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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DANIEL RAYMOND DUNLOP

Before: Morgan LCJ, McCloskey LJ and Huddleston J

Mr R McConkey BL (McConnell Kelly and Company Solicitors) for the Appellant

Mr R Steer BL (Public Prosecution Service) for the Prosecution

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McCloskey LJ (delivering the judgment of the court)

Preface

Further to the *ex tempore* decision of the court pronounced on 06 December 2019 this judgment contains our more detailed reasons.

Introduction

[1] This appeal against sentence is brought with the leave of the single judge. The Appellant received a custodial sentence of 20 months, divided equally between imprisonment and licenced release, in respect of the following offences:

a) Count 1: supply of a Class A drug (cocaine) contrary to section 4(3)(b) of the Misuse of Drugs Act 1971.
b) Count 2: supply of a Class B drug (cannabis) contrary to section 4(3)(b) of the Misuse of Drugs Act 1971.

Trial History

[2] The offending occurred on 30 October 2015. On 22 January 2019 the Appellant was committed for trial in the Crown Court. Upon arraignment on 4 March 2019 he pleaded not guilty to both counts. At his re-arraignment on 16 May 2019 the Appellant pleaded guilty to both counts. His plea of guilty was made on re-arraignment. On 27 September 2019 he was sentenced in the terms already indicated. Notice of Appeal was lodged on 24th October 2019. The decision and Order of the single judge are dated 14 November 2019.

The Offending

[3] On 30 October 2015 police officers conducted a planned stop and search of a vehicle proceeding from the Stena Cairnryan ferry. The Appellant was one of three occupants. A postage receipt was found. The police intercepted the items posted and seized two packages; one containing 117.08 grams of cocaine at 8% purity and the other containing 966 grams of cannabis. All three persons were prosecuted.

Previous Convictions

[4] The Appellant has a substantial criminal record, comprising 61 previous convictions, three of which relate to possession of drugs (cannabis). Some analysis of his previous offending is appropriate. His 63 previous convictions, which date from the age of 16, include three drugs offences committed between 2004 and 2008. These entailed two offences of possession of a Class C controlled drug and one of possessing a Class B controlled drug. These offences were penalised by modest fines and destruction/forfeiture measures. Road traffic offences form the largest group in the criminal record. All of the Appellant's previous offences were prosecuted summarily, with the signal exception of robbery and thefts (in July 2012) which were punished by a determinate custodial sentence entailing two years and three months imprisonment, coupled with a licensed release period of two years and nine months. The two index offences were committed during the licence period, some three years before the self-referral noted below.

The Appellant

[5] From the pre–sentence report one learns that the Appellant -

(a) Is unemployed and is in receipt of benefits.

(b) Lives with his partner and their young daughter.

(c) Asserts that he is no longer a drug user; No longer misuses drugs and alcohol; references provided to the court confirm his desire for positive change.

(d) Had a stable upbringing but both parents were heavy users of alcohol and the family struggled financially.

(e) Was diagnosed with ADHD as a child and received medication for same, struggled educationally and worked as an occasional labourer but has been unemployed for a number of years.

(f) Started using cannabis as a teenager and this progressed to cocaine addiction.

(g) Expresses remorse.

(h) And, finally, is assessed as a medium risk of re-offending and not posing a risk of serious harm to others.

[6] The psychological report prepared by Dr Carol Weir, consultant clinical psychologist dated 20 June 2019 contains a detailed personal history. It records the Appellant's assertion that -

> *" … his attitude and outlook has changed as a result of the professional input he has sought and received*".

Dr Weir identified the goals for the Appellant as maintaining continued abstinence from cocaine, the cessation of cannabis consumption and gaining employment.

