Neutral Citation No. [2006] NICA 8 | *Ref:* **SHEC5494**

Judgment: approved by the Court for handing down | *Delivered:* **10.03.06**
(subject to editorial corrections)

HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

GERALD PATRICK DONNELL

Appellant

Before: KERR LCJ AND SHEIL LJ

SHEIL LJ

Introduction

[1] The appellant, Gerald Patrick Donnell, appeals against concurrent sentences of 14 years' imprisonment followed by two years' probation, imposed on him by Mr Justice Higgins on 23 June 2005 in respect of the manslaughter of Andrew Bannon and in respect of causing grievous bodily harm with intent to do so on Ignatius Neville. Leave to do so was granted by Gillen J on 26 January 2006.

[2] When the appellant's trial began on 23 May 2005, the appellant faced four counts on the indictment:

1. The murder of Andrew Bannon.

2. The attempted murder of Ignatius Neville.

3. Grievous bodily harm with intent to Ignatius Neville.

4. Conspiracy to pervert the course of justice in relation to a false alibi.

[3] On 27 May 2005 after some evidence had been given on behalf of the Crown, the appellant was rearraigned and on the first count pleaded guilty to the manslaughter of Andrew Bannon, which plea was accepted by the Crown.

On the third count he pleaded guilty to causing grievous bodily harm with intent to Ignatius Neville; on the second count of attempted murder a verdict of not guilty was recorded on the direction of the learned trial judge. On the fourth count he pleaded guilty to the charge of conspiracy to pervert the course of justice, in respect of which he was sentenced to 18 months imprisonment concurrent with the sentence of 14 years' imprisonment and 2 years' probation; he does not appeal against that concurrent sentence of 18 months.

The facts

[4] The charges against the appellant arose out of an incident on Monday 26 May 2003 at Andrew Bannon's flat at 61 Mullaghmore Drive, Omagh, where Mr Bannon and Mr Neville frequently met to drink and play cards, as they did on that particular evening. At about midnight Mr Neville fell asleep in a spare room. He was wakened at approximately 2.00am by a disturbance in the course of which he was struck on the left side of his face with what he thought was a hockey stick and lost consciousness. When he recovered consciousness a short time later he found Mr Bannon lying dead further down the hall.

[5] A post mortem examination established that Mr Bannon had died from multiple blunt force trauma to his chest and abdomen. The pathologist concluded that the deceased had suffered forceful blows from a weapon with a projecting component. The assault has resulted in fractured ribs, lacerations of the left lung, deep lacerations of the spleen and multiple lacerations of the left kidney. The deceased's breathing had been compromised and there had been heavy bleeding into his abdominal cavity. He had a injury behind his left ear which might have been the result of a kick. Mr Neville sustained a number of fractures, bruises and puncture wounds which, as already mentioned, had resulted in temporary loss of consciousness.

[6] The motive for the attack by the appellant on the deceased arose because of the appellant's concern about the relationship between his own mother and the deceased, whom he perceived to be an alcoholic. The appellant himself was an alcoholic and had consumed a very large quantity of drink on the evening in question.

[7] On 26 May 2005 Dr Bentley, the Deputy State Pathologist for Northern Ireland, who gave evidence on behalf of the Crown accepted that the weapon, a pick-axe shaft, which allegedly had been used by the appellant could not have caused the puncture wounds found on the deceased's body and on Mr Neville. Dr Bentley stated that after he had been shown the pick-axe shaft by a senior police officer, he had told that officer that the pick-axe shaft could not have caused the distinctive puncture wounds on both victims. That information was not contained in Dr Bentley's report. That evidence, together

with some other evidence, suggested that more than one person and more than one weapon had been involved in the attack on the deceased and Mr Neville. It subsequently emerged that Dr Bentley's opinion in that respect had been recorded by Detective Inspector Freeburn in his journal on 31 March 2004, but that journal had not been disclosed to the defence.

[8] Following the evidence of Dr Bentley the Crown made a re-appraisal of the case against the appellant and by the following day was prepared to accept that there may have been more than one person involved in the assault, that more than one weapon was involved and that the various assaults were not necessarily carried out at the same time.

