Neutral citation No. [2010] NICA 36

Ref: **MOR7995**

Judgment: approved by the Court for handing down

Delivered: **10/11/10**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (NUMBERS 2 AND 3 OF 2010)
ANTHONY JOSEPH MCAULEY AND PAUL RONAN SEAWARD

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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[1] These references arise as a result of sentences imposed for the offence of causing grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861. In each case the offender used his feet to attack the victim as he lay on the ground. The Director of Public Prosecutions submits that the sentences are unduly lenient and should be increased. The court now has an opportunity to give guidance as to how sentencing in such cases should be approached.

Guidance

[2] The infliction of wanton violence by young males, often after the consumption of large amounts of alcohol, is not a new problem and has been the subject of consideration by the courts on many occasions. There are two recent decisions of this court which assist in determining how such offenders should be dealt with.

[3] The first is R v Stephen Magee [2007] NICA 21. In that case the applicant instigated a confrontation with the deceased. At some stage he armed himself with a large knife. In the course of the confrontation he deliberately stabbed the deceased in the region of the armpit causing a deep wound which proved fatal. He pleaded guilty to manslaughter on the basis that he did not intend to kill or cause really serious harm and it

was accepted that merely moderate force would have been required to cause the fatal wound.

[4] The court noted that there were certain common characteristics of offences of violence committed by young men on other young men and identified the problem at paragraph 23.

> **"[23]** It is the experience of this court that offences of wanton violence among young males (while by no means a new problem in our society) are becoming even more prevalent in recent years. Unfortunately, the use of a weapon – often a knife, sometimes a bottle or baseball bat – is all too frequently a feature of these cases. Shocking instances of gratuitous violence by kicking defenceless victims while they are on the ground are also common in the criminal courts. These offences are typically committed when the perpetrator is under the influence of drink or drugs or both. The level of violence meted out goes well beyond that which might have been prompted by the initial dispute. Those who inflict the violence display a chilling indifference to the severity of the injury that their victims will suffer."

The court concluded that in a case of manslaughter where the charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between eight and fifteen years imprisonment. The court noted that aggravating factors may include (i) the use of a weapon; (ii) that the attack was unprovoked; (iii) that the offender evinced an indifference to the seriousness of the likely injury; (iv) that there is a substantial criminal record for offences of violence; and (v) more than one blow or stabbing has occurred. All of these factors go to culpability, the harm caused being an integral part of the offence. There may, of course, be other aggravating factors such as the commission of the offence in the public street or while on bail or licence or under the influence of drink or drugs.

[5] The second case in which these issues have recently been considered is R v McArdle [2008] NICA 29. That was a case in which the

appellant had been charged with causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861. The circumstances were that the appellant met another man with whom he was vaguely acquainted. They went to the house of a mutual friend late on a Friday night but the friend was not at home. The appellant became agitated and then struck the victim in the face with a knife which he had secreted while he was in the victim's flat. The court considered the guidance it had given in Magee and concluded that where the grievous bodily harm was inflicted deliberately and the appellant intended that the victim sustain grievous injury it did not believe that the range of sentences should be significantly different from that which it identified in Magee. The court, therefore, identified a sentencing range between seven and fifteen years imprisonment following conviction after trial for offences of wounding with intent to cause grievous bodily harm.

[6] The sentencing principles in relation to offences of this kind have also recently been considered by the Sentencing Council for England and Wales in their recent consultation issued in October 2010. The consultation document suggests that for this offence the important factors are the culpability of the offender and the degree of harm caused. Where culpability and harm caused are high the suggested range is nine to sixteen years custody if convicted after a not guilty plea. A range of five to nine years custody is suggested where there is either high culpability or a higher degree of harm caused with a range of three to five years custody being reserved for cases of low culpability and lower harm. The emphasis on culpability and harm is consistent with the approach of the courts in this jurisdiction to the determination of the appropriate sentence.

[7] We consider that the sentencing range identified in McArdle of seven to fifteen years imprisonment after conviction on a contest is generally appropriate where the offence under section 18 is committed by attacking a victim who is lying on the ground with a shod foot with intent to cause him grievous bodily harm. In virtually every case the fact that an attack of this kind is launched will of itself be an indicator of high culpability in the commission of the offence under section 18. The place within this bracket will generally be determined by the extent of the harm caused and any other aggravating and mitigating factors. Exceptionally there may be cases of slightly lower culpability, such as where only one blow was struck, and where the harm caused is at the lower end of the scale which would justify a marginally reduced starting point. With that in mind we turn to the individual cases.

