APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 47
HCA/2025/152/XC & HCA/2025/184/XC

Lord Justice Clerk
Lord Matthews
Lord Ericht

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEALS AGAINST SENTENCE

by

(1) DAVID NISBET AND (2) DECLAN JAMES McCUISH

Appellants

against

HIS MAJESTY'S ADVOCATE

Respondent

First Appellant: Party Appellant;
Second Appellant: Mohammed KC; Paterson Bell (for John Kilcoyne and Co, Glasgow)
Respondent: Dalziel (Sol Adv) AD; the Crown Agent

10 November 2026

Introduction

[1] This appeal raises issues of comparative justice. The appellants challenge the length of their respective extended prison sentences imposed on 27 March 2025 following trial at the High Court in Glasgow on comparative grounds. The first appellant, in his note of appeal, founded on sentences imposed on two other persons for connected proceedings and,

in the appeal hearing, introduced a comparison with two other persons in entirely different proceedings. The second appellant founded on comparison with the sentence imposed on the first appellant.

[2] Both appellants challenged their convictions on grounds of non-disclosure before abandoning those grounds following prolonged procedure. The first appellant's lawyers withdrew from acting before the sentence appeal hearing. We advised him of his entitlement to legal representation and that we would consider any motion for a continuation of the appeal to allow him to obtain it. He made it clear that he had prepared his argument, wished to present his appeal forthwith and did so.

The sentences challenged

[3] The trial judge imposed on the first appellant a cumulative extended sentence of 16 years with a 13-year custodial term after he was convicted of the following charges, the jury having deleted reference to cannabis on charge 2:

> "(002) between 22 March 2020 and 1 June 2020, both dates inclusive, at [a flat in Lenzie and five addresses in Glasgow] and elsewhere, you DAVID NISBET, did whilst acting with another, direct Andrew Macaskill, now deceased, and Anthony Haggarty Jr …to commit serious offences namely contraventions of Section 4(3)(b) of the Misuse of Drugs Act 1971 and the Proceeds of Crime Act 2002 in relation to criminal property, in that you did instruct them to obtain, transport, adulterate and supply controlled drugs on your behalf, namely quantities of Cocaine, Diamorphine, Etizolam and instruct them to take possession of, package and transfer criminal property, namely money obtained from the said sale and supply of controlled drugs on your behalf and have in your possession and control a firearm, namely a handgun, for the purpose of using it to commit acts of violence: CONTRARY to Section 30(1)(a) of the Criminal Justice and Licensing (Scotland) Act 2010;
>
> (003) between 22 March 2020 and 14 April 2020, both dates inclusive, at [a flat in Lenzie and three of the same five addresses in Glasgow and an address in Liverpool] and elsewhere you DAVID NISBET and, DECLAN JAMES MCCUISH did conspire with Andrew Macaskill, now deceased, and with others, to shoot and murder Ryan Carvill… and in pursuance of said conspiracy you did identify the address where said Ryan Carvill was residing and the means of accessing said address, identify the

> car that he was using, monitor his movements, discuss and agree how best to murder him, agree the price to be paid to carry out the said murder, offer money and arrange for individuals, including James Patrick Richards, to be brought to Glasgow to carry out the said murder, source and obtain stolen cars with false number plates to use in the said murder, discuss the testing of a firearm to be used to carry out the said murder, make plans to conceal the firearm and to set fire to the car used during the said murder and you did thus conspire to murder said Ryan Carvill;
> and it will be proved in terms of Section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 that the aforesaid offence was aggravated by a connection with serious organised crime."

[4] Had each offence been tried alone, the sentences would have been imprisonment for 7 years on charge 2 and on charge 3 an extended sentence comprising a custodial term of 10 years (including 6 months for the aggravation) and a 3-year extension. For reasons of proportionality, the ultimate cumulative sentence on the two charges was an extended sentence of 16 years with a 13-year custodial term.

