

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

IN THE CROWN COURT OF NORTHERN IRELAND SITTING AT BELFAST

THE QUEEN

-v-

KIERAN EDWARD McLAUGHLIN

SENTENCING REMARKS

HORNER J

A. INTRODUCTION

[1] The defendant, Kieran Edward McLaughlin, who was born on 16 February 1955 and is aged 60 years, was found guilty at Belfast Crown Court on 27 March 2015 of Count 2, namely that between 9 October 2013 and 17 October 2013 he had in his possession firearms and ammunition, namely a sawn-off, 12 bore double-barrelled, breech loading, side by side shotgun, marked "F Williams London and Birmingham", a Mauser Model 1910, 6.35 x 16mm SR (.25 "ACP") calibre self-loading pistol and magazine, seven 12 bore shotgun cartridges marked "GB, Super Express" and one 12 bore shotgun cartridge marked "Eley" with intent to endanger life or cause serious damage to property or to enable another person to endanger life cause serious damage to property contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004. He was also found guilty of Count 4, namely having in his possession an imitation firearm, namely a Denix imitation "Walther P38" pistol with intent by that means to cause another person to believe that unlawful violence would be used against him or her contrary to Article 58(2) of the Firearms (Northern Ireland) Order 2004.

B. PERSONAL CIRCUMSTANCES

[2] The defendant has six adult children. He is separated from his partner and the children's mother apparently due to his previous periods of imprisonment. He says himself that he had been active in the Republican Movement and that this

dominated much of his adult life. He stays in contact with his former partner and his children. His eldest child is his main source of support and practical help. He is troubled by mental health issues. He apparently suffers from depression. He is presently on anti-depressants.

C. THE DEFENDANT'S RECORD

[3] The circumstances in which the offending occurred are set out in some detail in the judgment delivered by this court on 27 March 2015. It is not proposed to repeat them, save where it is necessary.

[4] Following his conviction, the defendant's criminal record was made available to the court. It discloses that:

- (i) On 4 November 1974 he was convicted of possessing a firearm and ammunition in suspicious circumstances and was given a period of imprisonment of 2 years suspended for 2 years.
- (ii) On 24 January 1989 he was convicted of possessing a firearm and ammunition with intent to endanger life or property and imprisoned for 13 years, he was also convicted of possessing a firearm and ammunition in suspicious circumstances for which he was given a 7 year concurrent term.
- (iii) At Belfast Crown Court on 30 November 2001 he was convicted of possessing firearms with intent to endanger life or property for which he was sentenced to 18 years. He was also convicted of possessing items for terrorist purposes for which he received a concurrent custodial sentence of 5 years and also of possessing prohibited weapons for which he received a 3 year period of imprisonment to run concurrently.
- (iv) He has 3 convictions for assault arising from 9 June 2014 relating to an incident which occurred in prison. He was sentenced to 5 months' imprisonment on each of the offences, the periods of imprisonment to run concurrently.

D. THE PRE-SENTENCE REPORT

[5] The pre-sentence report prepared for the court includes the following information namely that he is presently in custody at HMP Maghaberry in the Care and Supervision Unit which accommodates prisoners who are under threat or who have been assessed as being at risk. Prior to moving to this unit he resided in Roe House in the prison. Roe House accommodates "separated prisoners". The defendant hopes to be able to return to the "Separated Prison Unit at some stage in the future". He gave a history of the sentences that he had served which were described as "paramilitary offences". He claims to have significant mental and

emotional health problems, from early depression and anxiety, although there is no medical report before the court dealing with these issues. He claims that they are linked to periods of imprisonment and difficulties in coping, post custody. He is currently on anti-depressant medication. He claims that he finds his period of custody “very difficult”. The lack of a medical report means that the court is unable to reach any informed conclusion about the defendant’s mental problems and how they have impacted upon his life in anything but a very general manner.

