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COURT INCREASES SENTENCE ON APPEAL

Summary of Judgment

The Court of Appeal[1] today allowed an appeal by the Director of Public Prosecutions that the sentence imposed on Martin Loughlin for attempted murder was unduly lenient and substituted a determinate custodial sentence of 11 years for the one of seven years which had been imposed by the Crown Court.

Background

Martin Loughlin ("the appellant") pleaded guilty shortly before his trial was due to commence to the offences of attempted murder, criminal damage and resisting police. The trial judge imposed a determinate custodial sentence of seven years imprisonment for attempted murder comprising three and a half years in custody and the same on licence. The judge imposed concurrent sentences on the other counts. The Director of Public Prosecutions ("DPP") referred the sentence for the attempted murder to the Court of Appeal submitting it was unduly lenient.

On 21 July 2017 the appellant, who had been taking drugs and alcohol for most of the previous day and on the day of the offence, was noted by the victim's brother lying half on and half off the pavement. The victim's brother stopped his van intending to have some conversation with the appellant and his co-accused. The appellant got up and punched the victim's brother. The brother punched the offender and drove off. At or about the same time the appellant contends that the victim, who lived in flats overlooking the road, shouted comments to the appellant referring to his drug abuse. The victim appears to come out of his flat but went to go back in again. The appellant and his co-accused followed the victim and assaulted him from behind. The victim collapsed and both the appellant and his co-accused continued to assault him. Part of the assault was caught on CCTV showing the appellant repeatedly punching the victim in the face as he sat on top of him. The appellant continued the assault in a frenzied and uncontrolled fashion by repeatedly kicking and jumping on the victim's head landing in excess of 20 such blows in a prolonged and persistent action. His co-accused attempted to persuade him to desist and pulled him back but the appellant returned to continue the assault which was interrupted only by the sirens and presence of the PSNI attending the scene. The attack continued for just short of 5 minutes.

The appellant was arrested at the scene. His trousers and trainers were covered with the blood of the victim. When interviewed he made the case that he had gone to the victim's flat to speak to him about the abusive comments and was assaulted by the victim. He alleged that he had acted in self-defence and maintained that stance at interview even though he was shown the CCTV evidence which demonstrated his relentless and persistent attack upon the victim.

The victim

The victim was admitted to intensive care where he remained critical until 23 July 2017. He sustained multiple facial fractures which required significant immediate reconstruction and ongoing surgeries.

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[1] The Court of Appeal panel was: Morgan LCJ, Stephens LJ and Huddleston J.

A consultant psychiatrist concluded that the victim experienced low mood, anxiety symptoms and symptoms of post-traumatic stress. The assault had added to the level of psychological stress the victim has experienced and his ability to manage the other stresses he is facing in his life.

The offender

The appellant is now 22 years old. He has a criminal record for offences of theft and handling stolen goods, common assault, assault on police, resisting police, disorderly behaviour and criminal damage. On 7 June 2017, shortly before this attack, a probation order was made in respect of offences of assault on police, possession of a class C controlled drug, and assault occasioning actual bodily harm. The appellant breached the probation order as a result of his detention in respect of these matters and a sentence of three months' imprisonment was imposed on 26 October 2017.

The pre-sentence report noted that he commenced drinking alcohol at the age of 13 and engaged in illegal drug taking regularly smoking cannabis from the age of 14. He experimented with many drugs including legal highs, ecstasy, cocaine and prescription drugs. He was admitted to the secure unit of Downpatrick hospital in 2016 because of a deterioration in his mental health as a consequence of polysubstance misuse and completed a four week inpatient program. After his release he failed to maintain contact with the Community Addictions Team. The pre-sentence report noted that prior to his remand on this matter no periods of abstinence in the community had been achieved.

On 16 June 2018 the appellant took an overdose and had two failed drug tests on 18 June 2018 and 21 August 2018. He reported to the probation officer that because of his chaotic and heavily dependent drug infused lifestyle he was a "time bomb". He also indicated his regret and extreme remorse for what had happened. He was assessed as posing a high likelihood of reoffending in the next two years. The presentence report concluded that he was not assessed as a significant risk of serious harm although it was recognised that he could place himself at risk of further offending if he reverted to his previous level of substance misuse. It was noted that the offence was committed impulsively and under the influence of substances.

The sentencing remarks

The trial judge noted that there had been no history of trouble between the parties although they had been known to each other. This was a random encounter between the victim and the two heavily intoxicated accused. He recognised the advice in the English sentencing guidelines that care needs to be taken to ensure that there is no double counting because an essential element of the offence charged might in other circumstances be an aggravating factor. It was submitted by the defence that the sustained nature of the attack was not an aggravating factor but the trial judge concluded that the several occasions on which the offender returned to the defenceless victim to resume the assault despite the efforts of his co-accused to take him away was an aggravating factor. Having selected nine years as the starting point he indicated that in light of the plea and all other factors he could not give full credit but gave significant credit by reducing the sentence to one of seven years.