[7] The aforementioned reports were supplemented by materials, in the form of information and testimonials, emanating from the organisations Extern and Addiction NI. These disclose that the Appellant has been engaging with these agencies since August 2018, following self-referral. They contain the following statements:

> "[The Appellant is] *a valuable member, helping to support others in their recovery …*
>
> *Not only does* [he] *support others in the groups he is actively motivating and recruiting new members in the community and encouraging them to refer to ANI … he has made positive changes regarding his way of thinking and his lifestyle …* [and] *… has become a role model and an advocate for others, he has a genuine care for others who are struggling with addiction …*
> [Extern] …
>
> *Daniel participates enthusiastically in group exercises and shows a keen interest in all aspects of the vocational training. Daniel is a punctual, conscientious and diligent*

individual … [and] *… is making steady progress through the course having already completed his forklift licence and is clearly finding it a resource for self-reflection and a means of seeking stable employment upon completion.*"

[8] When interviewed by the Probation Officer (*supra*) the Appellant reported that he had desisted from the misuse of drugs. The foregoing third party reports and testimonials were available to the officer, who commented that they "*… highlight extremely positive involvement … and motivation to maintain positive change*". The officer considered the Appellant a suitable candidate for a non-custodial disposal entailing probation or community service or a combination order which would enshrine drug counselling and/or treatment requirements.

The Sentencing

[9] The sentencing of the Appellant was via the following path. The judge:

(a) noted the factual matrix of the offending;

(b) accepted that there was an unjustifiable delay in the prosecution [41 months from arrest to arraignment and circa 47 months to trial];

(c) acknowledged the guilty plea, while observing that reduced credit would be appropriate due to its lateness.

(d) noted Appellant's criminal record, the aforementioned reports and the positive testimonials from Addiction NI.

(e) observed that the index offences were committed when Appellant was on licence for previous robbery and theft offences.

(f) identified Appellant's reported recovery from addiction which is a mitigating factor; and, finally

[10] The judge considered that the starting point for supply of class A drugs is 3.5 years. To reflect the Appellant's rehabilitation and the unjustifiable delay in the prosecution the judge reduced the starting point by one year to 2.5 years. Credit of 20% for the guilty plea was then applied. In this way the ultimate terminus was a sentence of 20 months imprisonment divided equally between custody and licenced release.

Grounds of Appeal

[11] The sentence is challenged on the global ground that it is manifestly excessive. As pleaded, this overarching contention has three discrete components: [1] the failure to suspend the sentence; [2] the attribution of insufficient weight to the

strong mitigation in respect of the Appellant's difficult background and the significant change in his circumstances documented in the sundry testimonials; and [3] making inadequate allowance for the factor of delay.

Decided Cases

[12] The maximum sentence for supply of a Class A drug contrary to section 4(3)(b) of the Misuse of Drugs Act 1971 is life imprisonment and in relation to class B drugs is 14 years imprisonment on indictment. The decision of this court in R v McKeown and R v Han Lin, DPP's Reference No 2 of 2013 [2013] NICA 28 at [16], (applying *R v Hogg and others* [1994] NI 258) establishes what may be termed the strong general rule that the offence of supplying drugs will … *"in all but exceptional cases…attract an immediate custodial sentence"*. The judgment continues:

> *"Much will depend on the circumstances of the supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record, together with his or her individual circumstances."*

[13] In M*cKeown & Han Lin* this court, unsurprisingly, did not embark upon any illustration or elaboration of what might rank as an exceptional case justifying a non-custodial disposal for this kind of offending. Some useful guidance can be found in three decisions of the English Court of Appeal, namely *Attorney-General's Reference No 101 of 2009* [2010] EWCA Crim 238 (*Matheson*) which commented upon *R v Alfonso & Ors* [2004] EWCA Crim 2342 and *Attorney General's Reference No 64 of 2003 (Boujettif and Harrison)* [2003] EWCA Crim 3514.

[14] In the first of this trilogy of cases, *Boujettif & Harrison*, the Court of Appeal formulated two qualifying conditions to be satisfied in order to justify a non-custodial disposal for this kind of offending:

(I) the offence must be of a kind which if punished by a non-custodial disposal public confidence in the criminal justice system will not be undermined; and

(II) there must be a proper basis justifying a real reason to believe the defendant wants to rid himself of drugs.

