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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **12/03/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

v

LUKE WALLS

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IN THE MATTER OF A REFERENCE BY THE DIRECTOR OF PUBLIC PROSECUTIONS (NI) UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2002)

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Before: Morgan LCJ, McCloskey LJ & Maguire LJ

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Representation

Prosecution: Rosemary Walsh, of counsel (instructed by the Public Prosecution Service)

Respondent: Mr Brian McCartney QC and Mr Joseph McCann, of counsel (instructed by Madden Finucane Solicitors)

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McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Upon the conclusion of this hearing of this matter on 26 February 2021 the court proclaimed its decision, with reasons to follow. This is the reasoned judgment of the court.

The proceedings

[2] The sentencing of the above-named defendant ("*the offender")* has been referred to this court by the Director of Public Prosecutions ("DPP") in accordance

with the unduly lenient review statutory provisions identified in the title hereof. At the conclusion of the prosecution presentation we granted leave to proceed.

[3] Luke Walls ("*the offender*") was prosecuted on an indictment comprising one count of aggravated burglary and stealing, two counts of common assault and one of criminal damage. At a late stage he pleaded guilty to the first three counts, with the fourth left "on the books". He received a sentence of three years and six months' imprisonment, divided equally between custody and licenced release, for the aggravated burglary count. Separate sentences of 12 months' imprisonment, each to operate concurrently, were imposed in respect of the two counts of common assault.

Factual matrix

[4] The following outline of the facts giving rise to the offender's convictions is drawn from the formal referral. The court ascertained at the hearing that there are no significant points of contention.

[5] The offender is aged 25 years. He was aged 23 on the date of the offences, 19 February 2019. It is common case that two other adults were actively involved in the relevant events. Neither has been apprehended.

[6] The offending occurred in the precincts of a dwelling house and farm at an isolated rural location. Three of the four residents, whose ages ranged from 62 to 72, were present throughout. On the evening of 19 February 2019 the offender and the other two male adults suddenly appeared in the kitchen of the bungalow, where the two oldest members of the household were present. They were shouting loudly and aggressively and asking "*Where's the money? … Where's the money? …. Don't move*". They were dressed in dark attire and what appeared to be scarfs covered their faces. Each of the men was carrying one or more of the following articles: two iron bars around two feet in length, some rope and a steel shafted grip with four prongs or spikes, some four feet in length. These items had been taken from the farm out buildings.

[7] The miscreants' immediate encounter was with the two male occupants of the household, who were seated. During the period which followed, each attempted to get up several times. They were prevented from doing so by the application of forceful blows to their forearms with the iron bars. The third member of the household present, a lady, was encountered in the hallway and brought into the kitchen. All three were terrified. One of the intruders remained with them at all times. The two who left the kitchen seized some bleach, with one of them spraying his weapon. The use of force with the iron bar continued, in one instance entailing striking one of the male occupants about the legs. When the female occupant mentioned "*getting the gun*", which was a bluff, the single male ran from the kitchen and, thereafter, all three left the premises. The estimated duration of the incident was 10 to 15 minutes.

[8] The three occupants discovered that all three bedrooms had been ransacked. They ascertained that some £2,000 cash which they had kept in a container in the wardrobe of one of the bedrooms had been stolen. Three mobile phones had also been stolen.

[9] The physical injuries inflicted on the two male occupants gave rise to soreness and bruising. Neither sought medical treatment. Upon the attendance of the police one of them was noted to be extremely agitated and upset. It is to be readily inferred that some mental upset was suffered by the other two also.

Arrest and prosecution

[10] Forensic examination of a bottle of cleaning fluid recovered from one of the bedroom floors established a connection with the offender, whose DNA profile matched that of the major contributor. He was arrested some eight months later on 4 October 2019. His response to the vast majority of questions framed by the interviewing police officers was "no comment." He did answer a couple of questions about his place of residence, ascertaining that although he hails from County Wicklow, at the time of the offences he and his family – his wife and three children – had been residing with his wife's uncle some few miles away from the scene of the offences. He later informed the probation officer that, although a member of the travelling community, he had not led a transient lifestyle.

[11] The relevant timeline is the following:

(i) Arrest and police interviews unfolded on 4 and 5 October 2019. The offender was charged on the latter date.

(ii) On 15 September 2020 upon arraignment the offender pleaded guilty to the first count and not guilty to the remaining counts.

(iii) On 17 September 2020 upon re-arraignment he pleaded guilty to the second and third counts.