Sentencing for Attempted Murder

In *R v McCann* [1996] NIJB 225 Hutton LCJ stated:

> "That the normal level of sentence for the attempted murder of a member of the security forces is in the region of 25 years imprisonment and in some cases a sentence in excess of 25 years may well be proper."

This guideline remains in force today and the Court of Appeal commented that nothing said in this case is intended to call into question its applicability. The Court of Appeal has not, however, given any further guidance on the appropriate range of sentencing for the offence of attempted murder. The circumstances in which this offence is committed can vary considerably. That point is reinforced by the extensive catalogue of aggravating and mitigating factors to which the Sentencing Guidelines Council makes reference and which the Court of Appeal considered should be taken into account in determining the correct sentence. The Court also referred to a paper produced by Sir Anthony Hart reviewing relatively recent decisions in this jurisdiction which shows a variation between 12 and 22 years as the starting point in non-terrorist attempted murder cases.

The Lord Chief Justice, delivering the judgment of the Court of Appeal, said it agreed with the Sentencing Guidelines Council that the culpability of the offender is the initial factor in determining the seriousness of the offence. The fact that the offender had an intention to kill demonstrates of itself a high level of culpability but there is a distinction to be made between planned, premeditated, professional attempts to kill and those that arise spontaneously. The Court also considered that the extent of harm caused is relevant to the overall sentence but that the court also has to take into account the harm that the offence was intended to cause or might foreseeably have caused. The Court considered that the intention to kill is a significant factor suggesting a materially higher range of sentencing:

> "Although the spontaneous commission of this offence with no aggravating circumstances might also lead to a starting point below the range set out above, generally we consider that the starting point for sentences for this offence are likely to lie within that range. We do not consider that it is possible to give any more specific guidance."

The offender's submissions

Counsel on behalf of the appellant submitted that the sentence was "merciful but not unduly lenient". He accepted that the CCTV images were appalling but contended that the circumstances of the commission of the offence were not an aggravating feature. There were three aspects to the attack. First, the appellant got himself on top of the victim and continued striking him with his fists in the face and continued to do so when it was clear from the CCTV that the victim was no longer responding to that portion of the attack. Secondly, the appellant then stamped on the victim about 20 times with his shod foot and thirdly, after being stopped and taken away by his co-accused he returned to continue the attack on the then helpless victim.

The Court of Appeal accepted that an essential element of this offence required a finding of a specific intent to kill. It noted that this was not a case where there was evidence of admissions or other evidence which demonstrated the appellant's intention:

> "We consider, however, that the combination of features in a case of this kind is relevant to the assessment of culpability. This was a persistent attack over a prolonged period where the victim's face was pummelled by the [appellant's] fists and his head was subject to repeated stamping. Much of this continued after the victim's body had gone limp, he was offering no resistance and was incapable of any self-protection. The manner in which an offence is committed can be an aggravating feature and was so in this case."

Counsel for the appellant also raised the matter of the appellant's personal circumstances. The pre-sentence report indicated that on committal to prison the appellant quickly achieved enhanced status and began work within the Hydebank Young Offenders Centre ("the YOC") as an orderly. He engaged with a programme to address his addictions and completed eight sessions of casework. It appears, however, that in June 2018 he took an overdose and there were two further failed drug tests in June 2018 and August 2018. He subsequently had two adjudications for offences against prison discipline including fighting with another inmate. The Court said it was to his credit that he made some effort when admitted to the YOC but it is clear that he will need substantial help if he is to address his addiction issues in the longer term. The last point made on behalf of the appellant was that the YOC had been a positive influence on him. If he is still in custody in October 2020 at the age of 24 he would be transferred to an adult prison. In such circumstances any progress that he made at the YOC would be put at risk.

Consideration

In this case, the Court of Appeal considered the appropriate sentencing range for the offence of attempted murder, the approach to double jeopardy in a PPS reference, the requirement to adhere to the statutory test in considering the imposition of suspended sentences and the need for care in the assessment of dangerousness even where the probation assessment is that the offender is not assessed as posing a significant risk of serious harm.

The Court noted that the trial judge recognised the need to ensure that he did not attribute as aggravating factors those matters which were actually part of the offence. It was satisfied, however, that the trial judge was correct to recognise the persistence of the attack as indicative of the extent of the determination of the offender to achieve the intended result and said that the manner of the commission of the offence can in appropriate circumstances constitute an aggravating factor and that such was the case in this instance.

The second aggravating factor was that this offence was committed while the offender was under the influence of drugs. The Court said it was "unhappily well aware" of the disinhibiting effect of alcohol and drugs leading to the infliction of substantial violence and those who commit offences in such circumstances can expect this aggravating factor to weigh heavily on the outcome. The third aggravating factor was the appellant's criminal record. At the time of the commission of these offences he was subject to suspended sentences and a probation order. The background to all of these offences appears to be his drug fuelled lifestyle and the Court commented that the earlier orders did not apparently alter his commitment to that lifestyle.

