

IN THE CROWN COURT OF NORTHERN IRELAND

—————  
THE QUEEN

v

MARK DONNELLY  
—————

SENTENCING REMARKS  
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**KEEGAN J**

**Introduction**

[1] Mark Donnelly you have been found guilty of affray and it is now my responsibility to sentence you for that offence. The affray arose out of an incident that took place on 31 December 2012 in Omagh. Tragically a young man, Jason McGovern, lost his life as a result of events that day. However, the affray charge relates to events earlier in the morning outside the Terrace Bar, John Street, Omagh.

[2] Mr McCollum QC and Mr Reid BL appeared for the prosecution. Ms McDermott QC and Mr Shields BL appeared for the defendant. I am grateful to both sets of counsel for the care and attention they have applied to this case.

**Background**

[3] Mr Reid took me through events with the use of CCTV footage and photographic evidence. He explained the defendant's actions through these mediums. The defendant did not dispute his presence on the CCTV and he accepted that he is the man in the white T-shirt.

[4] The prosecution summarised the defendant's involvement in the incident from the CCTV as follows:

He can be seen at 02:59:08 on the extreme left beside the red car. At 02:59:11 he has begun to move forward. At 02:59:16 he begins to make a movement consistent with

him starting an attack. It is not possible from the quality of the footage to see if contact was actually made. This is brief and by 02:59:18 as the melee is underway he is passive. He watches the fighting before then running.

[5] The prosecution also characterised the offence in the following manner. It was accepted that the defendant was not an active or central participant. It was also submitted that it is difficult to categorise the defendant's role given the nature of the offence and the speed with which events unfolded. This was not a case where weapons were used. There is no evidence as to the public being placed in great fear. This was a spontaneous incident and it took place over a very short period of time. It is not possible to say that any physical contact was made by the defendant. The prosecution also submitted that I should not draw a distinction between the culpability of the defendant and the other co-defendants.

[6] The parties who were affected by this affray are the deceased and Mr Liam Williams. It is important to note that four other co-defendants pleaded guilty to the affray and they were all sentenced by Her Honour Judge Loughran on 11 September 2014. One of the co-defendants also pleaded guilty to an assault on Mr Williams. I summarise the position of the co-defendants as follows. Firstly, James O'Brien pleaded guilty to the offence on 21 March 2014. He was sentenced to a period of imprisonment of 4 months suspended for 3 years. That defendant had a previous restorative caution for disorderly behaviour. Liam Chism was a youth at the time of the incident. He pleaded guilty to the affray on 10 March 2014 and he was sentenced to 50 hours community service. Aaron Bradley pleaded guilty on 10 April 2014. He was sentenced to a period of imprisonment of 4 months for the affray suspended for 3 years. He was also sentenced to a period of 3 months for the assault on Mr Williams and that sentence was also suspended for 3 years. Aaron Bradley had 11 previous convictions, one of which was for a serious assault. Aaron Davis pleaded guilty on 21 April 2014 and he was sentenced to a period of 4 months' imprisonment for the affray suspended for 3 years. Aaron Davis also had a criminal record involving offences in relation to drugs, disorderly behaviour, and a serious assault.

[7] This is a long running matter in that the defendant was arraigned on 17 September 2013 and pleaded not guilty to affray and manslaughter. There have been a number of trials but only one trial in relation to the affray. That was a trial from 4-13 November 2014. At that trial the jury failed to reach a verdict on the manslaughter charge however the defendant was convicted in relation to the affray. Following that trial there was a further full trial in relation to the manslaughter charge from 25 May 2015 to 6 June 2015. At that trial the jury also failed to agree a verdict. A third trial was directed however on 20 June 2016 the prosecution offered no evidence in relation to the manslaughter charge and the defendant was acquitted by the jury upon direction.

[8] In opening the case, Mr Reid explained that the deceased had been staying with a Mr Landers during the weekend before his death. On Sunday 30 December

2012 they met with a number of others and travelled to Omagh for the evening to socialise. They went to the Terrace Bar and Sally's Nightclub. The group broke up during the evening. Liam Williams, who remained in the company of the deceased, stated that as they were walking from a nightclub a number of young men began "mouthing off" at them. He recalled then he was punched and fell to the ground. He stated that as he tried to walk away he saw the deceased on the ground. He said that he and the deceased left the area by taxi thereafter and returned to Emyvale in County Monaghan. Tragically Mr McGovern died shortly after.

[9] There were witnesses to an affray outside the Terrace Bar, John Street, Omagh. There is also the CCTV footage of the incident which I had the advantage of viewing in part during these proceedings.

