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	Delivered: **26/05/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

GREGORY McCULLOUGH

Mr Mullan (instructed by Hunt & Co Solicitors) for the Appellant
Mr Steer (instructed by the Public Prosecution Service) for the Respondent

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Keegan LCJ, Horner LJ, McBride J

KEEGAN LCJ ***(delivering the judgment of the court ex-tempore)***

Introduction

[1] The court is in a position to give a ruling in this appeal today.

[2] The appellant applies with leave of the single judge to appeal a four year determinate custodial sentence imposed by His Honour Judge Irvine KC ("the judge") at Belfast Crown Court on 10 November 2022. This was after a plea of guilty to three counts on the indictment, namely count 1 hijacking, contrary to section 2(1)(a) of the Criminal Jurisdiction Act 1975, count 3 driving whilst disqualified, contrary to Article 168A(1)(c) of the Road Traffic (Northern Ireland) Order 1981 and count 5 using a motor vehicle without insurance, contrary to Article 90(4) of the Road Traffic (Northern Ireland) Order 1981.

The decision of the sentencing judge

[2] The sentencing remarks of the judge have been provided to us and we have considered them. It is clear from those sentencing remarks that the judge was aware of the background to this case and some relevant submissions were made to him and some authorities were put to him. Looking at the sentencing remarks the judge concluded that the appropriate starting point for the headline offence of hijacking, which is count 1, would be three years' imprisonment. It is clear that the judge took

into account aggravating features as follows. Firstly, the threats to stab the victim. Secondly, the appellant's criminal record, which is substantial in this case. Thirdly, the fact that the offences occurred when the appellant was highly intoxicated.

[3] The sentencing remarks also refer to mitigating factors which included the early plea of guilty, the fact that the offending was not premeditated, and the remorse expressed by the appellant. The sentence imposed for the hijacking was four years' imprisonment, reduced to three years to reflect a 25% reduction for the plea of guilty. The overall sentence was also reached by virtue of the activation of a suspended sentence for an offence of bringing drugs into prison. That was in a sentence of 15 months' custody and that was activated in the sense that the judge decided that one year of the sentence should be activated that led to the total sentence of four years.

Factual background

[4] This incident which grounds the offences occurred on the afternoon of 5 February 2022. The complainant was sitting in his white Berlingo van in Ballyclare when he was approached by the appellant who shouted "get out of the van before I stab you." This threat was repeated approximately three times and the appellant tried to grab the keys from the ignition of the van. The appellant then pulled the complainant out of the van and reversed the vehicle striking a wing mirror of another car and causing further damage.

[5] The complainant described the appellant as being under the influence and was carrying three bottles of alcohol. It was also noted that the appellant had a cut to the back of his head which was bleeding. There is various reference then to witness statements which I need not dilate on for the purposes of this ruling. The fact that the complainant phoned his girlfriend is relevant, however, because she had previously seen the appellant in Ballyclare and was aware that he was drunk. Today we have been referred to another witness statement who described the same type of behaviour.

[5] The police were contacted and drove to the appellant's address in Newtownabbey. The Berlingo van was located parked nearby. The police entered by the rear door which was open with the keys in the lock. The appellant was standing in the hall and was described as compliant by police. He was described as being unsteady on his feet and did have a wound to the back of his head. He was arrested and cautioned and replied, "why the fuck would I drive a van." He failed a preliminary breath test and was arrested. The car keys for the van were found in a child's toy box in the living room. He was thereafter taken to Antrim Hospital for treatment and received some staples to the back of his head.

[6] During interview on 6 February 2022, in parts of the transcript of which we have been referred to today, the appellant initially made no comment to questioning about the offences or if he was drinking in the area at the time. He later denied being in the area saying that he had been at a party in New Mossley but refused to say where this party was. He then claimed that a male had given him a lift home in a white van

from this party and this person must have left the keys and phone in his house. The appellant did consent to take part in a VIPER identification procedure and was identified by all witnesses on 9 May 2020 and thereafter, as I have said, pleaded guilty to the offences. I will return to the interview later in this judgment.

Personal circumstances of the appellant

[6] The appellant has a substantial criminal record, that amounts to 83 previous convictions. It includes convictions for serious offences of blackmail, burglary, assault, deception, handling stolen goods, road traffic offences, and making threats to kill. Mr Mullan rightly describes the record as of "some significance".

[7] A pre-sentence report was completed on 27 October 2022. It refers to some periods of stability in the appellant's life, the fact that he had two children, and the fact that he did obtain some employment during periods out of prison. It also refers to a history of drug and alcohol abuse and some mental health problems. Of note to us is that at the stage of preparing the pre-sentence report the appellant told the probation officer that on leaving the public house on the day in question he was chased by four males who assaulted him with a claw hammer sustaining a head injury. He believed he was attacked due to an outstanding drug debt. He also believed the males were linked to paramilitaries causing him to fear for his life. This information, in effect, forms the focus of this appeal.

