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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT AT CRAIGAVON

BETWEEN:

KYLE COULTER

Appellant:

v

R

Respondent:

Before: McCloskey LJ, Horner LJ and McFarland J

Mr Michael Chambers (instructed by McNamee McDonnell Solicitors) for the Appellant
Ms Kate McKay (instructed by the Public Prosecution Service) for the Respondent

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

Introduction

[1] Leave to appeal against sentence having been refused by the single judge, Kyle Coulter ("the appellant") renews his application before the plenary court. By this application he seeks to challenge the sentence of 42 months imprisonment, divided equally between an immediate custodial term and subsequent licensed release, for one count of conspiracy to steal contrary to Article 9(1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and section 1 of the Theft Act (NI) 1969. One further count, specifying the offence of handling stolen goods, was left "on the books" of the court in the usual terms.

The Indictment

[2] The appellant is one of three defendants who were prosecuted and sentenced together. The association linking all three arose out of their joint involvement in the

criminal operation described more fully in paras [3]–[14]. The comparisons and differences between the individual criminality of the three defendants are reflected in the bill of indictment in its ultimate incarnation:

Winter & Coulter:

(i) Conspiracy to steal – motor vehicles – 14/11/19 – 21/5/20 [maximum sentence: 10 years]

Dambrauskas:

(ii) Going equipped for theft – 20/5/20 [maximum sentence: 3 years]

Winter:

(iii) Possession of Criminal Property - £58,885 – 21/5/20 [maximum sentence: 14 years]

The Prosecution Case

[3] The text of paras [4]–[14]ff is drawn verbatim from the detailed statement of the prosecution case (with some linguistic idiosyncraticies) presented to the Crown Court at the time of sentencing, which was uncontentious.

[4] In June 2019 a crime spree began in the areas surrounding Lisburn, Hillsborough and Banbridge involving the theft of high value keyless cars. Over 40 victims reported having their vehicles stolen during the hours of darkness. Police suspected the vehicles were either being driven over the border and shipped from Dublin or brought to a 'chop shop' where they were dismantled into parts which are then sold on for profit.

[5] On 20 May 2020 police were tasked to Pine View Court in Gilford in respect of a suspicious black Jaguar. On arrival the vehicle was observed outside number 15. Vaidas Dambrauskas was located hiding in the bushes. A bag was retrieved close by containing sophisticated scanning devices and equipment used to steal keyless cars and block signals so the GPS cannot be tracked. At 6am a Nissan Qashqai KO67 TCZ, which had been circulated for arrest in respect of the incident at Pine View Court, was stopped at the junction of Artabrackagh Road and Dobbin Road. The driver was Dovydas Kulilauskas and the rear seat passenger was Saulius Fereca. They were charged as co-accused but failed to appear at court on different occasions and bench warrants are currently outstanding against them.

[6] As a result of their enquiries police searched a number of properties. One of these was commercial units at 163 Portadown Road in Armagh. The owner, Trevor Armstrong, states that he let one of the units to Keith Winter in April 2019. Winter stored more than 6 cars at a time to the unit in excess of their agreement so Mr Armstrong evicted him in January 2020. He heard a rumour that the Coulters were building him a shed. Parts connected to one stolen car were located at this property.

Unit 11 at the M12 Business Park in Portadown was searched. A bag was seized from the boot of a black Nissan Qashqai belonging to Kulilauskas. Inside the bag were 12 programmable car keys from different car types such as Land Rover and BMW. These keys were examined by a BMW technician who confirmed they were very sophisticated clones which had been programmed with details of BMW cars which had been stolen in Northern Ireland. Not all of these cars were amongst those identified during the police investigation, suggesting these vehicles had already been stolen and dismantled and sold for parts. Four of the keys were sampled for DNA and a major profile belonging to Saulius Fereca was obtained.

[7] The most significant search was at a farm at 69 Ballybreagh Road in Portadown. This property is owned by the appellant. The farm complex is very large, consisting of a large group of sheds and outbuildings, yards and the appellant's house. On arrival police noted various collections of vehicles that had been broken down into parts and then wrapped into black silage wrap as if prepared for transportation. The farm complex can be viewed in photos at Exhibit 68 (pp.460-528). Subsequent examination of the chassis numbers confirmed there were 11 vehicles, mostly BMWs, stolen on various dates between 14 November 2019 and 23 April 2020 mostly from the Lisburn, Banbridge and Hillsborough areas but also one from Omagh, one from Cookstown and one from County Kildare. Statements from 10 of the owners are on the depositions.

