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COURT DISMISSES APPEAL AGAINST SENTENCE BY NIALL LEHD

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal against sentence by Niall Lehd ("the appellant"). He pleaded guilty in June 2021 to one count of preparation of acts of terrorism contrary to section 5(1) of the Terrorism Act 2006 ("the 2006 Act"). He was arrested after being implicated by Ciarán Maxwell ("CM") who gave evidence against the appellant as an assisting offender and entered into an agreement under the Serious Organised Crime and Police Act 2005. The charge related to the discovery of hides in and around Larne in 2016 which contained items including pipe bombs, ammunition, explosive substances, timing units, flares and an anti-personnel mine. The appellant was sentenced to an extended determinate sentence of 24 years' imprisonment followed by an extended licence period of five years. CM received a sentence of 13 years' imprisonment and an extended licence period of five years. The appellant contended that his sentence was manifestly excessive and that the trial judge erred in deciding that he was "dangerous" within the meaning of Articles 11 – 15 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order").

The Sentencing Equation

The court outlined the different approaches to sentencing for offences under section 5 of the 2006 Act:

- The decision of the English Court of Appeal in *R v Kahar* [2016] EWCA Crim 568. This decision formulated a series of broad principles, factual categories and identified six levels of offending. The English Court of Appeal made clear that the guidance in *Kahar* was designed to prevail until publication of guidelines by the Sentencing Guidelines Council ("the SGC").
- The SGC published its Terrorist Offences Guideline in 2018 which addressed only offences under section 5 of the 2006 Act. The approach set out in the Guideline is for the sentencing judge to identify one of four levels of culpability and then to assess the level of harm. This represented a simplification of the six levels formulated in *Kahar.*
- Decisions of the Court of Appeal of Northern Ireland (NI).

One of the central issues for the court in this case was whether the appellant should have been sentenced as if the SGC Guideline had applied to this jurisdiction. The court said the Guideline did not apply as the sentencing regime in England and Wales is very different. The Sentencing Act 2020 introduced a new sentencing code which was designed to minimise the complexities in sentencing procedure. The 2020 Act has virtually no application to NI and the sentencing regime in this jurisdiction is different. It was against that background that previous decisions of the NI Court of Appeal must be considered to ascertain the approach which has been adopted to the guidelines of the SGC.

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[1] The panel was McCloskey LJ, Sir Paul Maguire and Scoffield J. McCloskey LJ delivered the judgment of the court.

In paragraphs [36] to [45], the court discussed the relevant NI cases on the approach to be applied to SGC publications and other sentencing organisations. It said these decisions illustrate the dangers in "slavish application of the SGC Guidelines and the correspondent need for caution." In particular, the case law makes it clear that assistance can be derived from the aggravating and mitigating factors identified in the SGC Guidelines but sentencers are discouraged from being constrained by the brackets of sentences as the circumstances in which an offence can be committed vary widely and sentencing in NI is carried out by a small cadre of full-time experienced Crown Court judges. The court commented that the NI case law identified the rationale for the principle of review or restraint which the Court of Appeal applies on appeal against a sentence said to be manifestly excessive.

Ground 1: Manifestly Excessive Sentence

This ground had four main components:

- The sentencing judge failed to give sufficient credit for the appellant's plea of guilty;
- The judge failed to make sufficient distinction between the seriousness of the appellant's offending and that of his co-offender CM;
- The judge erred in concluding that the appellant's offending involved the intent to cause multiple deaths;
- The judge gave inadequate weight to the mitigating factors applicable to the appellant's offending.

The court noted that the judge had sentenced the appellant on the basis of the *Kahar* decision, his assessment being that this was a "level 2[2]" case. The judge considered the aggravating features to be:

- careful planning, research and sophistication in the manufacture of "explosives never seen in NI before" and the design and construction of improvised explosives;
- the quantity and lethal nature of the munitions made and stored ready for use;
- the intention to share these munitions with dissident Republicans for use in their campaign of violence; and
- the potential for multiple deaths.

The judge concluded that the test for dangerousness was satisfied. He then turned his attention to the consequences of his finding of dangerousness stating that if the conviction had been after trial he would have imposed a sentence of 35 years' imprisonment. The judge highlighted two matters in considering the credit to be afforded by the appellant's plea of guilty: the appellant's no comment interview and his failure to plead guilty at an earlier stage. He concluded that credit of 20% was appropriate and said that a sentence of 24 years' imprisonment with an extension period of five years was appropriate.

