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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PATRICK FRANCIS McLARNON

Before: Higgins LJ, Coghlin LJ and Gillen J

HIGGINS LJ (delivering the judgment of the Court)

[1] This is an application for leave to appeal against an extended sentence of three and a half year's custody and three years licence imposed by His Honour Judge Marrinan at Antrim Crown Court on 27 June 2013, leave having been refused by the single judge, Mr Justice Treacy. Following the hearing we dismissed the application for leave to appeal and stated that we would give our reasons later which we now do. The applicant was returned for trial on three separate matters in respect of which he pleaded not guilty to individual indictments. A composite indictment of ten counts was later preferred. On 23 April 2013 the applicant pleaded guilty to Counts 2,4,6,8 and 10 and the remaining counts were left on the file.

[2] The relevant counts in the indictment were -

> " **SECOND COUNT**
>
> BURGLARY WITH INTENT TO CAUSE UNLAWFUL DAMAGE, contrary to Section 9(1)(a) of the Theft Act (Northern Ireland) 1969.
>
> **PARTICULARS OF OFFENCE**
>
> PAUL FRANCIS MCLARNON, on the 23rd day of May 2012, in the County Court Division of Antrim, entered as a trespasser a dwelling house, namely, 18

Gortin Park, Carnlough, with intent to do unlawful damage to the building or anything therein.

FOURTH COUNT

HARASSMENT, contrary to Articles 3 and 4 of the Protection from Harassment (Northern Ireland) Order 1997.

PARTICULARS OF OFFENCE

PAUL FRANCIS MCLARNON, between the 31st day of August 2012 and the 16th day of September 2012, in the County Court Division of Antrim, pursued a course of conduct which amounted to harassment of Philomena McGrory, and which he knew or ought to have known amounted to harassment.

SIXTH COUNT

COMMON ASSAULT, contrary to section 47 of the Offences Against the Person Act 1861.

PARTICULARS OF OFFENCE

PAUL FRANCIS MCLARNON, on the 4th day of July 2012, in the County Court Division of Antrim, assaulted Philomena McGrory.

EIGHTH COUNT

SENDING INDECENT MATTER BY POST, contrary to Section 85(3)(a) Postal Services Act 2000.

PARTICULARS OF OFFENCE

PAUL FRANCIS MCLARNON, between the 5th day of August 2012 and the 21st day of August 2012, in the County Court Division of Antrim or elsewhere within the jurisdiction of the Crown Court, sent by post, postal packets which enclosed abusive and threatening letters.

TENTH COUNT

HARASSMENT, contrary to Articles 3 and 4 of the Protection from Harassment (Northern Ireland) Order 1997.

PARTICULARS OF OFFENCE

PAUL FRANCIS MCLARNON, between the 9th day of August 2012 and the 31st day of August 2012, in the County Court Division of Antrim, pursued a course of conduct which amounted to harassment of Philomena McGrory, and which he knew or ought to have known amounted to harassment."

[3] The learned trial judge imposed the following sentences –

Count 2	-	three and a half years imprisonment and extended period of three years on licence;
Count 4	-	12 months imprisonment;
Count 6	-	6 months imprisonment;
Count 8	-	6 months imprisonment;
Count 10	-	12 months imprisonment.

The applicant appeals against the sentence imposed in respect of Count 2 only, on the sole ground that it is manifestly excessive and/or wrong in principle.

[4] The applicant and the injured party had been in a relationship for twelve years and had lived together for a time at different addresses including the premises in Carnlough, though not in recent times. They met at a rehabilitation centre for persons with addictive problems. The relationship was fraught with difficulties with occasions of domestic violence and abuse leading to the applicant's conviction of a series of offences all related to the injured party. This led to the imposition of a non-molestation order which was breached on numerous occasions. Prior to this relationship the applicant had no previous convictions. He is now 61 years of age and has a long-stranding alcohol problem with which these offences are associated.

[5] Chapter III of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order) requires a judge when sentencing an offender for a specified offence to assess under Article 13 or 14 of the Order whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences. This is referred to as the assessment of dangerousness. The learned trial judge concluded that there was such a risk and imposed the extended custodial sentence detailed above. The sole ground of appeal is that the learned trial judge should not have concluded that the applicant posed such a risk. In particular it was

submitted that the learned trial judge had failed to analyse and consider the nature and circumstances of the specified offence (Count 2, burglary with intent) and if he had done so properly he would have concluded that the applicant did not pose such a risk. Mr Stephen Mooney appeared on behalf of the applicant and Mrs McCormick on behalf of the Crown. We are indebted to both counsel for their helpful skeleton arguments and oral submissions.

