

Neutral Citation No. [2011] NICC 8

Ref:

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

Delivered: **03/03/11**

IN THE CROWN COURT OF NORTHERN IRELAND

DOWNPATRICK CROWN COURT

ICOS No: - 10/071624

THE QUEEN

v

C M

Defendant

His Honour Judge Miller QC

[1] The defendant is a 16 year old youth, who I shall refer to hereafter as C M in order to protect his identity, which is subject to reporting restrictions. He was arraigned on 15th June 2010 at Downpatrick Crown Court and pleaded not guilty to three counts, these being: - Possession of an offensive weapon; Attempted Robbery and threats to kill. The case was set down for trial and was originally listed for hearing in early November but due to concerns centring on allegations of intimidation in respect of a key Crown witness coupled with the fact that this witness was also heavily pregnant, the trial was put back to the 29th of that month. Again there were difficulties at that stage due to an ongoing trial but the matter was listed for mention at the request of the defendant's counsel on 6th December at which point the defendant applied to be re-arraigned and pleaded guilty to all counts.

[2] The factual background as presented by Miss McColgan on behalf of the Crown may be briefly stated. On Tuesday 24th November 2009, Elaine Byrne was working in Deeny's Chemist, St. Patrick's Avenue, Downpatrick. At approximately 5 o'clock in the evening, she was brushing the shop floor in the area of the dispensary, when she felt someone holding her from behind. The person had his right arm across the front of her body and was holding a knife to her throat. This male (the defendant C M) then turned Mrs. Byrne towards David Lowry, the Pharmacist on duty at the time. The male threw a plastic bag on the counter and shouted "*Put the fucking money in the bag*". Mr. Lowry told the

male that the safe was on a time delay. At that point another male ran out the front door. Seconds later then, the male holding Mrs. Byrne also ran out the front door.

[3] There were a number of other persons working in the chemist at the time, one of whom, Bronagh Moore, heard the male repeatedly stating, "*I'm gonna kill her.*" Although Ms Byrne sustained little in the way of physical injury as a result of this incident it is apparent that she was greatly shaken by this attack and 15 months on she continues to exhibit symptoms and behaviours consistent with post-traumatic stress disorder. Mr. Lowry gave chase to the male and observed him run to a terraced house. He saw him then enter the house. Police arrived a few minutes later.

[4] Constables MacNamee and Cupples entered the house in question. They spoke to the female occupier, who told them that there was a male upstairs in the shower. C M was located naked in the bathroom. He was asked where his clothes were and he could not answer that. Police then went to the kitchen. While in the kitchen, another male entered the house via the back door. This person was the female occupier's partner. Police searched the house and rear yard and seized various items of clothing. During a search of the kitchen they discovered a black handled knife between the washing machine and the kitchen cupboards. It was also seized. Both C M and the other male were arrested.

[5] Forensic examination of the knife revealed that the DNA recovered matched that obtained from the reference sample attributed to Mrs. Byrne. C M was interviewed under caution. He denied any involvement in the robbery.

[6] Miss McColgan accepted that had the case proceeded to trial there would have been witness difficulties. Mrs. Byrne would not be fit to attend trial due to ongoing stress related problems. This would have required a hearsay application in respect of her evidence. In addition the female occupier of the house was a reluctant witness who would have required a summons before she would attend court. That said neither of these matters would have presented insuperable problems and of themselves would not amount to grounds for a significant reduction in sentence particularly given the lateness of the pleas of guilty. There are, however, matters peculiar to this defendant, which do give rise to considerable concern from a sentencing perspective.

[7] The defendant was arrested on the day of these offences, namely the 24th November 2009. He was remanded in custody, initially to the Juvenile Justice Centre, but was subsequently transferred to the YOC in December 2009, where he remains to this day. At the time of his transfer he was only just 15 years of age and now at 16 he remains the youngest child detained within the YOC. The fact

that he was deemed unsuitable for bail pending trial and has thus been in custody for more than 15 months to the date of sentencing is indicative of the concerns that are raised in this case. I had originally directed that the PSR and any reports to be relied upon by the defence were to be lodged by the 17th January 2011 with a view to sentencing on 28th January but this proved impossible because the defendant refused to co-operate with the Probation officer assigned to his case. Given the importance of ensuring that the court had the fullest possible amount of information about the defendant I requested the Probation Service to try and make further contact with the defendant with a view to enlisting his co-operation. I am grateful for the assistance the Area Manager, Mr McCusker, afforded in this process towards ensuring that the court's directions were fulfilled. Inevitably, however, this course of action necessitated still further delay whilst the necessary appointments and subsequent Risk Management meeting was arranged. Thus it is that sentencing is only now taking place nearly 3 months after the pleas of guilty were entered to the charges.