In that case the Court examined the propriety of imposing a drug treatment and testing order ("DTTO") in a context where a custodial sentence of up to four years imprisonment would normally have been appropriate (in the A-G's reference), in tandem with an appeal against a sentence of four years imprisonment where it was contended that a DTTO should have been imposed. The reference was dismissed and the appeal against sentence succeeded, the court substituting a community rehabilitation order.

[15] In *Matheson* the defendant was sentenced to 12 months' imprisonment suspended for two years, coupled with a supervision requirement and a drug rehabilitation requirement of 12 months' duration for the offences of possession with intent to supply 30 grams of cocaine and 10 grams of cannabis. There was evidence

indicating that the defendant had begun turning his life around. The Attorney-General challenged the sentence under the unduly lenient statutory regime. Dismissing the challenge, the Court of Appeal stated at [6]:

> "*The Recorder was well aware that what he was doing was a departure from what might be expected in the ordinary run of supplying cases.*"

Having observed that the crux of the case was the defendant's opportunity to turn his life around the court took cognisance of the two principal conditions (at [13]) formulated in *Boujettif & Harrison,* concluding that the Recorder had made no sentencing error. It observed that every judge who, based on evidence, imposes this type of sentence is "*always to an extent taking a risk*". While it had transpired that the defendant had not managed to turn his life around the Court considered that its task *"[was] not to second-guess the judge with hindsight"* but to decide if the sentence passed was wrong in principle, concluding that it was not: see [21].

[16] The key passage in *Matheson* is at [12]:

> "*We want to say absolutely nothing which is capable of discouraging sentencing judges in the Crown Court from passing in a suitable case sentences of either drug treatment and testing orders (where still available) or community orders or sometimes (as here) suspended sentences with a drug rehabilitation requirement.* ***Such orders are capable of being constructive, of capitalising on motivation to change and thus they are capable of being very much in the public interest. If a drug addict who is also in consequence a criminal can indeed be helped to put his use and abuse of drugs behind him, with that will pass habitual criminal offending, that is in everybody's interest.***"

[Emphasis added.]

Noting that the case in question would normally have attracted a sentence of imprisonment of 4½ to 5½ years duration, the court nonetheless emphasised at [15]:

> "*In the present case the offence was not one which although it normally carries a substantial sentence of imprisonment was outside those for which a rehabilitation requirement was put out of court by the impact that it would have on the public. In a proper case of this kind such an order could be made.*"

Ultimately the appellate court concluded that the sentence was not unduly lenient on the ground that the pre-sentence report, coupled with information relating to

positive developments in the offender's personal life, provided sufficient material to justify the sentencing course taken. The court recognised that any sentencing judge opting for this course "*… is always to an extent taking a risk*": see [16].

[17] The decision in *Matheson* is a reminder of one of the more hallowed principles of sentencing law, which has some purchase in the present context. In *R v Brannigan (DPP's Ref No 7 of 2013)* [2013] NICA 39 , at [10], this court cited *Attorney General's Reference (No 4 of 1989)* [1989] 11 Cr App R(S) 517, recalling the frequent judicial statement that -

> *"Sentencing is an art rather than a science and [that] an appeal court has to pay proper respect to the views of the sentencing judge."*

[18] Also to be reckoned is the well-established principle that the offender's good character, or good deeds, normally count for little in cases where the offending traverses a certain threshold of gravity. In this context there is a pertinent passage in *R v Stalford and O'Neill* (unreported, 3rd May 1996), which concerned drugs offences, where this court stated:

> "*… as was said in R v Slater and Scott 16 CAR(S) 870 at 877 "good character in offences of this gravity are of little importance …* [continuing] …
>
> *"While a late conversion to good sense and behaviour is an encouraging feature it must be looked at in the overall seriousness of the offending."*

The Factor of Delay

[19] There is ample authoritative guidance on the correct approach to Article 6 ECHR delay complaints in criminal cases. Article 6 ECHR, which belongs to an international treaty, is one of the rights protected by the machinery of the Human Rights Act 1998 ("*HRA 1998"*). Under the rubric of "*Right to a fair trial*" it provides, in material part:

> *"In the determination of …. any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time …."*

The question to be addressed by the sentencing court in an appropriate case is whether the defendant has been denied his right to a completed trial process within a reasonable time thereby infringing Article 6 ECHR, contrary to section 6 of the Human Rights Act 1998. In most cases the focus will be on the conduct, or inertia, of the PPS, the PSNI and other agencies such as NIFSL during the whole of the period under scrutiny.

