Neutral Citation no. [2011] NICA 54 | *Ref:* **MOR8277**

Judgment: approved by the Court for handing down | *Delivered:* **19/09/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

FRANCISCO NOTORANTONIO
Defendant/Applicant.

Before: Morgan LCJ and Higgins LJ

MORGAN LCJ

[1] The applicant renewed his application for leave to appeal against the imposition of a custody probation order of 12 years (consisting of 11 years imprisonment followed by 1 year probation) for manslaughter. The offence arose out of a street fight in February 2005 between the applicant's family and the victim's family in the context of an ongoing feud. The applicant argued that the sentence imposed was manifestly excessive in that the learned trial judge did not give sufficient weight to the applicant's expression of remorse, his lack of intention to kill or cause serious bodily harm and his youth. Mr O'Donoghue QC and Mr Moriarty represented the applicant and Mrs McKay the respondent. We are grateful to counsel for the assistance we received from the written and oral submissions. After hearing the submissions we dismissed the appeal but indicated that we would give our reasons later.

[2] The applicant was arraigned on counts alleging the murder of Gerard Devlin, affray, wounding Thomas McCabe with intent to do him grievous bodily harm and attempting to wound Thomas Loughran with intent to do him grievous bodily harm. He pleaded not guilty to all counts. His four co-accused were also facing trial for the murder of Gerard Devlin and affray. The trial was due to commence in April 2008 but was adjourned to 15 September 2008. The start of the trial was then further delayed for a period until 24 September 2008. On 24 September 2008, the applicant's four co-defendants pleaded guilty to affray. The Crown did not proceed on the murder charge against them. The applicant pleaded guilty to affray, wounding Thomas McCabe with intent and attempting to wound Thomas Loughran. He pleaded

not guilty to the murder of Gerard Devlin but guilty to his manslaughter. This plea was accepted by the prosecution on the basis that it could not be established beyond reasonable doubt that he intended to kill or cause serious bodily injury and an additional count of manslaughter was added to the indictment.

[3] On 25 November 2008, Stephens J sentenced the applicant to a custody-probation order, comprising 11 years imprisonment followed by 1 year probation, for the manslaughter of Gerard Devlin, 6 years imprisonment for attempting to wound Thomas Loughran, 5 years imprisonment for wounding Thomas McCabe with intent, and 4 years imprisonment for affray. All sentences were ordered to run concurrently.

Background

[4] All of the defendants are related to each other and are part of the extended Notarantonio family. The victims of the offences, Gerard Devlin, Thomas Loughran and Thomas McCabe, were all members of the extended Devlin family. There has been a deep and enduring animosity between the two families since in or about 2002. All of those involved in the incident were residents of or lived close to Whitecliff Parade, Belfast with one exception.

[5] On the afternoon of 3 February 2006 Gerard Devlin had been visiting his family home at 27 Whitecliff Parade. As he was leaving he became involved in a confrontation with William Notarantonio outside the house. This confrontation arose after some sort of altercation between two young children in the opposing family factions. When this confrontation developed into a fight further members of the Notarantonio family, which included the appellant and the four co-defendants, joined the affray the focus of which was an attack on Gerard Devlin. Thomas Loughran and Anthony McCabe, who were in separate houses, became aware of the developing brawl and went to the assistance of Gerard Devlin. Weapons such as cudgels improvised from pieces of wood and brushes were used in the affray and the applicant was observed with a knife. The applicant's case is that he picked up the knife at the scene and that it had been brought by others. That was accepted by the Crown.

[6] Thomas Loughran alleges that he intervened to help Gerard Devlin and as he did so the applicant came at him with the knife. The applicant then swiped at him but missed. Anthony McCabe admitted that he threw a brick at the Notarantonio faction in an attempt to help Gerard Devlin. While involved in the melee, he saw the applicant running at him carrying the knife. The applicant swung the knife at him and stabbed him in the chest.

