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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT

REGINA

v

MARTIN DOHERTY

Representation
Appellant: Mr G Berry QC and Mr Stephen Toal, of counsel (instructed by MacElhatton Solicitors)
Respondent: Mr Philip Henry, of counsel (instructed by the Public Prosecution Service)

Before: McCloskey LJ, Horner J and Huddleston J

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Martin Doherty ("*the Appellant*") appeals to this court, with leave, against the imposition of an indeterminate custodial sentence ("*ICS*"). The two stand out features of his appeal are (a) the vintage of the sentence which he seeks to challenge, having been imposed over 10 years ago on 12 September 2011 and (b) the fact of his continuing incarceration pursuant thereto.

The Underlying Proceedings

[2] The Appellant, who is now aged 43 years, was prosecuted for two counts of robbery and two counts of possession of an offensive weapon in a public place. The offences arose out of two incidents, factually similar, on 24 May 2010 and 02 June 2010. In broad outline, on each occasion the Appellant having entered a taxi threatened the driver with an 8 inch bladed knife and committed robbery.

[3] On 12 September 2011, upon arraignment, the Appellant pleaded guilty to all four counts. On 21 September 2011 he was sentenced by the imposition of an ICS with a minimum term of four years in respect of the robbery counts, together with an ICS of two years minimum term in respect of the offensive weapon counts. All sentences were ordered to operate accordingly. Making allowance for reckonable remand custody, the minimum term of four years imprisonment expired on 02 June 2014. The Appellant remains in prison to this day.

The Sentencing of the Appellant

[4] From the available transcript, the decision of the sentencing judge invites the following summary: the Appellant had a criminal record comprising 147 convictions including several robberies, the possession of offensive weapons and hijacking; the previous attempts of sentencing courts had entailed a broad range of disposals with limited success; when the index offending occurred the Appellant was serving the probation aspect of sentences imposed for previous robbery offences; the probation assessments were of "*high likelihood of reoffending*" and "*a significant risk of serious harm to others*"; their recommendation was that a "public protection sentence" should be imposed, the rationale being that this would facilitate a full psychological assessment which, in turn, would identify any necessary treatment or intervention; there was no dispute that the Appellant was a dangerous offender; and, finally, the essential contest before the court lay between an ICS and an ECS. The judge opted for the former. The sentencing decision is examined in greater depth at paras [35] – [38] infra.

The Appeal to this Court

[5] The Appellant, represented by the same firm of solicitors who represented him at the time of his sentencing, initiated the proceedings in this court by Notice dated 03 May 2019. This enshrines two grounds. The first is of the vires species. It is contended that the sentencing judge was not empowered to impose an ICS in relation to the two offensive weapon offences. The second ground is that the ICS was "… manifestly excessive and wrong in principle in circumstances where an extended custodial sentence would have sufficed." The application also sought an extension of time for appealing.

[6] The application was, in the usual way, assigned to a single judge. By his ruling dated 13 January 2020 Maguire J deferred his final adjudication, in the following terms:

> "This court concludes that it should postpone any decision on the issue of the grant of leave to appeal until it is provided with any decisions made by the parole authorities in relation to the Applicant, as in this case it may be important to know what has occurred since the expiry of the minimum term."

What transpired thereafter? A substantive hearing date of 16 December 2021 having been assigned, examination of the hearing bundle by the presiding judge revealed the absence of any final determination of the single judge. Simultaneously other problems with the hearing bundle and the authorities bundle were identified. These collective deficiencies necessitated the prompt convening of a case management review.

[7] At the aforementioned listing certain necessary information was in short supply. Counsel for the PPS was able to confirm to the court that the single judge had made a final determination, dated 12 October 2021, whereby (a) he granted leave to appeal and (b) he extended time for doing so. This court drew to the attention of the Appellant's lawyers the absence from the hearing bundle of the additional materials considered by the single judge, together with the failure of the skeleton argument to address certain issues with the court considered important. The upshot of this exercise was that the imminent substantive hearing date had to be vacated. The hearing then proceeded on the earliest date available thereafter, namely 11 January 2022. In the interim the court received revised hearing and authorities bundles, in tandem with a revised skeleton argument on behalf of the Appellant.

The Indeterminate Custodial Sentence

[8] The sentencing mechanism of the ICS is a statutory construct, introduced via the Criminal Justice (NI) Order 2008 (the "2008 Order"). One of the main features of the 2008 Order is its creation of the concept of the so-called "dangerous offender." This topic is regulated by the provisions of Chapter 3, Articles 12 – 15. Within this discrete code the legislature further devised the concepts of "specified offence" and "serious offence": see Article 12, Schedule 1 and Schedule 2. Accordingly, the list of offences enshrined in these two Schedules constitutes the first port of call for the sentencing judge. In this way the legislature made a distinction between "specified offences" (on the one hand) and "serious offences" (on the other). A further feature of this elaborate new sentencing regime was the introduction of the punishment of a so-called "extended custodial sentence" ("ECS").

