Neutral Citation No: [2022] NICA 46	*Ref:* **McC11919**
	ICOS No: **21/39621/A01**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: ex tempore, 13/05/22*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

THOMAS ROBIN

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BEFORE: MCCLOSKEY LJ, MAGUIRE LJ, SCOFFIELD J

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Appearances
Mr G Purvis, of counsel, appeared on behalf of the Crown
Mr R McConkey, of counsel, appeared for the Applicant

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McCLOSKEY LJ

[1] This is an application for leave to appeal against sentence, leave having been refused by the single judge.

[2] The state of play is that the court, having drawn to the attention of the appellant's legal representatives the power available to it under section 10 (3) of the Criminal Appeal (Northern Ireland) Act 1980 ("the Act") to quash the impugned sentence of the Crown Court and to impose such other sentence authorised by law, whether more or less severe, in substitution therefor as it thinks ought to have been passed, adjourned the hearing to enable the appellant's legal representatives to take instructions.

[3] Further instructions have been provided by the appellant, as a result of which Mr McConkey, his counsel, has conveyed to the court that he is instructed not to pursue the appeal. The net result is that the court is ordering that the appeal be withdrawn, if that be the technical language that is used in these situations, or dismissed, as the case may be. That would be a matter more of technicality than of

substance and the court will take care to ensure that the order is carefully crafted once, as is in the usual way, the Court of Appeal Office prepare an initial draft for judicial consideration.

[4] That gives rise to the question of whether the court should exercise its power under the Criminal Appeal Act to grant costs to the appellant and, if so, in what manner and to what extent. That, in turn, engages a general practice of this court. It is a practice which one trusts is helpful to the profession because it has the merits of predictability and certainty and therefore enables informed decisions to be made, first of all on whether to appeal at all in criminal cases and, secondly, where appropriate, whether to continue to appeal in cases where the single judge has refused leave to appeal. In the latter type of case it is the practice of this court not to approve public funding for the appellant where the court has not required the Crown to reply.

[5] That is this case and this court considers that in light of its intervention at the beginning of the hearing and the outcome to which that has given rise, it should bear in mind the terms in which leave to appeal was refused. And we do that because of that to which we drew attention at the outset of this hearing, namely the terms of section 10(3). The interplay between section 10(3) and the refusal of leave to appeal will be apparent and requires no elaboration on our part.

[6] We take into account, firstly, that the bringing of the appeal has raised a significant question mark in relation to the starting point adopted by the sentencing judge. That was not sufficient to persuade the single judge to grant leave to appeal. Nonetheless, we are obliged to approach that with a fresh mind in view of the powers available to this court. Second, it is clear that the appellant's legal representatives have conducted the appeal to date to a high professional level. Third, their engagement with the court has been prompt and commendable. That relates to, first of all, the further steps which the court required to be taken in the presentation of the appeal arising out of the case management review two days ago. And secondly, the response which has been made to the issues canvassed by the court at the outset of today's listing.

[7] All of those factors are on one side of the notional scales. On the other side is the practice of this court. That practice, as I already observed, is not inflexible. It is to be emphasised that any ruling of this court in relation to costs in a criminal appeal sets no precedent. It is intensively case sensitive.

[8] In this case, the ruling to be made is borderline in nature because nothing points all that decisively in favour of one course rather than the other. That, therefore, obliges the court to stand back and to form an intuitive and evaluative judgment.

[9] We do not wish to discourage criminal practitioners in this jurisdiction from keeping under review the propriety of an appeal of any kind. We do not wish to deter practitioners from being sufficiently proactive and courageous to advise that appeals should not be pursued, at whatever stage of their existence. We do wish to convey to

practitioners that the consequences of responding positively to the factors highlighted by the court in this case will not necessarily be penal or draconian from the financial perspective. And finally, we must take into account that all of the work undertaken in connection with the appeal will, in reality, not be remunerated at all if the court declines to award costs.

[10] Balancing and taking all of the foregoing into account, in a context of borderline judgment in an intensely litigation sensitive case and setting no precedent of any kind, the court has concluded by a narrow margin that the costs of the appellant should be allowed in the exercise of our discretionary power (noted below)*and we so rule.

[*From 24 March 2016 s.28(2)(a) of the Criminal Appeal(NI) Act1980 was repealed by Access to Justice (NI) Order 2003 Sch. 5 **and SR (NI) 2016/199, and replaced by a new regime: see especially Article 26, together with the Criminal Defence Services (General) Regulations SR (NI) 2016/197 which states:**
"relevant proceedings" means the proceedings listed in Schedule 2 to the Access to Justice (2003 Order) (Commencement No.8) Order (Northern Ireland) SR (NI) 2015/237 [i.e. An appeal under Part 1, Part 2 or section 47A of the Criminal Appeal (NI) Act 1980] 3. The Court of Appeal or a judge of that Court may at any time grant a right to representation in respect of any relevant proceedings in the Court of Appeal, the Supreme Court or the Crown Court.]