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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:*
	Delivered: **15/04/1997**

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

v

RICE, HOULAHAN AND LAPPIN

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SENTENCING REMARKS

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GIRVAN J

Introduction

[1] The defendants have pleaded guilty to the crime of an affray which occurred in the early hours of 2 January 1996. They were originally charged with the manslaughter of Paul McGleenan ("the deceased") who died on that date, but the defendants pleaded not guilty to the charge of manslaughter and the Crown has not proceeded on that count.

[2] The death of Paul McGleenan was tragic and distressing. The precise circumstances in which he died have not been clearly established and from a reading of the deposition, it is clear that the Crown would have faced difficulties in proving a charge of manslaughter against each or any of the accused. Although the death of the deceased may well have been the result of the defendants' actions, in passing the sentence, I must proceed upon the basis that the Crown did not allege and have not proved that the defendants are guilty of manslaughter. I am bound, accordingly, to sentence the defendants on the basis of the charge to which they have pleaded guilty, namely affray, and I must wholly disregard the unproven charge of manslaughter.

[3] The Crown go so far as to accept that it would be difficult, on the evidence, to prove beyond reasonable doubt that the injury which caused the death of the deceased was actually caused by one of the defendants or any of them.

[4] Affray is a common law public order offence, the sense of which is:

> "Unlawful fighting or a display of force to the terror of the Queen's subjects."

[5] Mere presence at an affray is not enough to constitute aiding and abetting, there must be evidence that the defendant at least encouraged the participants by some means or other. By pleading guilty to the offence the defendants, therefore, admit the ingredients of the offence although, as counsel have pointed out, the offence of affray covers a significant range of behaviour, the criminality of which depends on the precise circumstances.

[6] The background to the facts giving rise to the offence can be considered in two stages. As far as the first stage is concerned, the defendant Houlahan and his uncle, Rice, together with the defendant, Lappin, went to premises at 6b Granmore Road, Keady, at which the deceased was present. Shortly afterwards, an altercation occurred as the result of a dispute about some money allegedly owed by the deceased to Rice. This ended in the deceased striking out at Rice in circumstances which led to an episode of some violence and pushing and shoving. As a result, the deceased fell backwards and hit his head against the ground, apparently with considerable force. It may have been the result of a violent shove by one of the defendants, though this is not necessarily so. On the evidence, there is confusion as to who actually caused the deceased to fall and hit his head on the ground. The defendant, Lappin, alleges that the deceased ran into his, Lappin's, outstretched arms and that caused the deceased to fall backwards. Having regard to the onus of proof upon the prosecution to establish all elements against the defendants beyond reasonable doubt, it cannot be said that Lappin's suggestion on that point is necessarily fallacious and, in that context, one must bear in mind that the deceased had consumed a significant quantity of alcohol. The Crown accept that at that stage of the matter the elements of an affray did not exist.

[7] So far as the second stage of the matter is concerned, after the defendants moved away from the scene of the first part of the episode, the deceased got up and followed them, allegedly shouting abuse. The defendants pursued him. In the melee which followed in the railway embankment area, the deceased was roughly handled, stripped of his footwear and clothing. Lappin and Houlahan removed their shirts prior to this and it is clear that they intended to act in an aggressive manner towards the deceased. It is clear that the deceased was roughly handled and shaken about and left lying in an undressed and distressed condition on the ground. This stage of the incident was violent, anti-social and totally unacceptable behaviour on the part of each of the defendants. They pled guilty to affray in relation to that stage of events. The Crown state, and accept, that the deceased appears to have behaved provocatively towards the defendants, but the defendants' reaction was disproportionate and wholly inappropriate.

[8] I accept that the defendants were not aware of the fact that the deceased had received a serious head injury as the result of the earlier fall and the deceased's

behaviour would not have alerted them to that fact. I also accept that when the defendants left the deceased, they did not leave him with the intention of leaving him to die or believing him to be injured. Their intention seems to have been to give him a "roughing up" as a punishment for his aggressive behaviour towards them.

[9] Against that background, the question arises as to what is the proper sentence to be imposed? In the local community, from which the defendants are drawn, feelings have run very high against the defendants and it seems likely that for the foreseeable future, the defendants will not be welcome back in Keady. This court, however, must decide the case as objectively as it can on the evidence available to it and cannot determine this case by an emotional reaction to the dreadful, unforeseen and unforeseeable consequences of the defendants' behaviour.