[8] The respondent is a 33-year-old single man. He was arraigned at Belfast Crown Court on 12 March 2009 on 7 counts being one count of grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861, one count of assault occasioning actual bodily harm, one count of assault, three counts of criminal damage and one count of possession of an offensive weapon. All of the offences were committed on 10 February 2008. The respondent pleaded not guilty on all counts. On 19 March 2009 a further count of affray was added to the indictment and the respondent pleaded not guilty to that count. A jury was sworn for the trial on 29 September 2009. In light of the medical evidence then available the respondent offered to plead to assault occasioning actual bodily harm on the first count but not to causing grievous bodily harm with intent. The prosecution were unwilling to accept that plea but sought an adjournment to obtain further medical evidence. A jury was then sworn on 22 February 2010 and hearsay applications were dealt with the following day. On 24 February 2010 he pleaded guilty to the original seven counts on the indictment. He was sentenced to a commensurate sentence of four years imprisonment comprising two years custody followed by two years probation for the grievous bodily harm with intent and concurrent sentences of two years imprisonment for the assault occasioning actual bodily harm, six months imprisonment for assault and 12 months imprisonment on the remaining counts.

[9] The offences arose against a background of tension between neighbouring families called McGuinness and McFeeley. Darren O'Neill is the son in law of John and Susan McGuinness. The offender was visiting O'Neill on the evening of 9 February 2008 when O'Neill was arrested by police for pushing Caroline McFeeley and making threats to her. Sometime after 2.30 a.m. on 10 February Dolores McFeeley was awakened by the sound of the living room windows in her house smashing. She called her son who went outside and found that the windows in his car had also been smashed. These constituted two of the criminal damage counts. Mrs McFeeley was concerned about her daughter Caroline in light of the earlier incident and made her way to Caroline's home with her husband and son. A scuffle and fight then ensued between members of the McFeeley and McGuinness families.

[10] The offender came out to join the fight and armed himself with a knife. He punched Dennis McFeeley, aged 60, in the face knocking him backwards and causing him to strike his head on the ground as he fell. He was rendered unconscious. The offender admitted stamping once on Mr McFeeley's head. The injured party sustained a laceration to the right ear which required sutures, a laceration to the back of the head which also required sutures, a fracture of the right coronoid process of the mandible and bruising to the right side of his mouth and eyes. This was the basis of the grievous bodily harm with intent count. Unfortunately in October 2008 Mr McFeeley suffered a stroke. No medical evidence was offered to suggest that there was any relationship between the development of the stroke and the assault.

[11] The respondent struck Dolores McFeeley in the face as a result of which she sustained two black eyes, some deviation of the septum of the nose, a fracture of one tooth, a loosening of another and the breaking of a crown. He punched Leanne O'Neill in the face which constituted the assault and he attacked a car in which children were sitting with a knife causing damage to the driver's window. This was the third criminal damage count. He caused no injury with the knife. Although there were various other claims and counterclaims this was a confused situation and some of the claims against the respondent were not substantiated by the medical evidence. As a result of the tensions between the families the McFeeley family left the area shortly after this incident.

[12] The respondent was abusing alcohol and cannabis at the time of these offences. After committing the offences he barricaded himself in his flat but was talked out by police some hours later. Since the incident he has resided with his parents and siblings and now has the benefit of family support. The pre-sentence report indicates a medium likelihood of re-offending and the respondent is assessed as not posing a risk of serious harm. He has convictions for assault occasioning actual bodily harm and assault arising out of an incident in November 2001 but otherwise has no convictions for offences of violence.

[13] In terms of culpability for the section 18 offence committed by kicking the victim on the ground this case lies at the bottom end of that bracket. There was a single blow with the foot and the harm caused was at the lower end of the range for this type of offence. Although he had a weapon it was not used to cause any injury. He was not an instigator of the fight although he voluntarily joined it. He did, however, commit the

criminal damage offences which preceded the fight and he did, of course, commit other assaults at the same time. Taking all these matters into account we consider that the appropriate sentence on a contest in this case was in or about seven years imprisonment.

[14] The respondent did not plead guilty at the first opportunity and indeed denied his responsibility for the offences at interview. This Court has made it clear on numerous occasions that those who seek to obtain the maximum benefit for pleas of guilty will generally only do so where they admit their responsibility at the earliest reasonable opportunity. The respondent did, however, indicate his acceptance of his responsibility in September 2009 and his plea was not entered at that stage because the prosecution had not completed their medical inquiries. This resulted in a delay of approximately 5 months. When the updated medical evidence was available he accepted his responsibility for the section 18 charge. We consider, therefore, that the appropriate sentence in this case was probably in or about five years imprisonment.

[15] In a reference under section 36 of the Criminal Justice Act 1988 the court should only interfere where it is satisfied that the sentence is unduly lenient (see Attorney General's Reference (No 4 of 1989) [1990] 1 WLR 41). Although a commensurate sentence of four years imprisonment might properly be described as lenient it is not in our view unduly lenient. Even if it were possible to say that the sentence was unduly lenient we would have had to exercise our discretion taking into account the double jeopardy principle and would not have interfered with the sentence.

