

**IN THE CROWN COURT IN NORTHERN IRELAND**

**BELFAST CROWN COURT**

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**THE QUEEN**

**-v-**

**MARK JOHN RUSH**

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**STEPHENS J**

[1] Mark John Rush, on Friday 9 November 2007, on the third day of your trial, you pleaded guilty to the manslaughter of Robert Hillen on 6 September 2006. You had previously been arraigned in relation to that offence on 11 May 2007. At that stage you pleaded not guilty.

[2] Despite the fact that your trial had commenced Mr Kerr QC on behalf of the prosecution stated that you are entitled to considerable credit for your plea of guilty. The assault which you perpetrated on your victim, Robert Hillen, was committed on 2 September 2006 in Bedford Street, Belfast. On 6 September 2006 Robert Hillen died of the injuries that he had sustained. You were interviewed by the police on 7 September 2006 and at that stage you admitted punching your victim though you did not give a full account of the total number of punches that you had inflicted on him. You made a case that Robert Hillen had started the incident by striking you but to your credit, you did not make the case that after that initial blow from him there was any further reason for attacking and assaulting him. You did not attempt to suggest that he presented a continuing threat to you which meant that you had to act in self defence. The substantive issue which remained at your trial was whether the blows that you had inflicted on the deceased on 2 September 2006 caused his death, four days later, on 6 September 2006. An autopsy was carried out on 8 September 2006 at Belfast City Mortuary. It was necessary to obtain the opinion of a consultant neuro pathologist. The full autopsy report was not available until 6 September 2007. Accordingly it was not until the 24 September 2007 that a notice of additional evidence was served on your

solicitors which contained the full autopsy report. A report was then obtained on your behalf from Dr Cromie. That report was delayed somewhat by difficulties obtaining the complete medical notes and records in relation to the deceased. Accordingly Dr Cromie's report was not available to you until Thursday 8 November 2007 after your trial had commenced. As soon as that report was made available to you you indicated that you wished to be rearraigned and you then pleaded guilty to the offence of manslaughter. At my direction the jury convicted you on your confession.

[3] It was through no fault of yours that the medical evidence was not complete until 8 November 2007. I accept that you pleaded guilty at the earliest reasonable opportunity having regard to the need to obtain the entire medical picture and to have legal advice in relation to it. The medical issue was obviously a critical matter in your case. I accord to you the maximum discount available for a plea of guilty despite the reservation that your police statement was not entirely frank and open as to the number of punches that you had inflicted on Robert Hillen and also despite the reservation that the case against you was a strong one. I state in open court, in accordance with the requirements set out in article 33 of the Criminal Justice (Northern Ireland) Order 1996, that in view of the fact that you have pleaded guilty I am imposing on you a punishment which is less severe than the punishment I would otherwise have imposed.

#### **Factual background.**

[4] The factual background has been outlined to this court by Mr Kerr QC on behalf of the prosecution in opening the case to the jury. In addition and in advance of today's hearing the factual background was set out in written submissions to this court by the prosecution. Those submissions were made available to your counsel, Mr McCartney Q.C. They have been agreed as being accurate by your counsel.

[5] I set out the factual statement that has been agreed. It is in the following terms:-

“Roy Hillen was a well known member of the Belfast Homeless Community. He was an alcoholic who spent most of his time begging and drinking on the streets of Belfast. The accused was an acquaintance of Mr Hillen, lived a similar lifestyle.

On Saturday, 2 September 2006 Mr Hillen had taken up a position on the steps of the Ulster Hall, Bedford Street, Belfast. He was accompanied by Elaine Hunter, both were drinking cider and vodka. Shortly after 6.00 pm the deceased observed the defendant

begging on the opposite side of the roadway. Angered by what he perceived to be someone begging on "his patch" he crossed the roadway and punched the Defendant once on the face. The defendant retaliated by punching Mr Hillen several times. By themselves, these blows appear to have been of moderate severity. However when combined with the intoxicated condition of Mr Hillen they caused him to either strike his head upon a wall or on the ground.

