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Sentencing: *R v Kenneth Clarke & Jamie McConnell (Reference by the Director of Public Prosecutions)* [2024] NICA 52

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ABSTRACT

Sentencing offenders for multiple offences can be a complicated task with various competing demands placed on the sentencing judge. The principle of totality seeks to ensure that the overall criminality of the offending behaviour is reflected in the ultimate sentence. Judges normally achieve this by making some or all of the sentences concurrent or by reducing the length of each individual sentence. In approaching this task, what role does the 'headline' or 'lead' offence have and how does it assist the judge to arrive at a 'just and proportionate' sentence? This case comment examines the reference brought by the Director of Public Prosecutions (DPP) in the case of *R v Clarke & McConnell*. In this decision, the Northern Ireland Court of Appeal decided that the wrong headline offence had been identified in the lower court which, in turn, skewed the starting point for the overall sentence. This comment examines the relevance of such a 'headline' or 'lead offence' and considers its role in the sentencing exercise. With Northern Ireland operating a different sentencing regime to England & Wales, it also considers how such cases are approached by judges in the absence of specific sentencing guidelines.

Keywords: sentencing; totality.

INTRODUCTION

Almost half of cases that come to be sentenced in our criminal courts involve individuals who have committed multiple offences.[1] It is generally accepted that simply adding together individual sentences for multiple offences to reach an aggregate sentence can often be disproportionate. Instead, the totality principle must be considered to ensure a final sentence is not too severe and that judges can 'scale

1 Mandeep Dhami, 'Sentencing multiple- versus single-offence cases: does more crime mean less punishment?' (2022) 62(1) British Journal of Criminology 55–72, 60–61.

back' the sentence as appropriate.[2] Since 2009, the Sentencing Council in England & Wales has had a statutory duty to prepares guidelines 'about the application of any rule of law as to the totality of sentences'.[3] The guidelines issued since have emphasised that sentencing judges must pass a sentence which reflects the totality of the offending behaviour and also considers the factors personal to the offender as a whole. This is imperative to ensure that the overall sentence is 'just and proportionate'.[4]

As Ashworth and Kelly recognise, multiple offences give rise to both theoretical and practical difficulties in the sentencing process.[5] Perhaps the most obvious difficulty is the tension between the principles of totality and proportionality. The fact that a defendant may receive 'discount for bulk offending' arguably undermines the deterrent effect of the law.[6] As Reitz notes, a persistent offender may ultimately have the same amount of convictions as a multiple offender who is sentenced on one occasion, yet the former is punished more severely.[7] It may be argued that the recidivist is more culpable and thus deserves an increased sentence, but the significant difference between the sum of sentences imposed on one offender over several years compared to the total sentence imposed at one time is often difficult to justify considering the principle of proportionality.[8] There are other issues with the totality principle in practice: what criteria should sentencing judges use to assess if a proposed total sentence is just and proportionate? Ashworth concludes that the calculation of totality seems to be left to 'instinct' and 'feel' – an unsatisfactory position for any sentencing regime.[9] Further, should a different approach be adopted depending on the categories of harm/offence?[10]

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2 Martin Wasik, 'Concurrent and consecutive sentences revisited' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 287.

3 Coroners and Justice Act 2009, s 120(3)(b).

4 Sentencing Council, 'Totality' (guideline effective from 1 July 2023).

5 Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* 7th edn (Hart Publishing 2021).

6 Wasik (n 2 above) 287.

7 Kevin Reitz, 'The illusion of proportionality: desert and repeat offenders: theoretical and applied perspectives' in Julian Roberts and Andrew von Hirsch, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart 2010).

8 Allan Manson, 'Some thoughts on multiple sentences and the totality principle: can we get it right?' (2013) 55(4) Canadian Journal of Criminology and Criminal Justice 481–494.

9 Andrew Ashworth, *Sentencing and Criminal Justice* 6th edn (Cambridge University Press 2015) 285.

10 Manson (n 8 above) 484.

The effectiveness of the totality approach in facilitating rehabilitation and the weight that sentencing judges should give to these factors is also open to debate.[11]

This article considers the reference brought by the Director of Public Prosecutions (DPP) in the case of *R v Clarke & McConnell*.[12] While the judgment is important for the emphasis placed on deterrence as a sentencing aim, this article focuses on the role of the 'headline' or 'lead' offence in the sentencing of a multiple offence case. It considers the utility of identifying such an offence, which is typically the most serious among all of the charges brought. No formal sentencing guidelines exist in Northern Ireland (unlike England & Wales) so the discretion of the sentencing judge comes into sharp relief in such cases. As such, there is an argument that identification of a headline/lead offence attains even more importance as a guide to ensure the overall sentence is 'just and proportionate'.