[9] To summarise, the ICS was established by Art 13, while the ECS is the creation of Art 14. Each of these sentencing mechanisms was reserved for "dangerous offenders" only.

[10] Under Article 13 of the 2008 Order there are three sentencing candidates, namely a life sentence, an ICS and an ECS. In the application of these provisions the sentencing court must first enquire whether a life sentence is available. If 'yes' the next enquiry is whether it is appropriate. If either of these enquiries yields a negative result the court must next consider whether an ECS (see Article 14) would be "… adequate for the purpose of protecting the public from serious harm occasioned by the commission of the offender of further specified offences …" If this

enquiry yields a negative result, the court must ("... shall") impose a ICS. In thus acting the court, per Article 13(3)(b), must further:

> "… specify a period of at least two years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[11] The definition of "ICS" is critical. Per Article 13 (4):

> "An indeterminate custodial sentence is –
>
> (a) Where the offender is aged 21 or over, a sentence of imprisonment for an indeterminate period,
>
> (b) Where the offender is under the age of 21, a sentence of detention for an indeterminate period at such place and under such conditions as the Secretary of State may direct,
>
> Subject, (in either case) to the provisions of this Part as to the release of prisoners and duration of licences."

I shall examine infra the meaning of this latter qualifying clause.

[12] The final element of the Chapter 3 sentencing framework is Article 15. This provision operates where a person has been convicted of a "specified offence" and it is incumbent upon the court to assess under either Article 13 or Article 14:

> "… whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences."

The attribution of the status of *dangerous offender* applies in a case where the sentencing court determines that there is a risk in these terms.

[13] The following summary is apposite. In any case where an offender (a) has been convicted of a serious sexual or violent offence specified in Schedule 1 to the 2008 Order committed on or after 15 May 2008 and (b) has been assessed as dangerous (as explained above), there are four sentencing options, each of them subject to the governing statutory conditions being satisfied: a discretionary life sentence, an ECS, an ICS or a hospital order. The court must examine the propriety of the first three mechanisms, in sequential order. An ICS can be imposed only if the court has considered, and rejected, the first two alternatives.

The ICS/ECS Interplay

[14] The ICS and ECS have become colloquially known as "protective" sentences. This is short hand for denoting that, from the penal policy perspective, the dominant objective of each is the protection of the public. This is reflected unambiguously in the statutory language: see Article 13(1)(b), Article 13(3) and Article 14.

[15] By Article 14(3) of the 2008 Order, the definition of ECS is, as regards adult offenders, the following:

> "(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of
>
> (a) the appropriate custodial term; and
>
> (b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences or serious terrorism offences.
>
> (4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which—
>
> (a) is the term that would (apart from this Article and Article 15A) be imposed in compliance with Article 7 (length of custodial sentences); or
>
> (b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months."

By virtue of the statutory labyrinth which follows, it is necessary to consider also the remaining provisions of Article 14:

> "(4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which—
>
> (a) is the term that would (apart from this Article and Article 15A) be imposed in compliance with Article 7 (length of custodial sentences); or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months.

(5) Where the offender is under the age of 21, an extended custodial sentence is a sentence of detention at such place and under such conditions as the [Department of Justice] may direct for a term which is equal to the aggregate of—

(a) the appropriate custodial term; and

(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences or serious terrorism offences.

(6) In paragraph (5)(a) "the appropriate custodial term" means such term (not exceeding the maximum term) as the court considers appropriate, not being a term of less than 12 months.

(7) A person detained pursuant to the directions of the [Department of Justice] under paragraph (5) shall while so detained be in legal custody.

(8) The extension period under paragraph (3)(b) or (5)(b) shall not exceed—

(a) five years in the case of a specified violent offence (unless sub-paragraph (c) applies);

(b) eight years in the case of a specified sexual offence or a specified terrorism offence, (unless sub-paragraph (c) applies); and

(c) ten years in the case of a serious terrorism offence for which the offender is convicted after the commencement of section 20 of the Counter-Terrorism and Sentencing Act 2021 [29 June 2021].

(9) The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term.

> (10) In this Article "maximum term" means the maximum term of imprisonment with which the offence is punishable (apart from Article 13).
>
> (11) A court which imposes an extended custodial sentence shall not make an order under section 18 of the Treatment of Offenders Act (Northern Ireland) 1968 (suspended sentences) in relation to that sentence.
>
> (12) Remission shall not be granted under prison rules to the offender in respect of a sentence imposed under this Article."

