Judicial Communications Office

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SENTENCING FOR AFFRAY

Summary of Judgment

R v Michael McGinley

The Court of Appeal[1] today allowed an appeal against sentence by Michael McGinley ("the appellant") who was sentenced to a determinate custodial sentence of 40 months (20 months custody and 20 months licence) on 11 January 2024 following his plea of guilty to a single count of affray. The court substituted this sentence with one of 30 months split equally between custody and licence.

BACKGROUND

On 13 September 2018, police were called to an altercation at a wedding party at the Roe Park, Spa and Golf Resort in Limavady. The police relied on CCTV evidence which showed the appellant and Daniel Dundon fighting each other. Both men are armed with knives and the appellant appears to have a significant injury to his eye. At one point the appellant slashes Daniel Dundon on the back of the neck causing a gaping injury. The appellant also sprayed a number of persons with some, unidentified, noxious substance which caused irritation to their eyes. The prosecution accepted that they could not state with certainty from the CCTV footage how the incident started or how the appellant sustained the injury to his eye.

The appellant pleaded not guilty at arraignment on 30 March 2023, however, it was indicated to the prosecution that he would be willing to plead guilty to affray if an assault charge and the count of assault against his wife were left on the books and not proceeded with. Negotiations continued for some time and the appellant was ultimately re-arraigned and pleaded guilty to the single count of affray on 21 May 2023. He was sentenced on 11 January 2024 to a determinate custodial sentence of 40 months (20 months custody and 20 months on licence). His co-accused, Daniel Dundon was similarly sentenced but did not renew his application for leave to appeal against his sentence.

AFFRAY

Affray is a common law offence punishable in Northern Ireland by a maximum of life imprisonment. It consists of participating in a fight with one or more persons in a public place when the conduct was such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. The courts have previously stated that it is impossible to devise sentencing guidelines for affray because of the infinite variety of circumstances and participation however the Court of Appeal in *R v Shebani* [2022] NICA 9 said the general approach that should be adopted is first to consider the nature of the affray itself and in particular how it is perceived by innocent members of the public. Relevant factors would be the number of participants, the duration of the affray, the ferocity of the fighting, whether weapons

[1] The panel was Keegan LCJ, Treacy LJ and Humphreys J. Treacy LJ delivered the judgment of the court.

were used, the injuries sustained, the number and proximity of the public and the impact on the public.

GROUNDS OF APPEAL

Reduction for guilty plea

Counsel for the appellant contended that although he did not plead guilty at the earliest opportunity he had, from arraignment, through his counsel made attempts to resolve the indictment by way of a plea to affray. It was asserted that the trial judge failed to take into account and apply appropriate weight to his early indication of willingness to plead to the count ultimately accepted by the prosecution.

The court recognised that defence counsel engaged in early discussions with the prosecution, however, this did not involve an unequivocal offer to plead guilty. The appellant initially wanted to plead guilty on the basis that he was not armed with a knife and that the wounding with intent charge would be left on the books. He also wanted the charges against his wife to be discontinued. The court said it was correct that the prosecution could not accept the conditional offer to plead until his co-accused indicated he would plead guilty. This ultimately occurred and the appellant belatedly accepted that he had been armed with a knife. The court considered that the 25% reduction for the plea was generous and certainly well within the bounds of the judge's sentencing discretion.

Disparity

The appellant submitted that the trial judge failed to distinguish the appellant from his co-defendant in the sentences imposed. The court said an obvious point of distinction between the appellant and his co-accused Dundon is their criminal records. The appellant has a very limited record comprised of two appearances in the magistrates' court both in 2013 for which he received a community service order of 120 hours subsequently revoked and replaced with a £600 financial penalty. When he appeared for those offences, he had a completely clear record. The appellant therefore had no convictions for violent offences when he was being sentenced for affray. The court also noted that he had been on bail for the index offence for five years and there was nothing pending against him.

In sharp contrast Dundon had an extensive criminal record totalling 22 entries spanning a period from his first court appearance in August 2010 until June 2022. On 4 March 2013 he was sentenced in the Crown Court for possession of a weapon in a public place and grievous bodily harm ("GBH") for which he received a sentence of four years' imprisonment suspended for four years. He repeatedly breached the suspended sentence committing further offences. In May 2015 he was sentenced at the magistrates' court for possession of drugs with intent to supply. These offences were also committed in breach of his suspended sentence, but no steps appear to have been taken to activate the suspended sentence. For the drugs offences he was given probation and community service. Shortly before the index offence of affray in September 2018, Dundon had been sentenced for an offence of wounding which was committed just a few days before he appeared for the drugs offences. For the wounding charge he received a determinate custodial sentence of two years (one year custody and one year licence). Although that wounding took place within the period of the four-year suspended sentence imposed for the previous GBH it was not activated. Dundon was on licence for the offence of wounding when he committed the index offence of affray in September 2018. Whilst on bail for the affray charge

he committed further offences of disorderly behaviour, criminal damage and resisting police in March 2022 and in June 2022 he was given a suspended sentence for those offences.