BACKGROUND

This was a reference brought by the DPP for Northern Ireland under section 36 of the Criminal Justice Act 1988 (as amended by section 41 of the Justice (Northern Ireland) Act 2002).

Both respondents had pleaded guilty to conspiracy charges, namely: i) conspiracy to steal from several ATMs, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 1 of the Theft Act (Northern Ireland) 1969; ii) conspiracy to commit arson of vehicles intending that such property would be destroyed or damaged, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and article 3(1) and (3) of the Criminal Damage (Northern Ireland) Order 1977; and iii) conspiracy to commit criminal damage to buildings and ATMs, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and article 3(1) of the Criminal Damage (Northern Ireland) Order 1977.

The factual background of the case involved a series of incidents whereby ATMs were attacked using digger machines across County Antrim, Northern Ireland. The charges pertaining to the first respondent (Clarke) related to offending which took place over a 14-month period. The second respondent (McConnell) had a much more limited role with offending taking place over a 16-day period. The *modus operandi* involved a digger being stolen in the early hours of the morning close

11 Mirko Bagaric and Theo Alexander, 'Rehabilitating totality in sentencing: from obscurity to principle' (2013) 36(1) University of New South Wales Law Journal 139–167.

12 *R v Clarke & McConnell* [2024] NICA 52.

to the location of an ATM. The digger would be driven to the ATM where it would rip out the ATM and load it onto a waiting vehicle, such as a car with a trailer. The digger would be burnt out at the crime scene to destroy any forensic evidence and the ATM would be moved and opened at another location.

An agreed basis of plea was entered by both respondents in which it was accepted that the prosecution could not identify the respondents as having removed or disposed of the ATM machines, of having handled or disposed of cash taken from the ATM machines or having destroyed property. However, the respondents accepted their guilt on a joint-enterprise basis. The total damage associated with the first respondent (Clarke) was over £1 million, including £550,000 of cash from the ATM machines, arson damage amounting to £153,000 and property damage with consequential loss in the region of £472,000. In relation to the specific incidents in which McConnell was engaged, the loss of cash stolen from the ATMs was £263,000 with the damage caused by arson of £115,000 and the damage to property with consequential loss at £184,000.

In its reference, the DPP contended that both sentences were unduly lenient. The trial judge had sentenced the first respondent (Clarke) to a period of imprisonment of five years and eight months after reduction for a guilty plea. The starting point chosen by the trial judge was eight years. The second respondent (McConnell) was sentenced to a total period of imprisonment of three years and eight months, after reduction for a guilty plea, the starting point chosen by the judge being five years in his case.

Allowing the appeal in part, the Court of Appeal of Northern Ireland (NICA) accepted that in relation to the first respondent (Clarke), the trial judge erred in her choice of a starting point of eight years. Instead, based on Clarke's specific offending, the starting point should have been 10 years. However, the NICA noted that the trial judge had been 'unwittingly drawn into this error as the case was presented to her based on a headline offence attracting a maximum sentence of ten years'.[13] The court described this as 'a mistake' which restricted the sentencing powers of the judge. Instead, greater sentencing flexibility was available to the trial judge given the other offences which attracted a 14-year maximum sentence. The court dismissed the reference in the case of the second respondent (McConnell) whose sentence remained unchanged at three years and eight months.

13 Ibid [33].

COMMENTARY

The decision of the NICA in the *Clarke & McConnell* reference is significant in relation to the judicial approach that should be adopted to sentencing for multiple offences. In this reference, the NICA deprecated the emphasis placed on the chosen 'headline' offence which in the lower court had been presented as the conspiracy to commit theft. While the maximum sentence for this offence is 10 years' imprisonment, the conspiracy to commit arson and criminal damage offences attract a maximum of 14 years' imprisonment. The court felt that this was an error of principle which had 'crept in' based on how the case was presented in the lower court.[14]

