

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

VIKTORAS FEDORENKO

**HART J**

[1] The defendant is before the court to be sentenced for his plea of guilty to the manslaughter of Joel Frazer Souter. The defendant originally pleaded not guilty to the charge, but on the second day of the trial, before the selection of the jury was completed, the defendant asked to be re-arraigned and pleaded guilty following an indication of sentence given by me at the request of the defence.

[2] That indication was given upon the basis of an agreed statement of facts prepared by the defence and the prosecution and the following account of the events that night and subsequently is based upon that agreed statement of facts.

[3] On 2 July 2007 the deceased Joel Frazer Souter was in the vicinity of the Jubilee Garden at the foot of High Street near the junction with Victoria Street. He was accompanied by a number of individuals, all of whom, like him, had alcohol problems. It is unclear how many were in that group, there were at least two and possibly as many as four.

[4] The defendant, who is Lithuanian, had come to Belfast with two friends, also Lithuanians, Andrius Paulaoskas and Thomas Lukosevicius. All three had gone to McHugh's Bar in Custom House Square at approximately 8.30 pm. The defendant had consumed not more than 1¼ pints of beer in McHugh's, and was not drunk.

[5] Sometime before 9 pm Paulaoskas left McHugh's to go to a cash machine to get some money. On that journey he came into contact with the deceased and his friends.

[6] Whilst the contact was initially friendly, and he gave a cigarette to the deceased and another person in the company of the deceased, for some reason which is not clear an altercation started between Paulaoskas and the deceased. This culminated in them fighting and throwing punches at each other, and it appears that the deceased's friends either joined in, or were standing close by, as can be seen from the statements of two witnesses in the vicinity, Leanne Wylie and Stephanie Osbourne.

[7] At some point during the altercation Paulaoskas was able to phone the defendant and said either that he was in a fight or in trouble. The defendant and Lukosevicius immediately left McHugh's to go to find their friend. On emerging from McHugh's they saw Paulaoskas and the deceased fighting, and it is accepted by the prosecution that they saw the deceased punch Paulaoskas.

[8] The prosecution accept that the defendant was concerned for his friend's welfare and ran across the road to the scene of the fight. He struck the deceased a single blow to the jaw with his fist and the deceased fell backwards and hit his head on the ground. It appears that as a result of that contact between his head and the ground he suffered a fracture of the skull.

[9] The defendant, Paulaoskas and Lukosevicius then left the scene. The prosecution accept that Paulaoskas had been assaulted and had been punched to the head and face having been in a fight with the deceased. There was evidence confirming this from the proprietor of a nearby public house, and Mr Lyttle QC (who appears on behalf of the defendant with Mr Lindsay) handed in a photograph of Paulaoskas which was taken by the defendant on his mobile phone. This shows Paulaoskas with clear evidence of a swollen left eye.

[10] The deceased subsequently died of a head injury on 10 July 2007, by which time he was detained in Maghaberry Prison. Whilst it is accepted that the skull fracture, internal bleeding and related brain damage which led to the death of the deceased was the result of the back of his head striking the road after he was punched by the defendant, nevertheless his condition between his being taken to hospital and the date of his death was somewhat unusual and has been the subject of considerable investigation. It is unnecessary to go into every aspect of this matter, save to say that after the deceased was admitted to the Belfast City Hospital he was prioritised as urgent and placed on a trolley. Later he was found lying on the floor and it was reported by nursing staff that he appeared to have climbed off the trolley, slipped and fallen. In addition he had been behaving in an inappropriate fashion and

bothering the nurses. Later that morning the deceased discharged himself from hospital, but before that had happened he had been x-rayed. When the x-rays were reviewed later that day it was found that he had suffered a skull fracture, this was noted to be quite subtle and only visible on one view. It was then discovered that the deceased had discharged himself from the hospital earlier that morning, and because of concerns about the effect of the fracture efforts were made to trace the defendant and the PSNI were contacted.

[11] At that stage the deceased was in police custody and the police brought him back to the Belfast City Hospital. He was kept under observation in hospital until his condition was considered to have improved sufficiently to permit his discharge to the care of the hospital at Maghaberry Prison on Monday 9 July.

[12] The deceased was then taken to Maghaberry where he was kept under observation in the hospital wing. However, he was found dead in his cell in the early hours of Tuesday 10 July.

