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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**13/04/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

WILLIAM HUNTER

_____

Before: Deeny LJ, Treacy LJ and Keegan J

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DEENY LJ (delivering the judgment of the court)

[1] This is an appeal against sentence brought by William Hunter. The court is obliged to Mr McCrory Q.C. and Mr Kearney of counsel for Hunter and to Mr Connell on behalf of the prosecution for their succinct and helpful written and oral submissions.

[2] The background to the case is fully set out in the sentencing remarks of His Honour Judge Babington. On 9 August 2015 in Upperlands in South Derry at about 11pm the owners of a house were sitting in the sunroom at the rear of their property when a security light came on in the garden and 3 persons were seen to be proceeding to the back door, all of whom were wearing dark clothing. They did not seek to be admitted but rather used a sledgehammer to make an entrance. It was noted that at least two of them were wearing boiler suits and they had balaclavas on and they made it clear that they were looking for the son of the house. They smashed a glass and two of them entered the home, another one effectively remaining to guard the house owners. It seems that their son on hearing this managed to secrete himself but his young lady was in a bedroom when a man burst in. She remonstrated with him and told him to leave but then a second man came in, whom we now know to be this appellant. He grabbed her from behind and pushed her on to the bed, quite violently, on her account, which was accepted by the jury. As she was pushed on to the bed she saw that he had a black handgun, a firearm or imitation firearm, in his hand.

[3] Now it seems that when entry was forced to the house this defendant must have cut himself in some way and when the police, very professionally examined the dressing gown of the young lady at a later stage having taken it for analysis it was found to have on it the DNA of the appellant who has a short criminal record, relatively modest by the standards of some other cases in this court. It was some time after this in November of 2015 that he was arrested by police and interviewed. He denied being at the property and that is relevant to the issue of what discount he should get for pleading guilty at a later stage. He admitted to knowing the son of the house. When it was put to him that his blood was on the dressing gown worn by the young lady he then refused to answer further questions and resorted to a no comment approach. He was arraigned on 26 September 2016 on a number of counts and pleaded not guilty to those 4 counts on the indictment. He was re-arraigned on 23 November 2016 and he pleaded guilty at that time to the charge of aggravated burglary with intent to commit grievous bodily harm, contrary to Section 10(1) of the Theft Act 1969. He also pleaded guilty to two subsidiary charges of criminal damage and common assault, presumably the assault on the young lady. He continued to plead not guilty to the second count on the indictment which was possession of a firearm or imitation firearm with intent to cause fear of violence, contrary to Article 58 of the Firearms (Northern Ireland) Order 2004.

[4] The matter was subsequently brought to trial in 2017 on the issue of the firearm. As Mr Connell for the prosecution points out this means that the 3 people in the house did have to give evidence but Mr McCrory stresses that that was only on the issue of whether or not they had seen a firearm in this man's hand. Two of them in fact had not done so; it was the young lady who saw the firearm or imitation firearm. That is relevant to the discount again: they did have to give evidence but it was not in the most stressful of circumstances and counsel accepts that Mr McCrory did this in a way that was not intended to cause any distress or likely to do so.

[5] The jury convicted him on the second count in the indictment. He was then sentenced by His Honour Judge Babington on 4 September 2017. On the first count of aggravated burglary he sentenced him to 9 years' imprisonment with 4 years 6 months' custody and 4 years 6 months' licence. That is the only count appealed against. Hunter was sentenced to 6 years for the firearm offence, 1 year for the criminal damage and 1 year for common assault but they were all concurrent, one with the other and with the major sentence.

[6] This Court therefore has to determine whether, as Mr McCrory submits, this sentence on his client was wrong in principle or manifestly excessive. In the written submissions of counsel this court was referred to a number of previous decisions of this court with regard to aggravated burglaries and I think it may be helpful to the profession if I advert to some of those and express a view on behalf of the court.

[7] We were referred to the case of *R v Peter Murray and Christopher Armstrong* [2003] NICA 24, a decision of a two judge Court of Appeal, Carswell LCJ and Girvan J. At paragraph [1] the judgment records that His Honour Judge Rodgers on

24 January 2003 made a custody probation order in respect of *Murray* consisting of 2½ years' custody and 18 months' probation, under the then provision for custody probation orders. The co-accused, *Armstrong*, was sentenced to a 3 year custody probation order with equal periods of custody and probation. On a further charge of causing actual bodily harm to a man in the house they both received 18 months' imprisonment concurrent with the other sentences.

[8] They had forced their way at 2am in the morning into a house in the Holylands in Belfast belonging to a former girlfriend of Murray. She was pushed back against the wall when the door was forced open and the men ran upstairs and gave "a severe beating" with a brush shaft to her new boyfriend. The court was inclined to accept that the stick had just been picked up outside and that they had gone merely to confront the new boyfriend. Photographs showed a number of red angry looking welts on his arms, legs and body. Murray pleaded guilty and had only a modest record for dishonesty. Armstrong had no criminal record and also pleaded guilty somewhat earlier than Murray. It is clear that the court then did not take the view which has since been established that a sentencing judge should assess a starting point for the offences before giving a discount for a plea. The court was influenced by a decision in *R v Moore & Others* [1991] JSB Sentencing Guidelines Cases Volume II paragraph 5.2.1, where a sentence of 5 years was imposed on a group of people who attacked a man who lived with his wife and children in a caravan where they attacked him with metal rods and inflicted actual bodily harm. They had their sentences reduced from 5 years to 2 years. There was the implication in that case that if the entry had been for gain followed by an attack on the residents that would be more serious than the actual attack which was of the nature of a revenge on the man living in the caravan for attacks that he allegedly carried out on others.