In Northern Irish sentencing practice, the 'headline offence' usually refers to the most serious offence among multiple offences, which acts as a base for the overall sentence which should ultimately reflect the total range of offending. In England & Wales, this has been referred to as the 'lead offence' (see *R v ADX*;[15] *R v PS*).[16] As the NICA previously made clear in the case of *R v ZB*,[17] where no 'headline' offence is apparent – that is because all offences are as serious as the others and 'one does not aggravate the other' – the assessment of totality becomes increasingly important.[18] In England & Wales, the approach to sentencing an offender for multiple offences is laid out by the Sentencing Council's 'Totality' guidance.[19] The NICA 'found assistance' in this guidance in the *ZB* case but has more recently in the case of *R v Hutton* stressed that courts should avoid a 'mechanistic approach' to sentencing such cases.[20] Nonetheless, while Northern Ireland does not have formal sentencing guidelines like England & Wales, the broad principles of the Sentencing Council's guidance have been approved, with the imperative being the need to achieve a 'just and proportionate' sentencing outcome.[21] The NICA has cautioned, however, that the sentencing methodology adopted by the England & Wales Court of Appeal should not be 'direct[ly] read across to this jurisdiction' and has laid out some broad guidance in *Hutton*.[22] One feature of this guidance is that courts should 'consider the sentence for each individual offence and consider identifying a headline offence' before consideration of concurrent/consecutive sentences, whether any

14 Ibid [27].
15 *R v ADX* [2024] EWCA Crim 196.
16 *R v PS* [2022] EWCA Crim 202.
17 *R v ZB* [2022] NICA 69.
18 Ibid [70].
19 Sentencing Council (n 4 above).
20 *R v Hutton* [2024] NICA 19, [58].
21 Sentencing Council (n 4 above).
22 *R v Hutton* (n 20 above).

'downward adjustment' might be required and whether any reduction for a guilty plea might be appropriate.

The utility of identifying a 'headline' or 'lead' offence in such cases is worthy of examination. The NICA in the *Clarke & McConnell* reference essentially determined that the totality principle had not been properly interrogated and applied. The court emphasised the 'interplay' between the three different conspiracy offences but noted that there had been undue focus on conspiracy to commit theft in terms of sentence availability.[23] The unfortunate outcome, the court suggested, was that the trial judge was not afforded the flexibility to properly address the 'high harm' caused by the first respondent.[24] Unlike other NICA cases (such as *R v Playfair*,[25] for example) the court here did not explicitly identify an alternative headline offence. While it did not say so directly, the NICA signalled that the wrong headline/lead offence had been presented since, if the trial judge had identified one of the more serious charges as the headline/lead charge, sentencing flexibility would have been maximised. Indeed, the NICA went further and suggested that in cases involving multiple incidents a range of 10 to 14 years is an appropriate starting point before a guilty plea is taken into consideration.[26]

What then is the purpose of identifying the headline/lead offence in these cases? In *R v Plaku & Ors*,[27] a stalking offence was identified as the lead offence in a case involving several other related offences as it was appropriate to 'reflect the overall criminality' of the offender.[28] In the case of *R v PS*,[29] the Court of Appeal was content that the sentencing judge had assessed the case's 'seriousness by reference to the combination of offences committed' and then gone on to 'pass the resulting sentence on the lead offence in that group'.[30] These cases contrast in terms of the utility of identifying a lead offence – in *Plaku* the headline/lead offence was sufficient to reflect the overall criminality while in *PS* the headline/lead offence acted as the centrepiece around which the ultimate sentence was constructed. To be clear, it is not suggested that either of these approaches is correct or incorrect – rather it demonstrates that the headline/lead offence can be a useful tool for the sentencing judge in gauging the totality of the offending. Considering the 'overriding need to maintain judicial discretion' in

23 *R v Clarke & McConnell* (n 12 above) [32].
24 Ibid [31].
25 *R v Playfair* [2024] NICA 21.
26 *R v Clarke & McConnell* (n 12 above) [41].
27 *R v Plaku & Ors* [2021] EWCA Crim 568.
28 Ibid [50].
29 *R v PS* (n 16 above).
30 Ibid [14].

sentencing in Northern Ireland, the headline offence operating in this flexible way is arguably in keeping with general sentencing principles.[31]

Although subtle, there is an assumption in the Sentencing Guidelines in England & Wales that a lead offence will be identified in cases involving multiple offences.[32] While the judicial guidance in Northern Ireland encourages judges to 'consider' identifying a headline offence, this is not mandatory.[33] It is worth briefly noting that the judicial approach to the relationship between the 'headline offence' and the principle of totality has appeared inconsistent at times in Northern Ireland. For example, in the case of *R v Magee*,[34] the Crown Court considered that dealing with manslaughter as the headline offence was important 'to comply with the principle of totality' where an arson charge was also involved.[35] In *ZB*, cited above, the court agreed with both the prosecution and defence that no headline offence needed to be identified in a case involving an offence under section 18 of the Offences Against the Person Act 1861 and a sexual assault of a child under 13, contrary to article 14 of the Sexual Offences Act 2008.[36] Since there was no identifiable headline offence, the NICA emphasised the importance of the totality principle. Granted, these cases involved very different charges but there is nonetheless a lack of clarity around the operation of the headline offence in terms of how it impacts the court's overall approach to totality.

