Easter Term
[2022] UKSC 13
On appeal from: [2019] NICA 66

JUDGMENT

R *v* Maughan (Appellant) (Northern Ireland)

before

Lord Hodge, Deputy President
Lord Hamblen
Lord Burrows
Sir Declan Morgan
Lord Lloyd-Jones

JUDGMENT GIVEN ON
18 May 2022

Heard on 27 January 2022

Appellant
Martin O'Rourke QC
Steffan Rafferty BL
(Instructed by John J Rice & Co Solicitors (Belfast))

Respondent
Samuel Magee QC
Natalie Pinkerton BL
(Instructed by Public Prosecution Service for Northern Ireland (Belfast))

Intervener (Lord Advocate)
(written submissions only)
Her Majesty's Advocate
(Instructed by Appeals Unit, Crown Office (Edinburgh))

SIR DECLAN MORGAN: (with whom Lord Hodge, Lord Hamblen, Lord Burrows and Lord Lloyd-Jones agree)

1. The appellant pleaded guilty at arraignment on charges of aggravated burglary and stealing, false imprisonment, burglary, attempted burglary and allowing himself to be carried at Downpatrick Crown Court on 14 September 2017. In this appeal it is contended that the sentencing judge erred in reducing the discount to which he was entitled for his plea by reason (i) of his failure to accept responsibility for his offending behaviour when requested for interview after detention or to indicate his intention to plead guilty at any stage prior to arraignment and (ii) the fact that he was caught red handed in respect of some of the offences.

Background

2. The detection of the appellant and his brother, who was also his co-accused in most of these offences, occurred as a result of events in the late evening of 24 July 2016. At approximately 9.55 pm a 62 year old householder returned to the home that he shared with his two sisters in Newcastle, Co Down. As he opened the front door the appellant and his brother ran up behind him and made their way into the house. The appellant was brandishing a knife. His brother had a screwdriver and lifted a large carving knife threatening to kill one of the sisters. They searched the house for money and valuables which they gathered in a bag. One of the ladies had a chain pulled off her neck and her watch taken. They then made off in the householder's car.

3. The attack was reported to police that evening and at approximately 11.30 pm the vehicle was identified travelling through Belfast. There followed a high-speed chase at speeds of over 100 mph with the vehicle avoiding a stinger by going through a roundabout on the wrong side and travelling through red lights. When cornered the stolen vehicle was used to ram the following police vehicle and subsequently was driven directly at an officer pointing a rifle towards the vehicle.

4. Eventually the vehicle came to a halt and the appellant and his brother attempted to make a run for it. They were arrested without warrant shortly afterwards and a range of items from the property in Newcastle were recovered. On any view in respect of these incidents the offenders were caught red-handed.

5. Further enquiries established compelling evidence including CCTV that in the previous three days the appellant and his brother had attempted to burgle a Parochial House in Holywood, and committed an aggravated burglary of a Parochial House in

Finaghy, an aggravated burglary of a house adjacent to a Parochial Hall in Dungannon, an attempted burglary of a Parochial House in Castlewellan, and a burglary of commercial premises in Newcastle. The appellant had also committed an aggravated burglary in the Presbytery of St Peter's Cathedral in Belfast the previous year in the course of which the priest residing there was locked up overnight.

6. The morning following the appellant's arrest he was deemed fit for interview by the forensic medical officer. His solicitor and an appropriate adult attended but he refused to leave his cell. When an attempt was made to bring a mobile recording device to his cell that evening the appellant began screaming, preparing to spit and threatening to damage the cell if an interview was attempted. No interview was possible. No acceptance of responsibility for any of these matters was made.

7. The appellant was charged and brought before the Magistrates' Court on 26 July 2016. He was remanded in custody and committed for trial on 30 June 2017. He was arraigned on 14 September 2017 and pleaded guilty to the charges the subject of this appeal. He had given no prior indication of an intention to plead guilty. The case was adjourned for a pre-sentence report and a psychological report and he was sentenced on 21 December 2017.