[10] In the case of the defendant, Rice, it appears that he is a married man aged 39 with five children ranging between the ages of 11 and 19. He is a businessman with interests in the building trade, acting as a managing director of a company which provided significant employment. There is nothing to indicate that he had any previous convictions or bad character.

[11] I take into account the references that have been furnished in relation to him and the fact that his actions that night were out of character. I bear in mind that he has been ostracised by the Keady community, and I take into account that he spent two months in custody awaiting trial before bail was granted and that he has pleaded guilty to the charge at the first opportunity.

[12] In the case of Houlahan, he is a 25-year-old single man engaged to be married. He has no previous convictions of any relevance. He suffers from a significant degree of disability as the result of a foot injury and it seems unlikely that he would be capable of much in the way of gainful employment. It does appear that he is capable of some form of work and the report of the probation officer indicates that arrangements could be made with the DHSS to offer him work that could be viewed as therapeutic. I take into account the references that have been furnished to the court on his behalf, and that his actions on that night were out of character. I take into account his plea of guilty at the first opportunity and that he has already spent two months in prison.

[13] In the case of Lappin, he is a 25-year-old single man living in a cohabiting relationship. As in the case of the other two defendants, he has been ostracised by the Keady community where he is no longer welcome. It does appear that in May 1992, he was convicted of an assault while acting as an umpire at a GAA match. The probation report suggests that he was involved in another assault incident on the night of the affray, but there is no real evidence of that before this court. It does appear that he is a young man who is not fully capable of controlling his aggressive instincts. I take into account his plea of guilty and the fact that he spent two months in custody pending trial. I also take into account the reference which has been furnished to the court.

[14] I have considered carefully the various options open to the court relating to sentencing. I take into account that in each case the defendant has served the equivalent of a four-month sentence of imprisonment. While the outcome of the offence was serious and tragic, had the deceased not been injured when he fell during the first part of the incident, the incident, though not significant, would not have attracted any great attention. It would have been dealt with in the magistrates' court and the court's approach to sentencing would have been such that a custodial sentence would have been wholly inappropriate. In this case, however, the court cannot wholly disregard the consequences of the actions of the defendants which highlight the risks involved in an affray.

[15] After giving the matter anxious consideration, I have decided that the proper course to adopt here is to make community service orders in each case provided that in each case the defendant consents.

[16] The guidelines laid down by the English Court of Appeal authorities indicate that important considerations to be taken into account in deciding whether a community service order is appropriate include the following:

(i) Whether the offence is an isolated incident not likely to be repeated in the future (which I am satisfied is the case here);

(ii) Whether the offender has a stable home and/or family background (which appears to be of relevance in each case);

(iii) Whether the defendant in question is in employment and has a relatively good record. Apart from the defendant, Lappin, each of the other defendants appears to have no record of any significance. In the case of Lappin, the previous conviction was a number of years ago; and

(iv) Whether the offender is of generally good character and has made significant efforts to settle down and avoid offending.

[17] It must be added that making a community service order should not be regarded as a trivial punishment. The evolving policy of the law borne out by the provisions of the Criminal Justice (Northern Ireland) Order 1996 (when it comes into force) shows that a community service order is to be regarded as a significant punishment not to be lightly imposed. It significantly impacts on the freedom of action of the individual sentenced and affects his liberty.

[18] One of the features that has led me to the conclusion that a community service order is appropriate at the present instance, is the fact that the offence in question was in the nature of an offence both against the deceased and against the community being in the nature of a public order offence. The carrying out of community service work is a way of requiring the defendants to pay back to society something to make

good the damages caused by their actions. Furthermore, the carrying out of such community work can be regarded to some extent as a means of the defendants redeeming themselves in some way in the eyes of the community.

[19] A number of conditions must be fulfilled before the court can impose such a community service order:

(i) The offender must consent to the order being made. I shall have to return to that shortly.

(ii) The court must be satisfied, after considering the report of a probation officer, that the offender is a suitable person to perform work under such an order. I am satisfied from the reports furnished by the probation officer in relation to each defendant that this condition is satisfied.

