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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT SITTING IN BELFAST

_____

THE QUEEN

v

SEAN RUDDY

Appellant

_____

Before: Gillen LJ, Weatherup LJ and McBride J

McBRIDE J (giving the judgment of the court)

Introduction

[1] This is an appeal against sentence imposed by His Honour Judge Kerr QC at Belfast Crown Court sitting on 18 November 2015. The sentence imposed was one of 8 years' imprisonment (4 years custody and 4 years on licence) on one count of possession of explosives with intent to endanger life or cause serious injury to property contrary to section 3(1)(b) of the Explosive Substances Act 1883.

Factual Background

[2] On 31 January 2014 police stopped a vehicle in the White Rise area of Dunmurry. As they were seeking to obtain details of the driver's movements and identity, the appellant walked into the cul-de-sac. Upon observing the police he turned and ran off. The police pursued him and observed something black and cylindrical in his jacket and noticed a metallic sound as they followed him. The appellant stopped after a second challenge. Initially he informed the police he had thrown a bag of cannabis

away. He then informed the police he had been carrying a black bag which contained a number of pipe bombs, which he had thrown over a fence near 1 White Rise. He further informed police that there was a small pipe bomb device in the car they had stopped. Follow-up searches located the black bag in a nearby garden and a fully functional pipe bomb device was located a short distance from the vehicle. The pipe bomb was made safe.

[3] The component parts of this bomb and the contents of the black bin bag were later examined by Naomi Louise Kelly at FSNI. The components part of the bomb were found to be consistent with being separated components of a pipe bomb type improvised explosive device. The items in the black bin bag consisted of four modified lengths of pipe, two steel bits and a brass nut. No explosive fuel or means of ignition were present. Ms Kelly states that pipe bombs are generally small, hand-thrown or placed devices which are primarily intended as anti-personnel weapons.

[4] The appellant was interviewed on 1 February 2014 and generally made no comment. He did, however, confirm that the vehicle belonged to him.

[5] A defence statement dated 10 December 2014 was lodged, in which the appellant denied the offence.

[6] On 26 January 2015 the appellant presented, through his legal representatives a Statement of Facts. In this he acknowledged the potential of the items he had discarded at the scene of his arrest and that they could be constructed into a potentially harmful and dangerous device. He further acknowledged that he had no defence or excuse for his possession of the relevant items.

[7] The co-accused pleaded not guilty. There were a number of applications relating to disclosure including an ex-parte hearing which related only to the co-accused. It was always represented to the court on the appellant's behalf that he was not resiling from his position as set out in the Statement of Facts. He was however unable to formally enter a guilty plea, in circumstances where the legal issues surrounding disclosure may have led to the proceedings against the appellant being rendered a nullity or discontinued, until the ex-parte discovery proceedings were determined.

[8] The appellant formally entered a guilty plea on the morning of the trial on 26 August 2015. His plea was tendered and accepted on the basis

that his possession was to enable some other person to possess the pipe bomb and component parts with the intent to endanger life or cause serious injury to property. The prosecution accepted that his plea should be treated as having been made at the earliest opportunity. He was sentenced on 18 November 2015.

Record

[9] The plaintiff has previous convictions but not for similar offending. There is one for grievous bodily harm which occurred in December 1995.

Pre-sentence Report

[10] The pre-sentence report records that the appellant is a 40 year old married man. He has two young sons. His parents separated when he was very young and he was brought up by his father. Both parents are now deceased. The appellant has been long-term unemployed.

Medical Reports

[11] Professor Adgey, consultant cardiologist, in a report dated 27 October 2015 confirms that the appellant has poor physical health and suffers from significant anginal symptoms and diabetes. She opines that he has all five major risk factors for coronary artery disease. He has had a number of TIAs and she concludes that he is "at very high risk for a major vascular event". Dr Curran, consultant psychiatrist in a report dated 3 October 2015 notes that the appellant's mental health is reasonably stable at the present time and that there is no evidence of any current or serious mental illness or psychopathology. He remains on a maintenance dose of anti-depressant.

Character References

[12] The court has also been supplied with a number of character references who speak highly of the appellant. There are also a number of certificates that confirm completion of a number of courses by the appellant.