[5] The judge imposed on the second appellant a cumulative extended sentence of 14 years with an 11-year custodial term after he was convicted of the following charges:

> "(001) between 22 March 2020 and 14 April 2020, both dates inclusive, at [a flat in Lenzie and four of the same addresses in Glasgow as charge 2 above] and elsewhere you DECLAN JAMES MCCUISH and others were involved in serious organised crime and did agree with Andrew Macaskill, now deceased, and with others, to do something you knew or suspected or ought reasonably to have known or suspected would enable or further the commission of serious organised crime, in that you did concern yourselves in the supply of controlled drugs, namely benzodiazepines and use encrypted electronic devices to communicate with each other and others; CONTRARY to Section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010;
>
> (003) between 22 March 2020 and 14 April 2020, both dates inclusive, at [a flat in Lenzie and three of the same four addresses in Glasgow and an address in Liverpool] and elsewhere you DAVID NISBET and, DECLAN JAMES MCCUISH did conspire with Andrew Macaskill, now deceased, and with others, to shoot and murder Ryan Carvill, … and in pursuance of said conspiracy you did identify the address where said Ryan Carvill was residing and the means of accessing said address, identify the car that he was using, monitor his movements, discuss and agree how best to murder him, [*agree the price to be paid to carry put the said murder*,] offer money and arrange for individuals, including James Patrick Richards, to be brought to Glasgow to carry out the said murder, source and obtain stolen cars with false number plates to use in the said murder, [*discuss the testing of a firearm to be used to carry out the said murder*,]

> make plans to conceal the firearm and to set fire to the car used during the said murder and you did thus conspire to murder said Ryan Carvill;
> and it will be proved in terms of Section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 that the aforesaid offence was aggravated by a connection with serious organised crime."

The jury deleted the following averments from charge 3 in their verdict for the second appellant: "agree the price to be paid to carry out the said murder" and "discuss the testing of a firearm to be used to carry out the said murder" shown above in parentheses.

[6] Had each offence been tried alone, the sentences would have been imprisonment for 5 years on charge 1 and on charge 3 an extended sentence comprising a custodial term of 9 years (including 6 months for the aggravation) and a 3-year extension. For reasons of proportionality, the ultimate cumulative sentence on the two charges was an extended sentence of 14 years with an 11-year custodial term.

The circumstances of the offences

[7] Much of the evidence related to the recovery and significance of EncroChat communications arising from Operation Venetic, the name given to English and Scottish investigations prompted by the provision to United Kingdom law enforcement authorities of the fruits of French investigations that had overcome the security of EncroChat communications used by serious and organised criminals. The communications recovered were spoken to by a police officer over many days of the trial and augmented by observations of other police officers. It was established that the first appellant used identifiers, known as handles, including "las-diablo" and "secrettuna" with the second appellant's handle being "remotestorm".

Charges 1 and 2

[8] Numerous facts were agreed by joint minute demonstrating that drug dealing was occurring at various addresses, some linked to the appellants and associates. EncroChat communications between the two appellants provided further proof of their involvement in that regard. Drugs and sums of money were found at five properties on charge 1 and six on charge 2 supporting the existence of operations to supply the respective controlled drugs featuring on the charges.

[9] The jury was satisfied that the activities described in charge 1, and the use of encrypted electronic devices for communication, served to enable or further the commission of serious organised crime. "Remotestorm" (ie the second appellant) communicated about Valium, a benzodiazepine, and allowed his address in Lenzie to be used by another of those involved in drug supplying. The judge confirms that messaging revealed that drugs were both stored and packaged there. The second appellant discussed with another participant in the scheme drugs transactions and bills owed to the second appellant for drugs and his involvement in transactions and gathering and banking money.

Charge 3

[10] Communications demonstrated steps being taken in pursuit of the conspiracy to murder and knowledge of the address of, and vehicle used by, the intended victim and about his movements. Arrangements were made for a succession of putative "hit-men" to come to Glasgow to shoot and kill the victim for which money was to be paid. There were discussions about the provision of stolen cars with false number plates for the would-be killers. Messages suggested that the victim was to have his legs tied, to be shot (and how

many times he was to be shot) and his body put in a canal and that the two appellants would be involved in disposal of the body.

[11] The first appellant was involved in communicating directly with the would-be killers and the second appellant was to make sure a flat he owned in Lenzie would be available for the killer. Both appellants arranged for a person who lived there, who was also involved in drug-dealing, to vacate that address for the killer. The third potential hit-man came to Glasgow on 10 April 2020 from Liverpool and engaged in communications with the first appellant about the weapon, vehicles and disposal of the vehicle used in the shooting. The judge reports that it could be inferred that the second appellant was privy to "the finer detail of the plan to murder". The second appellant discussed the route to the victim's house and where to burn the vehicle used in the murder. He sent messages about there being a "tool" in his flat, which might be inferred to be a gun.

