**Neutral Citation [2011] NICA 30** | *Ref:* **MOR8238**

*Judgment: approved by the Court for handing down* | *Delivered:* **30 /06/11**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**ADAM SMYTH**

**Defendant/Respondent.**

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**Before: Morgan LCJ, Girvan LJ and Coghlin LJ**

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**MORGAN LCJ (delivering the judgment of the court)**

[1] The applicant seeks leave to appeal against his conviction for the attempted murder of Mark Keller. The applicant was convicted by a jury of that offence together with offences of wounding Anthony Keller with intent to do him grievous bodily harm and assaulting Antony Keller thereby occasioning him actual bodily harm. The offences arise out of an incident in the early hours of Sunday 6th November 2005 in Belfast city centre when the applicant, with two co-accused, mounted an unprovoked attack on a group of young men during which the accused used a knife to stab the victims. The applicant argues the trial judge misdirected the jury in relation to joint enterprise. He also seeks leave to admit fresh evidence, namely the evidence of a former prisoner who avers that one of the applicant's co-accused confessed to him that he was the assailant who stabbed the victims.

[2] The applicant further seeks leave to appeal against his sentence of 20 years detention in the Young Offenders Centre for the attempted murder, 7 years detention for wounding with intent and 3 years detention for assault occasioning actual bodily harm, all three periods of detention to run concurrently.

[3] Prior to the trial one of the co-accused, Philip Irwin, absconded and the trial proceeded in respect of the applicant and Alan Stewart. Stewart was convicted and sentenced to a custody-probation order comprising 14 years detention in the YOC and 18 months probation for, inter alia, causing grievous bodily harm with intent to Mark Keller (this sentence has since been affirmed on appeal). Irwin handed himself in to police shortly after the trial.

He pleaded guilty to, inter alia, causing grievous bodily harm with intent to Mark Keller and was sentenced to 12 years imprisonment.

**Background**

[4] On the evening of 5th November 2005 the two victims, along with two other friends, travelled from Killyleagh to Belfast for the purposes of a night out. They attended Weatherspoon's pub on the Dublin Road and then Skye nightclub on Howard Street. Upon leaving the nightclub in the early hours of 6th November, they walked to the ATM in Donegall Square North in order to get money for a taxi home. It was in Donegall Square North, as they were using the ATM, that these four young men came under a savage and unprovoked attack from the applicant and his two co-accused. The applicant was carrying a knife with an 8 inch blade and used it to inflict injuries upon the two victims.

[5] The Applicant, along with Stewart and Irwin, had set out from a house in Bendigo Street Belfast on 5/6 November 2005. They had already had a lot to drink. They were of differing ages, with the Applicant being the youngest, aged 17 years. There was compelling evidence that they were unruly and aggressive as they approached the City Centre. On the evidence they appeared to have little reason to go into the City Centre in the early hours of the morning. The overwhelming impression is that they intended as a group to confront or to cause harm to others. The group was armed with a large knife measuring 31.5 centimetres which had been taken from Stewart's house. Both the Applicant and Stewart claimed that Irwin had the knife and that he was responsible for using it, but there was other evidence that tended to implicate Smyth in having the knife and carrying it at the time the subject incident developed. Ultimately, the jury clearly concluded from the evidence available to them that Smyth did have the knife and was the person responsible for using it in injuring Mark and Anthony Keller. The Applicant continues to assert that it was Irwin who had the knife and who was responsible for inflicting injury on the Keller brothers and wishes to call fresh evidence on this issue.

[6] The Applicant, Stewart and Irwin entered the City Centre and passed the Northern Bank area at Donegall Square West. Four men including the two victims had come from the area of Skye nightclub on Howard Street. Three had gone ahead (Mark Keller, Ryan Hagan and James Hodgkinson) and one (Anthony Keller) had lagged behind. CCTV footage shows the applicant, Stewart and Irwin moving abreast along the footpath with Irwin to the left, the Applicant in the middle and Stewart to the right closest to the wall of the Bank, walking in the direction of Howard Street having come from the Donegall Place direction. The other group was seen to be in the area of the ATM machine outside the bank. As the Applicant and his friends walked past

there was a collision between the Applicant and Mark Keller and a comment was passed by the Applicant.

[7] Thereafter, there were a series of incidents that gave rise to the charges. A knife was produced and forced up to the hilt into Mark Keller. The Crown case was that this was inflicted by the Applicant. They further contended that the injury was inflicted as part of a joint enterprise involving Stewart and Irwin. Similarly, it was also alleged that the same knife was used by the Applicant on Anthony Keller. Again, the assertion was that this was part of a joint enterprise involving the Applicant, Irwin and Smyth. The applicant was seen on CCTV viciously kicking at Mark Keller as he lay on the ground suffering from the knife wound which he had inflicted.