[7] It is not precisely clear when Gerard Devlin suffered the fatal stab wound. None of the witnesses on the papers before the Court witnessed the

actual moment of the stabbing. However, a knife discovered afterwards in the garden of 110 Ballymurphy Road was found to be smeared with blood. On forensic examination the blood matched the DNA of both Gerard Devlin and Anthony McCabe. The knife, described as a chef's knife, was approximately 13 inches long and had a blade of 8 ½ inches.

[8] The post mortem examination showed that Gerard Devlin died from a single stab wound to the chest. The entry wound was on his back. Anthony McCabe suffered a three inch stab wound to the left side of his chest. It was repaired with stitches.

[9] At the time of his sentencing the applicant was a 21 year old male who had achieved a qualification in electronic engineering and then obtained employment. He had been in a relationship for a number of years and had a one year old child. He had no relevant criminal record. He was assessed as not posing a high risk of serious harm and it was concluded that he had become drawn into an incident when emotions were high and substantial weapons were being used by others. The applicant expressed his remorse for what had happened.

The judge's sentencing remarks

[10] The learned trial judge considered the aggravating features:

(i) the use of the knife in respect of all of the offences;
(ii) an indifference to the seriousness of the likely injury when he stabbed Gerard Devlin;
(iii) in relation to the manslaughter charge, the fact that he committed the other 3 offences;
(iv) the offences were committed as part of a long standing feud between the families;
(v) committing such violent offences in a public place; and
(vi) the fact that he was a major willing participant in the affray.

However, the judge noted that there was significant mitigation:

(i) the fact that the offences were unplanned;
(ii) the applicant's young age;
(iii) the applicant's personal circumstances;
(iv) the applicant's remorse, although he did not accept that the applicant did not intend to hurt any one in light of his pleas to the section 18 offences;
(v) his exposure to this feud from an early age; and

(vi) the plea of guilty (albeit not at an early stage in the proceedings).

Conclusion

[11] This court has recently given guidance on the range of sentencing for the offence of manslaughter where the count is preferred on the basis that it cannot be proved that the defendant intended to kill or cause serious bodily injury in R v Magee [2007] NICA 21. The relevant portions of the guidance are contained in the following paragraphs.

> "**[22]** It is not surprising that there are relatively few decisions in this jurisdiction which could properly be described as guideline cases for sentencing for manslaughter. Offences of manslaughter typically cover a very wide factual spectrum. It is not easy in these circumstances to prescribe a sentencing range that will be meaningful. Certain common characteristics of many offences of violence committed by young men on other young men are readily detectable, however, and, for reasons that we will discuss, these call for a consistent sentencing approach…..
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> **[26]** 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.** This is, perforce, the most general of guidelines. Because of the potentially limitless variety of factual situations where manslaughter is committed, it is necessary to recognise that some deviation from this range may be required. Indeed, in some cases an indeterminate sentence will be appropriate. Notwithstanding the difficulty in arriving at a precise range for sentencing in this area, we have concluded that some guidance is now required for sentencers and, particularly because of the prevalence of this type of offence, a more substantial range of penalty than was perhaps hitherto applied is now required.
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> **[27]** Aggravating and mitigating features will be instrumental in fixing the chosen sentence within or – in exceptional cases – beyond this range. 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".

[12] It is common case that in this case a knife was used, that the offender evinced an indifference to the seriousness of the likely injury and that more than one stabbing occurred. As Magee makes clear the factors identified in that case were not intended to be comprehensive. In this case the additional significant aggravating factors were that this occurred as part of a feud, that it involved the use of open violence in the public street on a Sunday afternoon when members of the public, including children, might be expected to be on the street and that it was one of a number of such incidents associated with this feud.

[13] Against that background this was a case which required a sentence at the top end of the range. We accept that for a person with a clear record who had pleaded guilty this was a stiff sentence but in our view the learned trial judge adequately reflected the mitigating aspects in the discount he has allowed. It cannot be said, therefore, that the sentence was manifestly excessive or wrong in principle. For those reasons the appeal was dismissed.