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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

MICHAEL LOUGHLIN

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DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(No. 5 of 2018)

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Before: Morgan LCJ, Stephens LJ and Huddleston J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference by the Director of Public Prosecutions under section 36 of the Criminal Justice Act 1988 in which it is submitted that a determinate custodial sentence of 7 years imprisonment for attempted murder imposed at Newry Crown Court on 16 November 2018 by His Honour Judge Ramsey QC comprising 3½ years in custody and the same on licence was unduly lenient. The learned judge imposed concurrent sentences on counts of criminal damage and resisting police and made no order on suspended sentences for theft, common assault, assault on police and disorderly behaviour. Mr O'Donoghue QC and Ms Walsh appeared for the Director and Mr Lyttle QC and Mr Magill for the offender. We are grateful to counsel for their helpful oral and written submissions.

[2] In this appeal we consider 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.

Background

[3] The offence occurred at approximately 4 pm on 21 July 2017 at Scarva Walk, Banbridge. The offender and his co-accused had been taking drugs and alcohol for most of the previous day and continued this behaviour on the day of the offence. The victim's brother was driving his van through Banbridge and noted the offender lying half on and half off the pavement. He stopped his van and rolled down his window intending to have some conversation with the offender and his co-accused. The offender got up and was seen to run to the van and punch the victim's brother. The brother punched the offender and drove off.

[4] At or about the same time the offender contends that the victim, who lived in flats overlooking the road, shouted comments to the offender referring to his drug abuse. The victim appears to have descended the steps from his flat to the road but then made his way back again. The offender and his co-accused followed the victim and assaulted him from behind. The victim collapsed and both the offender and his co-accused continued to assault him. Part of the assault is caught on CCTV showing the offender repeatedly punching the victim in the face as he sat on top of him. It is apparent that the victim, who was a 40 year old man, lost consciousness and the CCTV shows the victim's blood covering the offender's hands as the victim lay unable to defend himself on the landing close to his flat. The offender continued the assault in a frenzied and uncontrolled fashion by repeatedly kicking and jumping on his 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 offender 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.

[5] The offender 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.

[6] He was arraigned on 6 February 2018 and entered not guilty pleas to all counts on the indictment. His legal representatives indicated to the prosecution at that time that the offender would plead guilty to an offence of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861. That plea was not accepted by the prosecution and the offender pleaded guilty to all offences in May 2018, shortly before his trial was listed to take place.

The victim

[7] The victim was 40 years old at the time of the attack. He was unconscious on arrival at hospital and was admitted to intensive care where he remained critical until 23 July 2017. He sustained multiple facial fractures including a bilateral fracture of the orbital floor, an open wound of his lip that required sutures under general anaesthetic, the reduction of a fracture of his nasal bones, the reduction of a blowout fracture of his right orbital floor and a closed fracture of the zygoma requiring significant immediate reconstruction and ongoing surgeries.

[8] Dr Noble, consultant psychiatrist, noted his pre-existing mental health history and his two subsequent admissions as a result of overdoses. He noted that the victim referenced the change in his impressions of himself and change in his social interactions following the assault. He is more socially withdrawn and feels that he is not the same person that he used to be. He has lost confidence. He describes hypervigilance and becomes quite agitated. He also suffers from disturbing dreams. Dr Noble concluded that he experienced low mood, anxiety symptoms and symptoms of post-traumatic stress. The assault had added to the level of psychological stress he has experienced and his ability to manage the stress he is facing from dealings he has with social services.

The offender

[9] The offender is now 22 years old. He has a relevant criminal record. In January 2016 he was given suspended terms of imprisonment on charges of theft and handling stolen goods. On 17 November 2016 he was given further suspended sentences of imprisonment in relation to offences of common assault, assault on police, resisting police, disorderly behaviour and criminal damage. The previous suspended sentences were not put into operation. The following week he received a further suspended sentence for disorderly behaviour committed on 1 November 2016 and on 9 March 2017 a conditional discharge in relation to resisting police on 10 November 2016. 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. He 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.

[10] 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 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.

[11] Although there were some indications that he was seeking to engage with services in the prison on 16 June 2018 he took an overdose and had two failed drug tests on 18 June 2018 and 21 August 2018. He reported to the author of the probation report 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 re-offending in the next two years. The pre-sentence 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. He had a previous record for offences of violence but there was not a prior established pattern of deliberate sustained violent behaviour. It was noted, however, that the offence was committed impulsively and under the influence of substances. The prosecution did not contest the assessment that he did not present a significant risk of serious harm to the public but the manner of his conduct on this occasion suggests that any such assessment must be dependent on his not returning to his previous level of substance misuse.

