Neutral Citation No. [2015] NICA 19

Ref: **COG9589**

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

Delivered: **17/04/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DANIEL CARLISLE

Before: GIRVAN LJ, COGHLIN LJ and GILLEN LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an application for leave to appeal a determinate custodial sentence of 6 years, comprising 3 years in prison and 3 years on licence, which was imposed at Belfast Crown Court on 13 February 2014. Leave to appeal has been refused by the Single Judge. Mr Patrick Lyttle QC and Michael Ward appeared on behalf of the applicant while Miss Tessa Kitson represented the Crown. The court wishes to acknowledge the assistance that it derived from the detailed and well-reasoned oral and written submissions advanced by both sets of counsel.

[2] The charges faced by the applicant arose from events occurring on 11 November 2012 and he was initially arraigned on 7 May 2013 upon an indictment containing 14 counts including two counts of attempted murder. On 13 February 2014 the prosecution applied for, and was granted, leave to add two counts of attempted grievous bodily harm to the indictment as alternatives to the counts of attempted murder. The applicant was then re-arraigned and pleaded guilty to counts 5 and 8-14 which included throwing a petrol bomb, criminal damage to a Peugeot car, threats to kill two individuals, threats to damage property, theft and the two counts alleging attempts to commit grievous bodily harm with intent. Her Honour Judge Philpott QC, Deputy Recorder of Belfast, imposed the sentences of 6 years for each of the two counts of attempted grievous bodily harm and shorter concurrent sentences for the remaining offences. Mr Lyttle informed the court that, subsequent to his original arraignment, attempts had been made on behalf of the applicant to persuade the Crown to reduce the charges of attempted murder to attempted grievous bodily harm and that, as soon as that had

been achieved, the applicant's advisers confirmed that he would enter guilty pleas. The court was prepared to accept that information as correct.

Background facts

[3] On 11 November 2012 the applicant attended the bar of the Trinity Lodge GAA Club in Turf Lodge, Belfast for a private function, namely, the christening of a friend's child. The applicant succeeded in gaining entrance to the premises despite having been barred from the establishment upon a previous occasion. It appears that he had been consuming alcohol for a considerable period of time before reaching the club and that he continued to drink after his arrival. At around 8.20pm, as he exited from a toilet, he was recognised by a door steward as a person who had been previously barred from the club. The steward said that he would arrange to obtain his drink and put it in a plastic cup but then he would be required to leave. The applicant started to leave but then, slowed down, showed some resistance and stopped.

[4] The prosecution case was that, at this point, the applicant turned around and swung a punch at the steward who avoided the blow and struck the applicant as a result of which the applicant fell to the ground. The steward told the police that he thought the applicant had struck his head against a wall as his forehead was bleeding. The applicant maintained that the steward had struck him with a knuckleduster. The applicant was then ejected from the club by another steward and another man. The applicant told the second steward that he knew where he lived and that he would burn down his house.

[5] The applicant then went to a petrol station across the road and filled two bottles with petrol which he stole. It appears that later, at approximately 9.00 pm, as Mr Christie and Mr O'Gormley were standing outside the premises the applicant returned. He then placed a rag into one of the bottles, lit the rag with his lighter and threw it against the wall behind the stewards. The applicant then ran towards Mr Christie and threw petrol over him some of which splashed on to Mr O'Gormley's trouser legs. The applicant was then observed attempting to light his lighter but he was prevented from doing so and a further struggle took place in the course of which Mr Christie obtained possession of the lighter. The applicant was then held until the police arrived. The applicant also caused criminal damage amounting to some £500 to the car of a Mr Scullion who had been standing talking to Mr Christie.

[6] The applicant was arrested the following day and when interviewed by the police he answered "no comment" to all questions.