[16] In summary, the ECS has two ingredients. The first is the appropriate custodial term and the second is the extended period during which the convicted accused will be subject to the conditions of a licence. The licence terms will be devised with the aim of protecting members of the public from serious harm occasioned by the commission for further specified offences by the offender. While the release of the offender upon the conclusion of the custodial term is a matter of right, it is open to the Parole Commissioners to effect the offender's release at any stage after the midpoint of the custodial term has been reached. Recall to prison is a possibility throughout the lifetime of the licence (see, for example, *R v Rainey* [2021] NIJB 157).

[17] In *R v Mongan* [2015] NICA 65 this court expounded the essential character of the ECS at para [21]:

> "The custodial term is designed principally to punish the offender in relation to past conduct. The extension period looks to the risk of future harm and is designed to secure protection for the public. The public includes those members of the public with whom the appellant may reside. The 2008 Order itself seeks to secure proportionality by providing in Article 14(8)(a) that the extension period in respect of a specified violent offence shall not exceed 5 years. Article 14(9) also provides that the term of an extended custodial sentence in respect of an offence shall not exceed the maximum term. An extended sentence does not involve the imposition of a custodial term longer than is commensurate with the seriousness of the offence. The extension is the period necessary for the purpose of protecting the public from harm (A G's Ref No 27 of 2013 [2014] EWCA Crim 334). Such an exercise has to be carried out bearing in mind the differing objectives of the two elements making up the total sentence. The analysis is likely to be highly fact sensitive."

[18] So in what respects does the ICS differ from the ECS? In a nutshell, the crucial distinction is that whereas the ICS gives rise to sentenced incarceration for an indeterminate period, the ECS is a determinate custodial sentence and it entails the possibility of early release. Every convicted accused person punished by the mechanism of an ECS is imprisoned for a finite period, calculable on the date of sentencing.

[19] The interplay between the ECS and the ICS has featured in several cases. The theme of both *R v McCarney* [2013] NICC 1 and *R v Greatbanks* [2013] NICC 9 is that the ECS should be preferred where it would achieve appropriate protection for the public against the risk posed by the offender. In *R v Noor* [2016] NICC 10 the careful reasoning of the sentencing judge provides an illustration of the ICS prevailing over the ECS. There the latter mechanism was considered inappropriate as the risk posed to the public was such that there would be a continuing need for compulsory medical oversight or continuing review of the offender's medical condition in the event of his release by decision of the Parole Commissioners and an ECS would be ineffectual to provide the necessary supervision.

[20] Guidance on the ECS/ICS interplay was provided by this court in *R v Pollins* [2014] NICA 62, at paras [26] – [27]:

> "The central issue in this case concerned the approach to the imposition of an indeterminate custodial sentence. Although the sentence of imprisonment for public protection has now been abandoned in England and Wales some of the earlier case law is relevant. We have been significantly assisted by the observations of Lord Judge in AG Reference (No 55 of 2008) [2008] EWCA Crim 2790. Apart from a discretionary life sentence an indeterminate custodial sentence is the most draconian sentence the court can impose. A discretionary life sentence is reserved for those cases where the seriousness of the offending is so exceptionally high that just punishment requires that the offender should be kept in prison for the rest of his life. It is not a borderline decision (see *R v Jones and others* [2005] EWCA Crim 3115 approved in *R v Hamilton* [2008] NICA 27). An indeterminate custodial sentence is primarily concerned with future risk and public protection (See *R v Johnson* [2007] 1 CR App R (S) 112).
>
> However, in a case in which a life sentence is not appropriate an indeterminate custodial sentence should not be imposed without full consideration of whether

> alternative and cumulative methods might provide the necessary public protection against the risk posed by the individual offender. In that sense it is a sentence of last resort. The issue of whether the necessary public protection can be achieved is clearly fact specific. That requires, therefore, a careful evaluation of the methods by which such protection can be achieved under the extended sentence regime."

Allowing the appeal against an ICS with a minimum term of three years imprisonment the court substituted an ECS comprising a custodial period of six years and an extension period of five years.

[21] In *R v McCambridge* [2015] NICA 4 the Appellant appealed to this court against an ICS with a specified minimum term of 5 years imprisonment. Giving effect to *Pollins* this court allowed the appeal, substituting an ECS. Gillen LJ explained the components of this sentencing mechanism at para [45]:

> "An extended custodial sentence will be the aggregate of a custodial term and an extension period. The custodial term will be a commensurate sentence and will not make any reduction for a notional remission. This will be built into the release provisions."