### **Sentencing principles**

[10] I was referred to a case of The Queen v Murray and others [2015] NICA 54. In particular I was taken to the judgment of Higgins LJ at paragraph 39 which reads as follows:

"Affray in Northern Ireland remains an offence against the Common Law, the maximum penalty for which is life imprisonment. It can be committed by one person but invariably involves a number of persons acting in concert or in confrontation. The offence consists of a violent disturbance of the peace by one or more persons which takes place in such circumstances as to cause terror to one or more persons of reasonable firmness. The most common form of affray is a fight between two or more men or more usually groups of men which terrifies bystanders. The disturbance of the peace may be a display of force for example brandishing an offensive weapon without actual violence. The offence on this occasion involves very considerably more than these minimal definitions. Laying down guidelines for such an offence is difficult due to the infinite variety of circumstances which may comprise the offence. In AG's Reference (No1) of 2006 [2006] NICA 4, quoted by the trial judge at paragraph 25 of his judgment, this Court stated at paragraph 25:

'[25] Because of the infinitely varying circumstances in which affray may occur and the wide diversity of possible participation of those engaged in it, comprehensive rules as to the level of sentencing are impossible to devise. Certain general principles can be recognised, however.

Active, central participation will normally attract more condign punishment than peripheral or passive support for the affray. The use of weapons will generally merit the imposition of greater penalties. The extent to which members of the public have been put in fear will also be a factor that will influence the level of sentence and a distinction should be drawn between an affray that has ignited spontaneously and one which has been planned – see R v Anderson and others [1985] 7 Cr App R (S) 210. Heavier sentences should in general be passed where, as in this case, the affray consists of a number of incidents rather than a single self-contained episode.”

### **Probation Report**

[11] A useful probation report has been presented to the court by Julie Brady, Probation Officer. This report is dated 1 August 2016. The report sets out the offender in his life setting. This report also states that the defendant fully co-operated with probation in its preparation. It is reported that there were no general difficulties pertaining to anger management. In her contact with the defendant’s mother the probation officer also noted no issues regarding the defendant’s general behaviour within the family context. The report states that during her contact with the defendant he was initially reluctant to discuss the sequence of events relating to the night in question referencing the extensive court proceedings. After some initial reticence the defendant did provide a narrative. He advised that on 31 December 2012 he had frequented Sally’s licenced premises where he consumed alcohol. He advised that he cannot recall the volume of alcohol taken but he stated that he was not intoxicated and can recall events.

[12] The defendant said that he was initially in the company of friends, prior to meeting his partner Ms McAleer. He reported no difficulties during the early course of the evening or any prior contact with Mr McGovern or his associate. The defendant recalled observing a fight on the opposite side of the street outside the Terrace Bar upon frequenting a nearby fast food outlet where he anticipated getting a taxi home. The defendant said that he went over to the crowd “out of sheer nosiness” and asked his co-defendant, Aaron Bradley what was taking place. He further stated that Mr Bradley had alleged he had been assaulted on a previous night and whilst discussing this, the defendant said that Mr McGovern and his associate “came over to them”. He reported no recollection of the content of this exchange but accepted that he raised his left arm, at that time. The defendant said that he did not physically strike anyone but could not provide any explanation as to the reasons for his actions.

[13] The defendant then described a “massive row” ensuing in the street. He said he stood back and watched, prior to returning to where his partner was at the fast food outlet. He explained how he and Ms McAleer then crossed the street to stand outside the Terrace Bar as the crowd had dispersed down the Kevlin Road. He further stated that he went down the hill on the Kevlin Road to look for his cousin and it was at that juncture, he went out of CCTV coverage. He described this as a very short period of time before he returned to meet his partner again. He recalled his taxi then arriving and prior to leaving the area he said that he went up Sally’s Hill in a final attempt to locate his cousin. Upon leaving the area, the defendant stated that he was unaware of the gravity of events.

[14] The probation report notes that the defendant expressed an appreciation of the seriousness of the offence and the significant implication of what happened upon the McGovern family. It is noted that the defendant acknowledged the difficulties experienced by the McGovern family during the trials and he expressed how they “haven’t got justice” as “no one has been held accountable”. The report states that the level of alcohol consumption at the time undoubtedly impacted upon the defendant’s impulsivity, reasoning and decision making capabilities.

