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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT IN NORTHERN IRELAND (DOWNPATRICK)

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BETWEEN:

REGINA

-and-

BRADLEY HAMILTON

_____

Before: McCloskey LJ, Maguire J and Sir Paul Girvan

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Bradley Hamilton ("*the offender*") aged 20 years, was prosecuted on indictment for the offences of (a) robbery, entailing the seizure of cash and cigarettes valued at approximately £900 from a retail store and (b) possession of an offensive weapon, being a knife, with intent to commit the indictable offence of robbery. Both offences were allegedly committed on 22 October 2018. The offender pleaded guilty to the first count (robbery) upon arraignment on 26 June 2019. On 03 June 2019, at a review listing, the prosecution in effect accepted this plea, with the second count being "*left on the books*". In this way the proposed trial scheduled for 02 October 2019 was vacated. On 26 September 2019 the offender was sentenced by the Crown Court to five years and four months imprisonment, to be divided equally between detention and licenced release.

[2] The offender's application for leave to appeal to this court was refused by the single judge, McAlinden J, on 13 January 2020. He renews his application to this court.

Agreed Basis of Plea

[3] The "*Statement of Facts*" on the basis whereof the offender was sentenced is in the following terms:

> ***Statement of Facts***
>
> *On 26 June 2019 the Defendant was arraigned and pleaded Guilty to Count 1 (Robbery) and Not Guilty to Count 2 (possessing a knife with intent to commit an indictable offence).*
>
> *His co-defendant pleaded Not Guilty to the 2 counts she faced (receiving stolen goods and possession of criminal property)*
>
> *The trial was listed for 02 October 2019.*
>
> *On 03 July the case was listed for review. On that date the prosecution applied to leave counts 2 to 4 on the books in the usual terms on the basis that Hamilton was accepting responsibility on a full facts basis as follows:*
>
> ***Background***
>
> *Just after 06 00 on 22 October 2018 police were alerted to a robbery at Eurospar on Downpatrick Road, Ardglass. The panic alarm had been activated by staff. The store was just opening at that time; one customer had used the petrol pump but had left by the time the Defendant entered the store.*
>
> *The Defendant was wearing a green parka and he had the hood up, partially covering his face. He lifted a bottle of juice and approached the till. He looked at staff member Rae McClurg before setting the drink to one side and walking out. He returned a few moments later and walked straight to the till, where Ms McClurg was still standing. He had a kitchen knife in his right hand. The blade was approximately 10 to 12 inches. He was waving the knife and repeatedly shouting "Hand me over your money. I want it now."*
>
> *Ms McClurg had no keys for the till and another staff member suggested she put through a plastic bag to open the drawer. When she did this, the Defendant lifted out x3 £5 notes. He had not been wearing gloves. After he removed the notes he put his sleeve over his hand and rubbed the inside of the till. He demanded more money and cigarettes. Staff opened the gantry and threw cigarette packets at him. The Defendant put the packets in to a plastic bag which he had found at the till. Staff noted that he had blood on his right hand and also saw blood on the bag.*
>
> *When police arrived they spoke Ms McClurg who described the culprit in some detail. The incident was captured on CCTV.*
>
> *Police looked for the Defendant in the local area but to no avail.*

CSI analysis of the scene was conducted.

As a result of police enquiries, Hamilton was suspected. It was known that his then girlfriend lived at nearby Mill River Close. This is about 400 m away from the Eurospar store. A search warrant was obtained for this address.

On Monday 22 Oct 2018 at 17 10 hours the search was conducted. The Defendant, his girlfriend and another male were present. Officers found a number of items hidden behind a hot water cylinder inside an airing cupboard. These items had been carefully concealed and could not be seen upon opening the cupboard door:

- *Green coat with fur lined hood and blood at right pocket*
- *Eurospar bag containing approx. 30 packets of cigarettes. Blood on bag*

In the kitchen, officers found a pair of tracksuit bottoms with blood at the right pocket as well as a black handled knife. Various smaller quantities of cigarettes were located around the house as well as items of clothing and footwear similar to that seen on CCTV.

In total 32 packets of cigarettes were recovered, from 9 different brands (value £264). These were sealed and fit for resale.

3 x £5 notes were also recovered.

Staff have recounted in their statements how they were left in a state of shock.

Hamilton was arrested and interviewed twice on 23 October 2018. He gave mainly no comment. He was offered a VIPER and, despite his initial consent to this, he declined to attend.

A previous video capture of the Defendant was used in a compilation and on 12 Feb 2019 he was picked out by Ms McClurg during a VIPER procedure. She had seen the Defendant in the store previously and recognised his voice; she also knew him to have a girlfriend named "Shannon".

