

Neutral Citation: [2009] NICC 7

Ref: **HAR7363**

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

Delivered: **6/2/2009**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

DARRYL PROCTOR

HART J

[1] The defendant has pleaded guilty to charges of causing grievous bodily harm with intent relating to events that occurred in Londonderry in the early hours of Sunday 16 July 2006.

[2] He was originally charged with the attempted murder of Paul McCauley on that date, and with causing grievous bodily harm with intent to Mark Lynch, contrary to s. 18 of the Offences Against the Person Act 1861, and with attempted causing grievous bodily harm with intent to Gavin Mullin, also contrary to s. 18. The defendant was arraigned on these charges on 8 February 2008 and pleaded not guilty to all of them. On the morning of his trial the prosecution were given leave to add a fourth count of causing grievous bodily harm with intent to commit grievous bodily harm to Paul McCauley, also contrary to s. 18. The defendant asked to be re-arraigned, and then pleaded guilty to each of the counts of causing grievous bodily harm with intent or attempted causing grievous bodily harm with intent, but maintained his plea of not guilty to the charge of attempted murder of Paul McCauley. The prosecution accepted these pleas and count 1, the attempted murder of Paul McCauley, was ordered to lie on the file, not to be proceeded with without leave of the Crown Court or the Court of Appeal.

[3] The charges relate to events which occurred near the home of Damien McCrossan at 105 Chapel Road, Waterside, Londonderry. At the rear of that address is a field owned by the McCrossan family and an adjoining area of

open ground. Mr McCrossan organised a barbeque in the garden of 105 on the night of Saturday 15 July 2006. That day Mr McCrossan and some friends had been engaged in clearing rubbish from the cellar of 105 and the rubbish had been dumped in the adjoining field to make a bonfire.

[4] The bonfire was lit late on the night of Saturday 15 July and guests went to and from the barbeque to the bonfire. By 3.30 to 3.45 am on Sunday morning virtually all of the guests had left, leaving Paul McCauley, Mark Lynch and Gavin Mullin standing chatting at the bonfire. Suddenly a group of young males rushed out of the darkness and attacked them. Accounts vary as to how many attackers there were, but there seem to have been at least six.

[5] Gavin Mullin described how he was knocked to the ground and grappled with his attacker as they rolled down the hill. His attacker then ran off, as did the others. Mr Mullin spoke to Mark Lynch and realised that he too had been attacked, before he saw that Paul McCauley was seriously injured and staggering around.

[6] Mr Mullin then tried to help Mark Lynch and Paul McCauley up to the house at the same time to get help for them, but this proved impossible to manage, so he left them both to get help, having first put Mr McCauley in the recovery position. He then ran to the house where he arranged for the police and ambulance to be called to the scene, before returning to his companions.

[7] Fortunately Mr Mullin only suffered scrapes, bumps and nettle stings, and was discharged after examination at Altnagelvin Accident and Emergency Department. Nevertheless, the abrasions and marks were extensive as can be seen from the photographs in Exhibit 25, and it is clear that his attacker or attackers intended to inflict injuries on him by knocking him to the ground, but his spirited resistance appears to have saved him from more serious injury.

[8] I have been provided with a victim impact report in relation to Mr. Mullin in the form of a psychiatric report prepared by Dr Michael Curran after an examination on 10 January 2009. The assessment of these events upon Mr Mullin is rendered more difficult by his unfortunately having been subsequently the victim of another attack in October 2007 when he was struck on the head with a bottle. Dr Curran records how Mr Mullin struggled to come to terms with the events of 16 July, especially during the first six months when he suffered subjective anxiety, impairment of sleep and recurrent recollections. Not surprisingly as he has been attacked twice in the last two and a half years he remains very aware of his personal security and is cautious where he socializes. Dr Curran concluded by saying that

'It is evident that Mr Mullan (sic) been traumatized by what happened to his friend to the point that he feels it is worthless calling into the hospital.'

[9] Mark Lynch suffers from muscular dystrophy and has considerable difficulty in walking, particularly over sloping or rough ground. When the attackers appeared he fell to the ground as a defensive reaction and his next recollection is sitting up. He was later found to have suffered a fractured mandible which was treated by the insertion of three metal plates. These remained in place until they were removed under local anaesthetic on 11 October 2006, almost three months after he was assaulted.

[10] It is clear from the photographs of his injuries contained in Exhibit 27 that he must have sustained his fractured jaw as he was repeatedly kicked or stamped as he lay on the ground. This is clear from the stamp marks to his face shown in Exhibit 23, photographs 2 & 3, and to his back, shown in Exhibit 27, photograph 7.

[11] When examined by Dr McKenny in the Accident and Emergency Department the following injuries were noted.