Gillen LJ elaborated on both the methodology and the rational of the ECS at paras [46] – [47]:

> "The extended period will be for such period as is considered necessary to protect the public from serious harm. The protective element should not be fixed as a percentage increase of the commensurate sentence. On the contrary, the protective element should be geared specifically to meet the statutory objective i.e. the protection of the public from serious harm and to secure the rehabilitation of the offender to prevent his further offending. The punishment element cannot dictate the period required to ensure the necessary level of protection. The two aspects of sentence thus serve different purposes. The first is to punish and the second is to protect. See Valentine "Criminal Procedure in Northern Ireland" 2nd Ed at 18.64, R v McColgan [2007] NIJB 254 at paragraph [24] and R v Cornelius [2002] Cr. App. R.(S)69 at paragraph [10]. …

> The protective element cannot exceed 5 years for a violent offence. The aggregate of the custodial term and the extension period cannot exceed the maximum period for the sentence. The effect of this is that after the appellant has served the relevant part of a sentence, the Secretary of State shall release him if the Parole Commissioners direct his release when they are satisfied it is no longer necessary for the protection of the public that he should be confined. The relevant part of the sentence is one half under Article 28 of the 2008 Order. The Secretary of State, on the recommendation of the Parole Commissioners, can revoke the appellant's license and have him recalled to prison. Thus the offender may, in the events that happen and depending on his behavior, have to serve the whole or part of the extension period. Unlike a determinate sentence; the Court does not recommend licence conditions to the Secretary of State where an extended custodial sentence has been imposed. These conditions are to be imposed by the Secretary of State, after consultation with the Parole Commissioners, pursuant to Article 24(5) of the 2008 Order."

The dominant purpose of the so-called "protection" sentences features strongly in the next succeeding passage at para [48]:

> "It is pertinent to observe that whilst the statutory provisions do not expressly advert to the concept of proportionality between the sentence passed and the gravity of the offence, nonetheless Parliament has imposed a restriction on the length of the protective element that can be imposed. Parliament cannot have intended that the Order be used to pass sentences that are wholly disproportionate to the nature of the offending. However, whilst proportionality has to be observed, strict proportionality between the length of the extension period and the seriousness of the offence will always be secondary to the main purpose of the provision which is protection of the public"

The Role of the Appellate Court

[22] The role of the Court of Appeal in appeals against sentence was explained in *R v Ferris* [2020] NICA 60. The court took as its starting point section 10(3) of the Criminal Appeal (NI) Act 1980 (the "1980 Act"). This provides:

> "On an appeal to the Court against sentence under section 8 or 9 of this Act the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution therefore as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the Crown Court."

At para [37] the court drew attention to the distinction between "shall" and "may." At para [39]ff the court identified what it described as the "restrained approach." At para [41] the court stated:

> "The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus s 10(3) of the 1980 Act does not pave the way for a rehearing on the merits. This is expressed with particular clarity in the following passage from the judgment of McGonigal LJ in *R v Newell* [1975] 4 NIJB at p, referring to successful appeals against sentence:
>
> > 'In most cases the court substitutes a less severe sentence ….the court does not substitute a sentence because the members of the court would have imposed a different sentence. It should only exercise its powers to substitute a lesser sentence if satisfied that the sentence imposed at the trial was manifestly excessive, or that the court imposing the sentence applied a wrong principle.'
>
> Pausing, this approach has withstood the passage of almost 50 years in this jurisdiction. The restraint principle is also evident in a range of post-1980 decisions of this court, including *R v Carroll* [unreported, 15 December 1992] and *R v Glennon* and others [unreported, 03 March 1995]."

The court further considered that the "restraint principle" operates in essentially the same way in both this jurisdiction and that of England and Wales: see para [41].

Receiving new evidence <u>or</u> information on appeal

[23] In *Ferris* at para [18]ff this court considered its powers to receive new evidence or information in appeals against conviction and/or sentence, including applications for leave to appeal. A clear distinction between receiving new evidence and new information was recognised: see para [29]. In both instances, the overarching test is whether receipt of the new material is necessary or expedient in the interests of justice. This will entail taking into account inexhaustively the express statutory criteria – in section 25(2) - for the receipt of new evidence, namely whether the new material appears capable of belief, whether it may afford a ground for allowing the appeal and whether its belated emergence can be reasonably explained: see para [32].

[24] The interaction between the restraint principle (outlined above) and the receipt of new information on appeal is explained at para [44] of *Ferris:*

> "We consider that in a case where this court receives material new evidence, or information, the restraint principle still applies but must be modified. The present case is a paradigm illustration: by virtue of receiving the new evidence, this court finds itself better equipped than the sentencing judge to identify the sentence which is the best fit for this case."

The judgment adds, at para [44], that in determining such appeals this court will apply the overarching test of the interests of justice. This must be considered in conjunction with what follows at para [46]:

> "We consider that it makes little sense to speak of deferring to the discretion of the sentencing judge in a context where the matrix of an appeal before this court includes newly admitted evidence which was not considered by the judge and this court has available everything considered at first instance. Precisely the same analysis applies to evidence which was available to the judge but evidently not considered by him."

At para [47] the approach of the Court of Appeal where it has admitted new evidence or information is explained:

> "… It is empowered, as a matter of law, to review the impugned sentence and make its decision as if it were a sentencing court of first instance."