[6] The applicant contended that if the trial judge had properly analysed the specified offence (Count 2) he would not have concluded that the element of dangerousness had been satisfied. There were a number of factors relating to this offence which pointed away from a finding that there was significant risk to members of the public of serious harm occasioned by the commission by the applicant of further offences. These were –

i. the prosecution of burglary with intent to cause criminal damage (as opposed to an offence alleging intent to commit violence) implies that his motive on that occasion (23 May 2012) was to cause criminal damage and not to cause serious physical harm or any violence;

ii. that any physical injury sustained by the injured party was at a low level and no gratuitous injuries were inflicted upon her;

iii. the applicant had the opportunity to inflict harm upon the injured party on 23 May 2012 but did not do so and this was not a case in which injury was avoided by good fortune or the injured party fleeing the scene;

iv. the applicant did not arrive at the scene armed with any weapon and when it was alleged that he had a weapon (a hammer) he did not use it;

v. while the applicant did commit further offences after May 2012 (Counts 4,6,8 and 10) none of them were either specified or serious offences; and

vi. no serious harm was caused by the applicant between May and August 2012 (the time frame of the counts in the indictment).

In addition but unrelated to Count 2 (and the other counts in the indictment) the applicant contended that other factors did not support the trial judge's conclusion on dangerousness. These were that the applicant's last conviction for a specified offence was in 2004, the incident having occurred in 2003, there was no escalating pattern of seriousness and no offences of violence accompanied his various breaches of court orders following his release from custody.

[7] A statement of facts relating to all counts on the indictment had been agreed between counsel at the Crown Court. In opening the case Mrs McCormick read from this statement and at the same time referred to pages in the depositions. In relation to Count 2 she stated –

> "The conduct to which the defendant has pleaded guilty is reflected in the depositions between pages four and six and in summary in this statement of facts. By his plea of guilty to the allegation of burglary with intent to cause unlawful damage the defendant admits that on 23 May 2012 he entered the home he formerly shared with the complainant and he awaited her return to the house. The front door was not locked and the defendant would have been aware of the complainant's practice of not securing her home. When the injured party returned home at around 10 o'clock the defendant shouted abuse at her, threw ornaments at her and damaged household items including a door and two televisions."

The depositions disclose that when the injured party returned home and opened the front door the applicant ran at her, that he shouted vulgar abuse at her eg "You're nothing but a whore", that he lifted some ornaments and threw them at her striking her on the right leg, and that he attacked the television and the living room door with a hammer while shouting abuse at her.

[8] Inherent in the applicant's appeal against sentence was the suggestion that the learned trial judge ought, in the first instance, to have considered the offence of burglary with intent and the circumstances in which it was committed in isolation from the other information before the Court relating to the applicant. If he had done so he would have concluded that the dangerousness provision had not been satisfied.

[9] The legislation relating to dangerous offenders is to be found in Chapter 3 of Part 2 of the Criminal Justice (Northern Ireland) Order 2008. This legislation is similar to but not identical with the provisions of the Criminal Justice Act 2003 (the 2003 Act). In that regard decisions of courts in England and Wales should be considered carefully to ensure that the provisions under consideration are identical. In addition much of the case law prior to 2008, when the 2003 Act was amended, was concerned with the question of whether it was reasonable or otherwise not to dis-apply the presumption in favour of dangerousness which featured in the 2003 Act but which is not part of the law in Northern Ireland under the 2008 Order. That presumption has now been removed from the 2003 Act. In addition there are differences in the circumstances in which an extended sentence may be imposed. Under Article 14 of the 2008 Order an extended sentence may be imposed even

where the specified offence is not serious offence. Where it is a serious offence and before a judge can impose an extended sentence, he must determine that the case is not one in which a life sentence or indeterminate custodial sentence under Article 13 should be imposed.