[9] To return to the judgment of Carswell LCJ in *Murray* the following was said at paragraphs [11] and [12]:

> "[11] We consider that for the type of offence of which *R v Moore* and the present case are examples it is not necessary to impose sentences of a length appropriate to punish and deter burglars who break into houses for gain and attack the occupants. The severity of the beating, the degree of premeditation and the use of the weapon are features which required the court to impose custodial sentences, but in the circumstances of the case and given the prospect that neither applicant will re-offend we think that the sentences should have been lower than equivalent sentences of four and three years' imprisonment. In our opinion the appropriate length would be three years and two years respectively, with a reduction of the sentence for assault in Armstrong's case to twelve months to reflect his secondary role. We agree

> with the judge's decision to make a custody probation order, though we shall vary the length of the probation supervision in Armstrong's case.
>
> [12] We therefore give leave to appeal and allow the appeals, varying the sentences as follows:
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> Murray – Count 1, aggravated burglary: substitute a custody probation order consisting of two years' custody and eighteen months' probation. Count 2, assault occasioning actual bodily harm, confirmed at eighteen months concurrent.
>
> Armstrong – Count 1, substitute a custody probation order consisting of twelve months' custody and twelve months' probation. Count 2, reduced to twelve months concurrent."

[10] It can be seen therefore that although at paragraph [11] the court considered the appropriate length for the custody probation order to be 3 years they in fact imposed a sentence at paragraph 12 of 3½ years.

[11] The opening of paragraph [11] would appear to give the impression that breaking into houses for gain with an incidental attack on the occupants was somehow less serious than breaking into a house to attack the occupants. It may be that that is merely an infelicity in wording, a case of Homer nodding, or it may be it reflects earlier social attitudes. So far as this Court is concerned burglary with intent to cause bodily harm to one or other of the occupants therein would be the graver of those two types of aggravated burglary. We believe this would more accurately reflect both basic principles of morality and current social mores. It would reflect the wording of s.10 (1) of the Theft Act.

[12] A more reliable guide for this court in sentencing in these cases is the decision in *R v Pollins* [2014] NICA 62, per Morgan LCJ, Coghlin LJ and Treacy J. The court set aside an indeterminate custodial sentence and imposed an extended custodial sentence of 6 years' custody with an extension period of 5 years. This was for burglary where the police came to the scene quickly and apprehended two men of whom one had a knife before any harm was inflicted. The applicant there had a considerable and relevant previous record. In *R v McGarrigle* [2014] NICA 82 Weatherup J, as he then was, sitting with Girvan LJ and Coghlin LJ, delivered the judgment of the court. A sentence of 8 years, 4 in custody and 4 on licence, for a man who led a group to attack a householder in his home with a hammer for sectarian reasons was upheld. The judge reviewed a number of the decisions pointing out the sentencing guidelines from England were helpful but only guidelines and that all these cases are fact specific.

[13] Bearing those authorities in mind we turn to the three matters relied on in the written and oral submissions by the appellant. We are not persuaded that he has been prejudiced by some element of double counting. The learned trial judge was in our view perfectly entitled to refer to one of the aggravating features as being the possession of a firearm or imitation firearm, as it may have been, by one of the intruders in this house. The sentence he imposed on the firearm sentence was concurrent and we do not see a prejudice to the appellant in his reference to the firearm.

[14] The second issue is that at the conclusion of his sentencing remarks the learned trial judge said that if William Hunter had contested all the charges his starting point would have been 10 years' imprisonment.

[15] Our attention has been drawn by counsel to the sentencing guidelines. The count is viewed by both the defence and the prosecution here as falling into the second category in the sentencing guidelines for aggravated burglary *i.e.* greater culpability but lesser harm. The element of lesser harm arises from the fact that apart from the throwing down of the young woman onto the bed, which must have been a most unpleasant experience for her and may well have left some considerable apprehension on her part so I do not minimise it, but apart from that there was not the sort of beating of one of the occupants that we see in some other cases. There is an element of fortuitousness, of course, in that in as much as the young man in the house managed to successfully hide from these intruders but nevertheless it is a fact that there was not such a beating. That is relevant to the fact that the guidelines, which do not seem to have been specifically drawn to the learned judge's attention, would suggest a starting point of a range of 6-9 years and a starting point of 6 years for a category 2 offence.

[13] Therefore, the point that the judge took of 10 years was outside the range. While it is true that he does point to a number of aggravating factors such as premeditation and the presence of a sledgehammer and the firearm or imitation firearm there is, it seems to us, substance in the contention, particularly in the written submissions, that that was higher than appropriate for a case of this particular type.

[14] The third matter relied on by Mr McCrory was the issue of discount. I think I can deal with the matter shortly in saying that the court was persuaded by Mr Connell in his submissions that the judge's discount in the circumstances, in effect of 1 year, which he said he gave with some reluctance, was a legitimate exercise of his discretion. As I have said, quoting the factual circumstances, the appellant did not admit these offences to police when he was first interviewed which this court has said is necessary for getting a full discount. He did not plead guilty to all the charges at his first arraignment, he only pleaded guilty to three of them at the second arraignment and he was ultimately convicted of the fourth count. While it might be said that the discount of 1 year against 10 years was at the lower level of what a judge might have allowed we would not have been ready to interfere with

the sentence if that point had stood alone. However, taking into account the previous cases, taking into account that there were some pleas here and taking into account the fact that the intruders did not in fact carry out what seems to have been their intention of giving a beating to the young man in the house, we do take the view that the 10 year starting point was excessive and we find it sufficiently excessive to come within the rubric of being manifest. Taking all the circumstances into account we do feel and conclude that the learned judge would have been entitled to impose a sentence of 9 years if the matter had been fully contested. We therefore consider that applying a reasonable and informed approach to the issue of discount in the light of the facts here that we will reduce the sentence from 9 years to 8 years' imprisonment.