The Lord Chief Justice referred to the significant physical and mental impacts upon the victim of this horrendous, brutal assault:

> "It occurred as the victim was trying to make his way to the sanctuary of his own home. It is clear from the depositions that this frightening attack was carried out in full view of those in the public street thereby exciting feelings of apprehension and danger among those passers-by. Members of the public going about their everyday business need to be protected from being exposed to the apprehensions caused by seeing such violence."

In mitigation the appellant relied considerably upon the history of his childhood difficulties and the apparent absence of any significant medical management response in relation to them. The Court commented that the evidence, however, did not indicate that he was incapable of recognising the

harm caused by his ingestion of drugs and use of violence and there was an absence of any attempt by him to address the issues prior to his admission to custody. The Court accepted that the appellant's chaotic lifestyle reinforced the fact that this was a random attack without planning or premeditation but did not consider that this should take the starting point outside the range for non-terrorist attempted murder cases in this jurisdiction:

> "The [appellant] is plainly entitled to some discount for his plea albeit that it was entered at a very late stage. It is contended on his behalf that although he made an exculpatory case at interview he had communicated through his counsel a willingness to plead to an offence [of causing grievous bodily harm] contrary to section 18 of the Offences against the Person Act 1861. We consider that the credit for that indication is limited having regard to the fact that the CCTV evidence was overwhelming if such an offence had been prosecuted. Although his plea to this offence came very late he is entitled to some discount for it."

It was also submitted that the appellant had displayed genuine remorse. Further discount for remorse is dependent upon additional material showing some further evidence of genuine remorse. The Court said that in this case the trial judge was entitled to recognise that the appellant had sought to address his problems in respect of addiction upon his admission to custody. It commented that those faced with such problems cannot be expected to suddenly cure themselves of their addiction without considerable help and relapses in the course of addressing these problems are common. While the appellant had relapsed, the trial judge was provided with evidence that he had once again sought to positively address his difficulties and the Court said he was entitled to have that taken into account by way of mitigation.

The final point raised in respect of mitigation was double jeopardy. The Court accepted that double jeopardy can arise in respect of PPS references depending upon the circumstances of the case. That will particularly be so where the effect of the reference may be to return an offender to custody who has already served the sentence or to impose a longer sentence on an offender who is already participating in a pre-release scheme. The Court did not accept that double jeopardy operates to reduce the appropriate sentence where the offender is serving a substantial custodial sentence and the only issue is whether it should be increased. It said that was the situation in this case.

The Court, having regard to the aggravating and mitigating factors before making allowance for the plea of guilty, considered that the starting point in this case was a sentence of 14 years. It commented that the trial judge gave a very generous discount for the plea and although none of the Court of Appeal panel would have made such allowance on the papers available, they considered they should acknowledge the discretion available to the trial judge and recognise his feel for the case in assessing the extent of the discount. Applying that approach, the Court considered the appropriate sentence in this case was a determinate custodial sentence of 11 years: "The original sentence was, therefore, unduly lenient and we substitute for it the period of 11 years."

The Court noted that the appellant had outstanding suspended sentences for matters of dishonesty and various assaults for which he was dealt with in 2016. No order was made by the trial judge in respect of breaches of the suspended sentence for dishonesty and the Court said it was inclined to the view that it should also make no order since there was no material available to it about the background and the reasons why no order was made. In respect of the suspended sentences for the convictions for assault, the trial judge indicated that he was making no order but gave no reasons for that approach. The Court said that this was not fatal to the trial judge's decision but commented that

it could think of no reason why the convictions for offences of violence should not now be imposed consecutively and accordingly ordered that the suspended sentences imposed for the assaults which were dealt with in November 2016 should be ordered to run concurrently with each other but consecutive to the sentence of 11 years imprisonment.

The Court, finally, commented that the approach to dangerousness in this case indicated that the appellant was not assessed as meeting the PBNI threshold for presenting a significant risk of serious harm to the public at this juncture as he was not someone with a prior, established pattern of deliberate, sustained violent behaviour. The presentence report noted, however, concerns should the offender revert to his previous level of substance misuse that he could place himself at risk of further offending and that this offence had been committed impulsively under the influence of substances. The Court said it did not appear that there had been analysis of the statutory test that might have been expected in light of these observations. It was conscious, however, of the constraints upon an appeal court interfering in this area and in those circumstances it did not consider it should do so.

Conclusion

The Court of Appeal allowed the appeal and substituted a determinate custodial sentence of 11 years for the offence of attempted murder together with a three month consecutive sentence arising from the implementation of the outstanding suspended sentences. Half of the total will be served in custody and the remainder on licence.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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