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Ref:

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IN THE CROWN COURT OF NORTHERN IRELAND

SITTING IN BELFAST

ICOS 19/110285

REGINA

-v-

STEPHEN COLEMAN

His Honour Judge McFarland

[1] This case is one of fourteen cases that have been listed before me for the purposes of consideration of issuing interim guidance to the Crown Court judiciary under the Lord Chief Justice's Programme for Action on Sentencing.

[2] I have heard preliminary oral and written submissions by, and on behalf, of a number of counsel who appeared on behalf of the prosecution and each of the defendants.

[3] The cases had been listed together as each of the defendants falls to be dealt with after their pleas of guilty for offences which have been categorised as "money mule" offences.

[4] The expression "money mule" is used as a loose description of a person who facilitates a more sophisticated fraud by assisting in the laundering of the proceeds of the fraud. The word "mule" has been used for couriers in illegal drug importation and storage cases and is an apt description as such a defendant's role is to protect the main offenders who can be kept at arm's length from the illegal item, be it drugs or cash.

[5] Typically, a fraud is perpetrated against a bank account holder. The frauds can be very sophisticated with fraudsters contacting bank account holders, both personal and business, and by trickery they are able to extract bank and personal details so that the criminals can access the victims' bank accounts, or they can arrange for the victims to access their own bank accounts. Such methods are often

described as “phishing”. Contact can be direct, or indirect through emails and messages. The fraudsters can be extremely clever and persistent, they can be very convincing, and frauds can often be perpetrated against even the most cautious and careful of victims. By these, and other similar methods, money is transferred out of the bank accounts.

[6] At this stage the money mule becomes involved. Typically they will already have a bank account and they make the bank account available so that money is transferred into it. Larger frauds will utilise several money mule accounts to avoid immediate detection by the banking system. Smaller frauds may just use the one account. The money mules will then withdraw the money from their accounts in cash. Sometimes this can be done by ATM withdrawal or a cash withdrawal at a bank counter using a debit card.

[7] Speed is usually of the essence as discovery of the crime will lead to a freezing of the money mule’s bank account. For this reason, it is more likely that foreign currency exchange facilities are used at public counters operated by travel companies and in-store supermarket banks. It is a frequent occurrence for money mules to be driven to and from currency exchange facilities withdrawing sums in the region of several thousand pounds, converted into foreign currency.

[8] One recurring theme in all these cases is the very lax money laundering regime that is operated by these facilities, and some by publicly listed companies. These companies will, no doubt, make significant profits from these currency conversion transactions, and it is important that they adopt a much more proactive procedure in checking the nature of the transaction, why there is a need for the amount of foreign currency, and look for travel documents to corroborate any story about a holiday. No doubt, these facilities are regulated in some way, and thought should be made to reminding the companies of their obligations under money laundering regulations.

[9] The money, acquired as criminal property, is very quickly handed over to criminal elements, and the defendant may be left with a small amount of cash which he or she is permitted to retain as a payment or commission for allowing their account to be used in this fashion.

[10] Given the nature of the fraud, it is inevitable that the money mule will be identified, although it does involve the police having to go to the time and expense in obtaining Production Orders requiring banks to produce bank account details to the police.

[11] Conviction is almost inevitable, and the typical case will involve an early admission of guilt when interviewed by police and an early plea of guilty before the court.

[12] Victims of this type of fraud can lose significant amounts of money in the totality of the criminal scheme, although the money mule may only have been involved in the laundering of a portion of the total sum. Depending on the role of the victims, and the arrangements that they have with their banks, the victim may have to shoulder the entire loss, or part of it. On some occasions the bank may agree to cover all or some of the loss, and there are inter-bank arrangements in relation to further indemnities between the banks that were involved in the various transactions. Some of the loss may also be covered by insurance.