8. In his sentencing remarks His Honour Judge Miller QC addressed the question of the discount for the plea in the following terms:

> "Having regard to this aspect I take the view, in line with the observations of the court in *R v Pollock* [2005] NICA 43 that the maximum reduction is only due to those who admit their guilt when first confronted with the allegation. Mr O'Rourke submitted the decision in *Pollock* was wrong but unless directed otherwise I intend to follow the principle stated therein. As indicated to counsel in view of the fact that neither defendant co-operated with police on arrest and given the fact that for certain of the offences they were either caught red-handed or the evidence against them was so overwhelming, I do not believe that either is entitled to full credit. That said their pleas at an early stage do warrant a significant discount, which I assess at 25% in respect of each defendant."

9. The Court of Appeal concluded that the sentencing policy on early admissions was more nuanced than described by the trial judge. The attitude at interview was

relevant but not decisive. The policy that an offender caught red handed should not generally enjoy as big a discount as those with a viable defence was well established in Northern Ireland. The court rejected the submission that the meaning of "proceedings for an offence" in article 33 of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order") was confined to court proceedings and held that it included the investigation of a suspected offence by police. The appeal was dismissed.

Sentencing policy

10. There were two sentencing policies at issue in this appeal. The first concerned the identification of the first reasonable opportunity to indicate an intention to plead guilty. This was derived from the decision of the Court of Appeal in Northern Ireland in *Attorney General's Reference (No 1 of 2006)* [2006] NICA 4 and was restated by the Court of Appeal in this case in the following terms:

> "To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have indicated his *intention to plead guilty* to that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant indicates his *intention to plead guilty* at the outset." (Emphasis added)

11. The second concerned the reduction in discount for the plea applied by Judge Miller QC because the appellant had been caught red handed in respect of some of these offences. Guidance from the Court of Appeal in Northern Ireland on this issue was given in *R v Pollock* [2005] NICA 43 by Kerr LCJ:

> "18. While we can understand the reasons that a reduction of the discount for having been caught red-handed should no longer apply in England and Wales, we do not believe that the situation in Northern Ireland should be taken to be equivalent. We consider that a strong case can still be made in this jurisdiction for distinguishing between those cases where the offender is caught red-handed and those where a viable defence is available. The incentive to plead guilty in the latter category of case should in our view continue to be enhanced in this jurisdiction. It follows that the discount in cases where the offender has been caught red-handed

should not generally be as great as in those cases where a workable defence is possible."

The Court of Appeal in this case agreed that it was undesirable that judges should become involved in an appraisal of the strength of the Crown case and warned that a considerable degree of caution should be exercised in cases where the defendant was not literally caught red handed in treating the evidence as overwhelming.

12. The administration of justice is a devolved responsibility in Northern Ireland and Scotland. Sentencing policy is largely set by the Court of Appeal in Northern Ireland and the High Court of Justiciary Appeal Court in Scotland. In England and Wales sentencing policy is shared by statute between the Court of Appeal and the Sentencing Council.

13. In *R (Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344 and *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36; [2021] 1 WLR 4168 the Supreme Court recently considered the approach to awards of costs. It concluded that responsibility for developing practice lay principally with the Court of Appeal in those cases. The principles laid down by appellate courts in that area were generally matters of practice and not matters of law. Accordingly only in rare circumstances would an appeal on costs raise a question of law of general public importance.

14. The reasons for this were that the Court of Appeal heard many more cases than the Supreme Court and was better placed to assess what changes in practice were appropriate. The Supreme Court recognised that guidance from that appellate court was important in securing consistency and transparency. The Court of Appeal had the advantage of speed, flexibility and sensitivity in developing that guidance. The same is true of the responsibility of the Court of Appeal in Northern Ireland for sentencing practice. There was no dispute, therefore, that the legal test in this case was whether the guidance was unlawful, in effect whether it was perverse.