[12] In the event the shooting did not take place as the third hit-man, once in Glasgow, was not satisfied with the getaway car and backed out of the scheme.

Previous convictions

David Nisbet

[13] The first appellant has convictions extending from 2007, mostly for crimes of disorder, motoring offences and crimes of assault:

- 19 December 2007, on summary procedure, a modest fine and compensation order for a charge of assault with no aggravations;
- 8 December 2010, on sheriff court indictment for a knife assault to severe injury and permanent disfigurement, committed when on bail, an extended sentence of 5 years with a 4-year term of detention;
- 30 November 2010, on sheriff court indictment for a knife assault to injury and breach of the peace, both committed on bail, detention for 18 months concurrently on each charge; and

- 31 October 2011 on summary procedure for assault to injury, a consecutive sentence of imprisonment for 4 months.

Declan McCuish

[14] The second appellant has convictions extending from 2008. On 29 March 2010, on sheriff court indictment, for assault to severe injury and permanent disfigurement, committed when on bail, he was sentenced to detention for 9 months. On 30 May 2014, on sheriff court indictment, he was sentenced to 12 months' imprisonment for a racially aggravated crime of disorder with a concurrent sentence of 4 months for production of cannabis.

Pleas in mitigation

[15] The first appellant continued to deny any involvement in the crimes he was convicted of. Serious though the crimes were, the court should conclude that the murder was unlikely to have occurred given the extent of the police knowledge of what was afoot and the apparent reluctance of the third hit-man who came to Glasgow to proceed.

[16] The second appellant drew attention to his involvement lasting little more than 3 weeks on both charges and that, in his case, the jury had deleted reference to acquiring and testing a firearm. The second appellant's involvement was less than the first appellant's. The justice social work report recorded adverse childhood experiences that had caused him to suffer Post Traumatic Stress Disorder and that he had lost what had been a stable relationship. He had anxiety and depression medicated with Sertraline.

Reasons for the sentences imposed

[17] The judge considered the first appellant to have more serious involvement in serious organised crime, given that charge 2 involved various drugs including class A and that he had been in possession of a gun in charge 3. He noted also his criminal record containing convictions for assault, including aggravated assaults. Whilst the conspiracy did not result in an actual assault and murder, he had shown an alarming level of commitment to have the person murdered. The failure of the plot was not caused by any reluctance of the first appellant.

[18] In the case of the second appellant, the judge noted that charge 1 involved a class C drug and lasted for about 3 weeks, nevertheless, he considered it serious offending. He considered that on charge 3, the second appellant's involvement was slightly less serious than that of the first appellant. The judge identified and set out in his sentencing statement the material aspects of his involvement in the conspiracy, including that he:

> "…conspired, along with others, to shoot and murder a person (who may have been involved in a rival drug gang).
>
> With the others, you identified the address where he lived, how to access it, identified the car that he was using, monitored his movements, discussed and agreed how best to murder him, offered money and arranged for individuals to be brought to Glasgow to carry out the murder, sourced and obtained stolen cars with false number plates to use in the murder, and made plans to conceal the firearm and to set fire to the car used during the murder. It was a detailed and advanced plan."

Grounds of appeal and the judge's response to them

David Nisbet

[19] The first appellant sought to make what he suggested is a comparative justice point. One of the others the appellant directed, Anthony Haggerty junior, whom he acknowledged played a subordinate role to the first appellant, pled guilty to trafficking the same drugs as

the appellant and was sentenced to 4 years and 6 months' imprisonment reduced from 6 years. Another conspirator Anthony Connell, who would have been indicted along with the appellant had he been extradited in time, pled guilty to two drug-trafficking charges and to conspiracy to murder and was sentenced to imprisonment for 6 years and 9 months reduced from 8 years and 6 months.

[20] The judge confirms that he did not sentence Mr Haggarty or Mr Connell. Mr Haggarty pled guilty to three charges of being concerned in supplying drugs along with others including Mr Connell but the first and second appellants were not named. Accordingly, Mr Haggarty was not convicted of being involved in serious organised crime with the first and second appellants. The first appellant had nevertheless had an elevated role in directing Mr Haggarty in the drugs operation. The first appellant's culpability was substantially higher. Had the judge known of Mr Haggarty's sentencing he would not have altered his approach in sentencing the first or second appellant.