Constable Buch arrived on the scene at 6.10 pm. He observed that the deceased had returned to the entrance of the Ulster Hall. He further observed that Mr Hillen was heavily intoxicated and abusive. He then crossed Bedford Street and spoke to the defendant who was holding a red coloured jumper up to his bleeding nose. Both the defendant and Mr Hillen declined to make any statement of complaint.

Ambulancemen who arrived minutes later were unable to identify any obvious injuries to Mr Hillen's face. After initial refusal Mr Hillen agreed to accompany the ambulance crew to hospital. The defendant also left the scene.

Mr Hillen was later admitted to the regional intensive care unit at 4.30 am the following day. This followed the removal of an acute subdural haematoma. Thereafter his condition deteriorated and he died at 6.27 pm on 6 September 2006."

[6] It appears from that factual statement and from the evidence in the case that it was Robert Hillen who came across Bedford Street and without warning or any indication that he was approaching you hit you causing your nose to bleed. However there was no further attack or threat from Robert Hillen. You reacted in a violent manner by delivering a series of blows to Robert Hillen and throughout that attack Robert Hillen was not reacting, responding or resisting. Indeed from the accounts of the witnesses the series of blows did not come all at once but there were gaps between some of them. Alison Finch who was in the area said:

"I saw the male in the fawn coloured top swing with his right hand, his fist was clenched and connect with the male in the pink top. He hit him twice on the left side of his face. They were hard punches. It looked

like he was using a lot of force. As he hit him, the male in the pink banged the back of his head off the wall. His head flicked back really quickly, connecting with the wall behind."

Henry Moreland another person in the area said:-

"As I walked towards them the male on the right was doing a lot of punching. He was swinging both his arms and punching up at the other male's head because of the height difference. He must have punched about 10 times or so and I saw him landing digs on the face and head of the other fella."

Jason Dundas also in the area said:-

"... It looked like he hit the one leaning on the window a couple of times in the face with punches with both hands to both sides of the face. As I got closer to them I was about 6 feet away a fella and a girl walked by me and the girl was shaking her head. As I walked by the fella who was standing with his back to me threw another 3 or 4 punches, good hard punches with both hands to both sides of the face. The guy who was taking the punches didn't put up any resistance at all."

[7] Those accounts from the witness have to be seen in the context of the medical evidence. Trivial facial injuries were caused by those blows. I accept that the blows you inflicted were of moderate severity. I also accept that Robert Hillen's alcohol abuse made his brain more vulnerable to injury. His condition rendered him unduly susceptible to and magnified the effect of blunt trauma. The deleterious effects of his alcoholism played a significant contributory role in the fatal outcome.

### **Personal Circumstances.**

[8] I take into account your personal background. I have read and considered the report from Mr Alan Darnbrook of the Probation Board for Northern Ireland dated 10<sup>th</sup> December 2007 together with the report from Dr Mark Davies, Consultant Clinical Psychologist dated 6<sup>th</sup> December 2007. You are 40 years of age having been born on 2 November 1967. You were born and brought up in Derry, the middle child of five. You had a problematic childhood affected by your father's alcoholism and unpredictable behaviour. Your parents separated when you were 12 to 13 years old. Your father tragically committed suicide 15 years ago. You had some problems at school

and your early career showed signs of some success despite your abuse of alcohol which commenced when you were 17 years old. You were an employer for a period in Scotland. You married in 1994/95. However alcohol which you abused began to dominate your life. You returned to Northern Ireland in about 2000. Since then you have been unable to lead a stable and normal life because of the effects of alcohol misuse. You are a chronic alcoholic and street drinker. You have drifted around the British Isles during the last 7-9 years, often deciding to move to a new town on a whim. You also began smoking cannabis which resulted in you becoming paranoid with psychotic symptoms. You were commenced on anti-psychotic medication on 17 September 2004. There have been periods of stability and abstinence particularly during and after admissions to Cuan Mhuire, Newry (Alcohol & Drug Rehabilitation Centre) when you have had the support of Alcoholics Anonymous following discharge. However, without a strong support network and being mentally and physically vulnerable, you have frequently returned to street/binge drinking and rough sleeping.