Issue (1) Reduction in sentence for a guilty plea

15. In *R v Caley* [2012] EWCA Crim 2821; [2013] 2 Cr App R (S) 47 Hughes LJ explained the approach of the Court of Appeal in England and Wales to the reduction in sentence for a guilty plea. The starting point was the guideline issued by the Sentencing Guidelines Council in July 2007 ("the 2007 Guideline"). That guideline identified the purpose of the practice of reducing a sentence because of a plea. It was

appropriate because a guilty plea avoided the need for a trial, shortened the gap between charge and sentence, saved considerable costs and in the case of an early plea saved victims and witnesses from concern about having to give evidence. Hughes LJ commented that the first benefit of a plea was for victims and witnesses and the second major reason was pragmatic, ensuring that limited resources could be concentrated in those cases where a trial would really be necessary.

16. The maximum discount was generally about one third of the sentence. That remains the position in England and Wales, Scotland and Northern Ireland. The policy approach was to ensure that the discount was sufficient to attract a plea from those who had committed offences but not such as to induce those who were innocent to enter a pragmatic plea.

17. Although *Caley* was concerned principally with the identification of the first reasonable opportunity of a defendant to indicate an intention to plead guilty, the 2007 Guideline expressly recognised that it might be appropriate where the case against the defendant was overwhelming to reduce the level of discount to 20%. That Guideline recognised that most of the benefits of the plea also applied in cases where the evidence was overwhelming but the policy justification was that a lesser discount was sufficient to induce a person who was guilty in those circumstances to enter a plea. Like the Court of Appeal in this case Hughes LJ emphasised the care that should be taken before concluding that the case against the accused was overwhelming.

18. The 2007 Guideline addressed the issue of the first reasonable opportunity to indicate an intention to plead in the Annex. It was noted that this might be on the first occasion that the accused was before the court and had an opportunity to plead but the court might feel that it would have been reasonable for the accused to have indicated his intention earlier, perhaps even when under interview. In both instances it was necessary to ensure that the accused and his legal adviser had sufficient information about the allegations.

19. That was the practice in England and Wales in the period up to the end of 2012. In *Caley* the court noted that there had been changes to procedure in the Crown Courts designed to encourage early guilty pleas in appropriate cases. Parties were encouraged to give early consideration to whether the case should be disposed of by way of a plea of guilty or by trial and were required to disclose their position in writing promptly on transfer to the Crown Court. Where no indication of an intention to plead guilty was given at that stage but the defendant subsequently did plead guilty the 2007 Guidance provided for a discount of no more than 25%. The abolition of committal in England and Wales meant that cases were transferred to the Crown Court very quickly, in some instances within days.

20. It was against that background that the Court of Appeal in *Caley* considered whether in the interests of consistency it was then appropriate to reduce the discount in cases where there had not been admissions in interview. In light of the new procedural arrangements the Court concluded that the full discount should be available to defendants who had indicated in accordance with the new procedures their intention to plead guilty after transfer to the Crown Court. Where an accused made admissions at the interview stage that might support an indication of remorse which should be assessed as a mitigating factor in determining the level of sentence prior to the reduction for the plea.

21. On 1 June 2017 the Sentencing Council issued guidance ("the 2017 Guideline") to replace that of 2007. The guidance stated that full discount should be provided where a plea was made at the first opportunity even if the case was overwhelming. It also specifically identified a number of factors that might justify delay in giving an indication of an intention to plead. The latter point is, of course, a feature of the fact that guidelines are not prescriptive and that sentencers must look to all the circumstances when applying them or taking them into account.

22. The change of guidance in relation to cases where the evidence is overwhelming demonstrates the flexibility that is appropriate in the development of sentencing practice. The changes of practice introduced by *Caley* and the 2017 Guideline are a reflection of that flexibility, responding to changes in the supporting regime, but do not raise any issue of unlawfulness in respect of the earlier approaches which the Northern Ireland courts continue to apply.

23. In Scotland one can also see the same flexibility. In *Du Plooy v HM Advocate* [2005] 1 JC 1; 2003 SLT 1237 the High Court of Justiciary Appeal Court addressed the principles supporting a reduction in sentence for an early plea. The court recognised what were described as the utilitarian benefits from the saving of court time, the avoidance of inconvenience and concern to witnesses and in some cases the potential distress to victims. In addition to this the court also considered that the issue of remorse should be dealt with as part of the discount. It also recognised that one should be wary about reducing the discount because the case was overwhelming but did not exclude reduction on that basis. The advice was that the discount should not exceed one third of the sentence.