The sentence

[9] Mr Gallagher QC, who appeared with Mr Turkington on behalf of the appellant, submitted that the sentence of 14 year's imprisonment and 2 year's probation was manifestly excessive and made no allowance for the appellant's pleas of guilty. He submitted that, while those pleas were only made on the fifth day of the trial, that was due to the fact that the appellant had little or no recollection of what had transpired on that particular evening as he had consumed a large quantity of drink. The appellant had however told his brother some hours prior to the attack that he was going to go around to the deceased's flat to give him "a fucking slap" and later told his brother that he had done something "really bad". A forensic scientist engaged by the appellant's solicitor estimated that the appellant's blood alcohol level would have been approximately 355 mg% at the time of the incident, a level at which the average drinker would display severe symptoms of intoxication. This court wishes to re-affirm what it has stated on previous occasions and most recently by Kerr LCJ in a judgment delivered on 24 February 2006 in Attorney General's Reference (No 1 of 2006) McDonald and Maternaghan:

> "If a defendant wishes to avail of the maximum discount in respect of a particular offence on account of his guilty plea he should be in a position to demonstrate that he pleaded guilty *in respect of that offence* at the earliest opportunity. It will not excuse a failure to plead guilty to a particular offence if the reason for delay in making the plea was that the defendant was not prepared to plead guilty to a different charge that was subsequently withdrawn or not proceeded with.
>
> To benefit from the maximum discount on the penalty appropriate to any specific charge, a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard

> the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset."

[10] Mr Gallagher QC submits that in effect the sentence of 14 year's imprisonment followed by 2 year's probation could be regarded as equivalent to a 16 year term of imprisonment. Higgins J in imposing a custody probation order, did not specify the term of the custodial sentence which he would have passed if the appellant had not consented to a custody probation order as required by Article 24(5) of the Criminal Justice (Northern Ireland) Order 1996 which provides:

> "A court which makes a custody probation order shall state the term of the custodial sentence it would have passed under Article 20 if the offender had not consented to the order."

In R v McDonnell [2000] NI 168 at 172 Carswell LCJ delivering the judgment of this court gave guidance as to the balance to be struck between the custodial and probation elements of a custody probation order, stating at the outset that "it is clear from the terms of Article 24(2) that since the court can deduct such period as it thinks appropriate to `take account of' the effect of the probation that is quite inconsistent with any requirement of mathematical equivalence."

As stated by the learned trial Judge "there was no justification for this unprovoked attack on two defenceless and vulnerable men", the deceased being aged 48 and Mr Neville being aged 60. He took into account the appellant's turbulent childhood and his regret for his involvement in these offences. He also noted the appellant's lengthy criminal record and his propensity for violence when under the influence of alcohol or drugs as recorded by the probation officer. In R v McCullough [1999] NI39, Carswell LCJ delivering the judgment of this court in a not dissimilar case stated at page 43f:

> "It is, of course, well established that a defendant cannot rely upon his voluntary drunkenness as a mitigating factor in respect of sentence: see eg, R v Bradley (1980) to Cr App R(S) 12 at 13, per Lord Lane CJ. It seems to us that in a case such as the present, where the intoxication negatived the specific intent, the accused should be sentenced as if he had intended to commit the acts which caused the death of the deceased, knowing what he was doing, but not appreciating their

> consequences. In this way his intoxication is taken into account affording him a defence to murder, but is then disregarded in sentencing him for manslaughter."

[11] In R v McCullough, the defendant was tried on charges of murder and assault arising out of the death of a man and an attack on a woman. The evidence showed that he had spent the evening in question drinking with other persons in a bar in which the victims were present. The deceased had later left the bar by a door into the alleyway where his body was discovered and the defendant and another man had left by the same door. The deceased suffered severe injuries which the State Pathologist said were consistent with his having been battered with a gas cylinder found lying in the alleyway. The jury found the defendant not guilty of murder but guilty of manslaughter and the learned trial Judge imposed a sentence of 13 years' imprisonment, against which sentence the defendant appealed. In reducing the sentence of 13 years imposed by the learned trial Judge in that case the court concluded its judgment by stating:

> "We therefore consider that the judge was fully justified in regarding him as a violent and dangerous man from whom the public requires protection. Having said that, however, we do consider that the sentence of 13 years was above the range which might properly be imposed in such cases, even after a contest. Taking all the factors into account, we think it right to reduce the sentence to one of 10 years."

[12] In this appeal we likewise consider that the sentence of 14 years' imprisonment followed by 2 years' probation was above the range which might properly be imposed and substitute therefor sentences of 10 years' imprisonment and 2 years' probation in respect of the manslaughter of Mr Bannon and the grievous bodily harm with intent to Mr Neville, both sentences to run concurrently with each other and with the 18 months' imprisonment on the conspiracy to pervert the course of justice.