[20] Where an alleged violation of any of the protected Convention Rights arises to be determined, an appreciation of the correct doctrinal approach is indispensable. The first step in the exercise is to identify the public authority against whom the complaint is directed. By section 6(1) of HRA 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention Right. Section 6(3) provides that "*a court or tribunal*" is embraced by the term "*public authority*". In the present case, at this appellate stage that is the Crown Court in which the Appellant was sentenced, given that in the appeal context the real complaint is that the sentencing judge has violated the defendant's Article 6 rights by making insufficient allowance for the anterior delay of other public authorities. At the trial stage the culpable public authorities were the PSNI, the PPS and (*semble*) NIFSL. The possibility in any case of the accused bringing separate civil proceedings against an allegedly culpable public authority of course exists.

[21] The next step in the exercise is to formulate the correct question. The question is not whether the public authority concerned (in this instance the court) *failed to have regard to or declined to consider, or did not fully consider,* the Convention right invoked. In the concrete context of the present case the question becomes: *did the sentencing of any of the Appellants by the Crown Court infringe their right to be tried within a reasonable time?* This is the approach mandated by the decisions of the House of Lords in *Belfast City Council v Miss Behavin'* [2007] UKHL 19 and *SB v Governors of Denbigh High School* [2006] UKHL 15.

[22] There is no shortage of guidance, both European and domestic, on how the reasonable time requirement enshrined in Article 6 is to be assessed and applied. In *Stugmuller v Austria* [1969] 1 EHRR 155 the ECtHR, in one of its earliest decisions, made clear that this is designed to protect parties against excessive procedural delays and, in the specific context of criminal cases, to address the mischief of protracted uncertainty and apprehension on the part of the accused: see especially [5]. Other recurring themes of the jurisprudence are that the State has an obligation to organise its judicial system in a manner which ensures compliance with the reasonable time requirement; there is no absolute time limit; every case is fact sensitive; and a fair balance is to be struck between the need to conduct judicial proceedings expeditiously and the more general principle of the proper administration of justice, itself also derived from Article 6(1): see, for example, *Pafitis v Greece* [1999] 27 EHRR 566 at [97].

[23] In *Attorney General's Reference No 2 of 2001* [2003] UKHL 68, the House of Lords provided extensive guidance (per Lord Bingham of Cornhill) at [20] – [23] in a lengthy treatise worth reproducing in full:

> "*[20] It is a powerful argument that, if a public authority causes or permits such delay to occur that a criminal charge cannot be heard against a defendant within a reasonable time, so breaching his Convention right guaranteed by art 6(1), any further prosecution or trial of the charge must be*

unlawful within the meaning of s 6(1) of the 1998 Act. Not surprisingly, that argument has been accepted by highly respected courts around the world. But there are four reasons which, cumulatively, compel its rejection. First, the right of a criminal defendant is to a hearing. The article requires that hearing to have certain characteristics. If the hearing is shown not to have been fair, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If the hearing is shown to have been by a tribunal lacking independence or impartiality or legal authority, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If judgment was not given publicly, judgment can be given publicly. But time, once spent, cannot be recovered. If a breach of the reasonable time requirement is shown to have occurred it cannot be cured. It would however be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other art 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all.

[21] Secondly, as the Court of Appeal recognised, at p 1875, para 19 of its judgment, a rule of automatic termination of proceedings on breach of the reasonable time requirement cannot sensibly be applied in civil proceedings. An unmeritorious defendant might no doubt be very happy to seize on such a breach to escape his liability, but termination of the proceedings would defeat the claimant's right to a hearing altogether and seeking to make good his loss in compensation from the state could well prove a very unsatisfactory alternative.