(iv) Following a sentencing hearing on 20 November 2020 he was sentenced on 11 December 2020.

The Offender's Circumstances

[12] In addition to the information concerning his roots and family circumstances noted above, the offender recounted that he had been in unskilled employment having left school aged 16. He stated that he had blindness in one eye and limited vision in the other. A history of adverse mental health was provided. He also claimed to have a muscle disease in his left leg. He described a pattern of heavy alcohol consumption and occasionally consuming un-prescribed medication. He claims to have played a very minor role in the offences, confined to remaining in the

kitchen and cleaning up DNA traces with bleach. He asserted that he was unarmed and denied any assault on either of the male injured parties. He claimed to have asked one of the other intruders to desist from the assaults. He suggested that he was given £100.

[13] The offender has a criminal record of some substance. Between the years 2014 and 2016, when his age ranged from 19 to 21, he was convicted of some 25 offences, the most serious whereof were five offences of burglary, two of criminal trespass and two of theft. The remainder were road traffic offences. All, with one minor exception, were committed in the Republic of Ireland. The sentencing measures imposed were a mixture of short prison sentences, suspended sentences, monetary disposals and probation.

[14] The probation officer (in common with this court) was far from impressed by the offender's protestations of minimal involvement and remorse. It was considered that he had no victim awareness, the author of the report highlighted limited victim empathy, impulsive and aggressive behaviour, engendering fear in his victims, failure to consider the consequences of his actions, willingness to use violence, lack of consequential thinking and a lack of responsibility for his actions. The author also noted the factor of alcohol misuse, upon which we shall comment further. Having noted also his criminal record, the assessment was that he presented a medium likelihood of reoffending during the next two years. His case fell short of the threshold of posing a significant risk of serious harm to the public.

Sentencing Framework

[15] The legal framework for sentencing in respect of this type of offending may be summarised as follows. The point of departure must be the statutory prescription of a maximum punishment of life imprisonment. This would explain why so many reported decisions have considered this offence to be on a par with robbery. As noted in *R v Moore* [unreported, 10 May 1992] aggravated burglary is in effect a burglary committed with a firearm, an explosive or a weapon of offence. In that case the sentencing judge observed that it is "*… at least generally indistinguishable from bad cases of robbery with violence to householders.*" This was quoted without demur in the judgment of Hutton LCJ.

[16] During the past three decades this court has, on several occasions, turned its attentions to the appropriate range of sentences of imprisonment for offending of this kind. Prior to *Moore* there was the case of *R v Ferguson* [unreported, 21 April 1989], decided just two years previously. This case illustrates the frequently close association between the offences of aggravated burglary and robbery involving the use of a firearm or imitation firearm. The appellant was convicted of the latter offence. The offending entailed a severe beating of the elderly male householder using a crow bar and preventing him from using his inhaler. His wife was grabbed by her arm and the hair and struck twice on her head, once with a garden hoe. When the intruders departed, the householder was in a helpless state, his face

covered with blood and suffering from laboured breathing, while his wife was left with her hands tied behind her back. Each of the injured parties required quite extensive treatment, coupled with hospital admission for several days. The appeal against a sentence of eight years' imprisonment was dismissed.

[17] In the judgment of O'Donnell LJ, one finds a heavy emphasis on the imperative of protecting the elderly, the lonely and the infirm from this kind of offending. The court noted that offending of this kind was on the increase, based on data provided by the DPP. This provided the impetus for its determination to review the appropriate sentencing policy. The central pillar of the judgment is contained in the following sentence:

> "*It must be brought home to offenders who violate the privacy and security of old people in their homes and expose them to violence that immediate and heavy sentences of imprisonment will follow their detection and conviction.*"

The court disagreed with the sentencing judge's suggestion that the normal bracket for this kind of offending was 6 to 12 years. O'Donnell LJ stated:

> "*We consider …. that because of the gravity of this type of crime and its increase in this jurisdiction and the need to ensure that people can live in safety in their own homes, the suggested starting point of six years is too low and that* ***the starting point for sentencing in the case of robbery of householders where violence is used should be ten years. This will increase depending on the degree of violence used, the age or ages of the occupiers, any previous history for offences of violence and in the appropriate case a sentence of 15 years would not be excessive.***"
>
> [Emphasis added.]