[21] The judge explains that Mr Connell, whilst indicted on 5 charges, pled guilty at a preliminary hearing to a charge under the 2010 Act section 28 in the following terms:

> "(004) between 18 April 2019 and 12 May 2020, both dates inclusive, at [the same address in Lenzie, three of the same addresses in Glasgow as featuring the appellants' charges and an address in Renfrew] …and elsewhere in Scotland, you ANTHONY WILLIAM STUART CONNELL were involved in serious organised crime and did agree with others, to do something you knew or suspected or ought reasonably to have known or suspected would enable or further the commission of serious organised crime, in that you did
>
> a. concern yourself in the supply of controlled drugs, namely diamorphine and etizolam
> b. conspire to murder Ryan Carvill and did identify the address where he was residing and the means of accessing said address, monitor his movements, discuss the installation of a camera to watch his movements, discuss and agree how best to murder him, make plans to conceal the firearm and to set fire to the car used during the said murder and you did thus conspire to murder said Ryan Carvil.

CONTRARY to Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010."

[22] The judge considered this to be substantially less serious criminal conduct than that of the first appellant. He noted the approach of this court to arguments based on comparative justice in *Douglas* v *HM Advocate* [2023] HCJAC 32; 2024 JC 31. He also noted that the maximum penalty for the section 28 offence is imprisonment for 10 years whilst for conspiracy to murder it is imprisonment for life and for the offence under section 30 of the 2010 Act it is imprisonment for 14 years. We also note that the different judge who sentenced Mr Connell, considered his culpability to be very substantially less than persons playing a leading role higher in the chain of command.

[23] The judge who sentenced the first and second appellants considered that they met that description. He noted that Mr Connell had only one conviction for assault, to injury, and that it resulted in a community payback order with 160 hours of unpaid work. Had the judge known of the sentence imposed on Mr Connell, he would not have considered that Mr Connell's offending matched that of the first appellant on the conspiracy charge. He would not have changed the sentence he imposed on the first appellant.

Declan McCuish

[24] The notional sentence of 5 years' imprisonment on charge 1 was excessive given the offending involved a class C drug over a short period with the second appellant playing a more limited role than the first. The distinction in the gravity of their offending was not reflected in the respective notional sentences (7 years in the case of the first appellant on his drugs charge). The notional custodial term of 9 years on charge 3, slightly lower than the 10 years for the first appellant, was an insufficient distinction between them, given their

respective roles and the part played in the conspiracy. The judge gave insufficient weight to there being no actual harm caused on charge 3.

[25] The judge took account of the points made in the note of appeal on charge 1, notably the nature of the drug, the level of the second appellant's role and the time over which he was offending. He noted that the second appellant plainly played an important part and was closely associated with the first appellant, who was directing operations. On charge 3, the judge evaluated culpability by considering what the second appellant did according to the libel. It included identifying the address where the victim lived, how to access it, identifying his car, monitoring his movement, discussing and agreeing how best to murder him, offering money and arranging for people to come to Glasgow to carry out the murder, sourcing and obtaining cars with false number plates and making plans to conceal the firearm and set fire to the car used in the murder. There was a plain intention to kill and the conspiracy came close to completion with a potential assassin travelling to Glasgow from Liverpool. This was a serious conspiracy to murder with comparatively little difference between the culpability of the first and second appellants.

Appeal submissions

David Nisbet

[26] The first appellant echoed his grounds of appeal. He contended that the Opinion of the Lord Justice Clerk (Carloway) in *Thomas* v *HM Advocate* [2014] HCJAC 66 vouched that even if it was imposed by a different judge, a sentence imposed earlier for the same offence must be a factor to be taken into account in sentencing subsequently "on the same charges". Even if an earlier comparator seemed lenient, the new sentencer ought to seek to reconcile any disparities: *Armstrong* v *HM Advocate* [2021] HCJAC 34, 2021 JC 227. In that case the

court had to consider carefully the responsibility of each co-accused within the same charge, leading to some sentences being reduced.