E. FIREARM OFFENCES AND THE APPROACH OF THE COURT

[6] In R v Wilkinson [2009] EWCA Crim 1925 the Lord Chief Justice in England and Wales stated:

“The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them: that is why they use them: and that is why they organise their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the well-being of the local community. ... As a matter of sentencing in reality, whenever a gun is made available for use as well as when a gun is used public protection is the paramount consideration. Deterrent and punitive sentences are required and should be imposed.”

These remarks are particularly pertinent to Northern Ireland which has been disfigured by the use of guns over many years. In this case Mr Barry McCrory, an innocent man, was gunned down at close range in a most brutal manner with a shotgun by a person whose identity remains unknown. This type of offending is all too common in Northern Ireland. Substantial sentences are necessary not just to deter a defendant from further offending with firearms but also to deter others who might be tempted to resort to firearms for their own nefarious purposes in the future.

[7] In deciding what is the appropriate sentence to impose, it will usually be essential for the court to ask itself a series of questions. These were set out by the English Court of Appeal in its decision in R v Avis & Ors [1998] 1 Cr App R 420. They are:

“1. What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded

firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.

2. What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm—the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.

3. With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.

4. What is the defendant's record? The seriousness of any firearms offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.”

[8] In answer to the questions posed in R v Avis, the court has concluded:

- (1) A loaded sawn-off shotgun capable of inflicting death and the most horrendous of injuries together with a handgun and an imitation firearm.
- (2) No use was made of the firearms but as the court made clear in its original judgment the most likely explanation for this was due to a last minute failure of nerve on the part of the defendant.
- (3) The defendant possessed the firearms with intent to endanger life in an effort to evade capture from the security forces.
- (4) The defendant has a number of other convictions for similar offending.

F. THE SENTENCE

[9] First, it is necessary for the court to consider the provisions of the Criminal Justice (Northern Ireland) Order 2008 (“2008 Order”). These require the court to consider one of three different types of sentence. They are:

- (a) a life sentence by virtue of Article 13(2)(b); or
- (b) an extended custodial sentence by virtue of Article 14; or
- (c) an indeterminate custodial sentence by virtue of Article 13(3).

Each of these three sentencing options requires the court to consider whether the accused presents a danger to others by virtue of being a significant risk to members of the public of serious harm in the event that he were to commit offences of the same or a similar nature in the future. However, there are some differences between the requirements of each form of sentencing disposal. The only practical difference between a life sentence and an indeterminate custodial sentence is that a person sentenced to life imprisonment remains subject to being recalled to prison at any time during his natural life if he has been released by the Parole Commissioners after serving the minimum term of imprisonment prescribed by a court. A person sentenced to an indeterminate custodial sentence is also released on licence when it is considered appropriate to do so by the Parole Commissioners, but the distinction between an indeterminate custodial sentence and a life sentence is that a defendant sentenced to an indeterminate custodial sentence has the right to apply to the court to have his licence conditions revoked ten years after release having served the minimum term of imprisonment imposed by the court: see R v McGleenon [2011] NICC 24 at paragraph [11].

[10] The offences to which the defendant has been found guilty engage the provisions of Article 13 of the 2008 Order. Consequently the court has to decide in this case whether there is a significant risk to members of the public of serious harm occasioned by reason of the defendant committing further serious offences, where serious harm means death or serious personal injury, whether physical or psychological. In R v EB [2010] NICA 40 at paragraph [10] the Court of Appeal approved the English Court of Appeal's approach in R v Lang [2005] EWCA Crim 2864 when it considered how the assessment of significant risk of personal harm should be made in respect of identical provisions in the Criminal Justice Act 2003. The English Court of Appeal said:

“(i) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Concise Oxford Dictionary) “noteworthy, of considerable amount... or importance”.

(ii) In assessing the risk of further offences being committed, the sentencer should take into account the nature and circumstances of the current offence; the offender's history of offending including not just the kind of offence but its circumstances and the sentence passed, details of which the prosecution must have available and

whether the offending demonstrates any pattern; social and economic factors in relation to the offender including accommodation, employability, education, associates, relationships and drug or alcohol abuse and the offender's thinking, attitude towards offending and supervision and emotional state. Information in relation to these matters will most readily, though not exclusively, come from antecedents and pre-sentence probation and medical reports. The Guide for sentence for public protection issued in June 2005 for the National Probation Service affords valuable guidance for probation officers. The guidance in relation to assessment of dangerousness in para 5 is compatible with the terms of this judgment. The sentencer will be guided, but not bound by, the assessment of risk in such reports. A sentencer who contemplates differing from the assessment in such a report should give both counsel the opportunity of addressing the point.