[22] Thirdly, a rule of automatic termination on proof of a breach of the reasonable time requirement has been shown to have the effect in practice of emasculating the right which the guarantee is designed to protect. It must be recognised, as the Privy Council pointed out in Dyer v Watson [2002] UKPC D1, [2002] 3 WLR 1488, 1508, para 52, that the Convention is directed not to departures from the ideal but to infringements of basic human rights, and the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. Judges should not be vexed with applications based on lapses of time which, even if they should not have occurred, arouse no serious concern. There is, however, a very real risk that if proof of a breach is held to require automatic termination of

the proceedings the judicial response will be to set the threshold unacceptably high since, as La Forest J put it in Rahey v R (1987) 39 DLR 481, 516, "Few judges relish the prospect of unleashing dangerous criminals on the public." La Forest J drew attention to the compelling observation of Professor Amsterdam, written with reference to American experience following the Supreme Court's decisions interpreting the Sixth Amendment to the United States Constitution in Barker v Wingo 407 US 514 (1972) and Strunk v United States 412 US 434 (1973):

> *'[T]he spectre of immunizing, of 'turning loose', persons proved guilty of serious criminal offenses has been thoroughly repugnant to judges, and they have accordingly held that shockingly long delays do not 'violate' the sixth amendment. The amendment has thereby been twisted totally out of shape – distorted from a guarantee that all accuseds will receive a speedy trial into a windfall benefit of criminal immunity for a very few accuseds in whose cases the pandemic failure of our courts to provide speedy trials has attained peculiarly outrageous proportions." Anthony G Amsterdam, Speedy Criminal Trial: Rights and Remedies (1975) 27 Stan L Rev 525, 539.'*

***[**23] Fourthly, the Strasbourg jurisprudence gives no support to the contention that there should be no hearing of a criminal charge once a reasonable time has passed. It is of course true that the European Court examines cases retrospectively and never prospectively, and it cannot quash convictions. But it is significant that in its interpretation and application of the Convention it has never treated the holding of a hearing as a violation or a proper subject of compensation. In X v Federal Republic of Germany (1980) 25 DR 142 a convicted criminal claimed a right to discontinuation of the criminal proceedings in view of the delays which had occurred. The Commission was sceptical (p 144) that such a right could be deduced from the Convention, but if it did it would only be in very exceptional circumstances. Such did not exist, so the application was found to be inadmissible. The Court found a breach of the reasonable time requirement in Eckle v Federal Republic of Germany (1982) 5 EHRR 1, but when considering just satisfaction for the protracted proceedings*

in Eckle v Germany (1983) 13 EHRR 556, 559, para 20, disavowed any "implication, that their prosecution, conviction and imprisonment were also in breach of the Convention. The sole matter to be taken into consideration is thus the prejudice possibly entailed by the fact of the two proceedings in question having lasted beyond a 'reasonable time'."

In *Neubeck v Federal Republic of Germany (1985) 41 DR 13 the Commission found (p 35, para 138) that there had been no sufficiently clear reduction of the sentence on account of delay, but there was no hint that the applicant was entitled to be compensated for having been imprisoned. The most explicit statement by the Court is to be found in Bunkate v Netherlands (1993) 19 EHRR 477, 484, para 25:*

> *'The applicant's claims are based on the assumption that a finding by the Court that a criminal charge was not decided within a reasonable time automatically results in the extinction of the right to execute the sentence and that consequently, if the sentence has already been executed when the Court gives judgment, such execution becomes unlawful with retroactive effect. That assumption is, however, incorrect.'*

The Court found a violation of art 6(1) but rejected the claim for just satisfaction. In Beck v Norway Application No 26390/95, (26 June 2001, unreported) the Court found that there had been no violation where the length of the criminal proceedings had earned the applicant a reduction of sentence."

[24] Lord Bingham developed the just satisfaction theme at [24]:

"[24] If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under art 6(1). For such breach there must be afforded such remedy as may (s 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the

hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."

At [26] – [28] Lord Bingham addressed the inter-related questions of when, for the purposes of Article 6(1), a person becomes subject to a criminal charge, ie when does the reasonable time begin?