The judgment adds the following, of no little significance:

> "This court will, of course, pay close attention to the approach and reasoning of the sentencing judge, which

> will attract varying degrees of weight depending on the individual case."

[25] This appeal will be determined in accordance with the legal framework set forth in paras [8] – [24] above.

The First Ground of Appeal

[26] The first ground of appeal in essence poses the following question: was the imposition of an ICS in respect of the two offensive weapon offences ultra vires the sentencing judge's powers under the 2008 Order?

[27] Each of these offences is established by Article 22(1) of the Public Order (NI) Order 1987. This discrete offence is not listed in Schedule 1 to the 2008 Order. Thus, it is not a "serious offence" within the compass of Article 13. From this it follows that the judge erred in law in imposing an ICS in respect of the two offensive weapons offences. It is submitted, correctly, on behalf of the Appellant that these two sentences must be quashed in consequence. This court exercises its power under section 10(3) of the Criminal Appeal (NI) Act 1980 accordingly. However, the Appellant achieves no practical relief in consequence as the ICS imposed in respect of the two robbery counts is unaffected.

The Second Ground of Appeal

[28] This ground, therefore, assumes critical importance. It is couched thus:

> "The learned judge erred by imposing an indeterminate custodial sentence for two offences of robbery which was manifestly excessive and wrong in principle in circumstances where an extended custodial sentence would have sufficed."

The Appellant does not make the case that the judge erred in concluding that he **was a** "dangerous offender." Rather it is contended that an ECS should have been imposed. The core of the Appellant's challenge to the imposition of the ICS in respect of the robbery offences is that it was not justified as a measure of last resort as it did not properly reflect either (a) the seriousness of these index offences or (b) the circumstances of the offender. As regards (a), two particular features of the offending are highlighted: there is no evidence that actual violence was employed and no medical, or other, evidence of harm to anyone.

[29] As regards (b), turning to the circumstances of the offender, the skeleton argument of Mr Berry QC and Mr Toal contains a series of assertions:

(i) The appellant is "very vulnerable." Following sentencing in 2011 he was remanded to a mental health facility.

(ii) Thereafter he "… disengaged with Northern Ireland Prison Service on the basis that he accepted that he would never be released."

(iii) "While the Appellant has started to take and pass drug tests for the first time in the last 18 months, he is not even close to being released by the Parole Commissioners any time soon … it was hoped that he could avail of bespoke 'mental health walks' in place of accompanied temporary release."

[30] As noted above, the Appellant's four year "tariff" expired on an unspecified date in 2015. The Parole Commissioners' materials directed by the single judge and considered by him prior to making his final decision have now been provided to this court. They consist of two determinations, dated 27 February 2020 (panel) and 15 November 2021 respectively (single Commissioner).

[31] It emerges that the first referral to the Commissioners under Article 18 of the 2008 Order was made in 2014. There have been three full panel hearings in the last two years. In its decision dated 27 February 2020 the panel decided that it was not satisfied that it is no longer necessary for the protection of the public from serious harm that the Appellant be confined and, therefore, directed that he should not be released. The evidence considered included an updated PBNI report. The panel observed inter alia:

> "The tariff expired on 02 June 2014. In the result, the prisoner has already served almost 10 years in prison. This is a draconian sentence reserved for defendants who are regarded as highly dangerous."

The decision records that the rehabilitation of the Appellant had been significantly compromised by his consistent failure to engage meaningfully, in particular with psychology services. It was noted that he had refused to take 27 mandatory drug tests, failing three such tests. There were, however, some recent positive signs: specifically, he had completed 15 sessions with AD: EPT relating to his drug dependency. The Appellant's counsel informed the panel that his client was not seeking release:

> "… but rather was seeking recommendations, which would assist him in progressing his sentence to a point where he might be considered for release on the next referral."

[32] The probation officer testified that the Appellant "… was addressing with support all of the risk factors and recommendations of the panel decision of February 2019 …" He was making "significant progress ... in particular excellent engagement with the mental health team, OT and Addictions." Nonetheless there was "… still a

great deal of work to do …" The evidence of the forensic psychologist described "… the diagnosis of dissocial/anti-social and psychopathic personality disorder" and the likelihood of the Appellant requiring "… longer and more intensive treatment programmes to reduce his risk of future recidivism." The risk of disengagement and the need for additional "individual bespoke support sessions" were also noted. The panel also received evidence from the Appellant. Concluding, it made specific recommendations for further therapies, treatments and behaviours.

[33] The second of the Commissioner's decisions before this court is that of the single Commissioner dated 15 November 2021. The outcome for the Appellant was unchanged. We observe that there were two further intervening decisions which have not been provided to this court: a single Commissioner's decision in January 2021 and a panel decision in April 2021. The evidence summarised in the recent decision conveys a mixed picture, including elements of regression in the Appellant's engagement with the services available to him: this is clear from paras 12–28 inclusive. It is further reflected in the single Commissioner's assessment:

> "[The Appellant] has made little if any effort to build on the recommendations that were made. Indeed it is difficult to come to any view other than that Mr Doherty has moved backwards in terms of his engagement and behaviour."