[8] Before turning to consider the sentencing options in this case I intend to set out something of the defendant's background. C M is originally from Ballynahinch and is one of three siblings. When his parents separated over 9 years ago he and his brother moved to reside with their father. He describes relations with his father as good and he has expressed a desire to return to his father's address on release from custody. It should be noted, however, that his father has been barred from visiting Hydebank for a year, after both he and C M became involved in a confrontation with staff over visiting times.

[9] It would seem that a lack of parental boundaries have been a contributory factor in C M's offending particularly his mother's attitude towards drugs and her willingness to supply both alcohol and drugs to her son from an early age. C M confirmed to Miss Vaughn (Probation Officer) that, on occasions when he has stayed with his mother, he has abused alcohol and other substances including Amphetamines and Ecstasy. As a result Social Services have been involved with C M and he had been placed in various residential units. He advised that he never settled in any of these placements and felt this was because he always needed to be around his family. Although he claimed that his father provided him with boundaries and discipline it is apparent that he continued to offend whilst in his father's care. C M believes that his mother has suffered a nervous breakdown and has not been the same since that event. He stated that he would like to see her but Social Services have prohibited contact at this time. It should be noted that C M has been the subject of a full Care Order since March 2009.

[10] It appears that from the age of 11 C M started to associate with older males in his local community. At the time he believed them to be friends however it is clear that they used him to assist them in petty crime. With the

freedom afforded him by his father he in turn began to abuse alcohol and drugs, using Ecstasy and Amphetamines when available. His abuse of alcohol continued to escalate and continued to be a factor in most of his recent violent offending. C M acknowledged that when drinking and abusing drugs he is more prone to mood swings leading to aggression and loss of control. He also recognised that there are concerns regarding the risk he may pose to others when under the influence of alcohol or drugs and he is recorded, as saying that he does not wish to continue this type of behaviour.

[11] Despite his youth C M has, since August 2008, accumulated 34 previous convictions including offences of Wounding with intent to cause GBH (x 1), AOABH (x 3), Common Assault (x 4) and Possession of an offensive weapon in a public place (x 2). On the 7th October 2009 at Lisburn Youth Court he was sentenced to a Juvenile justice Centre Order of 39 Days followed by supervision for 8 months. He was released from the detention element of this sentence on the 13th November 2009, just 11 days before he committed the index offences and it is clear that he had quickly fallen back into his old lifestyle of negative associations and substance abuse.

[12] With regard to the robbery it seems that C M willingly accepted responsibility for his actions. He did however add that he had no recollection of the substantive element of the offence. He told Miss Vaughn that on the day in question he had been with friends drinking and taking drugs including cocaine and some tablets (the type unknown to him). He stated that it was only in the midst of committing the Robbery with everyone screaming at him that he realised what he was doing and ran from the premises. He believed that his motivation for committing the offences was for the drugs rather than the money.

[13] The defendant exhibits hostility to authority figures and his determination to opt out of working with the psychology assessment under the auspices of PBNI in essence hinders the development of programmes designed to draw him away from his patterns of offending. His move from the JJC was necessitated by his violent actions towards both staff members and fellow detainees and since moving to the YOC he has continued to challenge authority, albeit that there are also signs of some limited progress in engagement.

[14] These offences were committed after the coming into effect of the full sentencing powers under the Criminal Justice (NI) Order 2008 on 1st April 2009. The offences of Robbery and Threats to kill are both “**serious**” and “**specified violent**” offences within the meaning of Schedules 1 & 2 of the said Order and the Court is, therefore, enjoined to reach a determination as to whether the defendant is a “dangerous offender” adopting the criteria set out in **Article 15** of the Order.

[15] Against the background set out in the preceding paragraphs it is perhaps not surprising but still no less depressing that C M is assessed as presenting with a high likelihood of re-offending. This is due to the following factors: -

Alcohol and drug abuse which he self reports increases his aggression and willingness to take risks;

- Lack of parental boundaries

- Lack of structure or purpose to his day

- Limited responsibility for some of his offending

His continued association with negative peers despite his knowledge that they increase his likelihood of offending

- Pro-Criminal Attitudes

- Lack of consequential thinking

- Limited victim awareness

Whilst it is noted that C M is currently demonstrating some changes in attitude and a willingness to engage with post- release conditions, it is recognized that progress is tentative and must be sustained and built on whilst he is in Hydebank.