His DNA was found on the blood on the Spar bag which was recovered at Mill River Close and contained the cigarettes. This matched the bag taken from the store.

The Defendant is 19 years old and he has previous convictions. At the time of this incident he was subject to a number of suspended sentences imposed on:

14.11.17

15.05.18

04.10.18

He had also been conditionally discharged on 02.08.18

Criminal Record

[4] The offender is, sadly, fast becoming a career criminal. At the age of 20 years he has accumulated a total of 87 convictions. He first began offending when aged 13 years and has continued to do so with regularity thereafter. His criminality has been varied, encompassing the offences of arson, burglary, common assault, criminal damage, possession of offensive weapons, road traffic offences and public order offences. In addition he has committed multiple breaches of youth conference orders and bail orders. Successive courts have attempted a range of disposals: probation, juvenile justice centre detention, youth conference orders, conditional discharges, driving disqualifications and suspended sentences. Of particular significance in the present context is that on the date of his offending the offender was the subject of a total of 24 suspended sentences, for periods of imprisonment ranging from three to six months, which had been imposed at court hearings conducted on 14 November 2017, 15 May 2018 and 4 October 2018. Furthermore on 02 August 2018 he had been sentenced by the imposition of five concurrent conditional discharge orders having a duration of 18 months. These 29 sentencing orders were live and current on the date of his offending. The most recent of them, entailing two concurrent sentences of three months' imprisonment suspended for one year, had been imposed just two weeks earlier.

Reports

[5] The sentencing judge had available to him the following two reports:

(a) The **pre-sentence report**. This documents (per the offender's self-reporting) a dysfunctional upbringing, fragmented education, a diagnosis of ADHD, virtually no gainful employment, heavy misuse of alcohol and drugs, the provision of medication and engagement in therapy. The excuse proffered for his offending was heavy substance misuse and his father's diagnosis of terminal cancer. He professed remorse. The probation officer assessed his likelihood of reoffending as elevated. Other prosecutions are pending. He was assessed as "*not posing a significant risk of serious harm to others*". The author of the report highlighted "*substances misuse, associated willingness to engage in risk taking behaviours and distorted thinking*". He was considered a suitable candidate for probationary supervision and community service.

(b) A **report of Dr Michael Curran, Consultant Psychiatrist**. This is dated 22 July 2019. It records *inter alia* several disciplinary adjudications (without elaboration) and the loss of enhanced prisoner status. The offender's medication consisted of prescribed tranquillisers and antidepressants, together with "*ADHD medicine*". The offender self-reported that he is the

subject of adverse paramilitary gang attention. He asserted that he had been in a stable heterosexual relationship for some 16 months. Dr Curran's report describes *inter alia* "*… near normal intellect … decompensation in his psyche … addictive behaviours ….* [and possible further] *psychotropic medications*". The consultant opined that "*Further therapeutic work is necessary to explore aspects of victim awareness and the implication of his recurrent delinquency on others*". Dr Curran positively declined to predict that upon release the offender's "*… excessive and aberrant behaviours will become less challenging to society*" while noting the offender's good intentions in this regard.

(c) A note from the "Start 360" organisation – regrettably undated – states that the offender had been engaged in a total of eight sessions focusing on his "*drug use, behavioural patterns and coping strategies*", noting continued engagement and support and his accommodation in a drug free landing in Hydebank College.

The Sentencing of the Offender

[6] The sentencing decision under challenge may be analysed in the following way: having regard to the guidelines decisions of this court, the starting point for a robbery of shop premises could not be less than eight years; mitigating factors must then be balanced; the prosecution's suggested aggravating factors of the use of a weapon to threaten violence, the targeting of a small business, the vulnerability of the employees and the offender's criminal record were evidently accepted; the offender's comparative youth and "*poor mental health*" were evidently identified as mitigating factors; notwithstanding his belated plea of guilty he would be credited with "*the maximum discount of one third*"; the court would decline to activate any of the suspended sentences; the appropriate starting point was eight years; this would be reduced to five years and four months "*after due allowance for the guilty plea*".

Grounds of Appeal

[7] These are encapsulated with commendable concision in the skeleton argument of Mr Richard McConkey (of counsel):

> "*… the young age of the* [offender] *and his exceptionally difficult personal circumstances and mitigation should have led to the judge selecting a starting point below eight years.*"

This is, incontestably, a "*manifestly excessive*" ground rather than one of the "*wrong in principle*" variety. Mr McConkey replied affirmatively when the court sought confirmation of this assessment at the outset of the hearing.