[13] Even though the direct victim may ultimately bear no financial loss, being the victim of such a fraud can have a serious impact on an individual's health, and their financial wellbeing. If the loss is borne by a bank or insurance company, that does not lessen the crime, as the loss will impact on profitability, with consequential increase in banking charges or higher insurance premiums which will be borne by the public at large.

[14] This type of crime also has a significant impact on general public confidence in the banking system, particularly as more and more transactions are carried out by internet facilities. It also enriches organised criminal gangs, making available to them significant funds which, in turn, facilitates them to commit further crimes.

[15] In summary this is a crime which generates a lot of money into the hands of criminal elements. It is sophisticated at the fraud end of the scheme and less so at the money laundering end of the scheme.

[16] Money mules can be recruited in a variety of ways. In some cases it can be by simply responding to a request for use of a bank account. This can be by way of word of mouth or can be as basic as open advertising for bank account holders on social media platforms. The attraction is an offer of quick profit for use of the account. Others can be in some sort of debt, usually a drugs debt or loan-shark debt. Pressure is then put on the debtor to let their bank account details be used with promises of cash or relief of the debt. What is evident from these recruitment methods is that lower rank criminals such as loan sharks and drug dealers appear to have ready access to the facility to pass on money mule clients to the serious end of the fraud, again, probably on the basis of a commission. Alternatively the initial fraudsters may 'sell on' the proceeds of the fraud to local criminals.

[17] The typical money mule will be a vulnerable individual. They would not normally require a bank account, but with so many aspects of modern life requiring bank accounts for payments of social security benefits or income, they will have such an account, but invariably there will be very little money in the account. Having come under the influence of criminal elements who would exploit them, they are likely to have a modest income and lack the resilience and support to resist the type of demands placed upon them. There may also be an element of coercion or intimidation falling short of duress. The offending will be opportunistic with limited planning on their part.

[18] The offences with which money mules will typically be charged with are:

- (a) Acquiring criminal property (section 329 (1)(a) of the Proceeds of Crime Act 2002). This would cover the acquiring of the money when it is transferred into their bank account.
- (b) Fraud by false representation (section 1 of the Fraud Act 2006). This would cover a defendant falsely representing that they were entitled to transfer funds out of their bank account.
- (c) Converting criminal property (section 329 (1)(c) of the Proceeds of Crime Act 2002). This would cover converting the credit in their bank account into cash.
- (d) Transferring criminal property (section 329 (1)(d) of the Proceeds of Crime Act 2002). This would cover the transferring cash from the bank account into another bank account

[19] The maximum sentence available for the Proceeds of Crime Act offences is 14 years and the maximum sentence for the Fraud Act offence is 10 years.

[20] In relation to the basic approach to sentencing although there may be multiple counts, these will normally cover a single course of conduct and concurrent sentences should be imposed. Consecutive sentences could be imposed if there are separate and distinct transactions.

[21] Morgan LCJ in *R -v- Mahoney* [2016] NICA 27 at [20] stated:

"The Sentencing Guidelines Council of England and Wales issued guidance with effect from 1 October 2014 in relation to offences of fraud, bribery and money laundering. The Guidelines accordingly included the offences of conspiracy to defraud which appear in counts 1 and 2 on this indictment. The structure of the Guidelines is to recognise that culpability and harm are the driving factors for determining the sentence. We agree that the factors identified as contributing to culpability and harm in the Guidelines are appropriate and should be taken into consideration in this jurisdiction. We also agree that the aggravating and mitigating factors identified in the Guidelines are of assistance."

[22] The general approach suggested to Northern Ireland judges is that they should avoid attempting to follow the English guidelines when it comes to starting points and sentencing ranges. This has been mentioned in a number of Court of Appeal decision, most notably by Morgan LCJ in *R -v- McCaughey and Smyth* [2014] NICA 61 at [19] - [24].