Trial Judge's Sentencing Remarks

[13] In passing sentence the learned trial Judge considered the proper starting point, after reviewing a number of authorities, to be 12 years' imprisonment. In mitigation he noted, that the appellant was entitled to credit for his guilty plea. In assessing the amount of credit to be given, he said:-

> "In [this] case the plea was on the morning of the trial, having either refused to comment or denied knowledge of the offence at interview. It can also be asserted that the case against him was strong. In such circumstances credit would normally be minimal.
>
> Mr McDonald QC appeared for him and made a number of points suggesting that the credit should be more than minimal. He reminded the court the defendant made admissions at the scene. He made the case that a plea in a terrorist case was always of value in this case particularly, and informed the court, that his plea was anticipated as it led to hostility and even threats to him in his community. Mr McDonald also suggested the plea was of significance as it was a sign of genuine remorse for his offending which, through him was being expressed appropriately. I consider that he is entitled to some significant credit but not full credit".

In the event the learned trial Judge gave 20% discount for the plea of guilty.

[14] Further, after reviewing the medical evidence and the relevant authorities, as an act of mercy, the learned trial Judge increased the total discount to one-third.

The Appellant's Submissions

[15] In his Notice of Appeal the appellant submitted that the sentence of the learned trial Judge was manifestly excessive and wrong in principle on three grounds, namely:

(a) That the starting point selected by the learned trial Judge was too high.

(b) The learned trial Judge gave insufficient reduction for the plea of guilty.

(c) The allocation of a discount due to the medical condition of the appellant was insufficient in the circumstances.

[16] At the appeal hearing, Mr McDonald QC on behalf of the appellant sought to advance the appeal on ground (b) only, namely that the learned trial Judge gave insufficient credit for the guilty plea.

[17] He submitted that the credit was insufficient because:-

(i) The learned trial Judge was under a misapprehension when he stated the plea was entered on the first day of trial. In fact the prosecution had accepted and it was made clear to the court that the plea had been entered at the earliest opportunity. The co-accused was involved in a legal dispute about disclosure. The outcome of this dispute may have nullified proceedings or led to proceedings against the appellant being discontinued. In these circumstances the plea could not be formally entered until after the appellant knew the outcome of the ex parte discovery proceedings. As a result of these circumstances the prosecution accepted the plea was to be treated as being entered at the earliest opportunity.

(ii) The appellant made admissions at the scene and made a full admission of guilt in his Statement of Facts, a position he had not resiled from.

(iii) The appellant had shown remorse.

(iv) A guilty plea had benefited the administration of justice as it saved court time and expense.

Prosecution's Submissions

[18] Mr Russell, on behalf of the prosecution, agreed that before the learned trial Judge the prosecution had accepted that the plea should be treated as having been made at the earliest opportunity.

[19] Mr Russell submitted that even though the learned trial Judge made an error in his sentencing remarks about the timing of the plea, this did not mean that the sentence imposed was manifestly excessive or wrong in principle. In assessing credit for a guilty plea he submitted that the learned trial Judge was entitled to conclude that the appellant was not entitled to full credit as there was a strong prosecution case and the appellant had not demonstrated early remorse as shown by his attitude in police interviews and defence statement. Remorse was only finally demonstrated in the Statement of Facts which was filed some 12 months post offence. He further submitted that considering the case in "the round" the sentence imposed could not be found to be manifestly excessive or wrong in principle.

Principles governing credit to be given for a guilty plea.

[20] As appears from R v Connolly [1994] NIJB 226 it is long established that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate.

[21] Further, Article 33(1) of the Criminal Justice (Northern Ireland) Order 1996 provides:-

> "(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account -
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given".

Thus, in determining the appropriate sentence when a guilty plea is entered the court is required to consider the stage and circumstances in which the plea is entered together with all the circumstances of the case.

[22] In Attorney General's Reference No 1 of 2006 [2006] NICA 4, Kerr LCJ, in considering the stage in the proceedings at which the offender must plead, to avail of maximum credit, said at paragraph [19]:-

> "To benefit from the maximum discount on the penalty appropriate to any specific charge the 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. None of the offenders in this case did that. All either refused to answer or denied guilt during police interview. On no basis, therefore, could any of them expect to obtain the maximum reduction with their belated guilty pleas. We wish to draw particular attention to this point."