[27] So far as the comparator Anthony Connell was concerned, whilst it had to be accepted that Mr Connell had pled guilty under section 28 of the 2010 Act, carrying a maximum sentence of 10 years' imprisonment, the notional sentence prior to discount of 8 years and 6 months for offending with a libel extending over a longer period for the same conspiracy and involvement that was comparable or greater than the first appellant's, tended to show that sentence was excessive.

[28] The first appellant concluded that his sentence should be reduced on comparative grounds, primarily with Mr Connell.

[29] The first appellant then sought to draw a comparison with an unrelated case which he said came under the umbrella of Operation Venetic, specifically the sentences passed on Gerard Gilmour and Martin Mullen in the High Court in 2023.

[30] The clerk of court was able to provide us with the minutes of the proceedings in the High Court at first instance, recording the charges to which Mr Gilmour and Mr Mullen pled guilty, and sentences passed. We came to understand that they were co-accused at first instance in the appeal taken by Mr Douglas, the appellant referred to at para [22] above.

Declan McCuish

[31] The deletions made by the jury from their verdict against the second appellant were significant as was the limited period of 23 days over which he was offending. His real contribution to the conspiracy was providing accommodation. There were favourable indications in the JSWR of a capacity for reflection and rehabilitation. His involvement in supplying drugs was for a shorter period and involved less serious drugs than those that

Mr Nisbet engaged with. The nominal sentence of 5 years for charge 1 was excessive as was that of 9 years on charge 3, given the second appellant's peripheral role compared to the first appellant. The final sentence with an 11-year custodial term and extension period of 3 years was excessive. The comparative difference in their relative starting points of 17 years for the first appellant and 14 years for the second appellant was not sufficient given the differences between their backgrounds, different roles in supplying benzodiazepines and in the conspiracy and the difference of only 2 years between their ultimate extended sentences was insufficient. The court should reduce the second appellant's sentence.

Analysis and decision

[32] The Lord Justice General (Emslie) stated in *Simpkins* v *HM Advocate* 1985 SCCR 30, at page 35:

> "The short fact of the matter is that when a team enterprise of this kind takes place, roles are allotted to the various actors and it matters not whether the role is a leading role or a supporting role or a character role. The fact of the matter is that the event took place as a team enterprise, and a team enterprise which on proof of guilt of participation demanded a custodial sentence."

[33] In delivering the Opinion of the court in *Armstrong* v *HM Advocate* [2021] HCJAC 34, 2021 JC 227 [24] the Lord Justice General (Carloway) explained that the general principle of comparative justice is that co-accused persons who have been convicted of the same offence ought to receive substantially the same sentence and the severity or leniency of the sentence on one co-accused is a factor to be taken account of in sentencing the other accused. We consider it important not to overlook the word "substantially" and that the general principle applies between persons convicted of the same offence.

[34] The Lord Justice General explained that reasons to depart from the general principle might include situations where co-accused persons have significantly different criminal

records, if one has reduced culpability for a reason such as youth when others do not, or perhaps, exceptionally, if the roles played by different persons were radically different in an art and part case: *Cosgrove* v *HM Advocate* [2007] HCJAC 54, 2008 JC 102. We consider that care must be taken with *Cosgrove* as it was a decision of two judges who did not notice *Simpkins* and referred to no authority.

[35] In determining the appropriate sentence for the appellant in *Armstrong*, the court noted that he fell within the scope of the Scottish Sentencing Council's *Sentencing young people* guideline, albeit at the upper end of its range. Taking some account of another rather lenient sentence for essentially the same offence on the same indictment, the court reduced an extended sentence of 13 years with a 10-year custodial term, to one of 11 years with an 8-year custodial term.

[36] It is important to note that the court was not inhibited by the sentencing judge having failed to impose an extended sentence on the most direct comparator where it appeared to the appeal court that it would have been merited.

[37] We would add another example, to those identified in *Armstrong*, of a reason why the comparative principle will not always inevitably lead to the imposition of similar sentences on different co-accused appearing on the same charge. If a judge imposes sentence on one accused on an indictment, and materially errs in doing so, or simply imposes a manifestly inadequate or excessive sentence, injustice would be perpetuated if a second judge passing sentence on another accused on the same charge was obliged to impose much the same sentence.