It was further noted that the Appellant had chosen not to make any submissions. The Commissioner recommended a further referral to the panel within nine months. This court was informed that the Appellant had exercised his right to a referral to a plenary panel of Commissioners, resulting in a further hearing, on 11 January 2022. [The hearing before this court was deferred to 13 January 2022 in consequence].

Our Assessment and Conclusion

[34] The challenge to the sentencing under scrutiny involves the following single contention: as no violence was actually employed and there was no medical evidence of actual harm to any person the offending was insufficiently serious to warrant the imposition of an ICS.

[35] Notably, there is no suggestion that the sentencing judge left out of account any material fact or factor; took into account any immaterial or alien fact or factor; or misunderstood or distorted any of the information available to him. These are all self-evidently important touchstones in the context of a submission that the judge erred in principle in imposing the ICS.

[36] Based on all that has been presented to this court, in both documentary form and submissions, it is clear that the two main sources of information available to the sentencing judge were the PBNI pre-sentence report and the Appellant's criminal record. The pre-sentence report highlighted the following main facts and

considerations: while a remand prisoner in 2010/2011 the Appellant had spent some six months in a mental health facility undergoing treatment for epilepsy, depression, anxiety, panic attacks, paranoia and anti-social personality disorder; he refused his consent to any of the associated medical records being disclosed to PBNI; (from PBNI records) he had engaged in aggressive, hyperactive and disruptive behaviour from around the age of seven years; when aged eight he was admitted for child psychiatric therapy; his conduct remained unchanged during the following years (his criminal record began when he was aged 11 – infra); he misused alcohol and drugs from an early age; the frequency and gravity of his offending escalated progressively; a severe beating at the hands of paramilitaries inflicted adverse psychological consequences; he was intoxicated through alcohol and drugs consumption at the time of the index offending; he declined to engage regarding the motivation for his offending; he demonstrated little insight into the impact of his offending on the victims; his offending occurred when he was subject to probation supervision; his previous engagement with a similar sentencing disposal had been unsatisfactory; and he claimed to be willing to continue engagement with mental health services.

[37] Most of these themes are encapsulated in the following passage:

> "In the absence of information corroborated by medical or mental health professionals and given the information PBNI are aware of through Mr Doherty's offending history, previous response to supervision, concerns and issues highlighted by previous PBNI records, the Defendant's presentation in terms of his minimisation, distorted thinking and refusal to give consent to any further enquiries into his mental health treatment, the gravity of the offences for which he appears which are indicative of premeditation and the use of weapons to engender fear and the assessment of likelihood of reoffending, it is the conclusion of the PBNI risk management meeting that Mr Doherty is assessed as posing a significant risk of serious harm to others."

This is followed by, notably:

> "If the court accepts this assessment the Defendant may be dealt with **by way of a public protection sentence** under the auspices of which a full psychological assessment would be essential in order to determine what treatment/intervention must be undertaken by Mr Doherty prior to any consideration for his eventual return to the community."
> [Emphasis added]

[38] The other main source of information available to the sentencing judge, the Appellant's criminal record, discloses the following. The Appellant's criminal career began when he was aged 11. The index offences occurred when he was aged 32. In between he accumulated in excess of 150 convictions spanning a broad range of offending. These included five convictions for robbery or attempted robbery. He was the subject of a custody probation order when the index offending occurred. This discrete sentencing disposal had been attempted previously, with manifest lack of success. Indeed, it seems likely that previous custody probation orders overlapped on account of his reoffending. The convictions recorded post-October 2011 confirm that he had committed other offences during the currency of the probation supervision.

[39] Furthermore, having regard to the stage at which this court is being invited to intervene, it is essential to take into account that the Appellant committed two further offences – common assault and assault occasioning actual bodily harm – following the imposition of the impugned ICS ie in sentenced custody.

[40] We would make clear that as a matter of principle in a case (such as the present) where this court has determined the correct approach in principle to any type of sentence post-dating the impugned sentence the latter will have to be reviewed, on appeal, through the prism of the later guidance.

[41] In the present case, the post-sentence guidance provided by this court – in *Pollins* – is the cornerstone of the Appellant's case. The principle thereby established, namely that an ICS is a sentence of last resort is a reflection of its draconian nature. Where it falls to this court to consider the application of this principle in any given appeal an appropriately intense focus on the sentencing court's approach to alternative mechanisms and, in particular, the possibility of an ECS is required. In this respect the terms in which this court expressed itself in *Pollins* are not to be glossed. They are unambiguous: the sentencing court must give "full consideration" to other sentencing mechanisms and, in particular, undertake a "careful evaluation" of the ECS option.