[8] The "*personal circumstances of the* [offender]*, particularly his age*" emerge as the centre piece of the appeal. The personal circumstances of the offender which, it is contended, the sentencing judge failed to adequately reflect are his condition of ADHD, diagnosed in his younger years; his father's terminal illness; the miscarriage suffered by his offender's girlfriend some two months post-offending; his post-custodial positive progress in addressing his demons; his troubled and dysfunctional upbringing and his youth, the index offence having been committed just some eight months after he had attained his majority.

[9] Probing by the court exposed two matters favourable to the offender which were not apparent from the appeal bundle. First, he wrote a letter of remorse and apology which stated *inter alia*:

> "*… I understand that stealing is wrong and what happened at the garage has taught me that the consequences are not worth the unlawful gain. I sincerely apologise for my behaviour and I regret my actions and would like to promise that the incident will not be repeated and I will not resort to such inappropriate behaviour again.*"

Second, evidently with the assistance of his family, reparation in the amount of around £200 cash was made by the provision of this sum to the police on the date of sentencing. In response to the court's pre-hearing directions concerning this issue the PPS confirmed that the only ascertainable financial loss to the retail establishment in question was £15. There was, therefore, a substantial overpayment. Neither of these matters features in the sentencing decision under appeal. Nor did the judge make any reference to the offender's professed remorse, documented in both the aforementioned letter and the probation report.

[10] It has been repeatedly stated by appellate courts that a convicted offender's personal circumstances rarely qualify for substantial mitigation. Having regard to the nature of the offending, the obvious factor of planning, the offender's criminal record – both duration and content – and his reckless disregard for the multiple suspended sentences and conditional discharges to which he was subject at the material time, his comparative youth (aged 19) and his troubled background and upbringing clearly count for very little. This analysis is reinforced by the consideration that, as a matter of sentencing principle, <u>deterrence</u> of both the offender concerned and other potential offenders is a major purpose of sentencing in cases of this nature.

[11] Mr McConkey stressed that the robbery was "*extremely amateurish and poorly planned*". The riposte must be threefold namely (a) it was obviously planned and (b) its shortcomings from the perspective of the criminal can have no bearing on the fruits of the offence and (c) its impact on those prejudicially affected, who must have been terrified, was unmitigated by this circumstance.

[12] Mr McConkey's submissions also highlighted that the offender's criminal record did not encompass any previous conviction for robbery. This, by well - established principle, is a matter of no moment, the more so in this case where the offender's criminal record is of major proportions. *Ditto* the absence of any assessment of "*dangerousness*" by either the professionals concerned or the sentencing court.

[13] The offender's case, perhaps unsurprisingly, fails to engage with his manifest failure to acknowledge his guilt at a considerably earlier stage. The first windfall of which he is the beneficiary is that the sentencing court generously gave him full credit for pleading guilty to the robbery count (only). The second windfall is that the sentencing court, without observing the statutory requirement to give reasons for this course, declined to activate any of the active 24 suspended sentences. Having made these two observations, the court accepts, as a matter of principle, that neither of these windfalls can operate to the offender's detriment in the determination of this appeal. Alternatively phrased, it is not the function of this appellate court to substitute, consciously or subconsciously, its view of what the more appropriate course would have been in respect of either the allocation of credit for a guilty plea or the non-activation of live suspended sentences.

[14] We do not overlook what has been noted in [9] above. However, it has been repeatedly recognised by this court that busy and experienced sentencing judges of the Crown Court are not subject to the counsel of perfection of identifying and evaluating every single material fact and factor in their sentencing decisions. An appellate court will normally assume that all reports and other documentary materials (character testimonials, letters *et al*) generated for and during a sentencing hearing were considered by the judge. There is no warrant for adopting any other approach in the present case.

[15] There being no ground of appeal based on asserted error of sentencing principle, the exercise for this court, as so often, is to stand back and evaluate the complaint that the sentence imposed was manifestly excessive, bearing in mind that this is not a first instance sentencing court and a reasonable margin of appreciation must be accorded to the sentencing judge. This court must also be alert to the need for the promotion of deterrence in evaluating sentencing in cases of this kind. As the analysis in [10] above amply demonstrates, the facts and factors aggravating the gravity of the offender's criminal conduct and his culpability substantially outweigh those matters in his favour which we have identified. This is a purely objective assessment at this remove, one which clearly reinforces the course taken by the sentencing judge.

[16] As the court's brief oral decision at the conclusion of the hearing made clear, the offender's legal representatives left no stone unturned in their preparation and presentation of this appeal. Taking into account the further information unearthed favourable to the offender, addressed in [9] above, we consider that, albeit by a

narrow margin, the grant of leave to appeal is appropriate. However, for the reasons given, the appeal must be dismissed.