[13] There were therefore two possible defences open to the defendant. The first was that he acted in defence of his friend Andrius Paulaoskas at all times, and if the prosecution were unable to disprove that then the defendant would have been entitled to a verdict of not guilty. However, there was considerable evidence to support the prosecution view that the force used by the defendant when he struck the deceased was not proportionate to the defence of his friend, and it is appropriate that I should say something further at this point about the degree of force that was used.

[14] The defendant was seen crossing the road immediately prior to striking the deceased by several witnesses. One of these was Philip Smith, an off-duty part-time police officer driving along Victoria Street who saw the defendant cross from his right from the Queen's Square area to where he struck the deceased. He described the defendant as behaving in an aggressive way and said he saw the defendant strike the deceased twice. He described the blow struck by the defendant as being "one very powerful punch to the face", and he went on say:

"The force of the blow knocked him right off his feet and he landed heavily on the back of his head on the pavement right on the junction of High Street/Victoria Street. I would go so far as to say that he was hit so hard and unexpected that his feet came up in the air and it was his head that hit the ground there first."

[15] Leanne Wylie was standing at a bus stop on Custom House Square and she also saw the defendant punch the deceased. She described the blow in the following terms:

“It was one punch to the man’s chin or jaw with his right hand I think and this threw the man’s head back and it looked like it lifted the man off the ground with the force of the punch and the man went down and fell to the ground really hard.”

[16] Another witness of these events was William John Martin, a taxi driver driving along Victoria Street intending to turn left round the junction into High Street. He saw the defendant and his companion run from the Albert Clock side of the road across to High Street and he described the blow struck by the defendant in the following way:

“One of them actually threw a full haymaker. I will describe the way he’s moving to make this punch. If you are standing there and somebody’s giving you hassle and they throw a punch at you its just a straight punch. When he came across he ran across the road. I seen him actually drawing back with his right arm, level with his head. His fist the full ways back. Its at head height. I didn’t see the punch actually hit the guy.”

[17] These descriptions suggest that the defendant struck more than one blow and that the second blow was delivered with such force, that as Mr Smith and Ms Wylie described, the deceased’s feet were momentarily lifted from the ground and he then fell backwards and struck his head. However, the prosecution accept that the defendant only struck one blow, and, whilst they maintain that the force used was not proportionate to the threat faced by Paulaoskas, nevertheless Mr Terence Mooney QC (who appears for the prosecution with Mrs O’Kane) did not seek to argue that the force used was quite as severe as that implicit in the description set out above. Mr Lyttle QC on behalf of the defendant pointed to the absence of any medical evidence to suggest that the defendant struck the deceased on the jaw with such a degree of force, pointing out that there was no sign of any fracture, injury to, or swelling of, the jaw which would support the inference that a very severe degree of force was used, although he did accept that the defendant’s blow could properly be described as a “haymaker”.

[18] In those circumstances, whilst it is clear that the defendant must have struck the deceased a blow with considerable force, I do not consider it appropriate to regard the degree of force as so excessive as to amount to a separate aggravating feature of the case.

[19] I have referred to the length of time between the defendant being admitted to hospital and his eventual death. The prosecution, rightly in my view, accept that there was a substantial issue of causation arising in the case because of the significant period that elapsed between the infliction of the injury and the time of death. It could have been argued by the defendant that his apparent fall in the Belfast City Hospital; that he apparently “whacked” his head off the cell wall while in custody; and the standard of medical care provided to the deceased from the time of his first admission to hospital until his ultimate death could have given rise to a doubt as to whether it was in fact the fall and fracture of the skull as a result of the blow struck by the defendant which was the actual cause of death.

[20] The prosecution accept that these were complex medical and legal issues in the case and that the defendant’s plea of guilty to manslaughter should be regarded as being entered at the first opportunity. I accept that is the case given that the nature of the medical evidence was such that these issues were being by addressed by all concerned right up to the very last moment. In particular, the defence had to consider the implications of the nature of the care received by the deceased as described in the disclosed report prepared in July 2008 of a “Joint Review Between Belfast Health and Social Care Trust and Northern Ireland Prison Service of the Death in Custody of [the deceased]”.