[16] The fact that C M so often has recourse to acts of unprovoked violence has given and continues to give real concern and factors heavily towards a conclusion that he does represent a *“significant risk to members of the public by the commission of further specified offences.”* He has a conviction for Wounding with intent, which arose out of an incident where he stabbed someone who refused to give him a cigarette. Further acts of violence giving rise to convictions only underline these concerns and his behaviour whilst in the JJC led to him being assessed as posing a risk to members of the public as far back as October 2009. Since then he committed the current offences, which, as previously noted, mark a further escalation in offending and once more involve the use of a knife to inflict fear and also physical injury (albeit minor) on his defenceless victim. He has already been categorized at Level 3 risk of serious harm to the public, defined as *“someone whose previous offending (or current alleged offending in the case of potentially dangerous persons), current behaviour and current circumstances present compelling evidence that they are highly likely to cause serious harm through carrying out a contact sexual or violent offence.”* This decision was based on the lack of protective factors including absence of positive influences and boundaries, an escalation in violent offending and lack of victim awareness.

[17] On the 18th February 2011 PBNI held a further Risk Management Meeting with representatives from the Public Protection team and with the PBNI Psychologist present. Information was shared regarding the nature and details of

the current offences and discussions took place regarding his limited self control' particularly when under the influence of substances. It was agreed at this meeting that C M continues to pose a risk of serious harm to the public and that nothing has changed regarding his status since he has been remanded.

[18] I have considered the very helpful and carefully structured PSR, the submissions of Mr Grant QC and have re-examined the depositions in light of all these matters. I have further applied the guidance as set out in the recent decision of **R v E B [2010] NICA 40**. On the basis of this I am drawn inexorably but no less regrettably to the conclusion that C M does pose a significant risk of serious harm to members of the public by the commission of further specified offences. This being so I find that he is a "*dangerous offender*" within the meaning of the 2008 Order.

[19] This determination must shape the approach taken to the range and level of sentence. I have considered whether an Extended Custodial Sentence would be adequate for the purpose of protecting the public. I consider that such a sentence would be adequate for the following reasons -

- a.) there is evidence that C M shows some awareness of the main factors, which influence his offending;
- b.) measures can be put in place, first whilst he remains at the YOC and then when he is eventually released, to put in place programmes such as alcohol and drug counselling and methods of monitoring his movement through electronic tagging;
- c.) the fact that he acknowledges that these measures will be necessary and that he has indicated an acceptance of such conditions; and
- d.) I bear in mind his youth and the fact that the finding that he is a dangerous offender should be mitigated with the lowest level of sentence commensurate with the risk posed.

[20] I pause to reflect that in England & Wales the passing into law of the **Criminal Justice and Immigration Act 2008** has had a significant limiting effect on the power of a Crown Court to sentence a young offender as a dangerous offender. In essence unless the Court considers that the young person should spend at least two years within a custodial establishment the court cannot impose a sentence for dangerousness. This statute does not apply in Northern Ireland, but I make it clear that on the evidence placed before me I am of the opinion that even if it did the threshold is met in the present case.

[21] In addressing the issue of sentence I have also borne in mind the principle that the welfare of the child must be specifically taken into account as set out in **Section 53 of the Justice (Northern Ireland) Act 2002**, the relevant parts of which provide: -

53.-(1) The principle aim of the youth justice system is to protect the public by preventing offending by children.

(2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principle aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.

(3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

[22] I have also considered the guidance offered in **R v C K [2009] NICA 17** in which Kerr LCJ (as he then was) analysed how the court should approach the issue of sentence under the provisions of **Article 39 or Article 45 of the Criminal Justice (Children) (NI) Order 1998**. This guidance was, of course given in respect of offences committed before the implementation of the **Criminal Justice (NI) Order 2008** and the sentencing court was not, therefore required to assess the issue of dangerousness. The effect of my decision on this issue, which does apply to the present case, means in effect that this court does not have the option of imposing a sentence under the relevant provisions of the **1998 Order**. I nevertheless consider that the principles set out in the judgement of the Lord Chief Justice have a bearing on and inform this court in its approach to sentence. In particular I take note of the following observations at **Paragraphs 18 - 22** of the ruling -

[18] The European Court of Human Rights has regarded the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules) and the United Nations Convention on the Rights of the Child (UNCRC) as providing guidance on how juvenile offenders should be dealt with. Paragraph 5 of the Beijing Rules states that: deprivation of liberty should only be imposed after careful consideration. It should be for a minimum period and should be reserved for serious offences.

