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

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Delivered:	15/02/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

D

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CARSWELL LCJ

On 16 November 2001 the appellant D, a youth of 17 years, was sentenced by His Honour Judge McKay QC at Newry Crown Court on a plea of guilty to two counts of assault occasioning actual bodily harm to consecutive terms of six months' detention, making an effective sentence of twelve months' detention. He was originally charged on the second count with causing grievous bodily harm with intent to M. On arraignment on 1 May 2001 he pleaded not guilty to both counts, then on re-arraignment on 29 June 2001 pleaded guilty to assault occasioning actual bodily harm on each count, which pleas were accepted by the Crown and the court. He appealed against these sentences, with the leave of the single judge, and we gave him leave at the hearing to call in evidence the Head of Sixth Form at his school.

The offences arose out of a fracas which took place outside a nightclub in Armagh in the early hours of 17 July 2000. An incident had occurred about half an hour earlier in which a young woman named T was assaulted by A.

When she came out of the club about 1.15 am with her cousin S and other friends S was set upon by a group of young men headed by A's brother MD. They punched and kicked him to the ground, but he managed to regain his feet a couple of times in order to avoid being kicked as he lay. He was again knocked to the ground and several members of the group joined in kicking him. Those charged with this assault, in addition to MD, were his brother A and K.

Meanwhile M and another girl attempted to go to the assistance of S, whereupon she was attacked by the appellant's elder brother SD, followed by the appellant. Both men kicked and punched M, knocked her to the ground and continued to punch and kick her there about the head, ribs, back and legs. When they broke off the attack on M the appellant and SD then joined in the assault on S.

The attack on M was savage and, even if the attackers claim some slight degree of provocation, utterly inexcusable. She said in her statement to the police that "It felt like I was being kicked for so long it seemed like a day". The club manager described it as a very brutal assault and said that she had never seen two men assault a woman in this way before. The doctor who attended to her in hospital found bruising to her right cheek and left hip. Although X-rays revealed no fractures of the facial bones and jaw, her dental surgeon Mr Henry found her lower jaw very tender on 20 July and expressed the opinion that she had sustained a dislocation of the lower jaw due to the trauma resulting from the assault. S complained of considerable pain and

discomfort following the attack but fortunately did not sustain serious injuries.

When the appellant was arrested he denied any connection with the assaults throughout his police interview. He pleaded not guilty on arraignment and only changed his plea to guilty on re-arraignment, when the charge of causing grievous bodily harm with intent to M was reduced to assault occasioning actual bodily harm. He was born on 17 September 1984 and is now in Form Lower VI at his school, studying for AS levels in Classical Civilisation, Geography and Information Technology, with a view to taking A-levels next year. He wishes to follow a degree course at university and to pursue a career in the field of business and computing. He has no previous record.

When the pre-sentence report was being prepared by the probation officer, the appellant co-operated fully. By then he appreciated the seriousness of his position and was described by the probation officer as being remorseful for his actions but finding it difficult initially to articulate his remorse. His appreciation of the impact on the victim of the assault appears at that stage to have been limited. His family is supportive and caring and very concerned on behalf of the appellant.

The teacher furnished a written report on the appellant's progress and behaviour in school. There was no evidence of any serious misconduct and his conduct, application and progress in 2001 were of a commendable level. He concluded his report as follows:

> "As head of Sixth Form I have spoken to him at length about the incident in which he was involved and am convinced that he very much regrets his actions and has learned his lesson. He is aware that he has let down himself, his family, his community and his school. On his release from custody he has faced up to his return to school with courage and dignity. He has been chastened by the whole experience and is aware of the stigma which now attaches to him. He is resolved to face the remainder of his life with a sense of civic duty and decorum. He will be helped in every way possible to do this by the school in the remaining 18 months of his time here."

In his evidence to the court, which we found of material assistance, the teacher said that the appellant was not a "hard man" or trouble maker. In his opinion he was very chastened and had learned his lesson. The experience of spending a week in Lisnevin and a week in the Young Offenders Centre had been extremely salutary. He expressed concern lest in serving a sentence of detention the appellant might become hardened or inured to criminal or anti-social behaviour and that the punishment might be counter-productive. He felt that if he could be allowed to continue with his education, that and the pastoral system at the school would be more beneficial in securing his future and keeping him out of trouble.

The judge summarised the facts of the case and background of each defendant in brief terms, reciting that only A and MD had relevant records. He went on to say:

> "I am satisfied, having considered the case in the full, that this was a vicious, violent, unprovoked attack and that it is necessary to impose custodial sentences to punish you, to deter others, and to reflect the public abhorrence of this type of

> disorder, which is far too prevalent in this Division."