24. The High Court of Justiciary Appeal Court returned to this issue in *Gemmell v HM Advocate* [2011] HCJAC 129. The court emphasised that the discount was a discretionary decision in respect of which it would rarely intervene. The Lord Justice Clerk (Lord Gill) examined the savings in time and money as a result of an early plea and indicated that this was the principal reason for allowing the discount. Matters in

relation to victims and witnesses were subsidiary matters. That court concluded that remorse was properly a matter to be taken into consideration in mitigation and that since the utilitarian objectives were achieved in cases where the evidence was overwhelming there should be no reduction in the discount on that basis.

25. The statutory position in Scotland affects the approach to the first reasonable opportunity to give an indication of an intention to plead. Section 31 of the Criminal Justice (Scotland) Act 2016 provides that a person who is in police custody or is being interviewed for an offence must be informed of the general nature of the offence, that he is under no obligation to say anything other than to give information as to his identity and that he has the right to the presence of a solicitor during interview. No adverse inference can be drawn from a failure to respond to questions at interview. The requirement for corroboration is also a factor as anything said at interview may suffice for that purpose.

26. Where a person is charged the accused is brought before a Sheriff as soon as possible, usually within a day, when bail or remand is considered. By section 76 of the Criminal Procedure (Scotland) Act 1995 where an accused person intimates in writing that he intends to plead guilty and desires to have his case disposed of at once he may be served with an indictment with a notice to appear at the appropriate court not less than four days after the date of the notice. There is, therefore, a statutory mechanism for the accused to give an early indication of an intention to plead guilty once he has been brought before a Sheriff.

27. The court system in Northern Ireland more closely resembles that in England and Wales. The biggest difference, however, is that save where cases are directly transferred to the Crown Court pursuant to article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or article 4 of the Children's Evidence (Northern Ireland) Order 1995 the Northern Ireland system still requires committal for trial. That means that the vast majority of cases remain in the Magistrates' Court until all of the papers have been prepared upon which the prosecution will rely at the Crown Court. At that stage the District Judge must determine whether there is a case fit for trial and if so the accused must be committed to the Crown Court.

28. Even where the accused provides full admissions or indicates an express intention to plead guilty the committal process requires considerable administrative work by the police and prosecution services. To that extent, therefore, the provision of an early plea in indictable cases in Northern Ireland does not provide all of the utilitarian benefits which are achievable in the other jurisdictions. That does not alter, however, the underlying rationale for the reduction in sentence.

29. An admission at interview will remove inconvenience for witnesses, provide vindication for victims and sometimes relief from anxiety. Despite the need to fulfil the committal process, the steps taken to achieve committal can be proportionate and provide some additional utilitarian benefit.

30. The only statutory provision touching on the reduction in sentence for a guilty plea in Northern Ireland is article 33 of the 1996 Order which provides:

> "33(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account -
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given.
>
> (2) If, as a result of taking into account any matter referred to in paragraph (1), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so."

31. The legal issue in this aspect of the appeal is whether the term "proceedings" includes the investigation by way of questioning which police were authorised to carry out in accordance with the Codes of Practice issued under article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989 prior to charging the appellant. The Court of Appeal concluded that the term was sufficiently wide to include that investigative stage.

32. Guidance as to the approach to the determination of the meaning of words used in a statute is to be found in the speech of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 397:

> "In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another, recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and fundamental freedoms: see section 3 of the Human Rights Act 1998. The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.
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> Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents."

33. The Royal Commission on Criminal Justice ("RCCJ") was established in 1991. It delivered a wide ranging report in July 1993. At para 20 of Chapter 5 dealing with prosecutions the RCCJ's report considered the point at which proceedings for a criminal offence were instituted. The report noted that section 15(2) of the Prosecution of Offences Act 1985 defined the point at which proceedings for an offence were instituted for the purposes of that statute. That point was where a justice of the peace issued a summons or a warrant for a person's arrest or a person was taken into custody without a warrant and then charged. The RCCJ report recommended acceptance of that test.