(iii) If the foreseen specified offence is serious, there will clearly be some cases, though not by any means all, in which there may be a significant risk of serious harm. For example, robbery is a serious offence. But it can be committed in a wide variety of ways many of which do not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there is a significant risk of serious harm merely because the foreseen specified offence is serious. A pre-sentence report should usually be obtained before any sentence is passed which is based on significant risk of serious harm. In a small number of cases, where the circumstances of the current offence or the history of the offender suggest mental abnormality on his part, a medical report may be necessary before risk can properly be assessed.

(iv) If the foreseen specified offence is not serious, there will be comparatively few cases in which a risk of serious harm will properly be regarded as significant. The huge variety of offences in Schedule 15 of the Act of 2003, includes many which, in themselves, are not suggestive of serious harm. Repetitive violent or sexual offending at a relatively low level without serious harm does not of itself give rise to a significant risk of serious harm in the future. There may, in such cases, be some risk of future victims being more adversely affected than past victims but this,

of itself, does not give rise to significant risk of serious harm.”

[11] Bearing in mind those factors, and without conducting an audit of them, the court is satisfied the defendant falls within the category of Article 13(1)(b). The risk factors include:

- (i) The defendant’s willingness to resort to the use of firearms on a regular and repeated basis throughout his adult life;
- (ii) A series of convictions for firearm offences as a consequence;
- (iii) A complete absence of remorse or even an attempt at an explanation for his offending. There is no hint that he regrets in any way his behaviour;
- (iv) The circumstances of the offending which involved the defendant in arming himself to the teeth when he knew he was wanted for questioning by the police and his intent, the court has found, to use his arsenal to prevent capture;
- (v) The real threat of serious violence as the defendant had in his possession a fully loaded sawn-off shotgun and ammunition. This court has concluded that such violence was avoided only by a last minute failure of nerve on the part of the defendant.
- (vi) This offending was committed while the defendant was on licence arising out of the offence he had committed on 24 November 2000 and for which he had been sentenced on 30 November 2001 for 18 years. He had been released on 26 November 2009 and was subject to Article 6 until 27 November 2018.

[12] Consequently in the light of what has happened in the past and the defendant’s attitude to his offending, the court assesses the defendant as being highly likely to reoffend in a similar manner in the future. Finally, the court notes that it is at the moment that the sentence is imposed that the Judge must decide whether, on that premise, the defendant poses a significant risk of causing serious harm to members of the public: see paragraph 15 of R v Smith [2011] UKSC 37. It has no hesitation in concluding that such an exercise gives rise to a serious risk to members of the public of serious harm given the defendant’s willingness to resort to firearms when he deems it appropriate.

[13] This court does not consider that the imposition of a discretionary life sentence is required as this punishment should be reserved for offences of the utmost gravity. The prosecution do not suggest that this is one of those cases and the court agrees. The next stage of the process is for the court to consider whether an extended custodial sentence would be adequate to protect the public from the

serious harm identified above. The court considers there is much to be commended in the comment of Stephens J in R v McCarney [2013] NICC 1 at paragraph 42 where he said:

“I consider that where there is a choice between an indeterminate custodial sentence and an extended custodial sentence then the latter should be chosen where it would achieve appropriate protection for the public against the risk posed by the offender.”

This court is acutely conscious that an indeterminate custodial sentence is one of last resort.

[14] The court is required also to consider the future. At paragraph 55 of R v Sean Kelly [2015] NICA 29 at paragraph 55 Gillen LJ:

“We are equally satisfied that in considering the issue of public safety the judge must address the future in taking into account in so doing all the relevant circumstances, evidence and material which will inevitably bear on this predictive decision.”