[8] The values of these vehicles range from £20,000 to £45,000. Police estimate the approximate value of the 12 stolen vehicles to be £360,000. This figure is arrived at by reference to valuations provided by the injured parties; insurance claims where the injured parties have not included a valuation; or an online check assessing current value of the make, model and year of a particular vehicle. This does not take account of other vehicles that were stolen during the life of the conspiracy and had already been dismantled and shipped away. Items seized were confined to three different sheds, one of which had been set up as a workshop containing multiple items of equipment used by mechanics. A toolbox containing £58,885 was located in this workshop.

[9] Dambrauskas was interviewed on 20 May following his arrest. He stated he was from Mullingar and this was his second time in Northern Ireland. He claimed a friend called Tomas accompanied him to meet a third party who was supposed to buy the bag containing the jamming equipment. When the police arrived, Tomas shouted to run and threw the bag at him. He then ran into the bushes. The appellant was arrested on 21 May and interviewed a total of 9 times that evening and the following afternoon. He provided pre-prepared statements saying he had rented his sheds to two foreign national males through Keith Winter and they were paying him £500 a month for the last 4-6 weeks. He would not confirm the method of payment and refused to provide any details in respect of these males. He denied all knowledge of the stolen vehicles in his sheds and yard. He claimed to have let the yard to Winter and was paid in labour. Keith Winter was arrested on Sunday 25 May at his home

address in Gilford. He was interviewed over the course of two days and answered 'no comment' to all pertinent questions.

[10] Police obtained physical evidence connecting Winter to 163 Portadown Road including DNA on a cigarette butt. A wealth of physical evidence connected Winter and the appellant to the workshop at Ballybreagh Road, including DNA on a cigarette butt, a straw and fingerprints on a half pint glass as well as numerous car components. Telephone evidence revealed the extent of the conspiracy. Kulikauskas' phone was seized on 20 May when he was stopped and arrested by police. The call logs show regular activity between him, Fereca and Winter (who is stored as 'Budyy').

[11] On 13 March 2020 at 10.48am Winter sent him a message "that's no problem atall b over there soon/" This was the morning after an overnight theft in Lurgan. On 9 April 2020 Winter messaged him enquiring if he could get "stuff moved" as he observed a police car. On 14 April Winter messaged him stating "Was looking at that Kyle says wanna split it we will fox it and all make money." On 23 April Kulikauskas messaged Winter stating he was thinking about "Banbridge tomorrow" for "work." Winter replied "Ok as long as every1 stays safe I'm happy." That night two vehicles were stolen without their keys in Banbridge. This phone contained a video showing the appellant power washing the workshop.

Numerous messages were exchanged between Kulikauskas and Fereca discussing the dismantling of cars and payments to 'Budis' (Winter).

[12] On the appellant's phone a number of significant messages were located:

6 April 2020 2:25 from Keith Winter: "Will never get nothinh shipped iota England atm with this virus"

28 March 2020 from his girlfriend: "Ur a lying cunt… u just told me u were down on ur own but sure the noise wouldn't of been coming from free air! Bullshitter!! Just u stay wreked n strip stolen cars then don't think ur coming up gere the nite. Sure ring ur mates n get a prossy like them lowlifes do!!!!! ?? good luck!

On 21 May 2020 : (the day of the police search) there is a conversation between The appellant and Winter on Whatsapp as follows:

Winter: "Do u wanna check a locked the garage think a did"

The appellant: "Where u put key"

Winter: "Under blue drum wua"

On 21 April 2020: The appellant sent Winter two images of car shells on fire in the farm yard (p. 196 statements).

[13] Winter's phone was seized following his arrest on 25 May. This was a new phone purchased following the appellant's arrest on 21 May. It was registered to his old number and he had Kulikauskas saved under 'Buddy.' There are also a number

of messages to other individuals discussing his situation. For example, he messaged his girlfriend on 23 May stating: "A don't think a wnt u involved u will prob b safer walking away uno just that a have the yard rented and have foreigner working for me."