[18] In *R v Skelton and Mooney* [1992] 3 NIJB 26 following a contested trial on counts of attempted robbery, the appellants were sentenced to 12 and 14 years' imprisonment respectively. The context was that of entering the home of an elderly and disabled man and subjecting him to brutality described by Hutton LCJ as "*appalling*." The injured party described it as "*torture.*" The conduct, very briefly, included repeated blows to the head and body with fists and a flask and attacking the householder with an ignited electric bar heater. Multiple bruises, burns and lacerations resulted. In dismissing their appeals against sentence, this court noted its recent guidance in *Ferguson*. Notably, the absence of planning was considered to be a factor of "*no real mitigation*": p 36. In the same passage the Lord Chief Justice stated:

> "*The purpose of the courts in sentencing in cases of this nature must be to make it clear that those who rob citizens in their homes with violence, whether the robbery is pre-planned or carried out without prior planning, will be punished severely and that if serious violence is used the punishment imposed will be of the utmost severity in order to deter others from similar crimes.*"

Equally, the suggestion that alcohol consumption should rank as a mitigating factor was brusquely rejected: see page 37. The judgment ends with the following statement:

> "*In upholding these sentences this court again gives the clearest warning that those who rob citizens with violence in their homes will be punished with the utmost severity.*"

The applications for leave to appeal were dismissed.

[19] Next, in *R v Cambridge* [2015] NICA 4 Gillen LJ, delivering the judgement of this court, at [41] adverted to "*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 …*". Gillen LJ continued at [42] – [43]:

> "We take this opportunity to reiterate the following principles:
>
> *(i) The starting point for robbery of householders where violence is used should be ten years.*
>
> *(ii) This will increase depending on the age, vulnerability, or infirmity of the occupiers, any previous history for offences of violence and in the appropriate case a sentence of 15 years will not be regarded as excessive.*
>
> *(iii) These offences are often carried out by young people. The youth of the offender and any personal background, whilst to be taken into account in the selection of sentence, will not weigh heavily in reduction of penalty where offences of this nature are extremely serious.*
>
> *[43] Aggravating factors will include:*
>
> - *The failure to respond to previous sentence.*
> - *Previous convictions, particularly where a pattern of repeat offending is disclosed.*

- *A failure to respond to warnings or concerns expressed by others about the offender's behaviour.*

- *The offence committed whilst on licence or on probation.*

- *Deliberate targeting of vulnerable victim(s).*

- *Commission of an offence whilst under the influence of alcohol or drugs.*

- *Deliberate or gratuitous violence or damage to property, over and above what is needed to carry out the offence.*

- *An especially serious, physical or psychological effect on the victim even if unintended.*

- *A sustained assault or repeated assaults on the same victim.*

- *The location of the offence (for example, in an isolated place)."*

This, notably, was formulated as an inexhaustive list of possible aggravating factors. A commensurate sentence of 10 years' imprisonment for one count of robbery and another of assault occasioning actual bodily harm, arising out of entering the sheltered accommodation of a woman aged 58 years and repeatedly punching her about the head, giving rise to bruising and soft tissue injuries, was upheld on appeal.

[20] In *R v O'Boyle and Smyth* [2017] NICA 38 the headline offence was that of robbery with a firearm or imitation firearm with intent to commit an indictable offence at the home of an elderly coupled aged 82 and 76 years respectively. While the offending entailed verbal warnings and threats and the elderly couple were tied up by their hands and legs, no actual violence was perpetrated against them. In contrast, their son was kicked and punched in the face several times. The offenders stole bank notes, cheques and valuables with a total value exceeding £14,000. An imitation firearm was used and there was careful planning. Very late pleas of guilty were entered and a sentence of 12 years' imprisonment was imposed. The ensuing appeal against sentence was dismissed.

[21] There is one English decision to which reference is appropriate. In *R v Funnell and Others* [1986] 8 Cr App R(S) 143 the offence charged was that of aggravated burglary. The victim was a householder aged 84 years, an imitation firearm was used and the physical violence employed was restricted to tying up the injured party to a chair. Following an early plea of guilty a sentence of 9 years' imprisonment was

imposed, reduced to 6 years on appeal. It is not difficult to deduce that this entailed a starting point of 9 years' imprisonment.

[22] This *excursus* through the relevant decided cases yields the analysis that the starting point for offending of the kind which occurred in the present case is a sentence of 10 years' imprisonment. In common with every starting point there is scope for some reduction in a case where compelling facts or factors justify this course. One must add immediately, however, that the fundamental purpose of guidelines judgments and starting points is to promote consistency and predictability in the sentencing of offenders and fairness among the members of the convicted community. Finally, there is a marked emphasis on deterrence in the sphere of this type of offending.