The court said it was clear that Dundon was a dangerous recidivist with a clear propensity to use violence. The appellant, in contrast, had a minor record and nothing for violence. The court noted that the judge was aware this, however, this striking difference was not reflected in the sentencing outcome. It considered that Dundon's record constituted a serious aggravating factor that ought to have been reflected in the overall sentences imposed.

Mitigation in relation to commission of offence

The appellant gave an account of the events of 18 September 2018 in his first after caution interview with the police. He said he had witnessed an argument between Barney Doherty and "a Dundon lad" in the toilets. He told them not to be "making a big thing out of it" and then Dundon hit him with a knife across the face. After that another man grabbed his leg and knocked him to the ground. When he got up, he could not see where he was going as blood was running into his eye. He turned around and Dundon kept approaching him with a knife and followed him out of the toilets. The appellant said all he could remember was his wife beside him, trying to save him from Dundon as he could not see, and her then getting him and his two daughters out of the premises. In his police interviews, Dundon gave no account of how the event started or otherwise.

In the prosecution opening in the Crown Court, it was stated that on arrival the police established that there had been an altercation which initially started in the male toilets and then carried on into the bar area. It noted that the prosecution case was "essentially based" on the CCTV footage which shows Mr McGinley with a "significant injury to his eye, and Daniel Dundon fighting with each other and are armed with knives by the time the fight spills into the main bar area." The prosecution statement of facts states that from the footage it was not possible to say "with certainty" how the incident started. The prosecution stated however that they had "no difficulty" agreeing that McGinley had suffered an eye injury "off camera" (the toilet was off camera).

The court cited a number of decisions relating to sentencing where matters put forward by the defendant do not contradict the prosecution case but constitute extraneous mitigation where the court is not bound to accept the matters put forward whether or not they are challenged by the prosecution (*R v Cairns & Ors* [2013] 2 Cr App R (S) 73; *Underwood* [2004] EWCA Crim 2256) and relevant passages from Blackstone and Archbold). Applying these authorities, the court said it was clear that the appellant falls into the category of cases where the issue of whether he was attacked or not before his involvement could properly have been regarded as extraneous mitigation, in terms of the offence. In terms of this mitigation the burden of proof resting on a defendant is on the balance of probabilities. The court said this was not the approach adopted by the trial judge who appeared to have dismissed the mitigatory impact of the appellant's account because the prosecution could not establish it with certainty:

> "With respect to the trial judge she approached the matter through the wrong lens. On the authorities she ought to have considered whether the matters put forward by the appellant contradicted the prosecution case (which they did not) and whether the matters constituted "extraneous mitigation". She should further have borne in mind that in relation to matters of extraneous mitigation that a civil burden of proof rests

> on the appellant. In assessing whether the appellant had established the "extraneous mitigation" on the balance of probabilities she should have had regard to whether there was other material that supported his account."

In his application for leave to appeal, the appellant contended that the trial judge erred in not considering that there was mitigation pertaining to the offence. On his account what triggered his involvement in the events shown on CCTV was that he had been the victim of a prior attack in the toilets. The Crown did not accept his account on the basis that they cannot prove to the criminal standard that he was so attacked. The court said it did not follow that the trial judge must reject the appellant's position as his account did not contradict the prosecution case but constituted extraneous mitigation which should have been assessed in the matter outlined above. It commented that although the prosecution cannot state with certainty how the incident started there was "other material" which tended to support the appellant's account that he was slashed with a knife in the toilet in which Dundon was present. This included Dundon's serious record ~~for~~; that he was on licence for wounding at the time of the index offence; he had a problem with drugs and drink; he was heavily intoxicated at the time and gave no account at all including of what happened in the toilet. Another striking feature commented on by the trial judge was Dundon's violent behaviour in March 2022 (whilst on bail) which in her words "chime with the present offending."