He imposed the following penalties:

- SD – six months for the assault on M and three months consecutive for escaping from lawful custody;
- A – six months for the assault on S and six months consecutive for the assault on M;
- K – six months for the assault on S;
- A – six months for the assault on S and six months consecutive for the assault on T;
- MD – six months for the assault on S.

The grounds of appeal advanced on behalf of the appellant were the following:

> "It is submitted that the sentence of detention was manifestly excessive and wrong in principle, inter alia, for the following reasons:
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> (i) The Appellant had no criminal record.
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> (ii) The Appellant is aged 17 years.
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> (iii) The Appellant is a school boy, currently in 6th Form at his school. He is studying for his AS and A level exams in ancient history, computer studies, geography and key skills. He is continually assessed throughout the year on these subjects and must sit exams in February and May of 2002.
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> (iv) The Appellant pleaded guilty to both offences at an early stage.
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> (v) The Appellant had a peripheral role in the offences.

(vi) In a very detailed pre-sentence report the Probation Officer suggested community service work or a suspended sentence.

(vii) A consecutive sentence on the second count was wrong in principle and manifestly excessive.

(viii) A sentence of detention was imposed without adequate or proper recourse to Articles 19 and 20 of the Criminal Justice (NI) Order 1996."

They were all cogently argued before us by Mr Macdonald QC on his behalf.

Counsel submitted that the judge did not follow the procedure prescribed by Articles 19(4) and 24(4) of the Criminal Justice (Northern Ireland) Order 1996. In declaring, however, that it was necessary to impose custodial sentences for the purposes which he spelled out, the judge was carrying out the task laid upon him by Article 19(4). It is true that he did not enunciate his conclusions in accordance with the formula prescribed by Article 24(4), but we would be prepared to presume in his favour that a judge with long criminal experience would have the substantive requirements of that paragraph clearly in his mind and we regard that as of importance. We would nevertheless remind judges that the requirements of the 1996 Order are specific, albeit onerous and mechanistic, and they should be followed.

It was in our opinion a perfectly legitimate sentencing objective for the judge to attempt to deter by severe sentences those who engage all too readily in assaults on innocent victims and indulge in the very dangerous practice of knocking down their victims and kicking them. We have no fault to find with

his imposition of immediate custodial sentences on such offenders, if that is in his judgment required to prevent repetition of their crimes.

We are more concerned, however, by the fact that the judge did not, expressly at least, examine the roles of the respective participants in each assault to ensure that the total sentence imposed on each truly reflected his degree of criminal responsibility. We regard the use of consecutive sentences where the offences in effect formed one transaction or incident as having questionable validity, and without resort to the totality principle it may lead to unevenness between the several participants in that incident. For that reason we are not satisfied that it was right to impose consecutive sentences on the appellant, though the brutality of the assault on M was such that it might well have attracted a longer term than six months.

The main thrust of Mr Macdonald's argument was directed to the proposition, founded on the teacher's evidence, that a custodial sentence was not a desirable means of dealing with the appellant, in that it may be disproportionately damaging to his future and may deter and rehabilitate him rather less effectively than another means of disposition. We agree at once with that proposition in relation to dealing with the appellant himself. If the only matter in issue was what is the best disposition of this offender, and that could be considered in isolation, then we should have little hesitation in holding that his future would be best secured by a non-custodial sentence. It is necessary, however, for us to have regard to the need for deterrence, for we

share the judge's concern about the prevalence of violent assaults by gangs of youths and the importance of stamping out this type of crime.

We have to balance that factor, the degree of the appellant's individual responsibility and the effect which various types of disposition may have upon him. We accept that he was to some extent a secondary party to these assaults, neither of which he instigated. We take account of his age, 15 years and 10 months at the time, and his good record in all senses. When we carry out this balancing process we consider that while prison sentences were entirely appropriate punishment for such savage assaults, in the appellant's case we would be justified in suspending them. We also consider that we should make the terms concurrent, which would reflect both the unitary nature of the incident and a reasonable totality. We do not consider that a custody probation order would be appropriate, for it requires the imposition of a period of actual custody. We propose accordingly to vary the sentences to six months on each count, which we make concurrent, and to suspend them for the period of two years from 16 November 2001.

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THE QUEEN

v

ADRIAN FRANCIS DONNELLY

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J U D G M E N T O F

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