The court said there was no suggestion in the appeal that the sentencing judge erred in principle. It held that the judge's self-direction in law was unimpeachable. The main feature of counsel's argument was that the appellant should have been sentenced on the basis of the SGC Guideline rather than the decision in *Kahar* contending that if this had been done it would have resulted in a much lower sentence being imposed. Under the SGC Guideline the highest sentence which could

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[2] In *Kahar*, a level 2 case was one where a life sentence would generally be appropriate with a minimum term in the range of 21-30 years or a very long determinate sentence and an extension period of five years.

have been imposed on the appellant was one of 15 years' imprisonment subject to downwards adjustment for his guilty plea. Counsel for the applicant argued that the "stage of preparation for the terrorist act which it was planned would be perpetrated" was a very important consideration in every case where the SGC Guideline was applied. Also, since the appellant's offending ended in February 2013, at which stage there had been no "attack planning", his culpability was not "high".

The court was rejected this argument:

> "The sentencing judge was not obliged to apply the SGC Guideline. Thus, he committed no error of law in failing to do so. As the consistent jurisprudence of this court … makes clear the judge could at his election have considered the Guideline with a view to determining whether it provided him with any assistance. This, however, was a matter of choice and not obligation. Furthermore, in the absence of a guideline decision of this court in relation to section 5 offences, the judge, though not bound by the decision in *R v Kahar*, was entitled to base his sentencing thereon. In the final analysis, we are satisfied that this approach did not give rise to a manifestly excessive sentence."

The court's second reason for rejecting this argument was based on the language of the SGC Guideline. It referred to the open textured nature of the language of the Guideline on culpability and said that in the absence of any tools of a scientific or forensic nature to be applied, these will be matters of evaluative judgement in each case, and frequently borderline assessment, for the sentencing judge. The court considered that the evaluative assessments made by the sentencing judge fell comfortably within the margin of appreciation available to him. Finally, the court said the "stage of preparation" formed an integral part of the *Kahar* sentencing framework which the judge chose to apply:

> "Given all of the foregoing, it is in the highest degree unlikely that if the appellant had been sentenced on the basis of the SGC Guideline this would have resulted in a more lenient sentence. In our view it cannot be plausibly contended that the application of the criterion of "culpability" would have allocated the offending of the appellant to a category other than one of the two highest categories. Nor can it be seriously argued that this was other than a borderline category 1/2 case in the application of the separate criterion of "harm". "

The court said the SGC Guideline provides a useful illustration of the reasons why the Court of Appeal has consistently exhorted caution in considering such publications. Firstly, the Guideline purports to prescribe a mechanistic, step by step sentencing exercise. Second, the document attempts to make a series of distinctions between different types of conduct which can only be described as marginal, or borderline. The court said that the exercise of applying this kind of guideline is more likely to distract, than assist, a sentencing judge:

> "Guidelines of this kind tend to encourage the widely divergent submissions made by prosecution and defence in this case, with the appellant's counsel contending that the case was a 'C2' case at worst and a 'D3' case at best; and the prosecution contending that the case was either an 'A1' or 'A2' case. Such technical arguments over the precise categorisation in circumstances where the relevant distinctions are far from clear-cut may well divert the sentencing judge from taking a more holistic view of the nature of the offending. This is self–evidently undesirable."

The court rejected the challenge to the trial judge's approach to mitigating and aggravating factors. It agreed that CM's offending belonged to a more elevated plane of gravity:

> "The argument that the appellant's starting point failed to properly reflect their different levels of gravity is based mainly on considerations of a quantitative nature, in particular the larger quantity of explosives materials involved in [CM's] offending arising out of certain hides in England with which this appellant had no connection and the longer period of his offending. Two observations are apposite. First, there will be cases where differences of this kind may not justify any distinction in starting points. Second, linked to the foregoing, a sentencing judge is entitled to form a broad, evaluative judgement in matters of this kind. There is no obligation to undertake a minute, forensic examination of comparable and contrasting facts and features, much less some form of arithmetically informed comparison. By virtue of the principle of restraint highlighted above there is a clear margin of appreciation in play in this respect. Given these considerations, we can identify no merit in the challenge to the starting point determined by the judge, which undeniably reflected a significant difference in the gravity of offending as between [CM] and the appellant."