'... swollen tender right jaw, partially avulsed right lower molar tooth, a large 'footprint' mark on his left frontotemporal scalp, tenderness of thoracic vertebrae T2-4, and another large 'footprint' mark on his upper right posterior chest wall. As a result of these injuries he required x-rays of skull, mandible, chest and thoracic spin, and he was found to have a fractured mandible. Following this he was referred to the maxillofacial specialist for further management. The injuries received by Mr Lynch were very serious, and were in my opinion, consistent with the allegation made.'

[12] A victim impact report on Mr Lynch has been prepared in the form of a medical report from Dr Curran dated 10 January 2009. Dr Curran records during the first two months Mr Lynch was in tremendous pain, could not eat properly and lost weight. Given the severity of the fracture of his mandible and that his jaw was wired up for a lengthy period these symptoms are entirely understandable, but fortunately it appears that he no longer has any physical problems from the fractures to his mandible. Dr Curran concludes that there were psychiatric consequences including withdrawal, subjective anxiety and impairment of sleep. Mr Lynch found Mr McCauley's condition deeply upsetting after visiting him in hospital, and retains a high degree of apprehension in certain social situations. Again, given the nature of the attack

upon him, the serious injury to his jaw, and the terrible consequences of the attack upon Mr McCauley these feelings are entirely understandable.

[13] Tragically Paul McCauley suffered two cardiac arrests on the way to the hospital, and two further cardio-respiratory arrests at the hospital from which he was resuscitated.

[14] Mr Choudhari, a consultant neurosurgeon, described in his witness statement the results of investigation at the hospital.

‘A CT of his brain had demonstrated a large 3mm haemorrhage on the outer surface of the brain (subdural haematoma) and a right temporal non-depressed skull fracture, fracture of his right petrous bone and gross cerebral oedema. He had an intracranial pressure monitor in the ICU. He had to be taken to theatre 19 July 2006 when a bi-frontal decompressive craniectomy (removal of bone to allow the brain to expand) was performed. When Paul was transferred back to Altnagelvin Area Hospital, he had made only a limited recovery from his severe head injury, possibly due to a hypoxic episode. He was not able to fix or follow commands, and his motor movements showed only flexor response in the upper limbs.’

[15] The witness statements, and an additional report from Dr McCann, show that Mr McCauley remains in a minimally responsive state with no significant improvement. He does not fix or follow with his eyes, he has no response to motor commands and he does not vocalise or verbalise. He has to be fed through a tube and is totally dependent upon nursing staff and carers for all aspects of his care. He remains vulnerable to infection, especially chest infection, and is at risk of skin breakdown. As Dr McCann put it in a further brief report of 15 May 2008:

‘There is no potential for any recovery at this stage. He will require full-time care both now and in the future.’

In his report of 21 January 2009 Dr Mc Cann stated

‘In summary therefore as a result of profound traumatic brain injury, Mr McCauley is in low-level consciousness state, probably vegetative state, and will require full-time care for the rest of his life. No treatment is going to change the course of things at

this stage and nor will he show any signs of improvement. Based on assessment of recent analysis regarding life expectancy I would place this at between 10 and 15 years from the date of injury.'

[16] The opinion of Professor Crane was sought as to how these head injuries could have been inflicted and he commented

'The injuries sustained by Mr McCauley would appear to be confined to the head. There was evidence of blunt trauma to the right side of the head, resulting in an underlying skull fracture. This was also associated with injury to the underlying brain probably indicative of diffuse axonal or traumatic axonal injury and which is typically associated with rapid loss of consciousness.

Considerable force would have been required for his injuries and could not have been due to a simple unaccelerated fall to the ground or by punching.

The injuries would be consistent with his having been kicked on the right side of the head with a shod foot or by his head having been stamped upon.

There is no evidence to indicate the use of a weapon.'

[17] This attack has therefore had truly catastrophic consequences for Mr McCauley, reducing him from an active, healthy young man to someone who at the age of 32 is probably in a vegetative state; will require full-time care for the rest of his life, and whose life expectancy has been reduced by many years. I have read the medical reports prepared on both his parents by Dr Curran which serve as victim impact reports on them. Their lives have been gravely blighted by these events. They take it in turns to spend time with Paul at the home where he is now cared for, and this naturally means that they have to spend a great deal of time apart. They describe how this has affected their other children, and, whilst they are clearly individuals of inner strength and strong religious conviction, the burden they now have to bear weighs very heavily on them. Understandably, not only do they wonder how anyone could behave in this way towards their son, but they are concerned that only this defendant has been made amenable as there were several others in the group that attacked him.