In any event, there are compelling reasons for identifying a headline/lead offence in cases involving multiple offences. This is true even if the multiple offences are deemed equally serious (as in *ZB*) or when one more serious offence clearly subsumes the others in terms of its constituent elements (as in *Magee*). Rory Kelly has proposed a framework that incorporates judicial assessment of harm and culpability into totality assessment and which centres, or at least begins with, identification of a headline/lead offence.[37] This framework requires an assessment of whether the harm of the other offence(s) and the offender's culpability can be dealt with whilst sentencing for the lead offence or whether those offences must be addressed separately. Further, this assessment requires consideration of the sentences available for the headline/lead offence in addition to whether the offence-specific guideline for the headline/lead offence

31 Department of Justice (Northern Ireland), 'Sentencing Policy Review Consultation: Way Forward' (April 2021).
32 Sentencing Council (n 19 above).
33 *R v Hutton* (n 20 above).
34 *R v Magee* [2024] NICC 6.
35 Ibid [18].
36 *R v ZB* (n 17 above) [70].
37 Rory Kelly, 'Totality: principle and practice' (2022) 7 Criminal Law Review 562.

offers sufficient guidance for sentencing the other offence(s). This approach is also instructive in terms of the approach to concurrent/consecutive sentences as the sentencing judge will consider whether or not the other offence(s) can be wholly accounted for whilst sentencing for the lead offence. An additional benefit of this approach is that it communicates to the victims of the other non-headline/lead offences that the crimes against them matter.[38]

The obvious challenge to adopting Kelly's suggested approach is the lack of formal sentencing guidelines in Northern Ireland. Indeed, while the England & Wales sentencing guidelines are frequently cited in Northern Irish decisions, it has been stressed on multiple occasions that they are not binding and are often of limited relevance.[39] Despite the lack of offence-specific sentencing guidelines in Northern Ireland, there is nothing in the case-focused approach to sentencing to prevent judges in multiple offence cases from being required to identify a lead offence and thereafter crafting the appropriate sentence. This practice is already common in many cases, as has been discussed, but perhaps the benefits of such an approach should be better understood. While a headline/lead offence was identified in the *Clarke & McConnell* reference, a more formulaic approach (as proposed by Kelly) might have made it more likely that a different headline/lead offence would have been identified – one which would have increased and not restricted sentencing flexibility.

Finally, a practical question emerges from this discussion: who should identify the lead offence? In the *Clarke & McConnell* reference, the NICA clearly identified the presentation of the case by the lawyers as the issue and remarked that the trial judge had been 'unwittingly drawn into this error'.[40] In other cases, such as *R v Magee*, both counsel agreed on the headline offence and the court concurred. Undoubtedly this is the norm in many cases.[41] While the decision as to headline/lead offence will ultimately rest with the judge, it follows that the choice of charges brought by the prosecution in the first instance will materially impact this. Prosecutors must ensure that charges brought reflect the seriousness and extent of the offending, give the court adequate sentencing powers and allow the case to be presented in a clear and simple way.[42] In *Clarke & McConnell*, the court went as far as suggesting how prosecutors should approach cases where multiple

38 Ibid.
39 *R v Magee* (n 34 above).
40 *R v Clarke & McConnell* (n 12 above) [33].
41 Ibid [18].
42 Crown Prosecution Service (CPS), 'The Code for Crown Prosecutors' (October 2018); Public Prosecution Service (NI), 'Code for Prosecutors' (May 2023).

offences are involved by recommending a 'more natural route' which would maximise flexibility for the sentencing judge.[43] The court noted that the charging of separate offences would assist the sentencing judge and reduce the risk of undue fixation on a headline offence as occurred here. It highlighted the possibility of a burglary or conspiracy to burgle charge (with a maximum of 14 years) which would likely have been identified as the headline/lead offence in the case. Such an approach would be consistent with the prosecution of these types of cases in England & Wales where similar incidents have been charged as burglary.[44]

43 *R v Clarke & McConnell* (n 12 above) [40].

44 For example, see *R v Beddoes* [2015] EWCA Crim 2525.