[7] The applicant is 24 years of age and in the pre-sentence report he was described as having enjoyed a stable childhood. Following the breakdown of his parents' relationship, he had lived with his mother. He had grown up in an area

with high levels of crime. As a consequence, from his early teens, he had become involved in substance abuse and offending behaviour. He had attended a specialist educational facility for those with identified learning needs and a final statement of those needs provided to the court indicated that the applicant had complex learning difficulties. He completed level 1 of a NVQ in bricklaying and key-skills qualifications in English and maths. At the time of his remand into custody he was employed as a cleansing operative by Belfast City Council. The misuse of alcohol and drugs of one type or another featured throughout his offending history and, as noted above, was also relevant to his involvement in the offences for which he was sentenced. In the course of his discussions with the probation officer the applicant denied having thrown or ignited a petrol bomb and, while he accepted that he had thrown petrol over the door staff, he denied that he had ever intended to ignite the petrol and maintained that he had simply been attempting to "engender fear" in them. The reporting officer recorded that the applicant "demonstrated a complete lack of awareness of the victim issues arising from his offending behaviour". The account proffered by the applicant during the discussions for the pre-sentence report was noted by the learned trial judge who recorded that no application had been made for a Newton hearing and that it was "clear from the papers before the court that the account given by the injured parties was correct". The probation officer concluded that there was a high likelihood of the applicant committing further offences but that, in view of the absence of an established pattern of similar violent offending whereby others had been seriously harmed, he was not assessed as presenting a significant risk of serious harm to others.

Previous convictions

[8] The applicant has ten previous convictions including criminal damage, common assault and assault on the police. On 15 May 2010 the applicant had committed the offence of hijacking but, as a result of difficulties arising in relation to his co-accused, that case was not dealt with in the Crown Court until 17 October 2013 when he received a determinate sentence of two years' imprisonment comprising one year in custody and one year on licence. When the applicant committed the offences the subject of this appeal he was on bail for the hijacking offence and, at that time, he was in breach of alcohol and curfew bail conditions. It appears that he was also subject to a suspended sentence of 18 months imposed for allowing himself to be carried on 26 October 2012. When the applicant committed the offences which are the subject of this appeal on 11 November 2012 he was remanded in custody and the bail which he had been granted with regard to the hijacking offence was revoked.

The grounds of appeal

[9] On behalf of the applicant Mr Lyttle focused his appeal upon the ground that the sentence of six years was manifestly excessive. In so doing he identified a number of criticisms of the approach adopted by the learned trial judge:

(*i*) The learned trial judge failed to identify a relevant starting point. Mr Lyttle referred the court to the Definitive Guidelines published by the Sentencing Guidelines Council in England and Wales. Mr Lyttle drew the attention of the court to the three categories identified by the Council with regard to the offence of causing grievous bodily harm contrary to Section 18 of the Offences Against the Person Act 1861. He submitted that the applicant's offence should properly be seen as falling within category 2 involving lesser harm and higher culpability. For category 2 offences the Council identifies a starting point, applicable to all offenders, of six years' custody with a category range of 5-9 years custody. Mr Lyttle reminded the court that these Guidelines were applicable to the completed offence rather than an attempt.

(*ii*) Mr Lyttle further argued that the authorities supported the proposition that it was virtually inevitable that an attempt usually carried a lesser sentence than one imposed for commission of the full offence. However, Mr Lyttle submitted that nowhere in her sentencing remarks had the learned trial judge recognised the applicability of that proposition.

(*iii*) Mr Lyttle also criticised the apparent inconsistency between paragraphs [23] and [25] of the sentencing remarks made by the learned trial judge on the basis that she appeared to have been confused to some extent with regard to imposing concurrent and consecutive sentences.

(*iv*) It was further submitted by Mr Lyttle that in imposing the sentence of six years the learned trial judge had failed to have any regard to the time spent in custody by the applicant in respect of the hijacking offence submitting that, in practice, he had received an effective sentence of eight years.