[19] Article 3.1 of UNCRC proclaims the paramountcy of importance of the welfare of the child in all public actions taken in relation to children. It stipulates that: -

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[20] *Article 37 (b) of UNCRC echoes paragraph 5 of the Beijing Rules: -*

"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

[21] *The need to promote the re-integration of a child offender into society is dealt with in article 40 (1) of UNCRC as follows: -*

"State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

[22] *The theme common to all these provisions (the need to have particular regard to the welfare of the child offender) should inform the approach of the court to the application of article 45 (2) (b) of the 1988 Order. Examination of the suitability of alternative methods of dealing with the case other than by detention must take place against the backdrop of an imperative to do what is best for the child, while, of course, recognising the need to prevent offending by children. Moreover, where it is concluded that detention is required, there is a need to focus on what is the minimum period that will accommodate that requirement.*

[23] Turning to the appropriate level of sentence applicable to offences of robbery I was referred by counsel to **R v Brendan Devine [2006] NICA 11** in which Kerr LCJ, (as he then was) referred to guidelines for robbery recommended by the Sentencing Guidelines Council in England:

The guideline identifies three levels of seriousness which can be applied to each of the categories of robbery. The first involves the threat or use of minimal force such as snatching from a person's grasp causing bruising/pain and discomfort; in the second category a weapon is used to threaten or there is actual significant force used; in the third category significant force or a weapon is used. The three categories of robbery discussed in the guideline are (i) street robbery or mugging; (ii) robberies of small

businesses; and (iii) less sophisticated commercial robberies. Where the offence involves the threat or use of minimal force the suggested starting point is 12 months with a sentencing range of up to three years custody. Where a weapon is produced or force is used which results in injury the starting point is four years' custody with the sentencing range being between two and seven years' imprisonment and where the victim sustains serious physical injury the starting point is eight years' custody with the sentencing range being seven to twelve years.

[24] The Court in *Devine* stressed that these guidelines do not always fit comfortably with the facts in any given case. It can be argued, as highlighted above, that in the present case this was a robbery of a small business involving specific targeting, pre-planning and a not inconsiderable threat of violence. Added to this is the central role played by the defendant in the actual act of robbery.

[25] The Court in *Devine* went on, however, to refer to its' own earlier decision in *Attorney General's reference (No 1 of 2004)* [2004] NICA 6 where it was said: - **"The normal starting point for robbery where the defendant has not played a central role should be in the range of 5 to 7 years on a plea of guilty. Obviously, the range of sentences for those who (like the offender's accomplice) play a central role should be much higher."** The Sentencing Guidelines Council for England & Wales suggest that a sentencing range of between 6 and 10 years with a starting point of 7 years would be appropriate on the basis of a 17 year old first time offender who pleaded not guilty. It is suggested that sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.

[26] Bearing all these factors in mind, together with all matters in mitigation urged upon the court by Mr Grant QC and more fully set out in the review of the PSR referred to in the preceding paragraphs I consider that the minimum appropriate custodial term to be a period of **3 Years**. After you have served at least one half of that period, the date of your release will be determined by the Parole Commissioners.

[27] I consider that the extension period should be **5 Years**. This is the maximum period permitted under the 2008 Order in respect of a

“violent offence.” Having reviewed the concerns raised by the Probation Service I believe that it is essential that the longest possible time is allowed to provide the fullest opportunity for the suggested programmes and measures to be put in place.

[28] If you are released from the YOC before the completion of the full custodial element you will be subject to the normal licence period for the balance of that term and then to this extended period of licence. This means that the effective term of the ECS is **8 Years**. I consider that this period is necessary for protecting members of the public from serious harm, for the following reasons – the assessment originally made in October 2009 and confirmed at the Risk Management Meeting on 18th February 2011 identifies your capacity for causing psychological and physical harm. An extended period of licence will be required to address these issues and I note that the Probation Service consider that it would be better to determine the appropriate conditions after psychological assessments whilst C M remains in his current protective environment at Hydebank.

Sentence:

Count 1 – Possession of an Offensive Weapon – 10 Months YOC

Count 2 – Attempted Robbery – 8 Years ECS (3 Years Custody followed by 5 Years on Licence)

Count 3 – Threats to Kill – 5 Years ECS (2 Years Custody followed by 3 Years on Licence)

[29] Finally by virtue of his detention since the commission of the current offences C M has been unable to complete the terms of a probation order imposed at this court on 23rd March 2009 for the offence of Burglary and Theft of a non-dwelling. Application has been brought by the Probation Board for the revocation of that order and the re-sentencing of the defendant. In view of the sentence I have imposed today I shall revoke the order as requested but shall make no further order in relation to this matter.