[8] The trial judge described the injuries to the two victims as follows:

> "[20] In consequence of the attack upon him, Mark Keller has suffered extremely serious injuries. He incurred a laceration of the aorta and pulmonary artery which resulted in cardiac arrest. In turn this caused damage to the optic nerve and he is effectively blind in consequence. The damage to his circulatory system also resulted in the development of a necrosis of the colon which required extensive treatment, including the need for a stoma for about a year: there is now permanent damage to his bowel function even though the stoma has been reversed successfully. He has suffered bilateral foot drop requiring him to wear splints and causing very significant interference with his mobility. His condition was so serious that the notes and records in the Casualty Department at the time of his admission record little detail about injuries such bruising, abrasions or minor lacerations. It is known however that he did have a second wound which was located on the left shoulder, this was assumed to be a knife wound, and he had abrasions and possible lacerations around the left eye. His brother Anthony also suffered a stab wound on the upper thigh and significant dental damage requiring extensive treatment."

**The appeal against conviction**

[9] The applicant applied pursuant to section 25 of the Criminal Appeal (Northern Ireland) Act 1980 (the 1980 Act) for the court to receive fresh evidence at the hearing of the application. By virtue of section 25 (2) of the 1980 Act it is necessary to consider whether the evidence appears to be

capable of belief, whether it appears to the court that the evidence may afford any ground for allowing the appeal, whether the evidence would have been admissible in the proceedings and whether there is a reasonable explanation for the failure to adduce the evidence in order to determine whether it is in the interests of justice to receive it.

[10] The proposed witness was William Williamson and we heard his evidence de bene esse in the course of the appeal. Mr Williamson had been a remand prisoner from in or about September 2006 until his eventual release from prison in September 2007 after conviction. He was a person with a considerable criminal record for recent offences of violence, dishonesty and contraventions of the road traffic legislation. He said that he met Philip Irwin approximately three or four months after he had been committed to prison. By that stage both were orderlies. He claimed that he and Irwin had discussed what they were in for and Irwin explained to him that he had stabbed someone but that his co-accused had got the blame.

[11] He said that Irwin had been admitted to bail shortly after this and he had thought no more about it. At Christmas 2009 he had attended a 60th birthday party and met the applicant's parents. In the course of the evening he told them that he had been imprisoned. The applicant's parents said that their son had got 20 years for a stabbing that he had not done. Williamson then asked them if he had been charged with Philip Irwin. That was how he had come to make his affidavit and give his evidence.

[12] In cross examination he said that it was a pure coincidence that he had met the applicant's parents. He had not known them before that evening. He had never testified in court before because although he had a substantial record he had always admitted his guilt. He was asked about the way in which Irwin had mentioned this admission and he said that Irwin had bragged about it. He said that he had never mentioned this conversation to anyone else until he met the applicant's parents.

[13] It is accepted that this is hearsay evidence. The maker of the statement, Irwin, could clearly be called since he is serving his sentence of imprisonment. The applicant has declined to call him since it is feared that he will rely upon his right not to incriminate himself. If the evidence is to be admissible, therefore, it can only be admitted by virtue of article 18(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 on the basis that it is in the interests of justice to admit it.

[14] In considering whether to admit evidence under this provision the court is required by article 18 (2) to have regard to the following matters.

> "(a) how much probative value the statement has (assuming it to be true) in relation to a matter

in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);

(c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

[15] It is readily apparent that the prosecution would have enormous difficulty in challenging the statement and that difficulty would evidently be likely to prejudice the prosecution case. In light of the fact that the witness said that Irwin was bragging about what he had done there must also be considerable doubt about the reliability of the statement made. In addition the extensive criminal record of Mr Williamson calls into question the reliability of his evidence about the making of the statement.

[16] Applications to admit statements in similar circumstances in the interests of justice have been considered by the English Court of Appeal in R v Y [2008] EWCA Crim 512 and R v Marsh [2008] EWCA Crim 1687. In each case it was recognised that the jury was faced with a virtually impossible task in seeking to evaluate the evidence in the absence of any possibility of cross examination of the maker. In particular in this case although the jury would be able to evaluate the reliability of Mr Williamson's account they would not be in a position to properly determine whether any statement made by Irwin

was a genuine admission against interest or whether it was a piece of false bravado. The interests of justice do not consist solely of the interests of the defendant and in light of the difficulties that the prosecution would face in dealing with this material it seems to us inevitable that this evidence would not have been admissible. In those circumstances the application to receive this evidence must fail.