[23] The English guidance deals with culpability in the following manner –

“A – High culpability

A leading role where offending is part of a group activity

Involvement of others through pressure, influence

Abuse of position of power or trust or responsibility

Sophisticated nature of offence/significant planning

Fraudulent activity conducted over sustained period of time

Large number of victims

Deliberately targeting victim on basis of vulnerability

B – Medium culpability

A significant role where offending is part of a group activity

Other cases that fall between categories A or C because:

Factors are present in A and C which balance each other out and/or

The offender’s culpability falls between the factors as described in A and C

C – Lesser culpability

Involved through coercion, intimidation or exploitation

Not motivated by personal gain

Peripheral role in organised fraud

Opportunistic ‘one-off’ offence; very little or no planning

Limited awareness or understanding of the extent of fraudulent activity

Where there are characteristics present which fall under different levels of culpability, the court should balance these

characteristics to reach a fair assessment of the offender's culpability."

[24] And in respect of harm:

"Harm is initially assessed by the actual, intended or risked loss as may arise from the offence.

The values [...] are to be used for actual or intended loss only.

Intended loss relates to offences where circumstances prevent the actual loss that is intended to be caused by the fraudulent activity.

Risk of loss (for instance in mortgage frauds) involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Risk of loss is less serious than actual or intended loss. Where the offence has caused risk of loss but no (or much less) actual loss the normal approach is to move down to the corresponding point in the next category. This may not be appropriate if either the likelihood or extent of risked loss is particularly high."

[25] In relation to the level of harm to the victims it states –

"High impact – [...]

Serious detrimental effect on the victim whether financial or otherwise, for example substantial damage to credit rating

Victim particularly vulnerable (due to factors including but not limited to their age, financial circumstances, mental capacity)

Medium impact – [...]

Considerable detrimental effect on the victim whether financial or otherwise

Lesser impact – [...]

Some detrimental impact on victim, whether financial or otherwise"

[26] The Guideline refers to the following aggravating factors –

"Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution

Attempts to conceal/dispose of evidence

Established evidence of community/wider impact

Failure to comply with current court orders

Offence committed on licence or post sentence supervision

Offences taken into consideration

Failure to respond to warnings about behaviour

Offences committed across borders

Blame wrongly placed on others"

[27] And to the following mitigating factors (in addition to the plea of guilty)-

*"No previous convictions **or** no relevant/recent convictions*

Remorse

Good character and/or exemplary conduct

Little or no prospect of success

Serious medical conditions requiring urgent, intensive or long-term treatment

Age and/or lack of maturity where it affects the responsibility of the offender

Lapse of time since apprehension where this does not arise from the conduct of the offender

Mental disorder or learning disability

Sole or primary carer for dependent relatives

Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Activity originally legitimate"

[28] Many of these factors will not apply in money mule cases. The offenders will often be totally distant from the initial fraud. In fact, they will have no real knowledge of it. They will have a knowledge, or suspicion, that the money has been unlawfully obtained, but that might be the extent of their criminal mind. They may also only deal with a portion of the money defrauded from the victim.

[29] The Court of Appeal has recently delivered a judgment in [2020] NICA 1. This case did have a money mule DPP's Reference 5 of 2019 (*R -v- Jack*) aspect to it but the offender was a bank official who had facilitated the transfer of money from the accounts of two bank customers into money mule accounts. It was therefore a case which is commonly referred to as a breach of trust case and followed in the well-known line of authorities of *R -v- Barrack*, *R-v- Gault* and *R-v- Clarke*. In addition to offering guidance in relation to culpability, harm, aggravating and mitigating factors for that type of case, it suggested a guide for sentencing tariffs based on the actual or intended loss. That guide is set out at [36] (f) -

- i. where the amount is not small, but is less than £30,000, terms of imprisonment from the very short up to 21 months will be appropriate;*
- ii. cases involving sums between £30,000 and £175,000 will merit two to three years;*
- iii. cases involving sums between £175,000 and £400,000 will merit three to four years;*
- iv. cases involving between £400,000 and £2 million will merit between five to nine years;*
- v. cases involving £2 million or more will merit 10 years or more (subject of course to the maximum sentence for the particular offence).*

[30] It must be borne in mind that the guidance in *Jack* is for breach of trust cases and therefore already incorporates a significant aggravating factor.

