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| **Neutral Citation No: [2021] NICA 3**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **McC11401**<br><br>*ICOS No:* **19/002313/A01**<br>**19/002313/A02**<br><br>*Delivered:* **15 /01/2021** |

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**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**REGINA**

**v**

**CHRISTINE CONNOR**

**[Appeal against sentence and DPP's Reference]**

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**Before: Morgan LCJ, McCloskey LJ and Scoffield J**

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**Representation**

**Appellant: Mr Tim Moloney QC and Mr Conor O'Kane, of counsel (instructed by Carlin Solicitors)**

**Respondent: Mr Liam McCollum QC and Mr Robin Steer, of counsel (instructed by the Public Prosecution Service)**

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**McCLOSKEY LJ (delivering the judgment of the court)**

***Introduction***

[1] It is convenient to borrow the following passages from the judgment of this court dismissing this Appellant's unsuccessful appeal against conviction (delivered on the same date: see [2021] NICA 2):

> *"[1] On 29 July 2020, following a non-jury trial, Christine Connor ("the Appellant") was convicted of the following offences:*

*(i) The preparation of terrorist acts between 01 February 2013 and 30 May 2013, contrary to section 5(1) of the Terrorism Act 2006.*

*(ii) Causing an explosion likely to endanger life or cause serious injury to property on 16 May 2013, contrary to section 2 of the Explosives Substances Act 1883.*

*(iii) Causing an explosion on 28 May 2013, contrary to the same statutory provision.*

*(iv) The attempted murder of Constable Polley on 28 May 2013, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and common law.*

*These represented the first, third, fourth and sixth counts in an indictment comprising six counts altogether. The Appellant was not convicted of the other two counts (the second and fifth) which alleged possession of explosive substances on the same dates as the causing explosions counts, namely 16 May and 28 May 2013. The appeal to this court is against convictions (ii) and (iv) i.e. the first and fourth counts. Convictions (iii) and (iv) arose out of the same facts, constituting a single transaction.*

*[2] On 20 August 2020 the Appellant was punished by 20 years imprisonment plus an extended custodial period of four years in respect of the first count and, with regard to the second and third counts, 15 years imprisonment (each) to operate concurrently with the lead sentence.*

……

*[4] The history of these proceedings also has a singular feature. On 03 May 2017 the Appellant pleaded guilty to all three counts and received an extended custodial sentence of 16 years and four months, with an extended licence period of three years and eight months. On appeal to this court her convictions were quashed due to reservations concerning her pleas of guilty – see [2018] NICA 49 – and a retrial was ordered. The appeals to this court follow upon her retrial."*

[2] This second judgment is required by the somewhat unusual merger of a DPP's sentence referral pursuant to s 36 of the Criminal Justice Act 1988 and an appeal against the same sentence. Thus whereas the Appellant maintains that her effective sentence of 20 years' imprisonment was manifestly excessive the DPP contends that it was unduly lenient. Should the DPP's application succeed, the appeal against sentence will inevitably fail, and *vice versa*. We shall consider together all of the arguments assembled in both challenges.

***Governing Principles***

[3] The legal test to be applied by this court in a s 36 referral is well settled. A sentence is unduly lenient where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. The application of this test will include consideration of reported cases and in particular guideline decisions of this court. It is also incumbent upon this court to recognise 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 factors; and that leniency in itself is not a vice. Finally, this court may in some instances reckon the factor of double jeopardy. See *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41 at 45 – 46 (per Lord Lane LCJ), adopted without qualification by this court in *Attorney General's Reference No 2 of 2002* [2002] NICA 40 at [21] and subsequently.

[4] The guideline decision of this court relating to sentencing for the offence of the attempted murder of a member of the security forces is *R v McCann* [1996] NIJB 225, at page 230E:

> "*The normal level of sentence for the attempted murder of a member of the security forces is in the region of 25 years imprisonment and in some cases a sentence in excess of 25 years may well be proper.*"

This was affirmed in the recent decision of this court in *R v Loughlin* [2019] NICA 10 at [18], the Lord Chief Justice emphasising that:

> "*That guideline remains in force today and nothing said in this case is intended to call into question its applicability.*"

At [19] ff the court, in its consideration of the starting point in cases of "*non-terrorist attempted murder cases*", having noted a variation ranging from 12 to 22 years, said the following at [20]:

> "*We agree with the Sentencing Guidelines Council that the culpability of the offender is the initial factor in determining the seriousness of the offence. The fact that the offender had an intention to kill demonstrates of itself a*

> *high level of culpability but* ***there is a distinction to be made between planned, premeditated, professional attempts to kill*** *and those that arise spontaneously. We also consider that the extent of harm caused is relevant to the overall sentence but that the court also has to take into account the harm that the offence was intended to cause or might foreseeably have caused."*
>
> [Emphasis added.]