"[26] The requirement that a criminal charge be heard within a reasonable time poses the inevitable questions: when, for purposes of art 6(1), does a person become subject to a criminal charge? When, in other words, does the reasonable time begin? In seeking to give an autonomous definition of "criminal charge" for Convention purposes the European Court has had to confront the problem that procedural regimes vary widely in different member states and a specific rule appropriate in one might be quite inappropriate in another. Mindful of this problem, but doubtless seeking some uniformity of outcome in different member states, the Court has drawn on earlier authority to formulate a test in general terms. It is found in para 73 of the Court's judgment in Eckle v Federal Republic of Germany (1982) 5 EHRR 1, 27 (footnotes omitted):

> *'1. Commencement of the periods to be taken into account*
>
> *73. In criminal matters, the 'reasonable time' referred to in Article 6(1) begins to run as soon as a person is 'charged'; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. 'Charge', for the purposes of Article 6(1), may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'. [Deweer v Belgium (1980) 2 EHRR 439 459, para 46].'*

[27] As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him. This formulation gives effect to the Strasbourg jurisprudence but may (it is hoped) prove easier to apply in this country. In applying it, regard must be had to the purposes of the reasonable time requirement: to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods. The Court of Appeal correctly held (at p 1872, para 10 of its judgment) that the period will ordinarily begin when a defendant is formally charged or served with a summons, but it wisely forbore (pp 1872-1873, paras 11-13) to lay down any inflexible rule.

[28] The interviewing of a person for purposes of a regulatory inquiry in England and Wales will not meet the test laid down above: Fayed v United Kingdom (1994) 18 EHRR 393, 427-428, para 61; IJL, GMR and AKP v United Kingdom (2000) 33 EHRR 225, 258-259, para 131. Nor, ordinarily, will time begin to run until after a suspect has been interviewed under caution, since Code C made under s 66 of the Police and Criminal Evidence Act 1984 generally requires the charging process to be set in train once an interviewing officer considers that there is sufficient evidence to prosecute a detained person and that

> *there is sufficient evidence for a prosecution to succeed. In Howarth v United Kingdom (2000) 31 EHRR 861, [2001] Crim LR 229, the European Court held that the period had begun with the first police interview of the defendant, but only four-and-a-half months separated that interview from the charge and attention was largely focused (p 865, para 20) on the passage of time between sentence and final determination of a reference by the Attorney General under s 36 of the Criminal Justice Act 1988. Arrest will not ordinarily mark the beginning of the period. An official indication that a person will be reported with a view to prosecution may, depending on all the circumstances, do so."*

[25] Lord Bingham's formulation of the Article 6 autonomous concept of when a person becomes subject to a criminal charge is couched in the terms of a general, not absolute, principle. It evolved somewhat in *Ambrose v Harris* [2011] UKSC 2435, as noted by Stephens LJ in *Cushnahan* v *British Broadcasting Corporation* [2017] NIQB 30 at [18] – [20]. In *Ambrose* Lord Hope stated at [62], without express reference to Lord Bingham's formulation:

> "*The test is whether the situation of the individual was substantially affected…*" [so that] *… a substantive approach, rather than a formal approach, should be adopted* [which] *… should look behind the appearances and investigate the realities of the procedure in question*":

This will potentially be a nebulous and evasive question in some cases, one might observe.

[26] *Ambrose* was followed (in time) by *O'Neill v HM Advocate (No 2)* [2013] UKSC 36, where the test devised by Lord Hope, namely "*… the date as from which (the defendant's) position has been substantially affected by the official notification"* (see [34]) represents another adjustment. As *O'Neill* makes clear, an "official notification" can occur verbally in a police interview. *O'Neill* also illustrates that detailed examination by the court of interview records and kindred materials may be necessary in certain instances. Lord Bingham's simpler and more pragmatic test would appear to have been overtaken. Finally, *O'Neill* decided unequivocally that the Article 6 right to trial within a reasonable time has a free standing existence, in the sense that it does not form part of an accused person's fair trial rights. As Lord Hope stated at [34], this discrete right is concerned with –

> "*… the running of time, not on what is needed to preserve the right to a fair trial.*"