**Attitude to the offence and risk of further offending.**

[9] I have also considered your attitude to the offence that you have committed and the risk of further offending. Mr Darnbrook states that you present as being deeply remorseful and aware of the impact of your actions on those close to the victim. He indicates that you are aware of the negative effects of alcohol abuse on yourself, physically and mentally, and on others through your behaviour and that you are motivated to change and accept appropriate treatment and support for your addiction. That you have been availing of the support provided by the Dunlewey Substance Abuse Service in HMP Maghaberry. However the likelihood of re offending is currently assessed as high as is the risk of harm to the public. Those risks would be reduced if you received appropriate treatment and sustained your motivation to remain alcohol free. In that respect I note that Mr Darnbrook states that you are positively motivated and that you have indicated your willingness to cooperate with the requirements of post custody supervision/probation, the focus of which would be to address your alcohol addiction.

**Representations of the victim's family.**

[10] I take into account the statement of Darren Hillen dated 2 December 2007. One of the constituent elements of the punishment that I impose on you is retribution for the offence that you have committed. In that respect this statement is an important factor to be taken into account. It shows the damaging and distressing effects of this crime on the surviving family members of your victim. I bear in mind that the exact consequences suffered by surviving members of the victim's family will vary from case to case. That accordingly the exact weight to attach is always a matter of discretion in each individual case.

[11] The statement from Darren Hillen is in the following terms:

“During this case it has been mentioned several times that my father was homeless and a drinker but I would like to tell you about Roy Hillen, the Father and Grandfather.

Roy had two sons and two daughters. He also had three grand children, the youngest, ..., was the apple of his eye.

My father was not always homeless and a drinker. For a long time he worked as a bus driver and some of my earliest memories are of him driving the buses.

During my teenage years, myself and my younger brother spent time working along side Roy pulling down and sometimes restoring old houses. These are some of the fondest times myself and my brother remember, but like many who are homeless, circumstances changed and my father ended up believing he was happier on the streets. The only thing that never changed was his love for us and ours for him. My sisters looked out for him and regularly spent time with him around the town, sometimes enjoying great laughter with some of his stories.

Whenever I seen him, we would always talk about ‘the good old days’, reminiscing on some of the fixes we got ourselves into.

On the day that I was called to the hospital I was told he was in a serious way but he had been in many scrapes before and I honestly believed that while it was serious, he would pull through. I couldn’t believe it when I was told there was no hope and as his eldest it was my permission that was needed to switch off the life support machine. To say that was the hardest thing that I have ever had to do is an understatement. I will never forget having to say goodbye to him and watch him take his last breath. Our only consolation is that we were there to say goodbye.

To have to explain to ... (his young grandchild) that she would never see her Granddad again was devastating. It was hard enough for me to take in, how was a young child expected to cope.

My father was only 56, not old in a man's life. I think what is worse is that while he didn't intentionally set out to deliberately kill my father, Mark Rush was also a street person-the people my father felt safest and happiest amongst."

### **Procedural requirements for a custodial sentence.**

[12] A pre sentence report from Mr Darnbrook has been made available to me and I have considered it in accordance with the provisions of article 21 of the Criminal Justice (Northern Ireland) 1996. In determining your sentence I have borne in mind the provisions of article 19(2)(a) and article 19(4) of the Criminal Justice (Northern Ireland) Order 1996. I consider that the offence before me now is so serious in its content that only a custodial sentence is justified and that, given that your offence was a violent offence, I also consider that only such a sentence will be adequate to protect the public from serious harm from you. I am of that opinion for the reasons set out in this judgment. I emphasise that you have committed a most serious offence. You are a danger and a risk to others.