Discussion

[10] It may be of some assistance to refer to some general principles before dealing with the specific issues being raised in this appeal. It has been observed by this court and others many times over the years that offences of violence are highly fact specific and that, therefore, comparison with other cases should only be approached with the greatest of caution. While the events in this case were contained within a reasonably short period of time it is clear that the applicant, no doubt feeling aggrieved at his treatment, whether justified or otherwise, made a determination to use a weapon, namely, fire for the purpose of exacting his revenge. That was clearly in his mind when he went to the garage and stole the

petrol. A rag by way of a fuse was then added to the bottle containing the petrol and ignited and the bottle thrown in the direction of the doormen. Fortunately, the petrol did not ignite. Faced with such failure, the applicant nevertheless then sought to throw petrol over the victims and use his lighter for the purpose of ignition. Time and again, over the years, the authorities in this jurisdiction have confirmed the need for severe deterrent sentences when dealing with offences involving petrol bombs, irrespective of the age and previous good record of offenders, because of the risk of appalling injuries and it is in that context that the circumstances of this appeal fall to be considered.

[11] The relevance in this jurisdiction of the Guidelines published by the England and Wales Council has been discussed by this court upon a number of occasions. In R v McKeown and Han Lin [2013] NICA 28, a case that concerned the possession and cultivation of a large amount of cannabis, the learned Lord Chief Justice observed at paragraph [25]:

> "The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without trammelling the proper level of discretion vested in the sentencer."

The Lord Chief Justice went on to observe that the Guidelines could provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentence worthy of consideration depending on the precise circumstances of the individual case.

[12] Recently, the matter has once more been considered by Morgan LCJ in the course of giving judgment in The Queen v McCaughey and Smyth [2014] NICA 61. In the course of delivering the judgment of the court the learned Lord Chief Justice noted the differences in the composition and size of the respective jurisdictions in England and Wales and Northern Ireland and went on to say at paragraph [22]:

> "In Northern Ireland we have a small Crown Court judiciary who have the benefit of regular meetings

> with colleagues where sentencing issues can be discussed both formally and informally. Sentencing is carried out exclusively by full-time judges most of whom have had considerable experience of criminal law before going on the Bench. We recognise the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance but we have discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance."

[13] While the learned trial judge did not specifically state that she was giving a discount for the fact that the applicant had pleaded guilty to an attempt as opposed to the full offence, it is clear from her sentencing remarks that she fully appreciated that she was dealing with an attempt. Indeed, at paragraph [24] of her sentencing remarks she specifically referred to an authority in the course of which this court indicated that attempts generally receive a lesser sentence than would be imposed for commission of the full offence. The learned authors of Blackstone's Criminal Practice 2015 state at paragraph A5.72:

> "The Court of Appeal in *Robson* (1974) CSPA1-4B01 indicated that it would be 'at least unusual that an attempt should be visited with punishment to the maximum extent that the law permits in respect of a completed offence'. It is submitted that the sentence for a given attempt should almost always be less than the sentence which would have been imposed if that offence had been completed, but clearly much will depend on the stage at which the attempt failed, and the reason(s) for its non-completion. On the other hand, within an offence category, some examples of attempt may merit more severe punishment than some examples of the completed offence."

[14] In Director of Public Prosecution Reference (Nos. 8, 9 and 10 of 2013) [2013] NICA 38 this court referred to the case of The Queen v Joseph [2001] 2 Cr. App R. (S) 88 a case in which the victim was struck, head-butted and knocked to the ground in an attempt to rob him of his laptop computer the attempt only failing because of the determination of the victim to hold on to the laptop. In the course of delivering the judgment of the Court of Appeal His Honour Judge Hyam said, at page 400:

> "The fourth consideration we must bear in mind is that attempted offences usually carry a lesser sentence than that imposed for the commission of the full offence, but in this instant case that is not a potent factor because the seriousness of this offence was that it was only the determination of the victim that prevented him from being robbed of his computer."