[10] The provisions relating to dangerousness are to be found in Article 15 under the heading 'The assessment of dangerousness' Article 15 provides –

> "15.—(1) This Article applies where—
>
> (a) a person has been convicted on indictment of a specified offence; and
>
> (b) it falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences.
>
> (2) The court in making the assessment referred to in paragraph (1)(b)—
>
> (a) shall take into account all such information as is available to it about the nature and circumstances of the offence;
>
> (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and
>
> (c) may take into account any information about the offender which is before it.

[11] Article 15 applies where it falls to a court to assess whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences. The words 'dangerousness or dangerous offender' do not appear in Article 15 but are a convenient shorthand for what has to be assessed under Article 15(1)(b). The requirement to assess dangerousness applies only where a person has been convicted of a specified offence. A 'specified offence' is defined in Article 12 as a specified violent offence or a specified sexual offence. A specified violent offence is an offence specified in Part 1 of Schedule 2 of the 2008 Order. A specified offence is a 'serious offence' if specified in Schedule 1. (my emphasis) Thus a specified violent offence may not be a serious offence for the purposes of the 2008 Order and vice versa. Burglary with intent to do unlawful damage is a specified violent offence under Schedule 2 Part 1

paragraph 14(b). It is also a serious offence under Schedule 1 Paragraph 14(c). Section 16 (threats to kill), Section 18 (wounding with intent), Section 20 (malicious wounding), and Section 47 (assault occasioning actual bodily harm) of the Offences against the Person Act 1861, Article 3 of the Criminal Damage (Northern Ireland) Order 1977 (Arson), and Article 6 of the Protection from Harassment (Northern Ireland) Order 1997 (putting people in fear of violence) are all specified violent offences under Schedule 2 Part 1. Not all of them are serious offences under Schedule 1, for example, the offences contrary to Section 20 and 47 of the Offences against the Person Act 1861 and offences under the Protection of Harassment (Northern Ireland) Order 1997. The others referred to are so specified.

[12] Article 15(2) provides that the court making the assessment shall take into account all such information as is available to it about the nature and circumstances of the offence, that is, the specified offence, in this instance burglary with intent (paragraph 2(a)). In addition it may take into account any information about any pattern of behaviour of which the specified offence forms a part (paragraph 2(b)) and any information about the offender (paragraph 2(c)). Paragraph 2(a) is mandatory as this is the specified offence which prompts the assessment of dangerousness. Whether the other paragraphs are taken into account will depend on the nature of the information before the court and its relevance to the offender and the question of risk. There is nothing in Article 15 which, when assessing dangerousness, restricts the court to the nature and circumstances of the specified offence. Article 15 does not require any connection between the facts of the specified offence and the finding of dangerousness, though the absence of some connection would be unusual. It is possible for a finding of dangerousness to be made on the basis of information before the court which has little or no close relationship with the specified offence. The Court must look at all the information it being remembered that the court is considering an assessment of future risk of serious harm.

[13] Mr Mooney submitted that as the intent in Count 2 was to cause unlawful damage it would be wrong to impute a different and violent purpose on the part of the applicant and that the injury sustained from the throwing of the ornaments was minor. While strictly speaking that may be correct and that the applicant had the opportunity to inflict more serious harm but had not done so, it is worth remembering what he did do. He entered this lady's home without permission and waited for her to return and then surprised her when she entered and then launched an abusive verbal attack on her and then proceeded to damage her property. That was a proper basis upon which to proceed (in conjunction with other relevant information in accordance with paragraphs (2)(b) and (c)) to assess whether there was a risk of serious harm to the injured party in the future by the commission by the applicant of further such offences. The other information before the court comprised a list of previous convictions, a victim impact report, a psychologist's report in respect of the injured party, a report from and evidence of Dr Bownes, consultant psychiatrist and a pre-sentence report from the Probation Board.