### **Sentencing guidelines.**

[13] I have been referred by counsel to the decisions in the Court of Appeal in *R v. Ryan Arthur Quinn* [2006] NICA 27 and *R v. Stephen Magee* [2007] NICA 21. The case of *R v. Ryan Arthur Quinn* sets sentencing guidelines for manslaughter cases in which death results from a single blow. At paragraph [20] of *R v Ryan Arthur Quinn* it was stated:-

"We consider that a more suitable starting point in Northern Ireland for this type of offence is two years' imprisonment and that this should rise, where there are significant aggravating factors, to six years."

[14] Both counsel in the case before me have agreed that this sentencing range is for a guilty plea. The case of *R v. Stephen Magee* involved a plea to the offence of manslaughter where the defendant deliberately stabbed the deceased with a substantial knife, capable of inflicting (as it did) a deep wound. At paragraph [25] in *R v. Stephen Magee* it was stated:-

“We consider that the time has now arrived where, in the 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.”

[15] I was also referred by Mr McCartney Q.C., who appeared on your behalf, to the decision in *R v Kenneth Ruby* (1998) 86 Cr. App. R. 186. Mr Gordon Kerr Q.C., who appeared on behalf of the prosecution, submitted that *R v Ryan Arthur Quinn* is the appropriate authority as far as your case is concerned and that I should follow the sentencing range in that case. The case of *R v Ryan Arthur Quinn* involved the manslaughter of a young man by the delivery of a single blow by a closed fist. As I have indicated the Court of Appeal concluded that the starting point in Northern Ireland for that type of offence was 2 years imprisonment and that this should rise where there were significant aggravating factors to 6 years. In that case there was no doubt that the defendant did not intend serious injury to his victim although the Court of Appeal was of the view that he should have been aware that this might occur. In your case you did not inflict one blow to your victim’s head but many. They were all blows of moderate severity. They were all inflicted with a closed fist. You did not intend to but in fact did cause your victim’s head to be punched back with force against the wall behind him and I consider that it was this single blow to the back of the head that caused the fatal injuries. In the particular circumstances of your case and bearing in mind the one significant blow and the effect that alcohol had had in making Robert Hillen’s brain susceptible to injury, I propose to adopt the sentencing range set out in *R v Ryan Arthur Quinn* and I have sought to apply the principles set out in that case. The sentence must reflect the seriousness of the offence. The seriousness depends on the culpability of the offending conduct and on the harm that has resulted from it. In adopting the sentencing range in *R v Ryan Arthur Quinn* and when considering your culpability I propose to treat as a serious aggravating factor that you struck multiple blows.

**Aggravating features in relation to the offence.**

[16] The assault took place in a public place.

[17] The assault occurred when you were under the influence of alcohol. The pre sentence report makes it clear that all your offending has been influenced by alcohol. Your consumption of alcohol on this occasion made it more likely that you would attack your victim and that you were not in a position to limit that attack. At the very least your intoxicated state made it more likely that you would inflict numerous and sustained punches upon your victim. I take



into account that you are addicted to alcohol but in the circumstances of this case, and in view of the role played by the alcohol in the incident, I consider that your consumption of alcohol is an aggravating feature in your case.

[18] I consider that the number of blows that you inflicted on your victim is a serious aggravating feature in your case. When considering that factor I also take into account that your attack on the deceased continued when he was not defending himself. That the deceased was vulnerable and unable to defend himself by virtue of the fact that he was under the influence of alcohol at the time.

**Mitigating features in relation to the offence.**

[19] At the time that these offences were committed you were heavily intoxicated with drink. Your perception of events may accordingly have been badly distorted. The offence was not premeditated or planned. I do not consider this to be a mitigating feature. I consider that the lack of premeditation through the consumption of drink is a neutral feature. I consider that your intoxication with drink in the particular circumstances of this case is an aggravating feature.

[20] I take into account the mitigating factor that you have pleaded guilty. I have already made it clear that the sentence I am now imposing is less than I would have imposed had you not pleaded guilty at the stage which you did.

[21] I take into account as a mitigating factor that the initial blow was struck by Robert Hillen and that he acted in an abusive manner towards you.

**Aggravating features relating to the offender.**

[22] You have previous convictions both here and in Southern Ireland. Your record is connected to alcoholism. There is no previous incidence of violence of this gravity. I do not treat your previous record as an aggravating feature.