[18] The defendant was born on 23 August 1990 and so was about six weeks short of his sixteenth birthday at the time of these offences, and is now eighteen years old. He was interviewed in relation to these events on 27 July

2006. In his first interview he denied any involvement, saying that he was not there. In the first four interviews he gave an account of his movements that night which essentially was that he went home to bed in his brother's flat, but got up when he received a text from a friend saying that the friend was in a fight at a bar in the Waterside. The defendant, who lives in the Fountain Estate on the City side, got up, got dressed and went down to the Craigavon Bridge and started to cross it. He said that before he had got very far he was attacked and beaten up by two men. He then sent his mother a text and her partner drove down and brought him home. In the fifth, sixth and seventh interviews he declined to say anything in answer to virtually every question, other than to repeat that he was not answering any more questions.

[19] In the eighth interview it was put to him that his DNA had been found on a baseball hat found at the scene, yet he continued to refuse to answer all questions, although in the ninth interview he said that he had worn a hat like that on many occasions.

[20] The case against the accused was entirely dependent upon forensic evidence. The baseball hat which has been referred to as being found at the scene was subjected to a DNA test, and DNA taken from the headband was found to match that of the defendant. In addition, when he was arrested the trainers he was wearing were seized by the police and subjected to forensic analysis. Blood recovered from the heel of the right trainer was found to match that of Mr McCauley, and the opinion of Mr Andrew McDonald was that the results of the comparison

'provide extremely strong scientific support for the proposition that the DNA tested originated from Paul McCauley'.

There was therefore very strong forensic evidence to place the defendant at the scene, and to place him at the very least in such close proximity to Paul McCauley that his blood got on the defendant's trainers.

[21] Given that blood matching that of Paul McCauley was found on the defendant's trainers it would be an understandable inference that the blood got there because the defendant kicked or stamped on him as he lay on the ground. However, Mr Murphy QC (who appears on behalf of the prosecution with Mr Gary McCrudden) stated that the defendant has admitted his guilt on the basis that he was a participant in a joint enterprise to carry out this violent attack, and Mr Murphy accepted that it could not be established beyond reasonable doubt that the defendant kicked or stamped on Mr McCauley's head because the blood could have got onto his trainers because he was close to Mr McCauley when Mr McCauley was bleeding. Miss McDermott QC (who appears for the defendant with Mr Talbot) emphasised that the defendant has pleaded guilty on the basis that he was a

participant in a joint enterprise to cause Paul McCauley grievous bodily harm, and it follows that his plea has been made, and accepted by the prosecution, upon that basis. I must therefore sentence the defendant upon the basis that he did not himself kick or stamp upon Paul McCauley's head, although in law as a participant in a joint enterprise he is liable for the consequences of the actions of those who did as part of that joint enterprise.

[22] When passing sentence it is permissible to make some distinction between those who actually inflicted the injuries and the defendant, although given the cowardly and highly dangerous nature of this attack the distinction in terms of sentence cannot be substantial. There were several others who took part in this attack and the three victims were heavily outnumbered, and although the defendant was a few weeks short of his sixteenth birthday, that does not exculpate him from the consequences of taking part in such conduct. Anyone of that age must realise the dangers of such conduct unless they are of less than full understanding, and there is no suggestion of that in the defendant's case.

[23] Although the defendant has pleaded guilty to count two, causing grievous bodily harm with intent to Mark Lynch, the pre-sentence report states that he believes that he was not responsible for breaking his jaw 'as he claims that he only hit him once and that he didn't hit him very hard'. Given that Mark Lynch says that he fell to the ground and then was attacked, it is likely that the blow that caused the fracture to Mark Lynch's jaw came from the defendant, although the prosecution appeared to accept that it could not be proved beyond reasonable doubt.

[24] This was undoubtedly a sectarian attack. The defendant left his home in the Fountain Estate and went across to the Waterside, and I have no doubt that the attackers picked on Mr McCauley and his companions because they were close to Chapel Road and so were thought to be likely to be Roman Catholics. I should emphasise that there is no reason whatever to suggest that Paul McCauley or any of his companions had done anything to provoke this attack, or that they had anything to do with the attack on the defendant's friend which led him to go across to the Waterside. They were simply enjoying themselves and were picked upon because of where they lived in a way that is sadly all too familiar throughout Northern Ireland where individuals, Protestant and Catholic alike, are attacked because of their perceived religion.

[25] There are several aggravating features of this case.

(i) The injuries to Paul McCauley and Mark Lynch were inflicted by kicking or stamping upon their heads.

(ii) This was plainly a sectarian attack.

(iii) The extreme severity of the results of the injuries inflicted upon Mr McCauley.

(iv) There were two victims as Mark Lynch also received injuries to his jaw as he too was kicked or stamped on his head as he lay on the ground.

(v) The attack was pre-meditated as the attackers made their way to this area and then selected their victims.

[26] There are a number of mitigating features.

(i) The defendant was not quite sixteen at the time.

(ii) He had a clear record at the time. However, he has since been bound over because of an incident which occurred after these offences. The pre-sentence report also records that he breached his bail by going into an area from which he was excluded as one of his bail conditions. These matters suggest he does not fully appreciate the implications of what he did on this night.