[27] In *Dyer v Watson* [2004] 1 AC 379, the Privy Council provided guidance on the correct approach to determining whether the period under scrutiny is unreasonable. See especially [53] – [55] (again per Lord Bingham):

> "*[53] The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.*
>
> *[54] The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.*
>
> *[55] The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured.*"

[28] This approach was endorsed subsequently by the Board in *Boolell v State of Mauritius* [2006] UKPC 46. In its later decision in *Rummun v Mauritius* [2013] UKPC 6, the Board noted the relevance of considering whether the accused had made representations protesting about delay at any stage of the trial process: see [16] – [17]. At [18] the Board highlighted the caution to be exercised when considering an argument that the accused had been advancing a spurious defence or contesting the case on grounds that were not tenable: Lord Kerr observing at [18]:

> "*A Defendant to any criminal charge is entitled to put the prosecuting authorities to proof of his guilt. The Board considers that the circumstances in which, by reason of a not guilty plea, a trial is delayed call for anxious scrutiny before he is penalised for such delay.*"

[29] The most important general principles to be distilled from the binding decisions of the House of Lords and UK Supreme Court considered above are the following:

(i) The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed.

(ii) In determining whether a breach of the reasonable time requirement has been established the court will consider in particular but inexhaustively, the complexity of the case, the conduct of the Defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap.

(iii) Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration.

(iv) In cases where a breach of the reasonable time requirement is demonstrated the question of remedy must be considered: see in this context section 8 of the Human Rights Act 1998.

(v) The appropriate remedy is not to discontinue the prosecution or to stay it as an abuse of process, much less to launch judicial review proceedings.

(vi) The appropriate remedy (or "just satisfaction") will depend upon the nature of the breach, considered in conjunction with all relevant circumstances, including particularly the stage of the proceedings at which the breach is established. Other case sensitive facts and factors may feature.

(vii) Remedy options include a public acknowledgement of the breach, steps to expedite completion of the trial process and the release of the accused on bail.

(viii) Specifically, one of the remedy options is "*a reduction in the penalty imposed on a convicted Defendant*".

[30] In this jurisdiction the cases in which Article 6 ECHR delay issues have arisen include *R v McGeough* NICA 22 at [16] and *R v Rodgers* [2017] NICA 20. In *Rodgers* this court stated at [17]:

> *"While the judge did say that she had taken account of what she rightly called "the considerable delay" …it is not at all clear how or to what extent such account was taken."*

Sentencing judges will doubtless have taken note. The duty in play is the requirement to provide a reasoned judicial decision.

Delay: the present case

[31] One of the grounds of appeal is that the sentencing of the Appellant made inadequate allowance for the delay in bringing the case to court. The judge expressly recognised there was "*unjustified delay*"[1] which the court was "*… required to take into account in assessing the appropriate sentence.*" While considering that the appropriate starting point for the offences in question would normally be three years "*before credit for a plea or other reductions*", the judge adopted one of 2 ½ years for the expressed reason of "*taking account of the rehabilitation that you have shown*". The next step was to reduce this (reduced) starting point by six months "*to reflect the delay in this case*", followed by a further reduction of 20% "*to reflect your late plea*". By this route the judge determined a sentence of 20 months to be evenly divided between custody and licenced release. The *Rodgers* criticism of opaque reasoning certainly cannot be levelled at the sentencing judge.

[32] This court made clear at the hearing its substantial concerns about the delays in the prosecution of the Appellant. The figures are stark. A period of fractionally less than four years elapsed from the arrest of the Appellant and the two co-accused until the completion of their sentencing. The PPS chronology reveals unexplained delays between the "*triage examination*" of mobile phones seized immediately and their much later "*specialist examination*". The phones then underwent a third type of testing, described as "*for evidential data*". The defendants were not interviewed until almost two years following their initial arrest and subsequent release on bail. There was a discrete delay of 21 months between the submission of the PSNI file to the PPS and the completion of the sentencing exercise. The Statement of Complaint post-dated the offences by some three years.