[38] An illustration is seen in a Crown appeal against sentence, *HM Advocate* v *Smith* [2026] HCJAC 22, 2026 JC 268. One judge imposed a sentence of imprisonment on Mr Smith for 28 months with a supervised release order of 12 months on a charge featuring two other

accused persons all acting in concert, one of whom, Mr Mitchell, had failed to appear at trial. Mr Smith proceeded to trial but pled guilty to an amended charge after several days. The Crown appealed on the basis of the sentencing judge's incompetent reliance on the Police, Public Order and Criminal Justice (Scotland) Act 2006 section 91 (broadly concerned with reductions of sentence where an offender reaches a formal agreement to cooperate with police investigations into the criminal conduct of others), his failure to recognise the implications of a plea of guilty to acting in concert with others, a technical failure regarding a bail aggravation and an over-generous approach to reduction of sentence for a plea of guilty after several days of evidence were led at trial.

[39] Before the Crown appeal against Mr Smith was heard a different and very experienced judge had imposed an extended sentence of 8 years with a 6-year custodial term on Mr Mitchell on the same indictment for the same principal offence. When Mr Mitchell sought to appeal against sentence on comparative grounds relating to Mr Smith's shorter sentence before the Crown appeal against Mr Smith was heard, leave to appeal was refused. The judge sifting Mr Mitchell's appeal noted the decision and reasoning of the court in *Douglas* v *HM Advocate* [2023] HCJAC 32, 2024 JC 31 and explained, in refusing leave to appeal, that the true issue was whether there had been a miscarriage of justice owing to the imposition of an excessive sentence on Mr Mitchell.

[40] Thereafter, the Crown appeal was heard, and Mr Smith's sentence was increased to an extended sentence of 8 years and 2 months with a custodial term of 5 years and 2 months following a reduction by two months for the very late plea of guilty mid-trial. Mr Mitchell was refused leave to appeal against sentence by two judges thereafter.

[41] We consider that it is rarely straightforward to achieve comparative justice and note that fundamental sentencing principles may pull in different directions as those who

regularly pass sentences well know. The core principle in the *Principles and purposes of sentencing* guideline, that sentencing must be fair and proportionate, may be seen, at least indirectly, to support the principle of comparative justice and one of its aspects is that sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability. Nevertheless, this does not mean that similar cases should be dealt with in the same way. Variations will occur due to the precise nature and scope of each offence, its particular circumstances and those of each offender.

[42] The *Sentencing process* guideline requires that culpability and harm, including potential harm, must be identified. Culpability often varies between co-accused. Then aggravating and mitigating factors must be considered. Mitigating factors may relate both to the circumstances of the offence and, particularly, matters personal to the offender.

[43] At common law, there is a requirement to have regard to all relevant circumstances in passing sentence. A judge must recognise those factors, evaluate them and attribute appropriate weight to them. The process is somewhat instinctive.

[44] More generally, this court identified the limitations of comparing one reported case with another in *McLachlan* v *HM Advocate* at [2026] HCJAC 14, 2026 JC 248 at [32]:

> "In *Mitchell* v *HM Advocate* [[2011] HCJAC 10, 2012 JC 13] the Lord Justice Clerk (Gill) noted that comparing a sentence with sentences imposed in other cases gives limited guidance. Lord Hardie was to the same effect (para 31), adding that it is difficult to compare the nature and gravity of one case with another. The Lord Justice Clerk (Dorrian) endorsed that observation in *Rauf and ors* v *HM Advocate* [[2019] HCJAC 72, 2020 SCCR 47] (para 17) stating that it is rare that the circumstances of two cases are so similar that a direct comparison can be carried out. This court made similar observations in *Keel* v *HM Advocate* [[2025] HCJAC 47, 2026 JC 69] (para 28)."

[45] Against that background, we come to what was said in *Douglas* v *HM Advocate*. As we have noted above, the case involved not only Mr Douglas but his co-accused at first-instance Mr Gilmour and Mr Mullen (not appellants) and whose sentences the first

appellant founds on for comparison. This is a very long way removed from a proper comparative justice situation. A particular relevance of *Douglas* is that Mr Douglas invited the court to reduce his sentence on the basis of comparison with the sentences passed on his two co-accused (Mr Gilmour and Mr Mullen) and that the first appellant seeks to found on the sentences imposed on them.