At [27] the court stated that "*the manner of the commission of the offence*" can in appropriate circumstances constitute an aggravating factor. In the same passage the court cautioned against the error of characterising as aggravating factors "*matters which were actually part of the offence*".

[5] This court has also given unambiguous guidance on how a sentencing court should approach the issues of starting point, aggravating features and mitigating features. See *R v Stewart* [2017] NICA 1 at [28]:

> *"We have come across a number of cases recently where the judge has established a starting point by reference to the aggravating features, has applied the discount for the plea to that starting point and then further reduced the sentence on the basis of the mitigating features. The effect of such an approach is to apply the discount for the plea to the aggravating features but to allow mitigation in full. Such an approach is, therefore, unduly generous to the accused. The proper approach is to identify the impact of all of the aggravating and mitigating factors to determine the starting point before applying the reduction for any plea. In that way both the aggravating and mitigating factors are subject to the same treatment."*

While it may be trite to add, it is nonetheless instructive to recall that in cases where the offender's guilt is established at the conclusion of a contested trial no question of credit for pleading guilty arises and, thus, the final step in the staged exercise specified in *Stewart* does not fall to be taken.

[6] There is one particular issue of sentencing principle which arises in the present case. This court has recognised that in sentencing an offender it may be permissible in appropriate cases to have regard to any physical disability or illness which will subject the offender to an unusual degree of hardship in prison. It is timely to emphasise the precision and restraint with which this court formulated this, in *Attorney General's Reference (No 1 of 2006) (McDonald and Others)* [2006] NICA 4 at [39]. First:

> "*It is permissible to have regard to any physical disability or illness which will subject the offender to an unusual degree of hardship if he is imprisoned ….*"

There is a second passage of substantial importance in *McDonald*. In the same paragraph this court endorsed without qualification the following statement of Rose LJ in *R v Wynne* [1994, unreported]:

> "*It is always to be born in mind that a person who has committed a criminal offence, especially one who has committed a serious criminal offence, cannot expect this or any other court automatically to show such sympathy so as to reduce, or to do away with altogether, a prison sentence purely on the basis of a medical reason. It is only in an exceptional case that an exceptional view can be taken of a sentence properly passed.*"

In short, there is a substantial threshold to be overcome.

[7] There is a related sentencing principle, again well settled, which arises in the present context, namely that in sentencing for terrorist offences the requirement of deterrence is the dominant consideration. See for example *R v McConnan* [2017] NICA 40 at [43] – [49]. As these passages demonstrate, this principle operates with the allied principle that the personal circumstances of the offender will rarely carry any appreciable weight in such cases.

[8] There is yet one further issue of sentencing principle arising in the present case, namely the impact and influence which the Coronavirus pandemic should properly have in the sentencing of any person whose offending is liable to be punished by a period of imprisonment in the present circumstances. In its decision in *R v Stewart* [2020] NICA 62, promulgated on 18 December 2020, this court took the opportunity to provide clear guidance on this discrete issue. At [12] the submission that the offender should have qualified for some reduction in a sentence of imprisonment purely on account of the pandemic was noted. At [12] – [13] the court considered the reach of the decision in *R v Manning* [2020] EWCA Crim 592. At [14] the "sister" decision in the jurisdiction of Scotland, *HM Advocate v Lindsay* [2020] HCJAC 26, was examined. At [16] consideration was given to the decision of the Recorder of Belfast in *R v Beggs* [2020] NICC 9, delivered on 15 April 2020.