[14] The applicant had the following previous convictions, all committed against or in respect of the same injured party -

> "ANTRIM CROWN COURT 3/2/2005
> Harassment (03/04/2003 - 23/9/2003)
> Imprisonment for 2 years
>
> Threats to kill (01/07/2003 31/07/2003)
> Imprisonment for 2 years
>
> Threats to damage property (22/09/2003)
> Imprisonment for 2 years
>
> Arson (22/09/2003)
> Imprisonment for 2 years
>
> ANTRIM CROWN COURT 4/5/2005
>
> Wounding with intent (31/08/2004)
> Custody Probation Order 27 months imprisonment and probation 2 years
>
> LIMAVADY MAGISTRATE'S COURT 21/2/2007
>
> Harassment (13/02/2005 - 04/08/2005)
> Imprisonment for 3 months, suspended 18 months
>
> BALLYMENA MAGISTRATE'S COURT 2/11/2009
>
> Breach of non-molestation order (24/03/2006)
> Conditional discharge for 12 months
>
> COLERAINE MAGISTRATE'S COURT 27/6/2011
>
> Breach of non-molestation order (06/05/2011)
> Breach of non-molestation order (10/05/2011)
> Breach of non-molestation order (11/05/2011)
> Breach of non-molestation order (13/05/2011)
> Breach of non-molestation order (21/05/2011)
> Breach of non-molestation order (24/05/2011)
> Breach of non-molestation order (24/05/2011)
> Breach of non-molestation order (24/05/2011)
>
> For each offence 3 months imprisonment concurrent
> Suspended for 3 years and a £25 fine."

[15] The Risk Management Committee of the Probation Board carried out an assessment of the applicant for the purposes of the pre-sentence report to be placed before the court. This stated –

> "While it is positive that the defendant now states that he accepts his relationship with Ms McGrory has ended and intends not to have further contact with her on eventual release, he has expressed these intentions previously and repeatedly breached Orders designed to prevent contact with her.
> …
> The offences before the court follow a similar pattern to those of the past, namely offences committed against the ex-partner involving psychological intimidation, assault and threats, which characterises the volatile nature of his relationship with her throughout the years. His offending has been linked to his propensity to misuse alcohol allied with his distorted views concerning his ex-partner, resulting in numerous breaches of court orders designed to act as controls on his behaviour.
>
> He has demonstrated that he can react violently when under the influence of alcohol. This agency considers him to present a significant risk of harm to others and a high likelihood of re-offending in a similar way as evidenced by his criminal record of offences of violence towards Ms McGrory and others."

The report of Ms Kelly on the injured party noted that she had suffered a serious and chronic psychological reaction as a result of events in her life including the conduct of the applicant.

[16] The case was opened to the learned trial judge on 10 June 2013 and on the same date he heard the evidence of Dr Bownes and counsel in mitigation. He adjourned the hearing to consider all the evidence and passed sentence on 27 June 2013. It is clear from his sentencing remarks, which total 17 pages, that he gave careful consideration to the evidence and to the issue of dangerousness under the Criminal Justice (Northern Ireland) Order 2008. In his opening remarks he referred to the written agreed 'basis of plea' and stated that this had been read into the record by prosecuting counsel and he did not propose to repeat it. He then referred to Burglary with Intent being a serious and specified offence as defined in Article 12(2) and Schedule 1 of the 2008 Order and that the court had to consider whether it was of the opinion that there was a significant risk to members of the public of serious

harm occasioned by the commission by the offender of further specified offences. He quoted the relevant part of Article 15(2) and referred to passages in R v Lang in which guidance was given as to how to approach the assessment of significant risk and to R v Johnson. He then posed the question – what do I know about this offender after all the information (the reports and evidence) has been processed? He answered that in the following terms -

> "The defendant here is 61 years of age. There is, to my mind, a highly relevant record of crimes against his former partner, Miss Philomena McGrory, most of which are not specified, such as harassment and repeated breaches of non-molestation orders. However, in that record there are a number of previous convictions for cases which are specified and serious, for example, the threats to kill of 1st July 2003, the arson of 22nd September 2003 dealt with at Antrim Crown Court on 3rd February 2005. There is also the highly relevant conviction of wounding with intent of 31st August 2004 which was dealt with by a Custody Probation Order and probation. That was the incident where it is alleged apparently that the defendant pushed the victim through shower glass or something to that effect causing her scarring to the face.
>
> Later he referred to the pre-sentence report and the views expressed relating to dangerousness.
>
> The background to the offender's offending against his victim is set out in detail in the pre-sentence report, and I do not intend to repeat all of that here. The offence analysis of the present case is also dealt with in detail in that report and again I see no merit in repeating all of that. The Probation authorities suggest that the defendant is assessed at a high risk of further offending. It would appear from everything that has been put before me that, to put it at its least, the defendant appears to be fixated on the breakdown of his relationship with the victim which was a lengthy and turbulent one.
> …….
>
> It is the settled view of the Probation Board for Northern Ireland's risk management meeting convened in this case that the statutory test of

> dangerousness is satisfied. They set out under 'The risk of serious harm' detailed reasons for coming to that conclusion. Again I do not believe it is necessary to set out in detail those factors, they are there to be read for themselves in the pre-sentence report and have been addressed in Dr Bownes' evidence and in cross-examination of Dr Bownes."