[23] The factors of age and vulnerability invite further reflection. In the vast majority of cases involving the elderly these twin factors will fuse. Age and vulnerability feature prominently in the sentencing framework which the cases outlined above have developed. There is one feature of sentencing practice in this area worthy of note. In cases of aggravated burglary involving physical attack on a male householder of younger years the tendency has been to impose more lenient sentences. This is illustrated in *Attorney General's References (Nos 10 and 11 of 2009: Vokes)* [2009] NICA 63 where the Lord Chief Justice adverted to a sentencing bracket of 3 to 5 years' imprisonment: see [12].

[24] It is also identifiable in *R v Moore* (*supra*) where a prolonged attack using hollow metal bars on a caravan owner in the presence of his wife and their six children causing bruising and soft tissue injuries was, in respect of the aggravated burglary count, punished by a sentence of 5 years' imprisonment for the lead offender, was reduced to 2 years on appeal. The distinction to which we have adverted emerges clearly in the following passage of Hutton LCJ, at pp11 – 12:

> "*In the present case the learned trial judge took the view that aggravated burglary is one of the most serious cases, generally indistinguishable from bad cases of robbery with violence of householders. He then referred to the judgement of this court in* ***R v Ferguson*** *where this court dealt with robbers breaking into the home of old people and using violence against them. The judge also referred to the offence of burglary with intent to commit rape. We consider that the trial judge erred in principle in considering this case as being comparable to robbery with violence of householders and that this error led him to impose sentences which were too heavy, even though we recognise that he imposed a sentence on the main offenders much less than the sentence of 10 years referred to in* ***R v Ferguson***."

The Lord Chief Justice also identified a further distinguishing feature, namely this was a case of ill feeling between two families which -

> "*.. was not comparable to the violence used by robbers when they break into homes and use violence (and often very severe violence) to force the householders, often elderly people, to hand over their money and their valuables.*"

The decision in *R v Murray and Armstrong* [2003] NICA 24 also belongs to this discrete group.

[25] It is appropriate to note, however, that none of the cases belonging to this cohort prescribes any guidelines on starting points or sentencing brackets. In this context three observations fall to be made about paragraph [12] of *Vokes*. First, the suggestion that the appropriate range should have been 3 to 5 years' imprisonment would have entailed a starting point not far short of 8 years. Second, *Vokes* is a fact sensitive decision. Furthermore, in the same passage, the Lord Chief Justice expressly noted that a sentence exceeding 10 years' imprisonment "*… may well be appropriate for the present type of aggravated burglary depending on the circumstances.*"

Section 36: The Governing Principles

[26] Section 36 of the Criminal justice act 1988 ("*the 1998 Act*") provides:

> *"36 Reviews of sentencing*
>
> *(1) If it appears to the Attorney General –*
>
> *(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and*
>
> *(b) that the case is one to which this Part of this Act applies,*
>
> *he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may –*
>
> *(i) quash any sentence passed on him in the proceeding; and*
>
> *(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.*
>
> *(2) Without prejudice to the generality of subsection (1) above, the condition specified in paragraph (a) of that subsection may be satisfied if it appears to the Attorney General that the judge:*

[(a) erred in law as to his powers of sentencing; or

(b) failed to impose a sentence required by –

[(zi) section [1(2B) or] 1A(5) of the Prevention of Crime Act 1953;]

(i) section 51A(2) of the Firearms Act 1968;

….

(9) In the application of this section to Northern Ireland –

(a) any reference to the Attorney General shall be construed as a reference to the [Director of Public Prosecutions for Northern Ireland];…"

[27] The legal principles to be applied in s 36 cases were established some three decades ago and have been applied consistently ever since. This follows from the decision of this court in *Attorney General's Reference (No 1 of 1989)* [1989] NI 245 at 248d – 249a, where this court endorsed without qualification the approach of the English Court of Appeal in *Attorney General's Reference Number 4 of 1989* [1990] 1 WLR 41 at 45h – 46e:

> *"1. The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.*
>
> *2. The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its*

powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.

3. Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence."

The Sentencing of This Offender

[28] Following the submissions of Ms Rosemary Walsh of counsel on behalf of the DPP the court granted leave to proceed. On behalf of the offender, Mr McCartney QC (with Mr Joseph McCann of counsel) made a submission which had the following main features. Guideline judgements of this court are to be applied as a tool of assistance. They should not trammel the exercise of discretion of the sentencing judge, who is uniquely placed. This was a careful sentencing decision which the judge had reserved. This was not the worst case of its type, involving no savagery or sadistic or cruel treatment. The judge recognised the seriousness of the offending. His approach was judicious rather than formulaic.