34. The RCCJ examined the practice at the time in respect of discounts for pleas in Chapter 7. At para 46 the report reproduced a portion of the sentencing remarks of the Court of Appeal in *R v Hollington and Emmens* (1986) 82 Cr App R 281:

> "This court has long said that discounts on sentences are appropriate, but everything depends upon the circumstances of each case. If a man is arrested and at once tells the police

> that he is guilty and co-operates with them in the recovery of property and the identification of others concerned in the offence, he can expect to get a substantial discount. But if a man is arrested in circumstances in which he cannot hope to put forward a defence of not guilty, he cannot expect much by way of discount. In between comes this kind of case, where the court has been put to considerable trouble as a result of a tactical plea. The sooner it is appreciated that defendants are not going to get full discount for pleas of guilty in these sort of circumstances, the better it will be for the administration of justice."

35. The RCCJ agreed with the Court of Appeal that, other things being equal, the earlier the plea the higher the discount. It was suggested that the primary reason for the discount on sentence was to enable the resources that would have been expended on a contested case to be saved. A subsidiary reason was that in some cases the plea had spared witnesses the trauma of giving evidence in court. Recommendation 156 in the report's summary was that the present system of sentence discounts should be more clearly articulated, with earlier pleas attracting higher discounts.

36. In England and Wales this recommendation was implemented by section 48 of the Criminal Justice and Public Order Act 1994, in Scotland by section 76 of the Criminal Procedure (Scotland) Act 1995 and in Northern Ireland by article 33 of the 1996 Order. Although there were minor differences in the drafting of these provisions they are not material to the issues in this appeal. The conclusion on what constitutes the institution of criminal proceedings in the RCCJ report, therefore, supports the view that the term "proceedings for the offence" in those statutory provisions does not include the interview by police of suspects prior to charge.

37. The interpretation section of the 1996 Order does not include a definition of when criminal proceedings are instituted. The term "proceedings for the offence" in article 33 contemplates an offence in respect of which proceedings have been issued. The police investigation by way of questioning is concerned with confirming or dispelling a suspicion that an offence has been committed. The offence which is the subject of proceedings only crystallises at the moment of charge, summons or, unusually, presentation of an indictment, in other words after the police interview.

38. Although there is no general definition of the institution of proceedings in the 1996 Order the issue is addressed in article 47 of the 1996 Order. This provision was not drawn to the attention of the Court of Appeal. Article 47 is concerned with intimidation offences.

"47(1) A person commits an offence if -

(a) he does an act which intimidates, and is intended to intimidate, another person ('the victim'),

(b) he does the act knowing or believing that the victim is assisting in the investigation of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, and

(c) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with.

(2) A person commits an offence if -

(a) he does an act which harms, and is intended to harm, another person or, intending to cause another person to fear harm, he threatens to do an act which would harm that other person,

(b) he does or threatens to do the act knowing or believing that the person harmed or threatened to be harmed ('the victim'), or some other person, has assisted in an investigation into an offence or has given evidence or particular evidence in proceedings for an offence, or has acted as a juror or concurred in a particular verdict in proceedings for an offence, and

(c) he does or threatens to do it because of that knowledge or belief …

(9) In this Article -

'investigation into an offence' means such an investigation by the police or other person charged with the duty of investigating offences or charging offenders;

'offence' includes an alleged or suspected offence;

'potential', in relation to a juror, means a person who has been summoned for jury service at the court at which proceedings for the offence are pending; and

'the relevant period' -

(a) in relation to a witness or juror in any proceedings for an offence, means the period beginning with the institution of the proceedings and ending with the first anniversary of the conclusion of the trial or, if there is an appeal or reference under section 10 or 12 of the Criminal Appeal Act 1995, of the conclusion of the appeal;

(b) in relation to a person who has or is believed by the accused to have, assisted in an investigation into an offence, but was not also a witness in proceedings for an offence, means the period of one year beginning with any act of his, or any act believed by the accused to be an act of his, assisting in the investigation …

(10) For the purposes of the definition of the relevant period in paragraph (9) -

(a) proceedings for an offence are instituted at the earliest of the following times -

(i) when a summons or warrant is issued under article 20 of the Magistrates' Courts (Northern Ireland) Order 1981 in respect of the offence;

(ii) when a person is charged with the offence after being taken into custody without a warrant;

(iii) when an indictment is presented under section 2(2)(c), (e) or (f) of the Grand Jury (Abolition) Act (Northern Ireland 1969);

and where the application of this sub-paragraph would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times."

