty.
- In E&W the opportunity to plead guilty at interview is deemed not to be appropriate for amongst other reasons "the mixed quality of advice in interview, sometimes at short notice and inconvenient hours." That was one of the reasons as to why "the police interview ought not to be regarded as the first reasonable opportunity to indicate a plea of guilty for the purposes of the Sentencing Guidelines Council Guideline" rather that there was a broad spectrum of possibilities beginning with the police interview of the defendant as a suspect.

[3] Section 144 of the Criminal Justice Act 2003 ("the 2003 Act")

- The question as to when "proceedings" commence can be informed by the definition for the purposes of Article 6 ECHR as to when an individual is subject to a criminal charge, i.e. "at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him". The Court considered that a person can therefore be subject to a criminal charge before the formal initiation of "court proceedings."
- The Police and Criminal Evidence (Northern Ireland) Order 1989 together with Codes of Practice made under that Order regulate criminal proceedings before a formal charge is made. For instance Code C requires access to legal representation which is part and parcel of any subsequent court proceedings. There are similar provisions in E&W.
- Section 2 of Contempt of Court Act 1981 states that the strict liability rule "applies to a publication only if the *proceedings* in question are *active* within the meaning of this section at the time of the publication". Schedule 1 provides that the "initial steps of criminal proceedings" include arrest without warrant so that subject to certain limitations criminal proceedings are active at that stage.

For these reasons the Court held that the correct construction of the word "proceedings" in Article 33(1) of the 1996 Order includes the police interview: "That interview is an important step in the process and cannot sensibly be separated from the events after the charge. They are all part and parcel of the same proceedings."

The impact on the discount of the defendant being caught redhanded or having no viable defence

The second issue for determination was the impact on the discount of the offender being caught red-handed or having no viable defence. The present guidance from the Court of Appeal[4] states that "the discount in cases where the offender has been caught red-handed should not generally be as great as in those cases where a workable defence is possible". The Court noted that a defendant being caught red-handed and a defendant having no viable defence are similar but not exactly equivalent concepts. The first is emphatic so that literally the defendant is caught in the very act of the crime or has the evidence of his guilt still upon his person. The second is less clear cut involving an evaluative judgment that there is no viable defence. Considerable care therefore has to be exercised before determining that the evidence is so overwhelming that there is no viable defence.

The starting point

The starting point selected by the trial judge was one of 18 years. He arrived at that starting point having stated that any one of the aggravated burglaries would have justified "a starting point well into double figures." On appeal, the submissions on behalf of the appellants concentrated on the appropriate starting point for the most significant offences which were the counts of aggravated burglary. The Court noted, however, that as concurrent sentences were imposed concentration on the most serious offences should not distract from consideration of the appropriate starting point taking into account the nature and number of all the other offences. No submissions were made on appeal that the concurrent sentences imposed for the other offences ranging from 6 months to 5 years custody were inappropriate.

It was agreed that for the purposes of this case assistance can be obtained from sentences imposed in respect of household robberies. In relation to household robberies the guidance states that "the starting point for sentencing in the case of robbery of householders where violence is *used* should be *10 years*. This will increase depending *on the degree of violence used*, *the age or ages of the occupiers*, *any*

[4] R v Pollock [2005] NICA 43

previous history for offences of violence and in the appropriate case a sentence of *15 years* would not be excessive". Further guidance was noted which stated that "There is an unbroken line of authority to the effect that in Northern Ireland the starting point in cases of robbery of householders, where violence is used should be 10 years and in appropriate cases a sentence of 15 years is not excessive …"

Relying on these authorities counsel on behalf of the appellants submitted that the starting point for any one of the offences of aggravated burglary should be between 6-8 years after trial. This submission was predicated on the level of violence used being well short of that evidenced in the guideline cases. The Court of Appeal agreed that the level of violence used can lead to the calculation of sentences using a starting point of less than 10 years and that the level of violence used in this case was in sharp contrast to the guideline cases. It said, however, that while the level of violence used in this case was significantly less it was clear that violence was used. The violence had a terrifying impact on the victims who were exposed to a real objective risk of very serious injuries:

> "On the basis of the level of violence used we consider that the learned trial Judge was wrong to say that any one of the aggravated burglaries would have justified "a starting point well into double figures." However given the multiplicity of the offences committed by each of the appellants, given their very substantial criminal records for similar type offences and the numerous serious aggravating features we consider that whilst the starting point of 18 years after a contest was undoubtedly severe in the context of these cases it could not be described as wrong in principle or manifestly excessive. "

The discount for the plea

The trial judge first indicated that he would give a discount of 25% subsequently stating that it would be approximately 25%. The Court rejected the submission that the judge was bound by the first indication. As noted above, it did not consider there is any requirement to change the existing guidance in this jurisdiction as to discount for a plea. The Court considered that the reason why John Maughan was not interviewed was that he decided not to be: "In those circumstances he can hardly complain that he was deprived of an opportunity at interview to indicate his intention to plead guilty". It said the trial judge was entitled to take the view that John Maughan was caught red-handed in relation to the further offences committed by him and that the evidence was overwhelming in relation to all of the other offences. That was an appropriate factor to be taken into account in determining the level of discount: "In the event the learned trial judge gave a discount of 22.5%. We consider that this was an appropriate level of discount."

Owen Maughan's limited cognitive abilities

It was submitted that inadequate weight was given by the trial judge to the mitigating factor of Owen Maughan's limited cognitive abilities. The Court agreed with the trial judge's assessment that Owen Maughan chose to become involved in these "appalling offences" and added that whilst his limited cognitive abilities are to be taken into account they are to be kept strictly in proportion given the choice that he made together with the lack of any evidence that there was any inhibition in his ability to make decisions or to comprehend the gravity of his actions. It said they should be considered as part of his personal circumstances so that they are of limited effect in the choice of sentence. In any event one of the further offences committed by Owen Maughan included a count of aggravated burglary and stealing so that the decision to impose the same sentence on the two offenders despite some differences in their personal circumstances is entirely understandable.

The imposition of concurrent sentences

The Court said the trial judge was entitled to impose concurrent sentences and noted that he also bore in mind totality. The Court considered that these were stiff sentences but said they were not manifestly excessive.

Personal circumstances of Owen Maughan

It was submitted that the trial judge failed to allow any or adequate mitigation in the light of Owen Maughan's personal circumstances. The Court was content that the trial judge was aware of those circumstances and that he gave them sufficient weight adding that personal circumstances are of limited effect in the choice of sentence.

Conclusion

The Court of Appeal dismissed both of the appeals.

ENDS

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