R v Seaward

[16] The offender in this case was initially charged with two counts of causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861. Both counts related to an incident on 1 November 2007. The offender was arraigned at Belfast Crown Court on 24 February 2009 and pleaded not guilty. The trial was initially listed as a standby trial on 21 April 2009 but was taken out to permit full interview transcripts to be made available. It was again listed for 13 October 2009 but was unable to go ahead as the prosecution had not issued the appropriate witnesses invitations. A jury was sworn on 1 March 2010 and the offender

was rearraigned on 3 March and pleaded guilty to count one. A plea to assault contrary to section 20 of the Offences against the Person Act 1861 was accepted in relation to count two. The learned trial judge imposed a commensurate sentence of two years six months imprisonment on the first count comprising 18 months imprisonment followed by 12 months probation and nine months imprisonment on the second count to run concurrently with that sentence.

[17] The offences occurred about 9:30 p.m. on 1 November 2007. The two victims were waiting for a bus on Antrim Road Belfast. There was an exchange of words with two passing males who referred to the victims as orange men and the victims were then confronted by those two males and three others who had arrived on scene. The offender was a little distance away from this confrontation and it is accepted that he may not have been aware of the sectarian overtones. As one of the victims sought to make his escape there was a shout towards the offender that he should grab him. At this stage this victim probably had in his hand a Stanley knife which was used by him as a work tool. The victim was grabbed by the offender and they both fell to the ground. The offender sustained a cut to his neck in this incident. This victim was then kicked and punched on the head and face and forensic evidence linked DNA matching the victim with the right white trainer worn by the offender. The plea to the second count related to this incident.

[18] The second victim then went to the aid of the first. He was hit hard from behind and punched around the head six or seven times. He fell to the ground and was then kicked six or seven times to the head. Around this time a bus stopped at the bus stop where this attack was occurring. CCTV footage from the bus shows the offender kicking this injured party approximately 7 times in the area of his head when he was lying on the ground. After the initial kicks the offender returned on two separate occasions to administer further kicks. The demeanour of the offender is consistent with the suggestion that he was highly intoxicated at the time. This event constituted the plea to count one. Although he initially denied his involvement in this offence at interview the offender accepted that he had kicked the victim once he was shown the CCTV footage.

[19] The first victim sustained a number of cuts to his head which required stapling, a cut to his face requiring stitches, damage to his right eye and severe bruising and swelling to his face. The second victim sustained a large amount of swelling and bruising around his right temple,

right forehead, both cheekbones and nose. He sustained swelling to both lips, a wound at the top of the forehead and a fracture of the nasal bones.

[20] Despite his admissions at interview the offender did not plead guilty at the first opportunity to the first count. It appears, however, that there were ongoing discussions between the prosecution and defence in relation to the factual basis for the plea and the prosecution did accept a plea to a lesser charge of the second count. There was a very strong case against the offender on the first count but he is entitled to credit for his admissions at interview and the indications given between counsel.

[21] This is a case where there was an element of delay before the jury was sworn. The case was removed as a standby trial in April 2009 because of failures of disclosure and again in October 2009 because prosecution witnesses had not been invited to attend. It was not listed for a further six months. Relying on the decision of the House of Lords in Attorney General's Reference (No 2 of 2001) [2004] 2 AC 72 it was contended on behalf of the offender that there had been a breach of his rights under article 6 (1) of the ECHR. Even if one accepts that these failings amounted to a breach of the convention right there was in our view no substance to the submission that the proceeding should have been stayed because clearly a fair hearing was still possible and it would not have been unfair to try the defendant. We accept, however, that the learned trial Judge was entitled to make some allowance for the delay in this case.

[22] The pre-sentence report disclosed that the offender had obtained employment as the manager of a retail outlet since this incident. He had one previous conviction for assault on police in 2005 but was assessed as posing a low risk of re-offending and he did not pose a risk of serious harm to the public. We further accept that there was no element of premeditation on his part prior to becoming involved in these incidents.

[23] The CCTV footage demonstrates that this was a persistent and brutal assault upon a defenceless victim. The learned trial Judge considered that the appropriate sentence after a contest would have been four years imprisonment. We consider that this was a wholly inappropriate starting point and that the appropriate sentence after a contest would have been at least 8 years imprisonment before taking into account the issue of delay. Taking into account his plea and making some allowance for the delay and the issue of double jeopardy we consider that the commensurate sentence of two years and six months imprisonment

should be increased to one of four years and six months imprisonment. Subject to his agreement we will impose a sentence of three years and six months imprisonment followed by 12 months probation. He will be entitled to credit for any periods spent on remand and for any period served to date.