In this case it was only the quick and determined action on the part of the doormen that prevented completion of the offences.

[15] While she accepted Mr Lyttle's submission that a plea of guilty had been entered as soon as appropriate counts had been added to the indictment, the learned trial judge took the view that the plea was of little value to the applicant in the context of being caught red-handed. Nevertheless she was prepared to extend some credit in the circumstances. It is quite clear from her sentencing remarks that the learned trial judge considered the Section 18 counts to be offences of extremely high culpability and in terms of the preparation and persistence of the applicant in obtaining and seeking to use inflammatory materials as a weapon it is difficult to disagree with such an assessment.

[16] The learned trial judge treated the sentence and remand in respect of the offence of hijacking as a separate offence and did not take it into account despite the submission advanced by Mr Lyttle. In our view it was within her discretion to do so. No doubt the period spent on remand in custody by the applicant prior to being sentenced for the hijacking was taken into consideration when completing his release date and it is well established that double counting should be avoided and that such credit should only be given once.

[17] We accept that it is somewhat difficult to reconcile paragraphs [23] and [25] of the sentencing remarks made by the learned trial judge. At paragraph [23] she said:

> "[23] In relation to the attempted Section 18s I am giving you a sentence of six years. In relation to the intimidation I am giving you a sentence one year, that is the two counts of threats to kill, that is one year each. In relation to the criminal damage I am giving you a sentence of six months. In relation to the theft, I am giving you a sentence of a year. In respect of throwing the petrol bomb I am giving you a sentence of three years. All of these sentences will be served concurrently because in my view they

> were all part and parcel of the same offending and I am taking that into account when viewing the totality of the sentence. So your sentence is one of six years."

At paragraph [25] she said:

> "[25] I indicated that in my view if this had not been a plea of guilty for the two attempted Section 18s because of the seriousness of conduct, the high culpability I would have been looking at a sentence of eight years on a fight, I would have reduced that down to five but taking into account all of the other additional conduct, in particular the criminal damage, the theft and the unnecessary threats to kill which included Mr Gormley's wife and family and of course the threat of destruction to his home which was a threat to commit criminal damage for which I am also giving a year for also."

However, standing back and reading the remarks fairly, as a whole, it seems to us that, having regard to the principle of totality, the learned trial judge reached a conclusion that the sentence merited for the Section 18 offences was one of six years taking into account the specific circumstances of this particular case. In DPP's Reference (Nos. 2 and 3 of 2010) [2010] NICA 36 this court referred to a sentence of 7-15 years imprisonment being generally appropriate after conviction where an offence under Section 18 was committed by attacking a victim lying on the ground with a shoed foot with intent to cause him grievous bodily harm. In that case, which the court confirmed was one of high culpability and entirely fortuitously low harm, the court, after making every allowance for mitigation, confirmed that the sentence for attempted grievous bodily harm in such circumstances on a contest would have been somewhere close to seven years imprisonment. In view of the powerful and eloquent submissions advanced on behalf of the applicant by Mr Lyttle we have given very careful consideration to the sentence passed in this case. We accept that this was a severe sentence towards the top end of the range. However, taking into account the specific factual matrix and the accepted need for severe and deterrent sentences with regard to the preparation and use of petrol bombs we are not persuaded that the sentence in this case was manifestly excessive. Accordingly the application will be refused.

[18] In conclusion we note that the pre-sentence report focussed strongly upon the adverse influences exerted upon the applicant by the local area and his peers. The applicant's mother has now moved the family home from the Moyard district of West Belfast to Finaghy. She personally gave evidence before the learned trial

judge. In so doing she confirmed that she had been in full-time employment all her life and that the change of address had been achieved at financial cost for the purpose of reducing the potential for the applicant to be exposed to adverse influences. That is very much to his mother's credit and it is accepted by Probation that the applicant enjoys strong family support. It is to be hoped that the applicant will recognise and fully utilise the benefit of such support during the licence period.