[29] Of the series of decisions noted above the only one expressly mentioned by the judge in his sentencing decision is that of *Vokes*. Clearly the judge would have been more fully assisted had this cohort of decisions been brought to his attention. Notwithstanding he did identify a starting point of "*at least 10 years*" in cases where the victims of aggravated burglary are elderly. The judge appeared to accept some of the aggravating factors advanced on behalf of the prosecution: the "group" factor, the forensic clean up, the removal of three mobile phones, the age and vulnerability of the householders and the offender's criminal record. The judge made no mention of other clearly aggravating factors: the use of weapons, the repeated physical attacks on the male injured parties, the injuries sustained and the protracted nature of the ordeal. He did, however, note the fear and terror suffered by the injured parties.

[30] The judge expressly rejected the prosecution suggestion that one of the aggravating features was planning. He expressed himself satisfied that this was not so. We cannot, with respect, agree. When the three miscreants entered the bungalow they had clearly driven some distance with purpose, they had armed themselves, their faces were covered and they shouted repeatedly "*Where's the money?*" The first three of these features speak for themselves. The fourth, it is common case, can only have been a reference to the petrol station some little distance away owned and

operated by the fourth member of the household, who was absent. The inference of a planned criminal enterprise was overwhelming and the judge identified nothing to the contrary. It is appropriate to add that planning, preparation and premeditation are synonyms. Each is descriptive of the same factor. Furthermore, planning of necessity is fact sensitive in nature, belonging to a notionally broad spectrum, from the most sophisticated to the most basic. While it has long been recognised as an aggravating circumstance in the commission of most offences, the weight which it will attract will be case sensitive. While its apparent point on the notional spectrum should not in principle matter greatly, this will be a matter to be assessed by the sentencing judge in the individual case.

[31] In the same context, the judge employed the description of "*a spontaneous criminal enterprise hatched in the middle of a drinks and drugs binge*." At the hearing this court established that this was probably traceable to the plea in mitigation advanced by Mr McCartney QC, based on his client's instructions. This discrete matter has two dimensions in particular. First, it had no evidential foundation whatsoever. The offender had ample opportunity to make this case: when interviewed by the police, by making a statement (he made none) and when interviewed by the probation officer. He did not, however, do so. The references in the pre-sentence report to a lifestyle involving the consumption of alcohol and illicit substances are <u>not</u> directed to the circumstances of the offending. Second, as a matter of sentencing principle, this was not a consideration to be weighed in any event. If and insofar as the judge treated it as something operating to the credit of the offender, we consider this erroneous.

[32] There are two further noteworthy features of the judge's approach. In observing that none of the offender's previous convictions had involved the use of violence the judge correctly took cognisance of a consideration which had a bearing on the weight and gravity of the criminal record as an aggravating factor. However, in the passage which follows, the judge clearly identified the factor of "*first conviction of violent offences*" as a mitigating feature. This is not sustainable as a matter of sentencing principle.

[33] Finally, the judge took as his starting point a sentence of six years' imprisonment, which he proceeded to reduce by approximately 40%. There are two considerations in particular arising out of this. The first is that taking into account the judge's apparent recognition of a starting point of at least 10 years' imprisonment, the transition which he then made to six years' imprisonment is both abrupt and unexplained. It represents an unjustified departure from the applicable guidance. Second, as the timeline outlined above makes clear, the offender's pleas of guilty materialised very late in the day. This court has repeatedly said that the maximum credit is reserved for those who plead guilty at the earliest opportunity. While there may in the abstract be cases where a failure to do so has a reasonable explanation, this is not such a case. The assessed credit of 40% is unsustainable accordingly.

Conclusion

[34] Having regard to all of the foregoing we conclude that the test for intervention by this court is satisfied. The starting point for this offender should have been a sentence of 10 years' imprisonment. The maximum credit for his late pleas of guilty should not, generously, have exceeded 30% - 33%, taking into account the "pandemic" factor (see *R v Stewart* [2020] NICA 62 at [11] – [18]). Avoiding a rigidly arithmetical approach and being as benign as possible we conclude that the appropriate sentence in this case should have been not less than six years' imprisonment. The sentence of 3½ years' imprisonment is varied accordingly. The six years will be divided equally between sentenced custody and licenced release.