The court said that, by contrast the appellant, who like all arrested persons was advised of his right to remain silent, chose to give an account and named those who were present. He gave an account at his first interview which formed part of the papers and which is supported by the CCTV to the extent that following his exit from the toilet he can be seen in an injured state with what is now known to have been a serious eye injury. Dundon, on the other hand, who claimed that the appellant was the aggressor, refused to give any account. In the CCTV Dundon can be seen advancing towards the appellant brandishing a knife but claimed that he did so "in self-defence". Dundon accepted in his skeleton argument seeking leave to appeal that he could have escaped, hence the plea.

The court said this was not, therefore, a case of the prosecution merely not being able to "gainsay" the appellant's account. It was a case in which there was objectively verifiable other material capable of supporting the appellant's account:

> "The judge did not consider or evaluate this other material specifically in the context of whether it was capable of supporting the appellant's account that he was slashed with a knife in the toilet prior to the altercation outside the toilet. Had the judge approached the matter through the correct lens as identified in the authorities identified above it would have been difficult to disregard his mitigatory claim as to what triggered the events giving rise to the affray."

Personal mitigation

The appellant contended that the trial judge failed to give an appropriate reduction in sentence for his personal mitigation and the probation assessment that he was a low likelihood of reoffending. The court heard that the appellant's mental health and lifestyle took a significant downturn in 2007 when his nephews died in a fire, from which he had tried to save them. Then in 2010 his son was diagnosed with cancer. The appellant's mental health further deteriorated with the death of his brother from suicide in 2019 and the stresses of the present proceedings hanging over his head for such a long period of time, which manifested itself in his attempt on

his life in December 2023, in the week he was due for sentence. The court said these factors caused probation to conclude that the appellant presents as "a low likelihood of reoffending within a two-year period." It was further noted that there had been no further violent offending, or indeed offending of any nature, in the five plus years from the commission of these offences to date of sentence.

Delay

The appellant's offending occurred on 11 September 2018, he was arrested on 13 September 2018 and interviewed on 5 November 2018. A summons to answer the complaint did not issue until 8 July 2022, with a first court appearance on 24 August 2022, almost four years after the commission of the offence. The appellant was sentenced over six years after the date of offence. The court said there had clearly been significant delay which was hanging over the appellant's head for an inordinate period and the court must take this into account when sentencing him (*A-Gs Reference (No.2 of 2001)* [2003] UKHL 68).

The Court of Appeal in Northern Ireland has addressed the issue of delay (*R v Dunlop* [2019] NICA 72 and *R v Ferris* [2020] NICA 60). The court said the trial judge properly recognised that there had been culpable delay in this case, but the appellant submitted that the delay was inordinate and the remedy for the breach ought to have been greater than the five months' reduction applied by the judge. The appropriate remedy identified by the trial judge was what Lord Bingham described as "a reduction in the penalty imposed on a convicted defendant." The rationale for this approach is said to be that a person charged should not remain too long in a state of uncertainty about their fate.

In *R v Jack* [2020] NICA 1 at [44] the court stated that the evaluative exercise should take into account not only the impact of the delay on the offender but also the requirement that offenders are realistically punished for their offences. Those competing private and public interests must be balanced and the balance must result in a proportionate response. The court in *Jack* further said that that it is not appropriate for the Court of Appeal to set out prescriptive guidance except to observe that in cases involving hardened recidivists who must be impervious to concern, in the case of vile and heinous crimes or in the case of dangerous criminals who pose a significant risk to members of the public of serious harm the appropriate response would be a public acknowledgement without any reduction in the penalty.

The court agreed that it is not appropriate for it to set out prescriptive guidance. It said the qualification in *Jack* about 'hardened recidivists' has no application to this appellant who had a minor record and none for violence. Accordingly, the court said it was strictly unnecessary for it to go further, nonetheless, it observed that the analysis, if correct and one by which it is bound, is "alarming":

> "It envisages a scenario where the court, when confronted with a breach of the article 6 reasonable time guarantee, will respond differently depending on whether the defendant falls within one of the undeserving classes of offender identified by the court in the passage just quoted or within the deserving class. Such a two-tier system discriminating between these two classes is difficult, if not impossible, to justify. Although the defendants in both classes have been subjected to a breach of their article 6 ECHR right to a fair trial within a reasonable time, those in the undeserving class are to be treated in a materially different manner by reason of the class/category

> in which they are placed. However, the guarantees of article 6 require that "*everyone* is entitled to a fair and public hearing within a reasonable time." On the analysis in *R v Jack* there is a category of prisoners who by reason of their classification will be excluded from receiving any reduction in sentence for the article 6 ECHR breach. It is arguable that this amounts to their being excluded from an effective remedy."