39. A distinction is drawn between offences relating to interference with those assisting an investigation and interference with actual or potential witnesses or jurors in proceedings for an offence. There is no reason why the term "proceedings" should have a different meaning in article 33 from that in article 47. It was clearly necessary, having drawn that distinction, to determine when proceedings were instituted. That line was drawn in article 47(10) at the earliest of charge, summons or presentation of an indictment. That reflected the approach of the RCCJ report.

40. Lord Bingham of Cornhill also discussed the commencement of criminal proceedings in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72. At para 27 he indicated that criminal proceedings were normally instituted by charge or service of a summons. In that case the court was concerned with the reasonable time guarantee in article 6 of the European Convention on Human Rights ("the Convention") which required some modification of the rule for that purpose. The statutory provision in this case was made before the Convention rights were implemented in domestic law and there is nothing in article 6 of the Convention which would require any modification of the interpretation of the statute.

41. The principal argument advanced by the respondent was based on the structure of the criminal justice system in Northern Ireland. Indictable offences are subject to a committal process in the Magistrates' Court before transfer to the Crown Court for arraignment. The committal process does not impose any requirement on the person charged to indicate whether they intend to plead guilty. Placing an onus on the person suspected of an offence to disclose any wrongdoing at interview addresses the absence of any such process between charge and arraignment.

42. Implicit in that argument is the proposition that in the absence of an extended meaning of "proceedings" the court was prohibited by article 33 of the 1996 Order from adopting a policy of treating the failure to admit wrongdoing during interview or indeed at any stage prior to arraignment as relevant to sentencing discount. Such an implication fails to appreciate the distinction between the requirements of the statute and the application of sentencing policy.

43. Article 33 of the 1996 Order is neither prescriptive nor exhaustive. It does not expressly require the judge to reduce the sentence because of the plea nor does it prescribe any rate of discount if he does so although there is a clear steer that a discount should be considered. It does not prescribe how any indication of an intention to plead should be given or indeed to whom it should be given. Admissions at interview have been considered sufficient but correspondence from solicitors to the Public Prosecution Service or an indication at court during a remand would also be sufficient to trigger the obligation under article 33. If the judge reduces the sentence for the plea he must articulate that he has done so and take into account when and in what circumstances an indication of an intention to plead was given.

44. Just as it does not prescribe any rate of discount at any stage of the proceedings neither does it prevent the court from adopting a sentencing policy by way of guidance designed to ensure transparency and consistency. There is no requirement for an extended meaning of "proceedings" to be adopted for that purpose. Article 33 does not prevent the adoption of a sentencing policy which treats as relevant to sentencing discount the failure to admit wrongdoing during interview.

45. The Court of Appeal was influenced in its conclusion by the provisions of the Contempt of Court Act 1981 dealing with when criminal proceedings were active. Section 2 of the 1981 Act deals with when the strict liability rule applying to conduct which may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings comes into play. Paragraph 4 of Schedule 1 to the 1981 Act supplements that section and defines when legal proceedings are active for the purposes of that statute. As a result of those provisions in Northern Ireland legal proceedings are active when initial steps are taken by way of arrest without warrant, service of a summons or service of an indictment, whichever is earlier.

46. The purpose of these provisions is to prevent interference with the proper administration of criminal justice. It is obviously of some importance that there is clarity about the circumstances in which the strict liability rule should apply. Where, in the case of the 1981 Act, such clarity was required about the conditions for exposure to criminal liability for contempt, the drafter expressly specified the circumstances in which that arose.

47. It does not follow, however, that the approach taken for the purposes of the 1981 Act in determining when legal proceedings are active is significant in respect of article 33 of the 1996 Order. The object of the 1981 Act was to include conduct both during the investigation of criminal offences and the prosecution thereof. That was achieved by defining when legal proceedings were active.