[9] In the Scottish case of *Lindsay* the Lord Justice Clerk, Lady Dorrian, stated at [24] & [25]:

> "*…The conditions which arise as a consequence of COVID-19 are unlikely to be permanent, and one can expect that in the short to medium term prisons will find better ways of*

> *adapting to the conditions dictated by the virus. There are already signs that this may be happening…*
>
> *It is reasonable to anticipate that in the short to medium term the Scottish Prison Service will find ways of adapting to the requirements imposed by the prevalence of COVID-19 and find reasonable ways of improving the situation for those in their care. To take account of the current emergency as a reason for discounting a custodial sentence would discriminate unfairly against prisoners who may have been given a short term sentence shortly before the lockdown, in favour of those upon whom such sentences are imposed now."*

In this context it is appropriate to add, based on the submissions which this court has received in *Stewart* and other recent cases, together with submissions routinely advanced in bail applications to the High Court, that there is some evidence of a tendency among practitioners to gloss the decisions in *Beggs* and *Manning*. It is important to recognise that, as set out in *Stewart*, the decision of the Recorder in that case to allow increased credit for a plea of guilty (40% *in lieu* of 33%) was made in the context of an offender who had positively taken the step of requesting an accelerated listing for the purpose of pleading guilty and being sentenced early. These circumstances enabled the Recorder to make the assessment that this provided evidence of additional remorse on the part of the offender and a willingness to co-operate with the authorities: two well recognised mitigating factors

[10] It is opportune to reproduce the outcome of the review of the aforementioned three cases which this court undertook in *Stewart*. The Lord Chief Justice stated at [18]:

> *"Given the steps taken by the Prison Service to deal with the issues arising from the pandemic we consider that there is much to be said for the approach espoused by Lady Dorrian. We do not, therefore, accept that there should be any automatic increase in the discount allowed for a plea of guilty by reason of prison conditions. We recognise, however, the force of the approach taken by McFarland J as he now is in respect of those who plead guilty and face up to the responsibilities during the pandemic."*

***The Sentencing of the Appellant***

[11] The judge provided a separate sentencing judgment. In this he devoted considerable space and attention to the question of whether the Appellant was a "*dangerous*" offender within the framework of the Criminal Justice (NI) Order 2008. In the relevant passages there is no error in the judge's self-direction in law. This is

followed, at [22], by a lengthy recitation of the facts and considerations impelling to the conclusion that the test for dangerousness was satisfied. The essential submission on behalf of the Appellant was that the judge's conclusion is not harmonious with *R v Lang* [2005] EWCA Crim 2864 and *R v EB* [2010] NICA 40. We consider that this resolves to a mere quarrel with the evaluative judgement formed by the judge at the conclusion of a carefully structured exercise. We can identify no error of law and consider the judge's assessment and conclusion unimpeachable.

[12] Turning to the second main section of his judgment, the sentencing path plotted by the trial judge is readily traceable. He began with a conclusion, namely that the offending of the Appellant did not warrant a life sentence. The contrary was not argued on behalf of the Crown and we consider that the judge was correct to thus conclude. We consider that the judge was also correct as regards the next discrete exercise undertaken by him which yielded the separate conclusion that an indeterminate custodial sentence was not warranted.

[13] Thereafter the sentencing path adopted by the judge was the following. He began by noting *McCann* and quoting the passage reproduced in [4] above, thus acknowledging that his point of departure must be a sentence of imprisonment of around 25 years duration. He observed that every sentencing guideline has a certain "*in-built flexibility*", this characteristic being designed to accommodate aggravating and mitigating features, which could result in either a longer or shorter term. In this case there were seven specific aggravating features identified – in our paraphrase, the furtherance of a violent political cause; the cunning and deceit employed to lure two police officers to the scene; extensive planning and preparation; a central role (throwing the pipe bombs); two separate episodes of criminality; a lack of remorse; and the factor of a live suspended sentence when the offences were committed. The judge then stated:

> "*I consider the culpability of the defendant to be high and the harm intended murderous.*"

[14] Next the judge diagnosed three specific mitigating factors: the Appellant's mental and physical ill health; the lack of sophistication in the pipe bomb attacks; and the Appellant's limited criminal record. He added:

> "*In terms of personal mitigation it has to be recognised this is of limited consequence given the gravity of the offences.*"

Followed immediately by:

> "*In terms of sentence the appropriate tariff for a terrorist attempted murder, with the present aggravating features, in my view is in the region of 24 years. Taking into account the various mitigating features and in particular the defendant's poor health, I consider the appropriate sentence*

> *after a contested hearing to be an extended custodial sentence, comprising 20 years with four years extended licence on the attempted murder of Constable Polley."*

[15] While some of the aggravating features identified by the judge are in our view intrinsic elements of the offences committed, this assessment does not apply to the factors of elaborate planning and preparation, the commission of two separate and potentially lethal attacks within a period of some two weeks and the circumstance of a live suspended sentence. In addition, though not identified by the judge, we consider that reckless disregard for the safety and lives of innocent residents and other civilians, such as passing motorists, in a residential area was a further free-standing aggravating feature.

[16] We consider that none of the three mitigating features identified by the judge can be sustained. In brief compass, first, the evidence relating to the Appellant's "*significant ill health, both mental and physical*" suffers from manifest limitations and falls demonstrably short of the elevated threshold established by the decision of this court in *McDonald and Others*, discussed above. Second, the absence of professional sophistication in these murderous attacks cannot conceivably be characterised a mitigating feature and is comfortably extinguished, indeed outweighed, by the consideration of meticulous and determined planning and preparation. Third, we consider it erroneous in principle to have ranked the Appellant's limited criminal record and good conduct whilst on bail as a mitigating factor. Properly analysed, to have confined her previous criminality to minor offending and to have complied with her legal obligations during her period on bail do not constitute mitigating considerations. No credit for either was warranted, as a matter of long-standing sentencing principle.

[17] Thus in our view there are certain identifiable flaws in the sentencing exercise carried out by the trial judge. On the hypothesis that there were no flaws in his identification of aggravating and mitigating features, the transition which he made from a point of departure of 25 years' imprisonment to a starting point of 24 years and finally to a *terminus* of 20 years cannot be sustained. Having regard to the building blocks which he identified, aggravation comfortably outweighed mitigation and the outcome should therefore have been a sentence of at least 25 years' imprisonment.

[18] We must now evaluate the judge's *terminus* of 20 years' imprisonment in the light of our assessment above of those features which should properly have been assigned to the aggravating and mitigating categories. This readily produces the conclusion that the sentence should have been in the bracket of 25 to 28 years imprisonment. We consider that the factor of double jeopardy does not fall to be reckoned, given that this is a case where a very long determinate sentence was inevitable. As a matter of sentencing principle, we observe that double jeopardy normally has purchase only in cases of modest imprisonment terms or where the

offender is at liberty – limited, provisional or otherwise – when this court makes its decision.

***Conclusion***

[19] We grant leave to the DPP to proceed under section 36 of the Criminal Justice Act 1988. We consider that the *McCann* general guideline must be given effect. The attempted murder of any member of the security forces in Northern Ireland is a heinous crime, demanding of condign punishment. The offending of Ms O'Connor is characterised by a multiplicity of aggravating facts and factors and a stark absence of mitigation. The sentencing of the trial judge was unsustainably generous. We substitute a sentence of 25 years' imprisonment accompanied by an extended licence period of four years for the attempted murder of Constable Polley. We affirm the lesser concurrent sentences imposed by the judge in respect of the other offences, about which there was no debate. The Appellant's appeal against sentence is dismissed.

***A footnote: time limits***

[20] In the written submissions on behalf of the Appellant it was contended that the DPP's application under section 36 of the 1988 Act exceeded the time limit specified in paragraph 1 of Schedule 3, which stipulates that the requisite notice "*… shall be given within 28 days from the day on which the sentence, or the last of the sentences, in the case was passed.*" This remained a live issue at the hearing and the court adjourned to give the matter further consideration. In the event Mr Moloney QC informed the court that having regard to the decisions in *Stewart v Chapman* [1951] 2 KB 792 and *Zoan v Rouamba* [2000] 1 WLR 1509 this contention was not being pursued. Bearing in mind the absence of adversarial argument on this issue and mindful of differences between the Interpretation Act (NI) 1954 and the Interpretation Act 1978 (the Westminster statute governing the 1988 Act) a concluded determination of this issue by this court is not required and is reserved for some appropriate future case.