[33] The court raised a series of questions with prosecuting counsel. Instructions were sought and answers provided. A detailed judicial examination of various segmental periods of delay was undertaken. As a result it is likely that this court was better informed on the issue of delay than the sentencing judge. We consider that the delay in prosecuting the Appellant and bringing the trial process to completion was both inordinate and disturbing.

[34] The sentencing court expressed itself "*required*" to effect some reduction in the Appellant's sentence in order to reflect the delays in the prosecution. While this is not strictly correct, having regard to the range of measures which, by reason of the

[1] Sentencing Remarks, page 2 line 25

House of Lords jurisprudence considered above, may be available, this court nonetheless recognises that it has become the practice of sentencing judges in this jurisdiction to make allowance for Article 6 ECHR delay by adjusting custodial sentences downwards. While it is possible that on appeal, or reference, this might not be sanctioned in an individual case there is no error of principle in this general approach.

[35] Reflecting our characterisation of the delays in the prosecution of this Appellant as inordinate and disturbing and with the benefit of a more detailed examination of this issue, we consider that insufficient allowance was made for this factor by the sentencing judge. This is our first main conclusion.

[36] We turn to consider the judge's assessment of the *Boujeitif and Harrison* "*principal conditions*". Addressing the first of these, namely public confidence in the criminal justice system, the judge observed that the commercial supply of Class A drugs and the consequences, which can include "*young people … dying on the streets*" were such that the first condition could not be satisfied. In thus concluding the judge did not undertake any examination of the *Matheson* principles and reasoning. Nor was any mention made of the Appellant's striking rehabilitation progress in the relevant passage. This assessment was expressed in purely abstract terms.

[37] The decision in *Matheson* highlights the multi-layered nature of the public interest in the rehabilitation of offenders. The beneficiaries of the rehabilitation of an offender are the public at large, the offender and the offender's social, community and family circles. Moreover there will usually be some benefit to the economy. Issues of rehabilitation in the sentencing of an offender will invariably entail a balancing exercise. Broadly this will normally involve the balancing of rehabilitation, retribution and deterrence in the fact sensitive individual case. As *Mathieson* makes clear rehabilitation can, in an appropriate case, attract determinative weight. In the specific context of the drugs offences considered in the decision of this court in *McKeown* and *Han Lin* a persuasive case for rehabilitation, supported by appropriate evidence, can potentially warrant the conclusion that exceptionally a non-custodial disposal is the appropriate sentencing course. The requirement of exceptionality can in principle be satisfied in this way. It is appropriate to add that in the practice of the High Court there is an increasing emphasis on the formulation of constructive bail orders.

[38] We consider that the two *Boujeitif and Harrison* "*principal conditions*" should have been considered by the sentencing judge in tandem since (per the second condition) the strength of the case "*justifying a real reason to believe that the Defendant wants to rid himself of drugs*" will normally have the potential to inform the court's assessment of the first condition, that of public confidence in a non – custodial disposal. This exercise was not undertaken in the sentencing of the Appellant. While the judge's formulation of public concern about this type of offending is unexceptional, only one side of the notional coin was considered. Equally no

consideration was given to the multi-layered public interest in the matter of rehabilitation.

[39] In the present case there was potent, compelling evidence favouring a constructive non-custodial disposal in order to give primacy to the public interests promoted by the rehabilitation of this offender. While the volume of drugs relating to this Appellant's offending is significantly greater than that in *Matheson*, the resolution of this appeal does not turn on inappropriate factual or numerical comparisons. This appeal, rather, hinges on the question of sentencing principle concerning the public interest promoted by rehabilitation generally and, specifically, the rehabilitation of this offender.

[40] Our second main conclusion is that, for the reasons given, both the approach adopted and the weight accorded by the sentencing judge to the factor of the Appellant's rehabilitation were erroneous in law. When one grafts onto this our separate conclusion that the delay in prosecuting the Appellant was inordinate and disturbing the ground is firmly laid for the recognition of an exceptional case within the *McKeown* & *Han Lin* framework. We conclude that this is such a case.

[41] At the conclusion of the hearing on 05 December 2019 the Appellant confirmed that he would consent to a probationary disposal. We allowed the appeal and substituted a combination order comprising 100 hours community service and a period of three years' probation.