48. The 1996 Order also had to deal with that issue in respect of intimidation. Article 47 of the Order, dealing with intimidation, drew a distinction between the investigation and the court process. It provided separate rules for each. As Lord Nicholls explained in *Ex p Spath Holme*, statutory interpretation is an exercise which requires the court to identify the meaning of the words in question in their particular context. It is the context in which this provision arises that explains why the investigative process does not fall within the meaning of "proceedings".

Conclusion on Issue (1)

49. The sentencing practices applied by the Court of Appeal in Northern Ireland are typical of those applied from time to time in all three jurisdictions over many years. They are justified by the utilitarian approach and the interests of victims and witnesses which have largely been accepted throughout the United Kingdom as the bases for the discount for the plea. They reflect the statutory background and circumstances of that jurisdiction and are well within the area of discretionary judgement available to that court.

50. Early guilty pleas by those who have committed offences promote confidence in the general public in the system of the administration of justice. The achievement of that outcome is affected by the structure of the system of criminal justice in each jurisdiction. The absence of a mechanism to enable indictable cases to be brought speedily to the Crown Court in Northern Ireland has resulted in long standing and unfortunate systemic delay.

51. The passing of the Criminal Justice (Committal Reform) Bill by the Northern Ireland Assembly on 14 December 2021 creates an opportunity to repair that systemic failure. It provides for the abolition of committal in indictable offences and should ensure that such cases reach the Crown Court promptly. Such a change will inevitably require support by way of amendments to Crown Court Rules, including consideration of when an indication of an intention to plead guilty should be given if the defendant is to avail of the maximum discount. That will be a matter for the Court of Appeal in Northern Ireland based on the underlying principles which have been recognised in all three jurisdictions for many years.

52. In summary, the meaning of "proceedings" in article 33 of the Criminal Justice (Northern Ireland) Order 1996 does not include the investigative process leading up to charge or the issue of a summons. Article 33 does not, however, prevent the development by the Court of Appeal of guidelines in respect of the reduction in sentence for a guilty plea based on administrative resources, inconvenience to witnesses and vindication and relief to victims. There was no error of law arising from the consideration of those guidelines by the Crown Court or the Court of Appeal.

Issue (2) Reduction in discount for plea when caught red handed

53. Any reduction in discount where the offender has been caught red handed has long been recognised as a feature of sentencing practice throughout the United Kingdom and was noted in the RCCJ's report in the passage from *R v Hollington and Emmens* at para 34 above. In each jurisdiction the courts have cautioned that the approach should be used sparingly.

54. Such cases can arise in many circumstances. Often this is where the offender is caught in the course of or in the aftermath of the commission of the offence or where there is video or CCTV evidence of the offending. The common feature is that the prosecution case is overwhelming. In this case the Court of Appeal contrasted such cases with those in which there may be a viable defence available to the alleged offender.

55. As explained in the 2007 Guideline at para 5.2, the purpose of the discount is to encourage those who are guilty to plead at the earliest opportunity. Where the prosecution case is overwhelming without relying on admissions from the offender that Guideline stated that the full discount may be withheld. That approach recognised that although an early plea in such cases delivered broadly the same utilitarian benefits and reassurance for witnesses and victims, the overwhelming nature of the evidence left the offender with little realistic choice. Such an offender might not deserve encouragement to plead guilty at the same level. The conclusion in the 2007 Guideline was that some discount was appropriate to encourage the early plea but it did not need to be the full discount. That was also the position in Scotland after *Du Plooy.*

56. In England and Wales and Scotland sentencing policy has changed in recent years so that full discount for an early plea is now given in such cases. That change of policy does not render unlawful the policy choices adopted earlier and does not prevent the Northern Ireland courts from continuing to apply the guidance in *Pollock* which reflects the lawful policy considerations set out in the preceding paragraph.

Conclusion

57. There was no error of law arising from the consideration of the relevant guidelines by the Crown Court or the Court of Appeal in the imposition of the determinate sentence of 14 years' imprisonment on the appellant. I would dismiss the appeal.