**Mitigating features relating to the offender.**

[23] I take into account your personal circumstances but on a strictly limited basis. I bear in mind that in cases of this gravity your personal circumstances are of limited affect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* (2004) NI CA 42 and *Attorney General's Reference (No 6 of 2004) (Conor Gerard Doyle)* (2004) NI CA 33.

[24] I accept and take into account the remorse that you have expressed and which has been expressed on your behalf by counsel during the plea in

mitigation. I also accept and take into account Mr Darnbrook's assessment of the remorse that you feel.

### **Custody probation.**

[25] As you must receive a substantial period of imprisonment in excess of 12 months I am required by article 24(1) of the Criminal Justice (Northern Ireland) Order 1996 to consider whether I should impose a custody probation order. In considering that issue I have sought to apply the principles set out by the Court of Appeal in *Attorney General's Reference (No 1 of 1998) (McElwee)* NI 232, *R v. Lunney (03/99)* and *R v. McDonnell*. The Court of Appeal pointed out in *R v. Quinn (2006)* NICA 27 at paragraph 29 that:-

“A custody/probation order should only be made where it is considered that the offender would benefit from probation at the conclusion of a period of custody and that it is deemed necessary to enable him to reintegrate into the society or because of the risk that he would otherwise pose.”

In view of the contents of the pre sentence report I have concluded that you would benefit from probation at the conclusion of a period of custody in view of your abuse of alcohol, your disorganised and chaotic lifestyle prior to the commission of this offence and the previous lack of stability in your life. I also consider that probation is necessary because of the risks that you would otherwise pose if you did not obtain appropriate treatment and if you were unable without support to maintain your resolve to remain alcohol free.

### **Conclusion.**

[26] If you consent to a custody probation order I will sentence you to 4 years and 6 months imprisonment followed by 2 years probation. There will be a number of requirements in the probation order. For the purposes of schedule 1 paragraph 1 of the Criminal Justice (Northern Ireland) Order 1996 I have considered your home surroundings. Also for the purposes of schedule 1 paragraph 5 of the Criminal Justice (Northern Ireland) Order 1996 I am satisfied that you are dependent on alcohol, that your dependency caused or contributed to the offence for which I am imposing a sentence and that your dependency is such as requires and may be susceptible to treatment. The requirements in the probation order will be as follows:-

- (a) You shall submit during the whole of the probation period to treatment by or under the direction of your probation officer with a view to the reduction or elimination of your dependency on alcohol. That the treatments to which you are to submit include treatment (whether as an

in patient or an out patient) at a hospital nominated by your supervising probation officer.

- (b) That you reside throughout the whole probation period in accommodation at an address approved by your supervising probation officer and in no other accommodation and at no other address.

[27] I make it clear that if you fail to comply with any requirement in the probation element of the order then you will be brought back to this court which may deal with you in a number of ways including revoking the probation order and sentencing you instead to a further period of imprisonment.

[28] If you do not consent to a custody probation order I will sentence you to 5 years and 6 months imprisonment.

[29] I make it clear that the 2 year probation period does not equate to the reduction in the period that you will spend in custody. I consider that you require 2 years probation to enable you to reintegrate into society and because of the risk that you would otherwise pose. In short, that you need that length of probation in view of your history of alcohol addiction and unsettled lifestyle.

[30] I must now enquire from you as to whether you consent to a custody probation order. Do you consent to a custody probation order being made?

[31] I understand that you consent. Accordingly I sentence you to 4 years and 6 months imprisonment followed by 2 years probation. I specify the following requirements in the probation order namely:-

- (a) You shall submit during the whole of the probation period to treatment by or under the direction of your probation officer with a view to the reduction or elimination of your dependency on alcohol. That the treatments to which you are to submit include treatment (whether as an in patient or an out patient) at a hospital nominated by your supervising probation officer.
- (b) That you reside throughout the whole probation period in accommodation at an address approved by your supervising probation officer and in no other accommodation and at no other address.