[7] We have also noted the victim impact in this case which is set out in the depositions of the complainant who when making his statement referred to feeling shaken and frightened and having sleep difficulty after this incident.

Grounds of appeal

[8] We then turn to the grounds of appeal which are threefold. Firstly, that the judge chose an excessively high starting point, particularly due to the circumstances of the head injury that had occurred prior to these offences. Secondly, that the sentence was out of kilter with previous authority, in particular, the case of *R v Conway* [2001] NICA 13. Thirdly, that cumulatively this case attracted a sentence which was manifestly excessive.

Consideration

[9] We have considered all of these arguments which have been well made on paper and in oral submissions by Mr Mullan. Our conclusion on the various grounds of appeal are as follows.

[10] First, in looking at a case of this nature we must turn to what the headline offence is. In this case it is an offence of hijacking. That is, of course, a serious offence. We reiterate the view of previous courts that any form of hijacking will in almost all

cases require custodial sentence even for a first-time offender. Realistically, Mr Mullan had no submission contrary to this guiding principle.

[11] The second point that we make is that reference to other cases in this area particularly cases of some vintage do not assist in adjudicating upon a sentence because these cases are fact sensitive. The offence of hijacking arises in a very wide range of circumstances and so it is not particularly useful for this court to provide rigid guidance, we think, in this area particularly as this offence is usually allied to other associated offending. Suffice to say that the outcome on sentence in a particular case will naturally depend on a consideration of all of the circumstances, the aggravating and mitigating factors.

[10] In this case a custodial sentence was merited. The aggravation was repeated threat and the physical altercation which occurred at the van. Also of significance was the substantial criminal record and the substantial intoxication of the appellant. We see no error on the part of the sentencing judge in relation to identification of these aggravating factors.

[11] In mitigation there was the plea and some remorse. However, we also note that there was a no comment interview, that the appellant lied about events, and so mitigation, we consider, is properly reflected in the reduction given for the plea in this case and does not amount to substantially more than that.

[12] In reality, the personal circumstances of having apparently been attacked by paramilitaries regarding a drug debt prior to these offences taking place forms the centre piece of this appeal. We understand the point that this issue should have been mentioned by the judge in his sentencing remarks as part of the background circumstances. However, this omission does not, in our view, amount to much in the serious circumstances of this case and given the particular way in which this incident was described by all.

[13] To our mind that this was a case where, as the prosecution say, the appellant was probably assaulted, the evidence does not reach a certainty beyond that phrase. It was clearly to our mind not a case of frantic escape. It was clearly not a case where there was any evidence in relation to any assault causing an impairment that would reduce culpability in this case for the serious actions and threats issued by the appellant.

[11] Also, of particular significance to us, highlighted by Mr Steer, is that the issue of previous assault was raised at interview with the appellant and declared as irrelevant by his solicitor. The appellant at interview, himself, said that nothing had happened.

[12] The above form the overall context which shapes consideration of the assault. It goes without saying that we have a difficulty in a revised, refined and strengthened

case being made on appeal in relation to facts which would have been known to the appellant and his legal advisers at the time.

[12] Carjacking of this nature is a frightening experience for victims and will result in custodial sentences commensurate with the type of offending. We see no error in the judge's assessment of the relevant factors in this case. We do not think that there is merit in the argument that because of the previous assault which probably happened that there should have been a reduction in the sentence imposed by the judge. The range here was three to four years. The judge was within range having considered aggravation and mitigation and so the sentence is neither wrong in principle nor manifestly excessive on the hijacking and related driving offences.

[13] The judge was also entirely correct, in our view, to activate the suspended sentence for the drug offence. That was a sentence of 15 months. There can be no argument that this should have been consecutive rather than concurrent. The only issue is whether the judge should have activated one year of this or perhaps a lesser period which Mr Mullan assesses at perhaps five to six months. This is a discretionary area of decision making. As we have said, the judge was entitled to activate the suspended sentence and we do not think that he went beyond the parameters of his discretion in choosing one year to impose consecutively. This appellant will have been warned when he was sentenced for the drugs offence that further offending could result in the activation of the sentence. We see no error in principle on the part of the sentencing judge in relation to this matter. Finally, the reduction for the plea cannot be faulted.

Conclusion

[14] This sentence, in our view, reflects the overall serious circumstances of this case. It is neither manifestly excessive nor wrong in principle. The appeal is dismissed.