[14] Fereca and Kulikauskas would steal high-value keyless cars using jamming equipment. They would drive the cars to a chop shop where they would be dismantled and the parts would be transported elsewhere for sale. Winter organised the premises for the chop shops but was not involved in the actual thefts. He leased the premises at 163 Portadown Road and used the garage there as a chop shop before the owner tired of him and evicted him in January 2020. He gradually moved the chop shop to the appellant's farm at 69 Ballybreagh Road. The £58k in the lock box belongs to him. The appellant joined the conspiracy around mid-March 2020 and allowed Winter and the others to use his outbuildings and yard to dismantle the stolen vehicles. He was not involved in the actual thefts. He was involved in dismantling the vehicles. Dambrauskas was not involved in the conspiracy but he was caught going equipped for the theft on 20 May. He lives in Mullingar.

Previous Convictions

[15] The appellant, who is now aged 37 years, has a criminal record of some substance. Between 2008 and 2017 he accumulated a total of 22 convictions. Among these were five convictions in respect of handling stolen goods, one in respect of going equipped for theft and one for theft. Most of the other convictions were vehicle related. All of the offences were prosecuted in the Magistrates' Court. The dishonesty offences were committed on three separate dates in 2008 and 2009. They were punished by concurrent sentences of five months imprisonment. Mr Winter has no criminal record.

[16] At the sentencing hearing it was contended by the prosecution that the criminality of the three defendants had the aggravating features:

(i) Very high value of thefts.
(ii) High value vehicles targeted.
(iii) Sophisticated equipment used to effect thefts.
(iv) Vehicles dismantled and sold for substantial profits (£58k in lockbox)

Basis of this Appellant's Plea

[17] The Basis of Plea document is in these terms:

(i) "The defendant pleads guilty to count 1 on the indictment (conspiracy to steal) and count 2 is to be left on the books under the usual terms.

(ii) The Crown accepts that this defendant was not an original party to the conspiracy and only joined it at a point sometime after its original inception.

(iii) The defendant's role in the conspiracy extended solely to the provision of premises where he and the other parties would and indeed did dismantle stolen vehicles. He did not play any part in the actual thefts of the vehicles and did not have any knowledge of how it was carried out. The Crown would accept that there is no evidence to contradict this assertion.

(iv) The defendant enters his plea on the basis he only became a part of the conspiracy at a point in or around the middle of March 2020. The Crown would accept that there is no evidence to contradict this assertion."

Sentencing

[18] The maximum sentence of imprisonment applicable in the cases of both the appellant and his co-accused Mr Winters was 14 years imprisonment. In sentencing the appellant, the judge recorded, firstly, that upon arraignment he had pleaded not guilty to both counts, later pleading guilty to the conspiracy count when rearraigned. The judge immediately adverted to the basis of his plea and, in particular, the acceptance by the Crown that the appellant:

> "… was not an original party to the conspiracy and only joined it at a point some time after its original inception."

The judge's acknowledgement of this agreed fact was repeated <u>three times</u> in the passages which follow.

[19] In the next section of her decision the judge stated the following: the appellant owned the land and buildings to which the criminal operation transferred around March 2020; he became "hands on involved in the dismantling on and onward movement of those vehicles in parts" from them; while he played no role in any of the thefts "he knew what was going on to his farm, or became aware of it rapidly, and therefore ….. is culpable in offending which took place from March 2022 onwards"; and he "… sought to minimise the extent of his own engagement …"

[20] Continuing, the judge made the following assessments. First (in terms) the appellant's role in the conspiracy was indispensable. Second, he had demonstrated no insight into the impact of this criminality on others. Third, he was "highly culpable in the offending" during the period under scrutiny.

[21] The judge also gave consideration to the facts and factors canvassed in mitigation on behalf of the appellant. In summary:

> "… he was struggling with his own mental health challenges and relied daily on taking illicit substances to cope with his own personal situation … he was addicted to methadone."

Dr Pilkington's opinion that substance misuse had contributed to the appellant's offending and was traceable to adverse childhood experiences was specifically noted. So too the appellant's willingness to undergo appropriate psychological therapy and his claim that he had desisted from substance misuse some two months previously. The Probation Service Assessment that the appellant presented a medium risk of

re-offending was acknowledged and accepted. The judge further noted the end of the appellant's ten-year romantic relationship, his reduced access to his son and the sale of the farm in question by his father, for whom he claimed to be a carer. The judge also expressly took account of certain positive testimonials furnished on the appellant's behalf.