[42] We are satisfied that the sentencing of the Appellant was compliant with all of the *Pollins* touchstones. The judge concluded that the Appellant was a dangerous offender. Notably, he did not simply accept the concession on behalf of his counsel to this effect. Rather he carried out his own assessment, in impressive detail. Having resolved this issue, the next step in the judge's sentencing of the Appellant was a recognition that the two competing sentencing disposals were an ECS and an ICS. His assessment that these were the "only two options" is not challenged in this court and we have found no reason to question it in any event, given that it followed inexorably from his "dangerousness" conclusion. Next, the judge's assessment of the Appellant's failure to engage appropriately with professionals, in two specific instances, is unimpeachable and was not challenged in this court.

[43] The judge then noted, in short hand, the essential differences between these two sentencing mechanisms. The key issue then identified by the judge was, in terms, the following: having regard to the significant questions relating to the Appellant's willingness to engage with programmes and services which would be offered to him post–sentencing and his lack of insight and limited self-awareness, would an ECS provide a sufficient period of time for all that would be required in this respect? The judge effectively answered this question in the negative. In so doing he drew on the relevant passages in the pre-sentence report (supra) and highlighted the substantial concerns relating to the Appellant's mental health warranting, in his words, "urgent and appropriate medical treatment."

[44] There is no discernible flaw in any aspect of the judge's approach as set out above. Quite the contrary. The judge is to be commended for the care, logic and unassailable self-direction which permeate every stage of his sentencing decision. We consider it manifestly clear from his decision, considered as a whole, that he was cognisant of, and duly applied, the principle of last resort. This is particularly evident from the following passage:

> "The court is obviously concerned to ensure that one doesn't go to the second of the two tools that are handed to it and it seems to me, particularly in the light of the assessment from the Risk Management Committee, that at this stage I cannot determine what those treatments or interventions might be even if I had the confidence the Defendant would engage with it against his background of non-engagement. It therefore seems to me that I am inexorably driven to an indeterminate sentence."

While the decision in *Pollins* did not materialise on tales some few years later, on any reasonable viewing of the sentencing decision the judge proceeded in accordance with its substance.

[45] In the final phase of his decision the issue addressed by the judge was that of the custodial term, or "tariff." He determined that this should be four years. Properly analysed, the challenge before this court does not relate to the length of this period. The "manifestly excessive" element of the grounds of appeal has, in substance, evaporated. It was a combination of the unsustainable and the immaterial in any event.

[46] We turn, finally, to the additional information available to this court. This has been assembled in two *tranches*. First, there is the material provided to the single judge upon his direction, summarised in paras [29] – [33] above. Second, there is the further material received by this court at its request.

[47] This most recent material is twofold. It consists of, firstly, an account from the Appellant's legal representatives of the hearing conducted by the Parole

Commissioners just over one week ago, on 11 January 2022. At that hearing the psychologist member of the panel expressed grave reservations about certain aspects of the system for the rehabilitation of offenders in Northern Ireland. Her concerns were focused on the facilities available to all offenders suffering from a personality disorder. She contrasted the situation in England, where the "personality disorder pathway" is treated by, amongst other things, prison officers fully trained to ensure appropriate attention and ensuing progression for offenders. This pathway can lead to success within a period of some five years. There is nothing equivalent in this jurisdiction. For Mr Doherty, this period of five years expired in Autumn 2016, over five years ago.

[48] Secondly, this court has been provided with the Parole Commissioners' report arising out of the review conducted within the last two weeks. Having regard to all of the evidence recorded above, the outcome was virtually inevitable. The Commissioners have determined that the Appellant continues to present a significant risk of serious harm to the public which cannot be adequately managed by arrangements in a community setting. Their conclusion is that it remains necessary for the protection of the public that the Appellant's incarceration continue. This was accompanied by a series of recommendations designed to further the Appellant's rehabilitation and a determination that he be reassessed some six months hence.

[49] The sentencing judge did not, of course, have the gift of prophecy. Notwithstanding, in the events which have occurred his evaluative assessment, his intuitive judgement and his instincts have all been fully vindicated. In short, the statutory test for releasing the Appellant is manifestly not satisfied. That has been the consistent assessment of the expert statutory agency, the Parole Commissioners, tasked with this function. In principle, this court could allow an appeal of this genre and substitute a sentence, coupled with an associated order giving rise to the offender's prompt release from sentenced custody. However, this is manifestly not a case warranting this course. It is appropriate to compare and contrast the differing functions and expertise of this court and the Parole Commissioners, in two sentences. This court is presumptively expert in the law relating to sentencing and matters of sentencing principle. The Parole Commissioners are the experts in the matter of release from custody in those cases entrusted to them. Constitutionally, this court could in principle differ from the assessment of the Commissioners in this kind of highly unusual context. However, this is likely to occur only in a most exceptional case.