[46] The court noted that all three accused were involved in serious organised crime relating to the supplying of controlled drugs and the possession of firearms. Mr Mullen operated at a higher level in the group than both co-accused and pled guilty to a charge (charge 6) of directing them to commit serious offences involving drugs and firearms (2010 Act section 30(1)(a)). Mr Douglas and Mr Gilmour pled guilty, though in different terms, to a charge (charge 5) of being involved in this criminal activity by agreement with Mr Mullen (2010 Act section 28(1)). Mr Gilmour and Mr Mullen also pled guilty to a charge (charge 7) of conspiracy to murder a man, who appeared to be affiliated to a rival crime group.

[47] The judge selected the same headline sentence of 10 years for Mr Gilmour (10 years on charge 7 and on charge 5, 8 years concurrently, these figures being reduced to 7 years and 6 months and 6 years respectively) and Mr Mullen (10 years on charge 7 and 9 years concurrently on charge 6, these figures being reduced to 7 years and 6 months and 6 years and 9 months respectively). Mr Gilmour had a more serious record, but Mr Mullen operated at a higher level in the group; these two factors balanced each other out. The appellant Douglas's sentence had not only to reflect the principle of comparative justice relative to the co-accused but also the serious nature of the criminal activity in which he had been involved.

[48] The judge had decided that an appropriate headline sentence for Mr Douglas was 6 years' imprisonment. It was discounted, to reflect a plea at the trial diet, to 5 years and 3 months. In the appeal, the court was told of Mr Douglas's wife having died, that Mr Douglas suffered from several medical conditions, and that he was bringing up three sons, one of whom had a long-term illness, Mr Douglas being his carer. Against that background, Mr Douglas challenged his sentence on comparative grounds.

[49] Lord Pentland (as he then was) delivering the Opinion of a court comprising also Lord Boyd, in refusing the appeal, explained at [11] that Mr Douglas's sentence was not excessive:

> "…The offence to which he pled guilty was undoubtedly serious. He played a significant role in the activities of a serious organised crime group. His level of culpability was high, as was the potential for serious harm to be caused by what he agreed to do. The headline sentence for the appellant was 40 per cent lower than those selected for his two co-accused, the sentences for each of whom appear to us to have been relatively lenient. We consider that the differential adequately reflects the differing degrees of criminality and the differences in the respective criminal records of the three accused. While the principle is an important one (*Armstrong v HM Advocate*), the question of comparative justice as between various accused on the same indictment can only be approached on a somewhat broad basis. Attempting to draw fine distinctions is not appropriate or helpful. At the end of the day the focus for this court must be on the question whether the sentence imposed on the appellant was excessive in the whole circumstances. We are satisfied that it was not."
>
> [Emphasis added]

[50] As a bench of three judges, we take the opportunity to endorse and adopt the passage underlined above. It is an important and correct statement of principle from judges with considerable experience of criminal cases and sentencing. It is unrealistic to expect mathematically calibrated precision in comparing sentences when there are always variables requiring careful evaluation. Contrived complaints based on fine comparisons between co-accused on the same indictment, or one accused and others in other proceedings, will not find favour.

[51] In determining whether the imposition of a sentence has given rise to a miscarriage of justice, this court generally proceeds on the basis described in *Douglas*; ie whether the sentence imposed on the appellant was excessive in the whole circumstances.

[52] As this court has frequently explained, an error in one or more of the steps by which the final sentence is reached will not of itself demonstrate that a sentence was excessive: *Miller* v *HM Advocate* [2024] HCJAC 3, 2024 JC 253 [31], Lord Justice General (Carloway); *Huynh* v *HM Advocate* [2026] HCJAC 6, 2026 JC 195 [42].

David Nisbet

[53] There is no valid comparison to be made between the disposals of the first appellant on the one hand and Mr Connell and Mr Haggerty on the other. They did not appear on the same indictment as the appellants and whilst there was some connection in their offending, it was not the same. The judge who sentenced the appellants would not have changed the sentences he imposed had he known of the sentences imposed on Mr Connell and Mr Haggerty. Neither has a criminal record comparable to the first appellant's and neither was convicted of sufficiently similar conduct to allow meaningful comparisons to be made.