[22] The kernel of the impugned sentencing decision is in the following passages:

> "Now, this man has a criminal record of 27 offences, including seven for dishonesty in the decade ended 2010 …
>
> I have concluded that he is highly significant, highly culpable, that he's a man with a relevant criminal record and that if he didn't know at the outset what he was doing, he rapidly became aware of it. Because of all that presenting so clearly and starkly, I consider that the custody threshold is easily passed. I have concluded that the starting point … is five years … that should be reduced by 18 months, more than a quarter, less than a third, to recognise the value of a plea in the pandemic."

Finally, the judge stated that the aggravating features had been taken into account, as had the "mitigating features such as they are …"

The Appeal

[23] The centre piece of the appeal is the following. The challenge to the impugned sentence is advanced on the sole ground that it is manifestly excessive because the appellant's co-accused, whose culpability is said to be "significantly greater" than that of the appellant, received the same sentence. It is contended that Mr Winter had a "leading role" in the conspiracy throughout its entirety and, further, pleaded guilty to a specific money laundering charge arising out of his possession of £58,000 cash at the time of detection.

[24] It is necessary to examine the judge's sentencing of Mr Winter. First, she addressed, and dismissed, his claim that approximately half of the £58,000 cash had been legitimately earned in his employment as a mechanic. Next, the judge expressly acknowledged the distinction between the roles of the appellant and Mr Winter:

> "So, whereas Mr Coulter's involvement is estimated to be from March of 2020, Mr Winters pre-dates the date on the indictment, in that he secured the original premises and was re-negotiating the relocation of the business … to Coulter's property by January of 2020. Count 1, of course, runs from a date in November 2019."

[25] The judge's assessment was that Mr Winter was "… also highly culpable" in respect of his offending. The mitigating features identified were the plea of guilty, the appellant's remorse, the absence of any criminal record and the adverse impact on his family of a custodial sentence. The judge concluded that "for him too" a starting point

of five years imprisonment was appropriate, to be reduced by 18 months – "… a reduction of more than a quarter and less than a third …" giving rise to precisely the same sentence of imprisonment as that imposed on the appellant.

[26] The appellant's case is that this court should exercise its appellate jurisdiction to intervene on the ground that the impugned sentence is manifestly excessive. In every case where a sentence is challenged before this court on this ground the review principle (in shorthand) is engaged. This principle has featured conspicuously in the recent jurisdiction of this court, particularly in *R v Ferris* [2020] NICA 60 at paras [41]-[42] especially, which bear repetition in full:

> "[41] The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus, s10(3) of the 1980 Act does not pave the way for a rehearing on the merits. This is expressed with particular clarity in the following passage from the judgment of McGonigal LJ in *R v Newell* [1975] 4 NIJB at p, referring to successful appeals against sentence:
>
> > 'In most cases the court substitutes a less severe sentence ….the court does not substitute a sentence because the members of the court would have imposed a different sentence. It should only exercise its powers to substitute a lesser sentence if satisfied that the sentence imposed at the trial was manifestly excessive, or that the court imposing the sentence applied a wrong principle.'
>
> Pausing, this approach has withstood the passage of almost 50 years in this jurisdiction. The restraint principle is also evident in a range of post-1980 decisions of this court, including *R v Carroll* [unreported, 15 December 1992] and *R v Glennon and others* [unreported, 3 March 1995].
>
> [42] The restraint principle operates in essentially the same way in both this jurisdiction and that of England and Wales, where it has perhaps been articulated more fully. In *R v Docherty* [2017] 1 WLR 181 Lord Hughes, delivering the unanimous judgment of the Supreme Court, stated at [44](e):
>
> 'Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-hearing **ab initio**, as is the rule in some other countries; on appeal a sentence is examined

to see whether it erred in law or principle or was manifestly excessive …'

In *R v Chin-Charles* [2019] EWCA Crim 1140, Lord Burnett CJ stated at [8]:

> "The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would a public law decision. Its task is to determine whether the sentence imposed was manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored it, rarely prosper. Judges take into account all that has been placed before them and advanced in open court and, in many instances, have presided over a trial. The Court of Appeal is well aware of that."