The court said a further reason for rejecting this aspect of the appellant's case was the undesirability of a later sentencing court reviewing in depth an earlier sentencing exercise undertaken by a different court. It said this was not an appropriate function for the second court whose focus will invariably be on whether the ultimate sentencing disposal was manifestly excessive.

The next element of this ground of appeal involved the contention that the sentencing judge should have made a more generous assessment of certain factors which were said to be mitigating in nature. The court said it could identify no merit in this discrete challenge. The court considered the judge's assessments of the aggravating features to be beyond reproach. It added that the extensive submissions on behalf of the appellant did not formulate any discrete challenge to this aspect of the sentencing. The court dismissed the first ground of appeal.

Ground 2: Dangerousness

The Court of Appeal has previously considered the statutory regime of "dangerousness" under the 2008 Order which sets out the statutory regime of dangerousness and from these cases certain themes emerge:

- The sentencing court is strongly exhorted to focus intensively on the statutory test rather than any other test which may have been applied by the Probation Service in its pre-sentence report;
- The future risk which lies at the heart of the statutory regime must be significant; thus a mere possibility, a remote prospect, of future harm will not suffice. Factors to be taken into account include the nature and circumstances of the index offence, the history and circumstances of previous offending, any ascertainable pattern of offending, the offender's attitude, any indications of a capacity to change and any positive indications emerging from the offender's pre-sentencing incarceration;
- The impact of the apprehended future conduct must be serious harm; the conduct must be likely to occur; and while imminence is a relevant consideration it is not a pre-condition of an assessment of dangerousness.

The court said that in determining this issue the sentencing judge rehearsed exhaustively all of the facts and factors put forward on behalf of the appellant. It said it harboured no reservations about the judge's assessment of dangerousness and referred to the following paragraphs from the prosecution's skeleton argument:

- The nature of the harm to which the offence was directed is particularly serious. The harm which could have been caused by the offending included multiple deaths, injury and damage to property;
- The appellant undertook his role knowingly and intentionally. His intent and foresight included multiple deaths, injury and damage to property;
- The offending was at an advanced stage. Substantial quantities of munitions had been made ready for deployment. The detection of the appellant in 2013 frustrated at that time his plans.
- There was clearly a high degree of planning and premeditation.
- The appellant played a leading role in the carrying out of the offence.
- The appellant has a deep seated and long-established sympathy with violent republican terrorism
- The express intention of the appellant displays a strong commitment to violent dissident republican activity. It is deep rooted. His possession of the instructions in 2016 to access the TOR browser is a disturbing manifestation of an intent to continue to engage in clandestine criminal activity after his release from prison. Whilst in prison and after his release he continued to associate with those who espouse the same violent republican dogma that he adheres to.

The court accepted this submission in full and dismissed the second ground of appeal.

Section 5 Offences: NI Guidelines?

The question was raised as to whether the Court of Appeal should formulate guidelines for sentencing for offences under section 5(1) of the 2006 Act. The court said that, following careful consideration, it did not consider it appropriate to do so for the following reasons:

- There was no indication that sentencing judges are encountering challenges or difficulties which might be ameliorated by guidelines from the Court of Appeal;
- There was no indication of marked variations in the approach of sentencing judges
- Offences under section 5 potentially encompass a very broad spectrum of criminal conduct and a correspondingly broad judicial discretion in the selection of the appropriate sentence is desirable; and
- The terms of the sentencing decision under challenge in this appeal provide a further indication that there is no demonstrated need for guidelines from this court.

The court said that sentencing judges will be at liberty in section 5 cases to consider *R v Kahar* and the SGC Guideline with a view to determining whether these sources assist them in their task. In particular, they may find this a useful exercise in identifying aggravating and mitigating facts and features. They may also find that the suggested sentencing ranges are an aid to orientation. However, it will not be appropriate to give effect to the sentencing mechanism in the SGC Guideline.

Conclusion

The court affirmed the sentence imposed on the appellant and dismissed the appeal.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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