[23] When determining whether and to what extent a particular circumstance gives rise to a discount, it is necessary to consider the rationale behind giving a discount for a guilty plea.

[24] In R v Connolly, MacDermott J at page 227, set out the rationale for a discount when a guilty plea is entered. He said:-

> "A lesser sentence … [is] appropriate to reflect the fact that the plea is an indication of remorse, has led to the saving of time and has convenienced witnesses who would otherwise have had to attend court".

[25] Further in R v McShane [1998] NIJB 64 at page 66, Kerr J set out circumstances in which a guilty plea may not lead to a discount:-

> "There are cases, however, where it will be appropriate to impose the maximum sentence even when the accused has pleaded guilty. If a late plea has been entered or if a plea has been delayed deliberately or where there is an open and shut case against the accused, the maximum penalty

> will be a possibility to be considered by the sentencer. That possibility will increase if the accused has a substantial and relevant criminal record and the offences to which the accused has pleaded guilty are particularly serious and of a type of which he has been frequently convicted in the past.
>
> It is clear, however, that even if these features are present, a maximum penalty will not always be appropriate. The imposition of a maximum sentence of a plea of guilty will be an exceptional event suitable only for exceptional cases."

[26] Thus, when determining the level of credit to be given for a guilty plea, the Court must consider the time at which the plea was entered and whether, in all the circumstances of the case, the plea indicates remorse, whether it led to saving of time or convenience of witnesses and if so, the extent of such saving and convenience.

Discussion

[27] It is clear from the sentencing remarks that the learned trial Judge treated the plea as having been made on the morning of the hearing and thus failed, in accordance with the agreement of all the parties, to treat the plea as having been made at the earliest opportunity.

[28] Pausing there, we note that by virtue of section 49(2) of the Judicature (Northern Ireland) Act 1978, the Crown Court Judge can, subject to certain provisos, vary or rescind any sentence or order made within 56 days, beginning with the day on which the sentence or other order was imposed or made.

[29] In circumstances where both counsel knew, or ought to have known that the learned trial Judge had made an error in his sentencing remarks, it is incumbent upon each of them to bring this error to the attention of the learned trial Judge, to enable him to consider the matter and if necessary to vary his sentence in accordance with the powers set out in section 49(2). This court deprecates any practice whereby counsel, knowing the learned

trial Judge has made an error simply seeks to "pocket" the point and then produce it as a ground of appeal.

[30] Notwithstanding the error made by the learned trial Judge as to the stage at which the plea was entered, we are of the view, that even if this matter had been brought to his attention this would not have led to a variation in the sentence imposed by the learned trial Judge.

[31] This is a case where, despite the fact the plea was to be treated as being entered at the earliest opportunity in the proceedings, the learned trial Judge was entitled not to give maximum credit because :-

(a) The prosecution case was strong. The appellant was caught red-handed. This was properly a matter the learned trial Judge took into account in his sentencing.

(b) The appellant delayed in making a full admission until one year after the offence. Although the appellant made admissions at the scene, the attitude of the appellant at police interviews and the stance taken by him in his defence statement all demonstrate that the appellant did not show remorse for his actions until the Statement of Facts was filed some 12 months post offence. Again these were matters the learned trial Judge was entitled to take into account in determining the level of credit to be given for the guilty plea.

(c) This was a case where, although there was a saving of time and witnesses were convenienced by the guilty plea, the extent of such convenience was not as great as in cases where for example, a vulnerable witness was convenienced by not having to give evidence.

[32] We are of the view, given all the circumstances in this case, that this was not a case in which the appellant was entitled to full credit for his guilty plea. The credit of 20% properly reflects the strength of the Crown case, the appellant's lack of remorse as demonstrated by his lack of co-operation at interview and his denial of the offence in his defence statement and the extent of time saved and convenience afforded to the witnesses in a case of this nature.

[33] In all the circumstances we are satisfied that the sentence imposed in this case is neither manifestly excessive nor wrong in principle. We therefore dismiss the appeal.