[17] It is clear that the learned trial judge did not expressly analyse the nature of the offence of Burglary with Intent as it was committed on 23 May 2012 but it is equally clear that the judge had all the material before him on which to do so and that he took time to consider his conclusions. Later he referred to correspondence sent to the injured party by the applicant whilst on remand in prison. Some of the correspondence forms the basis of Count 8 while others sent in September 2012 were background information admissible under Article 15 of the 2008 Order. The judge commented –

> "I don't propose, for reasons of delicacy, to read out much of what is contained in these letters, but it seems to me that they are testaments of hate as far as this lady is concerned. I am particularly concerned by a number of passages, for example, in the second letter of September 2012 on the second page the reference to: '*I will be free if I don't get bail in ten weeks, not long, then the fun will really start.*" I also refer to a reference in the same letter: "*I hate that whore with all my heart. What goes around comes around. If my mother dies I will go mad for one thing, you know what that is.'* And then in the more recent letter of 1 February 2013 that letter too is littered with hateful language, very distressing language, language which clearly Dr Bownes felt was very concerning. All that I will say about that is there is one passage which I find chilling: '*I will have something in my pocket just for you whore. I heard a 47 year old woman in Carnlough got very badly burnt all over her scar face, boiling water over the face. Big fucking time whore. Stinking fanny. You killed wee Kim, you bastard.'* And then Towards towards the end: '*I sort you out soon bastard'* and so forth. Clearly, even applying the most liberal construction and the most reasonable construction favourable to the defendant to his distress about his dog, for example, I find those comments brutally chilling."

After commenting on the evidence of Dr Bownes the judge stated –

> "I have looked at all of these matters and I have to say that, having taken everything into account and putting the best possible interpretation on any evidence produced in relation to the defendant's stated desire to avoid further custody, I have no doubt whatsoever that the statutory test is met in this case. I have also taken into account in that decision any guidance given by our Court of Appeal in cases such as R-v-EB [2010] NICA 40 and R-v-Owens [2011] NIC 48.
>
> This is a case, it seems to me, where it is actually more frightening to the court that this defendant does not have a recognisable psychiatric illness. If he did, then some of the threats that he has clearly made freely in the past, and continues to make from his prison cell, of extreme danger and damage to the victim might be said to be some form of outworking of a fantasy. All people have fantasies of one kind of another, whether they be in dreams or whether they be in actual consciousness, and most of those fantasies are entirely innocent. This defendant does not have any recognised psychiatric illness which would explain those threats or excuse them or at least reassure the court that they will not be acted on. He has acted on such threats in the past in 2003, he has acted on those threats in the past in 2004 and caused damage of a scarring nature to this victim. One cannot read the Victim Impact Report in this case without realising the terror he has put this unfortunate woman through over many, many years despite the frequent interventions of the police."

[18] As I have already observed in most cases there will be a relevant link between a finding of dangerousness and the nature and circumstances of the specified offence for which the offender is to be sentenced. In some cases it will be more obvious than in others. Where it is less obvious it would be preferable for sentencing judges to make clear their views on the nature and circumstances of that offence and how they and the other factors in the case have influenced the assessment of dangerousness as well as the serious harm foreseen. Apart from the offence of burglary with intent, of particular significance in this case must be the previous conviction of wounding with intent, together with the threat to kill, the abusive and threatening contents of the texts and letters sent to the injured party. On the issue of serious harm, apart from physical injury, of particular significance must be the psychological symptoms

caused by the applicant, although the judge recognised that not all the injured party's problems were the result of conduct by the applicant.

[19] It is quite clear from the history outlined above that the finding of dangerousness was properly considered and well justified and in those circumstances a sentence other than a determinate sentence was appropriate. The judge's decision that this was a proper case for an extended sentence under Article 14 could not be faulted.