This approach was reiterated more recently in *R v Cleland* [2020] EWCA Crim 906 at [49]. Also, to like effect are *R v A* [1999] 1 Cr App (S) 52, at 56; and Rogers (ante) at [2]. To summarise, through the decided cases in both jurisdictions the function of the Court of Appeal in appeals against sentence has been described, in shorthand, as one more akin to **review,** rather than appeal, in the typical case. This is the essence of the restraint principle."

[27] In short, an appeal against sentence to this court invoking the manifestly excessive ground does not entail a full-blown re-hearing of the sentencing exercise at first instance. This court conducts a more limited, more focused exercise. In contrast, in cases where it is contended that the impugned sentencing is vitiated by error of law, there is no such limitation. Rather this court will conduct an objective audit of the first instance sentencing exercise and will determine whether the asserted error of law has been established.

[28] There is a separate body of principles charting the correct approach for an appellate court in cases where a sentence is said to be manifestly excessive by reason of a comparison made with the sentencing of some other offender. This issue was addressed *in extenso* in *R v Stewart* [2009] NICA 4 at para [19]ff. At para [22] the Lord Chief Justice formulated the following principle:

> "An appellant who has been properly sentenced cannot benefit from an inadequate sentence wrongly passed on a co-defendant."

At para [25] it is stated:

> "It is not unfair to an appellant who receives a perfectly proper sentence that a co-accused is punished less severely."

The court endorsed fully the approach of Carswell LJ in *R v Delaney* [1994] NIJB 31 at page 33:

> "… the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered….
>
> **It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity …**"
>
> [Emphasis added.]

[29] In the present context the complaint is that the appellant has been treated in precisely the same way as a co-accused whose offending belonged to a higher level on the notional scale of gravity. With a modest adjustment of the principles articulated in *Stewart* and *Delaney*, the question to be posed is whether the court's failure to reflect the suggested more serious criminality of Winter in its sentencing of the appellant is glaring. This entails a self-evidently elevated threshold which will not be easily overcome in any case. It is a reflection of the sentencing principle of review, or restraint, which falls to be applied in challenges to sentences on the ground that they are manifestly excessive: see *Ferris* above. It simultaneously recognises the margin of appreciation available to the sentencing judge. Furthermore, it is faithful to the entrenched principle that sentencing is an art and not a science. Sentencing is not a mechanistic, arithmetical exercise. In any case where the assessment of the appellate court is that while different judges might have opted for a more lenient sentence the threshold for intervention by this court will almost invariably not be overcome. The reason for this is that there is no scope for appellate intervention in any case where the impugned sentence lies within the notional band, or range, of sentences which the first instance judge could reasonably impose.

[30] A careful examination of the impugned decision of the sentencing judge reveals that there were several assessments, each of them unimpeachable, unfavourable to the appellant: his role in the conspiracy was indispensable; he sought to minimise the extent of his involvement; he had demonstrated no insight into the impact of his criminality on others; his level of culpability was high; and he had a significant criminal record. To this one may add that there were no indications whatsoever of

remorse. Rather, in the interviews generating the reports before the court there was a marked emphasis on self. All of the foregoing falls to be contrasted with the sentencing judge's assessment of Mr Winter – see para [25] above – which was couched in altogether more favourable terms.

[31] Giving effect to the foregoing principles it is the clear view of this court that the appellant's challenge must fail. In thus concluding, we adopt the assessment of the single judge, O'Hara J, at para [11]:

> "I acknowledge that some judges might have imposed a lesser sentence on the applicant than on Winter, but I do not agree that the LTJ was arguably wrong not to differentiate between them. In my judgment she was entitled to regard his criminal record as a factor of some significance which made his position worse than that of Winter. In addition, I think that on any view, his role was fundamental, at least from around March 2020, in that he provided the premises to which the cars were taken and dismantled. Indeed, there was video evidence on a phone of him personally being involved in the dismantling. He did not therefore simply provide the safe premises. As to what he got by way of reward, that cannot be said with certainty but there was a text message on 14 April 2020 from Winter to one of the gang, to the effect that the applicant wanted "a split." The applicant certainly was not involved in this for nothing."

[32] It follows from the foregoing that this court, concurring with the single judge, refuses leave to appeal.