(iii) The court must be satisfied that the Probation Board can make provision for the offender to carry out community service work. That condition is satisfied in the present instance in each case according to the reports furnished by the probation officer.

(iv) The court must explain to the offender in ordinary layman's terms the purpose and effect of the order, the consequences following breach of the order and the court's power to review the order on the application of the offender or the supervising officer.

[20] It would appear logically that the court should explain the consequences of making an order to the offender first, then indicate the order the court is minded to make and then ascertain if the offenders consent to such an order. Accordingly, I deal first of all with an explanation of a community service order.

Explanation of the order

[21] A community service order is an order of the court which requires the defendant to perform unpaid work of value to the community for a specified number of hours which, in the case of these defendants, must not be less than 40 nor more than 240 hours, in each case. The defendant must report to the relevant supervising officer and, subsequently, from time to time, notify him of any change of address and must perform such work at such times as may be instructed by the relevant supervising officer.

[22] In allocating the work to the offender, the supervising officer should endeavour, so far as possible, to avoid any conflict with the defendant's religious beliefs and any interference with the times when the offender normally works or attends an educational establishment. The work must be performed within 12 months of the date of the order, unless that period is amended by the court or subsequently extended. It may be extended on the application of the offender or the

supervising officer where this would be in the interests of justice having regard to the circumstances which have arisen since the making of the order. The order will remain in force, unless revoked, until the offender has worked the specified number of hours.

[23] If the offender has failed to comply with the requirements of the order, he may be brought before the magistrates' court which may impose a fine of up to £1,000, or it may commit him to the Crown Court which may impose that fine or revoke the order and deal with him for the original offence. The Crown Court may pass sentence on the original offence in the light of his failure to comply with the order. If the offender is convicted of an imprisonable offence during the currency of a community service order, the order may be revoked and the defendant may be dealt with for the original offence if that is considered appropriate.

[24] The offender or the supervising officer may apply to a magistrates' court for the Petty Sessions district specified in the order for an extension for the duration of the order beyond 12 months. If problems arise (eg arising out of a change of job) which make it difficult for the offender to comply with the requirements of the order, he should notify the supervising officer and make an application to the court to amend the order. If these matters are not brought to the attention of the supervising officer promptly with the order being modified accordingly, the defendant may well be treated as acting in breach of the order.

[25] The offender or the relevant officer may apply to the magistrates' court in the relevant Petty Sessions district to revoke the order, and if the magistrates' court considers it just to do so in the present case, it could commit the defendants to the Crown Court which might, if it considers it just to do so, revoke the order and deal with the original offence in any manner in which it would have been dealt with if no such community service order has been made.

[26] That is an explanation, in hopefully layman's terms, of the nature of a community service order. I now have to seek the consent of the defendants in the light of the order which I propose to make.

Consent of the defendants

[27] In relation to the accused, Rice, subject to your consenting, I propose to impose a community service order requiring you to work 150 hours of community service and I ask you whether you consent to the making of such an order?

Defendant (Rice): Yes.

Girvan J: The defendant Houlahan, subject to your consent, I propose to impose a community service order requiring you to perform 130 hours of community service. Do you consent?

Defendant (Houlahan): Yes.

[28] This is somewhat less than the normal number of hours I have imposed on Rice, but in view of Rice's age, maturity and influence he carries a somewhat greater responsibility for the incident.

[29] In the case of Lappin, I propose to impose a community service order in your case of 170 hours. Do you consent?

Defendant (Lappin): Yes.

[30] In the case of Lappin, I have made this order somewhat longer in view of his past conduct which indicates a tendency towards aggression and an inability to control his temper.

[31] Now in relation to the Treatment of Offenders (Northern Ireland) Order 1976, the order must specify the Petty Sessions district in which the defendant resides or intends to reside and I call on the Crown to indicate what the appropriate Petty Sessions district is?

Mr Miller: It would be Armagh, if it please Your Lordship.

Probation Officer: With the greatest respect, my Lord, it's East Tyrone.

Girvan J: Sorry, East Tyrone. Well that's the address. That is the Petty Sessions district which will appear on the face of the order.

[32] In passing sentence in relation to this matter, I cannot forebear from passing the court's condolences to the family of the deceased. The circumstances of the death of the deceased were tragic and unfortunate, and the court has borne that in mind in relation to this matter.