[15] The court notes the conclusion of the Court of Appeal in R v Wong [2012] NICA 54 although the facts of that case are rather different:

“[20] Having concluded that the applicant was dangerous in the circumstances set out above we consider that there was no material to suggest that an extended custodial sentence would protect the public from the serious harm occasioned by the commission of further specified offences by the offender. In considering the question of proportionality it is necessary to recognise the grave nature of the risk of harm being assessed ... and the absence of any evidence of remorse at the time of his plea. Against that background an indeterminate custodial sentence was not disproportionate.”

Mr McCartney QC did his level best to persuade the court that the defendant was no longer an angry man and a threat to society. He submitted that the defendant has put any involvement with terrorism or the Republican Movement behind him and that at 60 years of age the court could be satisfied that this type of offending is now a thing of the past. The court draws no comfort whatsoever from such meagre morsels. While in this case the defendant was not a member of a terrorist gang or carrying out terrorist related activities, he has demonstrated a continuing determination to offend in a most serious manner. His willingness to arm himself

and his apparent refusal to pay any attention to his past offending, marks him out as a determined recidivist who refuses to mend his ways. As a consequence the public is and will remain at a very significant risk of serious harm should he be released. In the circumstances an extended custodial sentence is not sufficient to meet the risk that he poses. An indeterminate custodial sentence in these particular circumstances is not only proportionate it is also required to meet the risks of re-offending.

[16] Having imposed an indeterminate custodial sentence on Count 2, the court is required by Article 13(3)(b) of the 2008 Order to specify a period of at least 2 years as the minimum period which the defendant must serve in respect of this offence, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence or a combination of the offence or one or more of the offences associated with it.

[17] The Crown had suggested that the appropriate range for this offending was of the order of 12-15 years. The defence declined to put forward any range. I consider that the range for this type of offending to be 10-13 years given the nature of the offending but the absence of a paramilitary or terrorist element.

There are a number of aggravating factors. They are:

- (i) The defendant's deplorable record for similar offending.
- (ii) His complete lack of remorse. The court rejects utterly the suggestion that there are hints of remorse in his interviews.
- (iii) The circumstances of the offending which involved a loaded shotgun in direct response to the lawful intention of the police to apprehend the defendant. There was a second weapon present, although it was not loaded. Although both these firearms were in a locked car, it was a car to which the defendant had the sole means of access. They were firearms which the court has found the defendant intended to use to evade capture.
- (iv) The shotgun was modified by having its barrels sawn-off.
- (v) The case was contested and no meaningful explanation has been given as to how the defendant obtained and came into possession of the shotgun and other weapons.
- (vi) The offending was committed while the defendant was on licence. He had been released on 26 November 2009 subject to an Article 6 licence until 27 November 2018.

No mitigating factors were drawn to the court's attention although Mr McCartney QC suggested that the defendant had pleaded to Count 3 and he deserved credit for this. The court fundamentally disagrees. The defendant was caught red-handed

and he did what was the bare minimum he could do in those circumstances. He pleaded guilty to the lesser offence. He has now been found guilty of the two more serious offences having contested them. In the circumstances the period which the court specifies pursuant to Article 13(3)(b) is 10 years. This will include time which has been served.

[18] In respect of Count 4, that is possession of the imitation handgun with intent to cause violence an indeterminate custodial sentence is appropriate for the reasons which have already been given. The minimum term imposed in respect of this offending is 2½ years. This will include time served and is concurrent with Count 2.

G. ANCILLARY ORDERS

[19] The offences were committed after June 2012. In the circumstances the court makes the appropriate order that the defendant pays a levy pursuant to Sections 1-6 of the Justice Act (NI) 2011.

[20] The court has taken the breach of licence into account as an aggravating factor in the determination of the sentence for the instant offence and makes no further order in respect of that breach of licence. The other 2 counts are to remain on the books.

H. CONCLUDING REMARKS

[21] Finally the court thanks both sets of counsel who have done their best to ensure that the relevant issues have been drawn to its attention and who have where possible, agreed facts and witnesses' evidence. This has contributed to the smooth running of the trial and the sentencing process.