[21] I am satisfied that there are two aggravating features of this case. The first is that this episode took place in a public area. The defendant was prepared to fight in public and in doing so was committing a breach of the peace in a fashion which was at least capable of causing apprehension or fear to law-abiding members of the public who were in the area. This is part of Belfast city centre where substantial numbers of the public may be expected to resort at this time of night for various reasons, whether they are going to places of entertainment, or, like Ms Wylie, waiting to catch a bus at the nearby bus station. The second aggravating factor is that the blow which was struck by the defendant was disproportionate to the need to defend his friend.

[22] There are a number of mitigating factors. The first is that the defendant was coming to the assistance of his companion whom the police accept had been assaulted. Therefore whilst he cannot rely on defending his friend as a complete defence to the charge, nonetheless he was seeking to defend his companion and this should be taken into account in his favour. Secondly, there is the medical issue about causation to which I have referred, and the defendant can legitimately point to that and the self-defence issue as being live issues which were open to him to pursue. Thirdly, I accept that his remorse and regret for his actions are genuine. Finally there is his plea of

guilty which I accept, give the complexity of the medical issues, was made at the first opportunity.

[23] It was suggested that the defendant has no relevant record, however he has a number of convictions for offences of dishonesty in Lithuania and has been sentenced to terms of between 2 and 5 years' imprisonment in respect of these. It is correct to say there are no offences of violence upon his record, but he cannot claim the positive benefit which courts give to a defendant who has no previous convictions. However I do not regard his record as amounting to an aggravating feature of the case, although it is relevant to the question of deportation which I shall consider later.

[24] In this jurisdiction the starting point for any consideration of the appropriate sentence in a case of manslaughter of this type is the decision of the Court of Appeal in The Queen v Ryan Arthur Quinn [2006] NICA 27 where the court concluded that in Northern Ireland a suitable starting point on a plea of guilty to this type of offence is two years' imprisonment, rising to six years where there are significant aggravating factors.

[25] Taking into account the various aggravating and mitigating factors to which I have referred I am satisfied that, subject to the question of deportation and a custody probation order, the appropriate sentence to impose in this case is one of 2½ years' imprisonment.

[26] The defendant has been served with a notice under the Immigration Act 1971, and I am obliged to consider whether I should make a recommendation that he be deported. As stated earlier the defendant is a Lithuanian national and as such a citizen of the European Union. As the Court of Appeal in England pointed out in R v Bogoslov [2008] EWCA Crim 676, as a citizen of the EU the defendant's rights of residence in this country

“can only be derogated from in strictly confined circumstances according to the principles of community law reflected in both the legislation and the case law of the European Court of Justice”.

The Court of Appeal also said

“As this court has confirmed in the case of Carmona [2006] 2 Cr App R (S) 662 the criminal courts cannot make a recommendation for deportation in respect of an EU national, which would conflict with those criteria of community law.”

[27] The relevant principles of community law are now set out in Directive 2004 38/EC which came into effect on 30 April 2006. The relevant provisions of the Directive are paragraphs 27(2) and 28 (1).

27(2) "Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

28(1) Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural intergration (sic) into the host Member State and the extent of his/her links with the country of origin".

[28] As Stephens J has pointed out in R v Sliogeris & Ors [2008] NICC 32 at [37], deportation of criminals is now subject to Part V of the UK Borders Act 2007. This applies to Northern Ireland and whilst it provides for automatic deportation of "foreign criminals", which includes a person who has been sentenced to a period of imprisonment of at least twelve months and is not a British citizen, that does not apply where the removal of such a person from the UK will breach their rights under the community treaties, which obviously requires the Secretary of State to have regard to the provisions of the EU directive to which I have referred. The court still has a discretion to recommend deportation and so I must now consider the defendant's circumstances and the other considerations contained in the EU Directive.

[29] The defendant has lived in Northern Ireland since 2004 and has been in steady employment apart from the time he has spent in custody for this offence. The pre-sentence report records that he wishes to remain in Northern

Ireland upon his release, and suggests that a custody probation order be considered.

[30] The defendant is now 30 years old and his Lithuanian convictions were recorded between the ages of 15 and 22, the last conviction being on 27 February 2001, six and a half years before this offence. With some hesitation in view of his record in Lithuania, taking into account the unusual nature of the present crime and his good record in this jurisdiction I do not recommend him for deportation. Subject to his consent I will impose a custody probation order of eighteen months' custody followed by twelve months' probation, the probation period to be subject to his participation in an alcohol management programme as specified in the pre-sentence report. The sentence would otherwise have been one of two and a half years' imprisonment.