[50] We consider that the question for this court has become whether the judge erred in principle in determining that an ICS should be imposed in respect of the two headline offences. Given the analysis in paras [41] – [44] this court concludes that no error of principle has been established.

General

[51] We consider it important to emphasise the following. The jurisdiction of this court is not one of judicially reviewing the successive decisions of the Parole Commissioners, dating from circa 2014. Nor would this court entertain a challenge, disguised or otherwise, that is collateral in nature. Our legal system makes provision for challenges to the determinations of the Parole Commissioners by judicial review application to the High Court. This court is concerned only with whether the impugned sentence is wrong in principle and/or manifestly excessive.

[52] While this appeal must be dismissed on the main issue, some brief guidance, unavoidably limited, on the out-workings of a successful appeal of this kind is desirable. If this court had allowed the appeal it would have been necessary to formulate a carefully constructed order substituting an ECS for the impugned ICS in a manner engaging with two fundamental realities. First the difficult task of determining the custodial term which should have been imposed in October 2011 would have had to be undertaken. Second, the order of this court would have had to make full provision for the Parole Commissioners discharging in full their statutory function of formulating a series of recommended licence conditions. A carefully devised timetable for this purpose would have been necessary and it is likely that this court would have made specific facility for input and representations from the Commissioners directed centrally to the issue of timetabling and any kindred issues prior to finalising its order. From all of the foregoing it will be clear that success for an appellant in an appeal of this nature is most unlikely to result in immediate release from custody. Otherwise this court would be abandoning its duties to the public.

[53] Finally, this court is bound to express its significant misgivings about the inadequacies of the Northern Ireland post-sentencing system exposed by this appeal. Mr Doherty has been in sentenced custody for over 10 years. That is the equivalent of a 20 year determinate sentence. He suffers from a serious personality disorder which, evidently, has not received appropriate professional treatment. He has made at most minimal progress in the path to release from sentenced custody. He could well remain in custody for a further very lengthy period. As the evidence demonstrates, Mr Doherty is aware that those convicted of manifestly more serious offending have received substantially shorter prison sentences.

[54] The ICS is an extreme, Draconian sentencing weapon which has been justifiably criticised. Unsurprisingly it is the subject of formal review in GB, a process which continues. The relevant authorities in this jurisdiction will hopefully be watching with interest and contributing as appropriate. The ICS, however, is not the real mischief in Mr Doherty's case. The real mischief is the unavailability of the necessary professional services in Northern Ireland to bring about Mr Doherty's rehabilitation. The evidence suggests that the failings in this respect are abject in nature.

[55] There is a clearly identifiable and incontestable public interest in the rehabilitation of all offenders. This theme features in two comparatively recent

decisions of this court in *R v Dunlop* [2019] NICA 72 at paras [39] – [40] especially and, more fully, in *R v Ferris* [2020] NICA 60 at paras [49] – [54].

[56] Furthermore, this public interest is frequently the motivation for imaginative and constructive grants of bail to suspected offenders. In this latter context, it is to be lamented that a worthy and imaginative scheme in which Mr Justice Horner, a member of this court, has invested considerable time and effort has not been inaugurated due to the Covid-19 pandemic. This scheme would entail remand prisoners, i.e. those accused, but not convicted, of any criminal offence, being offered the opportunity to join a boxing club as a condition of bail. If this proved successful, and it has been tried elsewhere with promising results, then it could be extended to other sports such as soccer, GAA and rugby. It has been clearly demonstrated that active involvement in sport which requires self-discipline and team working and club responsibilities, provides a pathway to better, more responsible behaviour for many young men and women who become caught up in the criminal justice system at an early age and an opportunity for those young people to escape to a responsible, law abiding existence.

[57] The public interest in the rehabilitation of offenders is based on benefiting and protecting all members of society. This fundamental truism must be fully appreciated. It is not being furthered in the case of Mr Doherty and other related cases. No public interest is served by the incarceration of offenders and their subsequent release without adequate professional treatments and interventions both before and afterwards. No public interest is served by the reoffending of convicted offenders who have not received appropriate professional treatments and interventions before their release. This court, sadly, is powerless to provide a solution to this highly disturbing state of affairs in Northern Ireland. It is the court's earnest hope that Mr Doherty's case will provide a stimulus for much needed intervention and investment on the part of the executive. The alternative is a senseless vicious circle of offending and reoffending, a veritable vortex in which there is no winner.

Outcome

[58] For the reasons given the appeal against the imposition of the ICS in respect of the two offensive weapon counts succeeds. We quash these sentences and substitute a sentence of two years' imprisonment for each, concurrently inter se and to operate concurrently with the four year ICS tariff. For the reasons given this, however, is but a pyrrhic success for Mr Doherty. The main appeal, challenging the imposition of an ICS in respect of the two robbery counts, is dismissed.