[31] In *Mahoney*, the Court of Appeal offered some guidance in a fraud case not involving a breach of trust, when quoting from a first instance case of *R -v- Rymacki* [2013] NICC 20. That case involved counterfeit goods and based on an amount of

actual loss to a trademark owner or profit generated by the offender, the suggested starting points were –

Sums up to £20,000 (one to three years);

Sums up to £100,000 (three to four years);

Sums up to £500,000 (four to five years); and

Sums over £500,000 (five to six years)

It should be borne in mind that these values involve criminality on a commercial basis, and profits or losses on these scales would reflect significant criminal conduct.

[32] In *R -v- Brady* [2011] NICA 4 (a social security benefit fraud case) guidance of such a specific nature was not given, although reference was made at [14] to a number of what were described as comparator sentencing cases including a number of suspended sentences – 15 months (£45,698), 4 months (£19,539), 6 months (£24,707) and 3 months (£18,502). The amounts of benefit obtained are shown in parentheses.

[33] All the starting points and ranges mentioned in [29] and [31] would apply to cases involving convictions after a contest.

[34] Actual or intended loss is always an overriding factor, but it must be borne in mind that when considering this, and any of the aggravating factors, in most money mule cases the offender is not likely to have any real idea about the nature of the initial fraud, any particularly vulnerabilities of the victim, and the amount of the money that is intended to be, or has actually been, transferred to him. He or she has agreed to let their bank account be used for this purpose and must take the consequences that flow from that agreement, but it does add an extra layer to the sentencing exercise. In addition, although the value of the money passing through the bank account may be significant, the offender's actual or anticipated personal gain is likely to be very modest. Typically these are cases of potential low culpability but with high levels of harm, and with all cases of this type, be they crimes of violence, sexual offences, or fraud, sentencers should remind themselves of the well establishing sentencing principle that sentencing is an art not a science. As the Court of Appeal has recently said in *R -v- Nelson* [2020] NICA 7 "*within this principle lies the discretion, or margin of appreciation, to be accorded to sentencing judges.*"

[35] As for the working out of these sentencing principles and by way of example, the English Court of Appeal allowed an appeal in the case of *R -v- Hussain and Talukdar* [2019] EWCA Crim 1525. That court, of course, would have taken into account the English Sentencing Council guidance. The defendants had been convicted of money laundering offences. Both had allowed their accounts to be used. In the course of the fraud there was an attempt to transfer £9,100 into Hussain's account and a sum of £7,340 into Talukdar's account. Both transactions

were stopped in time and the defendants were convicted of entering or becoming concerned in a money laundering arrangement. Hussain had no previous convictions. Talukdar had a minor unconnected conviction. Both were university students and there had been a degree of delay in the case which had not been their responsibility. Both received sentences of eight month's imprisonment. On appeal, after both defendants had spent some time in custody, community service orders of 50 hours' unpaid work were imposed.

[36] Ultimately the amount of money laundered through the bank account is always likely to be the starting point for consideration. The exercise of identifying culpability and harm is for the guidance of English judges to find the correct place where the case falls on the Sentencing Council's matrix. If such an exercise was to be carried out in Northern Ireland the cases would fall into a category C or Lesser Culpability bracket. Assessment of harm will be difficult. The level of harm will be evident from the case papers, but it is acknowledged that it will be extremely difficult to apportion the appropriate level of that harm to the offender.

[37] As the English matrix has no relevance to a Northern Ireland judge, it is suggested that the more simpler approach be adopted, that is to identify a starting point based on value, then increase it by any aggravating factors, decrease it by way of mitigating factors (save for any guilty plea), and then a final reduction for any plea of guilty.