[17] The second basis upon which the appeal against conviction was pursued arose because of the different convictions against the applicant as principal and his co-accused Stewart as secondary party. It is accepted that the learned trial Judge gave careful directions on the roles of principals and secondary parties and on the mental element required in relation to each accused before he could be convicted of either attempted murder or wounding with intent. It is further accepted on behalf of the applicant that there was nothing inconsistent about a verdict of guilty of attempted murder against the principal but a verdict of guilty of wounding with intent only against the secondary party. The only point made was the suggestion that there was no explicit direction in relation to how different verdicts might arise.

[18] We do not accept that there is any substance in this submission. It is clear that the learned trial Judge directed the jury in accordance with the law and that the jury carefully carried out its task in differentiating where it felt it appropriate to do so between the applicant and Stewart. The fact that they did so is in our view because of the careful direction given by the learned trial Judge and forms no basis for any criticism of his approach. The issue for the jury was the intent of the applicant at the time that he wielded this large knife into the chest of the victim up to the hilt. In all of the circumstances surrounding this attack it was clearly open to them to infer an intention to kill. It did not necessarily follow that Stewart who was involved in the same fight had or contemplated the same intention.

[19] Accordingly we conclude that the grounds of appeal against conviction must be dismissed.

**Appeal against sentence**

[20] The learned trial Judge set out the extent of the material aggravating factors in this case.

> "(i) The appalling nature and consequences of the injuries inflicted on Mark Keller. The knife was thrust into the chest cavity up to the hilt;
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> (ii) The applicant was the only person shown to have had the knife;

(iii) There were a total of 3 stab wounds (2 upon Mark Keller and 1 to Antony Keller). Therefore the intent to cause injury or death was not a fleeting occurrence;

(iv) The applicant was carrying the knife with the intention that it be put to criminal use (having said in evidence, "if anything had broke out we were there to defend each other"). To go prearmed into the street with any knife, let alone one that size, intending to use it if necessary is a gross aggravating factor;

(v) It was a vicious attack at random on completely innocent victims without provocation;

(vi) The attack took place in full view of the public who were forced to witness quite unforgivable acts of violence;

(vii) The gross physical and psychological effects on the primary victim as well as the effects on the other three who were attacked;

(viii) Having stabbed Mark Keller earlier, the applicant was seen kicking viciously at him whilst he lay helplessly on the ground."

[21] The applicant was four days short of his 18th birthday at the time of his attack. Mr McClelland, a consultant educational psychiatrist, conducted intelligence and reading tests which established that the applicant had a verbal IQ of 73, a reading age of seven years nine months and a spelling age of eight years six months. He was confident, however, that the applicant could differentiate between right and wrong. The applicant was examined by Dr Bownes who found no evidence of mental impairment or illness. He noted that although the applicant displayed some evidence of insight it was apparent that he had only a superficial appreciation of the need for change on his part.

[22] A pre-sentence report described the applicant as a 19 year old single man who lived with his parents in the Best Hill area of south Belfast and was the youngest of 10 children. At the age of 13, he was attacked by paramilitaries during which he sustained bruising to his head and face, lost a number of teeth and spent a period of time in hospital. Following this attack

the applicant was assessed as having post-traumatic stress disorder and/or hysterical type reaction. The applicant admitted that he started to misuse alcohol as a teenager and, in the past, regularly used Cannabis and occasionally Ecstasy. He left school with no formal qualifications.

[23] The applicant continued to deny that he carried the knife or that he was responsible for inflicting the stab wound against either of the victims, only admitting that he took the knife from one of the co-accused and disposed of it. Given this continued denial, the Probation Officer stated that it was difficult to fully assess the level of risk posed by the applicant, but concluded that he posed a potential risk of harm to the public and that the likelihood of re-offending was high due to his minimisation of his behaviour, limited victim awareness, negative peer association, limited education, reckless and impulsive behaviour and poor emotional/mental health.

[24] This court has previously recognised the endemic problem of violence inflicted by young males often with the use of a weapon in R v Magee [2007] NICA 21. The remarks in that case focused on disputes between young males leading to the use of violence well beyond anything that might have been prompted by the initial dispute between them. In this case there is absolutely no suggestion that the victims and their friends played any part whatsoever in the events leading up to the gratuitous and barbaric infliction of horrendous violence upon them principally by the use of this large knife.

[25] If a person of full age and intellectual capacity had committed this offence a sentence well in excess of 20 years would have been necessary in order to properly meet the needs of retribution and deterrence for this sort of behaviour. The learned trial Judge tempered his sentence by reason of the age and intellectual capacity of the applicant and we consider that there is no possible criticism that could be made of a sentence of 20 years imprisonment for this appalling attack that had such dreadful consequences for an innocent young man.

[26] The appeal against sentence is also dismissed.