[12] Dr Bownes, consultant psychiatrist, noted that he had been referred to the behaviour support clinic as a child because of defiant and hyper-behaviour. His engagement with cannabis, alcohol and diazepam resulted in admission to hospital on 21 March 2015 and thereafter he regularly engaged with health services as a result of continued drug abuse. Dr Bownes noted that it was clearly apparent that rather than seeking out support and treatment the offender had instead chosen to self-medicate with alcohol and other mood altering substances and prescription medications. He concluded that should the offender revert once again to this pattern on his return to the community deterioration in his mental well-being and functioning with the risk of further episodes of socially inappropriate, hazardous behaviours would be inevitable.

The sentencing remarks

[13] In order to establish the appropriate starting point in this case the judge looked first at the guidance given by this court in DPP's Reference (Nos 2 and 3 of 2010) McCauley and Seaward [2010] NICA 36. That was a case in which the court was dealing with the appropriate sentencing range where the offence under section 18 of the Offences against the Person Act 1861 is committed by attacking the victim who is lying on the ground with a shod foot with intent to cause grievous bodily harm. The court indicated that the appropriate range in such cases was 7 to 15 years with the place in the range generally determined by the extent of harm caused and any other aggravating and mitigating factors. In the absence of any guidelines, having regard to the similarities with the factual circumstances of this case, it was

clearly appropriate to take that case into account. The judge noted in considering this range that the primary distinction in the offence to which the offender had pleaded was the intention to kill.

[14] The judge then turned to the Sentencing Guidelines Council Definitive Guideline on Attempted Murder. He noted the advice of this court that the aggravating and mitigating factors set out in such guidance were generally of considerable assistance but that one should avoid approaching the sentencing exercise on the basis of the brackets set out for different ranges as this may deflect the sentencer from arriving at the appropriate sentence for the case. He identified this case as one involving a spontaneous attempt to kill and his starting point of 9 years seems to be based on his evaluation that there was little or no physical or psychological harm.

[15] The third source of assistance was the paper prepared by Sir Anthony Hart for the Judicial Studies Board for Northern Ireland on 13 September 2013 dealing with sentencing in cases of manslaughter, attempted murder and wounding with intent. The paper noted that the English authorities suggested sentences ranging from six years on a plea to 20 years on a contest and that Northern Ireland sentences generally followed that pattern.

[16] Having taken his guidance from those sources, he 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 these two heavily intoxicated accused. He recognised the advice in the English 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 accordingly that the sustained nature of the attack was not an aggravating factor but the 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.

[17] Having selected 9 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 7 years. He indicated that he was making no order on the suspended sentences or an outstanding conditional discharge but gave no reasons as to why he did so.

Sentencing for Attempted Murder

[18] 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."

That guideline remains in force today and nothing said in this case is intended to call into question its applicability.

[19] This court 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 Guideline Council makes reference and which we consider should be taken into account in determining the correct sentence. The paper produced by Sir Anthony Hart reviewing relatively recent decisions in this jurisdiction, shows a variation between 12 and 22 years as the starting point in those non-terrorist attempted murder cases.

[20] We agree 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. We also consider 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.

[21] We consider that the intention to kill is a significant factor suggesting a materially higher range of sentencing than that adopted in McCauley and Seaward. There are cases involving substantial provocation, mental health issues or youth of the offender and little actual harm where starting points below those noted in the paper prepared by Sir Anthony Hart and set out at paragraph [18] above would be appropriate. 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

[22] In his carefully measured submissions Mr Lyttle submitted that the sentence was merciful but not unduly lenient. He readily accepted that the CCTV images were appalling. He contended, however, that the circumstances of the commission of the offence were not an aggravating feature. There were three aspects to the attack.

First, the offender 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 offender 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.

[23] We accept that an essential element of this offence requires a finding of a specific intent to kill. We agree that the features set out in the previous paragraph were evidentially material to the intention of the offender. This was not a case where there was evidence of admissions or other evidence which demonstrated his 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 offender's fists and his head was subject to repeated stamping. Much of this continued after the offender'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.

[24] The second feature of the case to which attention was given, was the personal circumstances of the offender. The report from Dr Bownes indicated that he had been seen at his local Child and Family Clinic in March 2001 when four years old with problem behaviours at home from the age of two. He was discharged from the clinic because of non-attendance in June 2001 but was referred to a local Behaviour Support Clinic in April 2003 at the age of six because his parents found his behaviour defiant and "hyper". He again attended the local Behaviour Support Clinic in December 2005 because of behaviour management problems. It is not clear what benefits he received from his attendance and whether the treatment offered was appropriate but there was then a 10-year gap before he was again seen at the Community Addiction Clinic by which time he was abusing cannabis, prescription drugs and alcohol. Thereafter he had no periods of abstinence within the community.