[38] The Court of Appeal having established levels in *Jack*, it may be useful to maintain those levels in this guidance, with the addition of one further band of up to £10,000. The suggested ranges, on conviction after a contest, are as follows –

Sums up to £10,000 (Community order);

Sums between £10,000 and £30,000 (six months' to one years' imprisonment);

Sums between £30,000 and £175,000 (one year to two years' imprisonment);

Sums between £175,000 and £400,000 (two years' to three years' imprisonment);

The guidance is not extended beyond this point given the unlikelihood of offending involving amounts in excess of £400,000 but if they do, then a suitable elevated range should be applied.

[39] The aggravating and mitigating factors identified by the Sentencing Council, and are set out above, will have relevance as to where the sentence will fall within those ranges. Significant factors applying to the facts of a case may place the case outside the range at either end.

[40] The plea of guilty will attract the usual reduction, depending on the time of the plea. Obviously the earlier the co-operation and plea, the more the discount. Co-operation by way of assistance to the investigation by identifying other parties and/or providing information as to the *modus operandi* of criminal gangs may also attract further discounts in accordance with the established practice.

[41] The final point relates to the suspension of any prison sentence. There is a strong argument that there is a need for immediate custodial sentences in cases such as this given the prevalence of this activity and the untold harm that is causing both to individuals and general economic well-being of the community.

[42] Article 23 of the Criminal Justice (NI) Order 1996 provided that a suspended sentence should not be imposed unless it can be justified by the exceptional circumstances of the case, but it has never been brought into force. The Court of Appeal has however identified certain categories of cases where there is a need for immediate custodial sentences and as such suspending such sentences would have to require an examination of the facts of the case to establish if such a sentence could be justified with the existence of exceptional circumstances.

[43] Such cases would be cases which would focus on either retribution or deterrence. They would include, by way of example, serious sexual offending particularly against children, rioting, gross negligence manslaughter, serious assaults, serious driving cases, robbery, perverting the course of justice and theft or fraud involving a breach of trust. Such cases would fall into that category of offending where there is significant personal culpability and/or significant harm (either to an individual or to the community). (See, for example, see *DPP's Reference 13, 14, and 15 of 2013 (R -v- McKeown)* [2013] NICA 13, *DPP's Reference 7 of 2013 (R -v- Brannigan)* [2013] NICA 39. *DPP's Reference 1 of 2013 (R -v- Marcus)* [2013] NICA 73, *R -v- McKenzie* [2017]] NICA 29 and *Jack*).

[44] I do not consider that these cases fall into such a category. The impact of the offending is significant, but it is not a crime which calls for a sentence to satisfy a genuine and measured public reaction to the crime and which would be a retributive in nature

[45] Whether these cases require a deterrent sentence is a more difficult question. Some have argued that these cases are the equivalent of social security fraud cases, although such cases would often have a higher culpability given the extended periods involved and the fact that the offender has benefitted to the full extent of the fraud.

[46] The experience of this court, is that benefit fraudsters will often receive suspended prison sentences, unless they have previous convictions for similar offences, other dishonesty offences, other significant criminal offences, or have failed to respond to earlier attempts within the criminal justice system to reform their conduct. Such an approach is reflected in the Court of Appeal judgment in *Brady*.

[47] I therefore consider that it is within the discretion of a sentencing judge to leave open the option of suspending a sentence, without the specific need to consider the existence of exceptional circumstances. The need for such circumstances would apply should this be a second money laundering offence, fraud or other dishonesty offence.

[48] Before leaving the matter of suspended sentences, defendants, and their legal advisors, should be aware that such an outcome would be unlikely after a finding of guilt by a jury. Suspended sentences are a means of expressing the seriousness of the offences with an acknowledgment that the custody threshold has been passed. The suspended sentence, however, allows the offender to remain in the community to assist in their rehabilitation, but still with a threat hanging over them should they re-offend. If there is no remorse or acknowledgement of guilt a suspended sentence could well be inappropriate.

[49] I now propose to arrange for the re-listing of the cases for a full plea and sentence hearing, to consider the individual circumstances of each case.