[15] The report states that the defendant has no previous convictions and as far as can be ascertained there are no matters pending. The report goes on to assess the defendant as representing a low likelihood of re-offending. The factors supporting this assessment are stated to include no known pattern of alcohol related aggression, appreciation of victim issues, supportive family relationships, stable employment and positive work ethic and absence of previous convictions. It is further stated:

“To maintain this assessment the defendant needs to exercise responsibility for his alcohol consumption and subsequent behaviours, particularly when in the company of peers. Furthermore, whilst Mr Donnelly demonstrates an awareness of the impact of Mr McGovern’s death, he needs to avoid complacency and remain mindful of potential risk situations when socialising.”

[16] The report goes on to assess the risk of serious harm. A risk management meeting was convened on 28 July 2016. That forum concluded the defendant does not currently meet PBNI threshold criteria for significant risk of serious harm. The factors supporting this assessment are stated to include no pattern of offending behaviour, no evidence of pre-meditation or intent, no known anger difficulties or previous use of violence, no evidence of alcohol misuse within his general lifestyle and appropriate victim awareness. The other protective factors including supportive family relationships, stable employment and lifestyle are also repeated.

## **Defence Submission and personal circumstances of the defendant**

[17] Ms McDermott QC presented a plea on behalf of the defendant in an exemplary manner. She began by accepting that at the forefront of this case is the tragic death of Mr McGovern. However, she pointed out this is unrelated to this affray as the death of Mr McGovern was as a result of an assault upon him 5-7 minutes later in a car park. Ms McDermott accepted that the defendant contested the affray charge however he was also charged with manslaughter unlike the other co-defendants. Ms McDermott submitted that this defendant had the least involvement in the affray. Ms McDermott then set out his personal circumstances.

[18] This defendant is now 24 years of age and he was a young man of 21 at the time of the offence. The incident was thus a considerable time ago. Since then the defendant has received no adverse attention. He was described as a hardworking young man who is employed alongside his father in a business dealing with concrete flooring. The defendant comes from a good family background. He is now engaged to be married to a long-term partner. The defendant has had significant success with moto-cross where he has competed at a national and international level. He is also involved in an athletics club and has an interest in football.

[19] Ms McDermott submitted that if the defendant had not been drinking alcohol he would not have acted in the way he did. She said that this was a salutary lesson to him and that he has no interest in alcohol now. Ms McDermott said that this incident has had a very significant effect on the defendant and his family however she did not ask for pity given the death of Mr McGovern and the effect upon his family.

## **Consideration**

[20] This was an unsavoury incident, undoubtedly fuelled by alcohol. This is yet another example of a group of individuals behaving inappropriately late at night under the influence of alcohol. This type of anti-social behaviour is clearly unacceptable. I accept the prosecution submission that I should not draw a distinction between the culpability of the participants. I also consider that the custody threshold is passed.

[21] However, I accept that there are not the aggravating features that would bring this to the high end of affray cases. There were no weapons used. There is no evidence of the public being in great fear. This was a spontaneous incident. It was of brief duration. There is also no evidence that there was physical contact made by the defendant.

[22] I take into account the sentences imposed upon the co-defendants. A factor that distinguishes this defendant from them is that he contested the case. However each defendant must be considered in light of their own personal circumstances including any relevant criminal record.

[23] I have also considered the mitigating factors that apply in this case. The defendant is a man who is reported to have matured and reflected on what happened on the evening in question. He is engaged to be married, he is employed and he has a supportive family. It is also significant that he has no previous convictions. I take into account the many and excellent references that have been put forward to the court on behalf of this defendant. These references emanate from athletic clubs, neighbours, his employers and other upstanding members of the community. I do note the theme contained in the references that this man is a quiet, hardworking individual who seems to be interested in progressing with his family life, and his sporting interests. I note from the probation report that the defendant is considered to be of low risk of re-offending. This is also not a case where the defendant meets the test of being a significant risk of serious harm. I am prepared to accept that the defendant has displayed genuine remorse and that he regrets his involvement in the events on the night in question.

[24] Taking all of the above into account I consider that the appropriate sentence in this case is one of 4 months' imprisonment. However, in the circumstances of this case, I consider that the sentence should be suspended. Given the length of time since conviction and the fact that the defendant has not come to adverse attention since then I consider that the appropriate period of suspension is a period of 1 year.

### **Sentence**

[25] Accordingly, Mark Donnelly, I sentence you to a period of imprisonment of 4 months suspended for 1 year. If you keep out of trouble for the next year the sentence will not be activated. However, I warn you that if you commit any further offence during the period of suspension of this sentence, the court that deals with the further offence may in addition to imposing a penalty for that offence, bring into effect this suspended sentence.