[25] The pre-sentence report indicates that on committal to prison he quickly achieved enhanced status within six weeks and began work within the Hydebank Young Offenders Centre ("the YOC") as an orderly. He engaged with Start 360 to address his addictions and completed eight sessions of casework with AD:ept. 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. It is 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. It was submitted that the offender went on a downward spiral as a

result of the death of his uncle in 2016 but the medical evidence seems to make it clear that he was well on his way before then.

[26] The last point made on behalf of the offender 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

[27] The learned trial judge recognised the need to ensure that he did not attribute as aggravating factors those matters which were actually part of the offence. For the reasons set out above, however, we are satisfied that he 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. We are satisfied 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.

[28] The second aggravating factor is that this offence was committed while the offender was under the influence of drugs. This court is 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.

[29] The third aggravating factor is his criminal record. He was convicted in November 2016 of common assault and two counts of assault on police. In June 2017 he was convicted of two counts of assault on police and one count of assault occasioning actual bodily harm. At the time of the commission of these offences he was subject to suspended sentences in relation to the first set of offences and a probation order in respect of the second set of offences. This offence was committed approximately six weeks after the imposition of the probation order. The background to all of these offences appears to be his drug-fuelled lifestyle. The earlier orders did not apparently alter his commitment to that lifestyle.

[30] We have set out at paragraphs [6] and [7] above 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.

[31] In mitigation the offender relied considerably upon the history of his childhood difficulties and the apparent absence of any significant medical management response in relation to them. The evidence does not indicate, however, that the offender 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. We endorse the continued relevance of the guidance about personal circumstances in Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes) [2004] NICA 42 at paragraph [15]; Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle) [2004] NICA 33 at paragraph [37] and R v Keith McConnan [2017] NICA 40 at paragraph [49]. We further accept that his chaotic lifestyle reinforces the fact that this was a random attack without planning or premeditation but we do not consider that this should take the starting point outside the range identified at paragraph [18] above for non-terrorist attempted murder cases in this jurisdiction.

[32] The offender 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 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.

[33] It was also submitted that the offender had displayed genuine remorse. In this jurisdiction it is recognised that the plea of guilty itself indicates some element of remorse and that further discount for remorse is dependent upon additional material showing some further evidence of genuine remorse. Inevitably any offender faced with this situation will regret finding himself facing a long term of imprisonment but that does not exclude that there may also be some genuine remorse for the consequences for the victim.

[34] In this case the learned trial judge was entitled to recognise that this offender had sought to address his problems in respect of addiction upon his admission to custody. 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. There was a relapse in relation to this offender but the trial judge was provided with evidence that he had once again sought to positively address his difficulties. He is entitled to have that taken into account by way of mitigation.

[35] The final point raised in respect of mitigation was double jeopardy. We accept the 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. We do 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. That is this case.

[36] Having regard to the aggravating and mitigating factors before making allowance for the plea of guilty, we consider that the starting point in this case was a sentence of 14 years. The learned trial judge gave what appears to be a very generous discount for the plea and although none of us would have made such allowance on the papers available to us, we consider that we 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 we consider that the appropriate sentence 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.

[37] The offender had outstanding suspended sentences for matters of dishonesty in January 2016 and various assaults for which he was dealt with in November 2016. No order was made in respect of breaches of the dishonesty sentences in November 2016 and we are inclined to the view that we should make no order in respect of those sentences in this instance, since there was no material available to us about the background and the reasons why no order was made in November 2016.

[38] In respect of the suspended sentences for the convictions in November 2016 the learned trial judge indicated that he was making no order but gave no reasons for that approach. Section 19 of the Treatment of Offenders Order (Northern Ireland) 1968, provides that where an offender is convicted of a subsequent offence punishable with imprisonment, a court shall make an order that the outstanding suspended sentence take effect with the original term unaltered, unless the court is of opinion that it would be unjust to do so in view of all the circumstances. Where it is of that opinion the court should state its reasons.

[39] Plainly the learned trial judge did not state any reasons in this case but that is not fatal to his decision. However, we can think of no reason why these convictions for offences of violence should not now be imposed consecutively to the term which the offender is required to serve in respect of the subject offence. Accordingly, we order that the suspended sentences imposed in November 2016 should be ordered to run concurrently with each other but consecutive to the sentence of 11 years imprisonment.

[40] Finally, we want to say something about the approach to dangerousness in this case. The pre-sentence report indicated that the offender 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 pre-sentence 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.

[41] Dr Bownes similarly concluded that should the offender revert once again to his reported pattern of illicit drug and alcohol abuse on his return to the community and be non-compliant of medication and professional assistance, a deterioration in his mental well-being and functioning with the attendant risk of further episodes of socially inappropriate/hazardous behaviours would be inevitable. It does not appear to us that there was the analysis of the statutory test that might have been expected in light of these observations. We are conscious, however, of the constraints upon an appeal court interfering in this area and in those circumstances we do not consider that we should do so.

Conclusion

[42] For the reasons given we allow the appeal and substitute 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.