[54] In the appeal hearing, the first appellant sought, for the first time, to found on comparison with two persons sentenced in 2023. The judge who sentenced the appellants did not have an opportunity to comment on the circumstances of Mr Gilmour and Mr Mullen. Although their crimes bear some superficial similarities to those involving the first appellant and may have been investigated in light of Operation Venetic, they do not raise a true issue of comparative justice. The most that can be said is that they provide examples of sentencing for crimes of a broadly similar nature.

[55] Coincidentally, as we have noted, these were two of the co-accused of the appellant *Douglas* referred to above. In evaluating the various sentences passed on Mr Gilmour and Mr Mullen, we note that the Opinion of the court delivered by the Lord Justice General (Carloway) in *HM Advocate* v *Fergusson* [2024] HCJAC 22, 2024 JC 376 was issued on 28 May 2024. That was almost a year after the sentences imposed on Mr Gilmour and Mr Mullen who were sentenced on 23 June 2023. In each of their cases, the notional sentences were reduced by one quarter for a guilty plea. Since the first appellant did not plead guilty, if comparison was valid, the comparator would be the starting point of each sentence imposed on Mr Gilmour and Mr Mullen. The sentences on each of Mr Gilmour and Mr Mullen were ordered to be served concurrently.

[56] In *Fergusson*, the court was concerned to address the problem of sentencing when there is more than one offence, whether sentencing concurrently or consecutively, and adopted the solution proposed by Lord Sutherland in *McDade* v *HM Advocate* 1997 SCCR 52 of passing sentence cumulatively. Doing so avoids "offences being committed for free" as could occur with concurrent sentencing or an excessive total if sentencing consecutively. In a refinement of the sentencing process, the court proposed that offences, or groups of offences, should be attributed specific sentences, in part for reasons of transparency in the interests of the accused, any complainers and the public. The judge should then total the sentences before making a reduction of the total, for reasons of fairness and proportionality, to give the final sentence.

[57] In the appeal before us, the judge passed sentence in accordance with *Fergusson*, totalling the individual sentences on each appellant and then reducing the total by a proportion. Accordingly, the concurrent sentences imposed on Mr Gilmour and Mr Mullen in 2023 do not offer a valid comparator.

[58] Had the *Fergusson* approach been followed in that case to the pre-discount figures, as would now be the norm, the consecutive total for Mr Gilmour would have been 18 years and for Mr Mullen 19 years. A proportionality adjustment may have reduced each total by 4 years or so to 14 and 15 years' imprisonment. Whilst Mr Gilmour is said in the court's Opinion in *Douglas* to have had a serious criminal record for violent offending, that of Mr Mullen was less serious. We remind ourselves that Mr Nisbet's custodial term was 13 years.

[59] For all these reasons, whilst we acknowledge the thought and care he put into his submission, and the courtesy with which he delivered it, we are not persuaded that the sentence imposed was excessive or a miscarriage of justice. We refuse the first appellant's appeal.

Declan McCuish

[60] There were some differences in the precise wording of the conspiracy charge in each of the verdicts on it, but we are not persuaded they are of great importance. The judge heard the evidence and concluded, reasonably, that the first appellant, whom we have noted had an extensive record for crimes of violence, bore slightly higher culpability in terms of what he was convicted of and what the evidence disclosed. The second appellant was, nevertheless, a significant actor in the same scheme. He has some convictions for crimes of violence and received short prison sentences for drugs offences, including production. Against that background, we do not consider the notional 5-year sentence for his class C drug supplying activities in charge 1, brought under section 28 of the 2010 Act, to have been excessive. Nor do we consider the notional sentence on charge 3 of 9 years including 6 months for the aggravation to have been excessive. No complaint has been made about

the judge's application of the principles in *Fergusson* leading to a cumulative extended sentence of 14 years with an 11-year custodial term. The proper comparison is with the appropriately imposed extended sentence of 16 years with a 13-year custodial term for Mr Nisbet.

[61] Approaching the matter on the broad, and correct, basis proposed in *Douglas*, we are quite unable to interfere with the assessment of the judge, who heard the evidence and was best placed to evaluate its import, to impose on the second appellant a cumulative extended sentence of 14 years with an 11-year custodial term on comparative grounds. We are not persuaded that it was an excessive sentence, there was no miscarriage of justice and the second appellant's appeal is refused.