(iii) He pleaded guilty at the commencement of the trial, and therefore did not plead guilty at the first opportunity even though he could have offered a plea of guilty to the charge under s. 18 at any time. As has been repeatedly stated by the Court of Appeal, the maximum allowance for a plea of guilty is earned by those who admit their guilt at the earliest opportunity, in other words during interview. The defendant did not do so because he maintained his denial of involvement throughout interview, and despite his pleas of guilty the pre-sentence report records that he continues to deny any part in the assault on Paul McCauley and the attack on Gavin Mullin. Although Miss McDermott stated that her instructions were that the defendant was not resiling from his pleas of guilty, this suggests he does not display any real regret for his involvement in these events. Nevertheless, despite the lateness of his pleas he is entitled to some credit for pleading guilty.

[27] It is common to find serious injuries inflicted by people who strike their victim's head either with a weapon, or with their fist or, as is particularly frequent, by kicking or stamping upon the head. As this case so graphically demonstrates the consequences of such conduct can be death or injuries of the greatest possible gravity. Those who take part in such cowardly and dangerous attacks must expect to be severely punished as a result, even if they did not themselves inflict the injuries. The mob or pack mentality that takes over in such situations is all too often fuelled and sustained by the support given to the actual attackers by supporters who stand by or join in.

[28] Although this defendant pleaded guilty he did so at the last possible opportunity and the case against him was an extremely strong one based on the forensic evidence. I therefore do not consider that a substantial degree of credit can be given to the defendant for either his youth or for his plea of guilty, although he is entitled to some credit for both. I also take into account his good record and his youth at the time, but in a case of this gravity such factors cannot carry much weight. I also propose to make some allowance for his being a participant in a joint enterprise rather than himself inflicting the injuries on Paul McCauley or Mark Lynch.

[29] In R v Daniel McArdle [2008] NICA 29 at [28] the Court of Appeal concluded

‘That for offences of wounding with intent to cause grievous bodily harm the sentencing range should be between 7 and 15 years imprisonment, following conviction after trial. An appropriate reduction on this range should be made where the offender has pleaded guilty ...’

[30] As well as the decision in R v McArdle I have been referred to a number of other sentencing authorities in this jurisdiction. Miss McDermott referred me to R v Carlin and to R v Stewart [2009] NICA 4. Mr Murphy also referred to the decisions in McArdle and Stewart. In Stewart the sentence imposed after conviction was one of 14 years’ detention followed by one years’ probation. However, although the injuries inflicted upon the victim in that case were very grave, the injuries inflicted upon Paul McCauley are significantly more serious, As the Court of Appeal has frequently pointed out sentencing guidelines are not meant to be prescriptive and there may be circumstances where sentences outside the normal range can be imposed. The consequences for Paul McCauley have been as severe as can be imagined, and I consider that for that offence alone had this defendant been convicted after a plea of not guilty upon the basis that it was he who caused the injuries by kicking and stamping on Paul McCauley’s head, and had he been a person of more mature years the case would have attracted a sentence of 18 years imprisonment.

[31] I also have to take into account the injuries inflicted upon Mr Lynch, and the defendant has pleaded guilty to these also. It is well established that where separate offences form part of one transaction the sentences will normally be made concurrent, although that is not a universal rule and where circumstances demand it consecutive sentences should be imposed. However, the ‘one transaction rule’ as it is commonly called is most often invoked where the sequence of offences involved a repetition of the same behaviour towards the same victim, as can be seen from the examination of the relevant authorities in R v Magill [1989] NI 51. In this case Mark Lynch was also

subjected to a serious assault, but as the defendant is being sentenced upon the basis that he did not inflict the actual injuries in either case, although he does admit punching Mark Lynch, I shall make the sentences concurrent

[32] I must take into account the totality principle in order to ensure that the total sentence imposed on this young man is not out of proportion to his criminality on this occasion.

[33] Taking into account his pleas of guilty and his youth at the time I consider that the appropriate sentence is one of 13 years detention in the Young Offenders Centre, subject to the question of a custody probation order which I am obliged to consider as the sentence exceeds twelve months detention.

[34] The pre-sentence report considers that the defendant presents a high risk of re-offending, and in view of his youth at the time of these offences, his re-offending whilst on bail, and continued denial that he committed some of these offences despite his pleas of guilty, and the aimless and unstructured nature of his life to date I consider that he would benefit from a period of probation upon his release in order to reduce the risk of further re-offending and to protect the public.

[35] Subject to his consent, on count four I will therefore substitute a custody probation order of 12 years' detention to be followed by one years' probation. The sentence would otherwise have been one of 13 years' detention. On count two I impose a sentence of three years' detention, and on count three a sentence of one years' detention. The sentences will be concurrent.