The court remarked that *R v Jack* refers to public confidence. It said public confidence is, however, unlikely to be eroded by a trial judge affording an appropriate remedy to vindicate the breach of the article 6 Convention right by way of a reduction in the penalty to be imposed:

> "What the appropriate remedy is in an individual criminal case will be a matter for the sentencing judge taking into account all the factors that are relevant to that exercise. On the other hand, public confidence could be eroded by a wholesale exclusion ~~of~~ or a materially different treatment of those who are deemed to fall within a de facto undeserving class. Further, if the sentencing courts are required or encouraged to treat article 6 delay differently in accordance with the dictum in *Jack* this may have adverse practical and policy implications. It may, for example, impact on how other criminal justice stakeholders view and respond to systemic delays in those cases deemed undeserving. Significant delays can and do occur in serious cases. Hopefully, the criminal cases in which article 6 ECHR delay is established are not numerous. The category of cases identified in *R v Jack* as effectively not justifying a reduction in penalty includes some of the most serious offences and offenders. If the courts are not seen to take the delay in those cases as seriously as it does in other cases criminal justice stakeholders may be emboldened to take a similar approach. We therefore take this opportunity to clarify the position regarding delay against the obiter comments in *R v Jack*. As a matter of principle our approach should now be applied."

Whether the reduction should come before or after the reduction for the plea

The prosecution relied on para [45] of R v Jack which stated that an article 6 breach "should be considered in fixing the starting point before applying the reduction for the plea." The court said that the remedy identified by the trial judge in this case was a reduction in the penalty, the rationale for this being that a person charged should not remain too long in a state of uncertainty about their fate.

The court said that, as a matter of principle, this exercise should be conducted after the starting point has been identified in the manner set out in *R v Stewart* [2017] NICA 1. The reason for this is that the reduction is to remedy the delay occasioned by state authorities resulting in a breach of article 6:

> "The remedy in this case is the reduction in the penalty. To reduce the penalty and to afford transparency one needs to know what is being reduced and by how much. It should be treated in a similar manner to the plea. The sentencer needs to know what sentence he would have imposed apart from the delay. From that figure he should make his reduction, if warranted. This is a vitally important part of the exercise to make clear to everyone the extent to which the delay has resulted in a reduction in the sentence of imprisonment which would otherwise have been imposed. If it is simply rolled up as mitigation there is no obligation on the sentencer to allocate a specific discount to the identified mitigating factors and so the parties, the victim and the Court of Appeal will not know precisely how delay has impacted the actual penalty. The

> actual remedy for the article 6 breach must be apparent on the face of the record, otherwise it will be impossible to discern. If the period is not identified it will be difficult, if not impossible, to determine whether the remedy was sufficient or excessive, and the true impact of serious delay may therefore be disguised. We have concluded that any reduction which is merited as a remedy for delay should be applied after any reduction for a plea of guilty. On this basis, a defendant who pleads guilty will receive the same reduction for delay as one who pleads not guilty and is convicted after a trial."

Exceptional circumstances

It is submitted that the appellant was a stranger to violent offending and, had it not been for what his counsel described as the "unprovoked attack on his person and the further approach from Dundon with a knife" this incident would not have occurred. It was suggested that his actions were entirely out of character for him, he has no history of violence and has not offended in any way in the intervening five plus years since the index incident. Notwithstanding the serious nature of the offending, it was submitted that, when one takes into account how he became involved in his offending, the injuries he sustained, the impact these events on his mental health and the delay, the court ought to have considered that there were exceptional circumstances justifying the suspension of any sentence.

The court commented that the trial judge plainly did not accept that exceptional circumstances existed in this case justifying the suspension of the sentence. It said that was a more than reasonable response for the judge to have taken to the facts of this case bearing in mind the serious nature of the offending. It rejected this ground of appeal

CONCLUSION

The court found that the appellant's case differs considerably from Dundon's and that the sentence should be adjusted to take into account his much more limited criminal record. Furthermore, the mitigation identified in relation to the commission of the offence ought to have been taken into consideration in arriving at the appropriate starting point. As a result, the sentence imposed on the appellant was manifestly excessive. The court concluded that the starting point ought to have been four rather than five years to take these factors into account. A reduction of 25% for the plea of guilty should then be applied. At that point a further reduction of six months, for culpable delay, should have been applied. The court rounded this down to a custodial sentence of 30 months. It therefore granted leave, allowed the appeal and substituted a determinate custodial sentence of 30 months, split equally between custody and licence.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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