Neutral Citation No. [2010] NICC 46 | *Ref:* **HAR7963**

Judgment: approved by the Court for handing down | *Delivered:* **23/11/2010**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

DOWNPATRICK CROWN COURT (SITTING AT BELFAST)

THE QUEEN

-v-

MARIUS DEMSKI

HART J

[1] The defendant has been convicted of two offences in relation to attacks upon his cousin Krzysztof Zlotnicki (the deceased), and is now before the court to be sentenced.

[2] The deceased and the defendant were both Polish nationals living in Newtownards. The defendant lived at 39 Balfour Street, Newtownards and had lived and worked in Northern Ireland for some years prior to 2009. To judge by the uncontradicted assertions of the defendant during the trial the deceased appears to have had a serious drink problem, and to have stolen from the defendant and others to sustain that habit. I must emphasise that the court has heard no evidence from any other person to contradict the defendant's account of the deceased's behaviour, nor was it put to him by the prosecution during the trial that these allegations about the deceased were incorrect.

[3] The evidence at the trial was that there was a volatile relationship between the defendant and the deceased because of the deceased's behaviour. The defendant asserted that he had taken the deceased in after he had been put out of his accommodation by other members of the family, and that he argued with the deceased because of his drinking. The charges relate to two separate incidents when the defendant admitted that he attacked the deceased.

[4] The first episode occurred in January 2009. The defendant had been drinking and accused the deceased of stealing credit cards or documents in Bangor. In the course of the argument he took his golf club and struck the

deceased on the right leg with such force that he caused an undisplaced fracture of the right tibia.

[5] A week went by before he went with the deceased to hospital, where he was treated with a plaster cast stretching from the thigh to the toes. The deceased had to return to the hospital on five subsequent occasions for review and further x-rays, and was also provided with a pair of crutches at that time. The deceased was still using the crutches in June 2009 when the second attack took place.

[6] The offence of manslaughter was committed on the night of Monday 15 June 2009. On this occasion it appears from the defendant's account that he had been drinking throughout the day. He was in the deceased's company until the deceased left for work at 7.00 pm.

[7] Prior to the deceased leaving for work an argument took place between them when the defendant accused the deceased of having stolen some £20 or thereabouts from a cupboard in the house whilst the defendant was staying with relatives the previous day. He was also angry because the deceased was drinking before he was going to work, and the defendant felt that this was likely to get the deceased sacked from work, something the defendant was concerned about because of the efforts to which he had gone to help the deceased to find work.

[8] After the deceased left, ostensibly to go to work, the defendant remained at home drinking and watching television. He received a telephone call from a friend, Stephen Fleming, to tell him that the deceased had been trying to buy drink on credit in an off licence also patronised by the defendant, and had also tried to borrow money from Fleming to buy drink.

[9] The defendant's account was that a few minutes after this telephone conversation the deceased returned to the house and a further argument took place between them. The facts of the argument have been outlined during the trial, and it is unnecessary to describe them again in detail, other than to say that the defendant admitted that he became more and more angry with the deceased and started shouting at him, and after about five minutes he was so angry at the deceased's dismissive attitude towards his concerns that he attacked the deceased.

[10] In his police interviews the defendant said that he was "very irritated and I was really upset" that the deceased was trying to get drink without paying for it, and borrowing money from the defendant's friends and people his cousin did not know. The defendant went on to describe what happened in the following words:

> "I simply lashed out … at some point I exploded. I couldn't stand it any longer … I simply lashed out and I started hitting him with crutches."

The defendant also said

> "I just wanted to give him a good thrashing for all he had done".

[11] He admitted striking the deceased with his hand or fist five times before he attacked him with the crutch. The crutch was broken when the police subsequently came to the house. The evidence of Mr Armstrong of FSNI was that the crutch was made of "high tensile" material, and marks found on the deceased's head, forehead and cheek, as well as on the right leg, suggested that the deceased had been hit several times with the crutch.

[12] The defendant admitted to the police that he struck the deceased with the crutch at least ten, if not twelve times. The post mortem examination by Dr Bentley, the Deputy State Pathologist for Northern Ireland, revealed a total of 84 sites of injuries: 38 of which were to the head; 9 to the left arm and hand; 11 to the right arm and hand; 6 to the left leg and foot; 9 to the right leg; 2 to the front of the trunk, and 9 to the back of the trunk. Many of these were bruises and abrasions but there were several lacerations. For example, of the 38 injuries to the head, 17 took the form of lacerations or cuts of the skin, including lacerations of the scalp and face which would have bled fairly briskly and heavily, leading to loss of blood, and Dr Bentley observed "such injuries on their own can be life threatening".

[13] Dr Bentley also ascertained that the deceased had sustained a fracture between the nasal bone and cartilage, a fracture of the right cheek bone at the edge of the eye socket, a full thickness laceration of the upper lip, as well as fractures of the 10th and 11th ribs on the right side.

[14] The defendant asserted that he had not intended to inflict really serious bodily harm upon the deceased, and the verdict of the jury that he was not guilty of murder but guilty of manslaughter means the jury accepted this. The deceased was some 9½ to 10 stone in weight, 5' 7" in height and of relatively light build. It is clear from the defendant's own account that the deceased made no effort to fight back, except to raise his arms to try and protect himself and move his body about to avoid the blows.

[15] The defendant said to the police:

> "Well he made me lose my temper, I just wanted to beat him up, to teach him a lesson, but I am sorry, I feel sorry that things turned out that way."

> "And it was just an accident you know he was beaten up and that was it, I was very angry and I simply went too far. I was very angry and I simply went too far. I was not aware that I got carried away so much."

[16] In R v Magee [2007] NICA 21 at [23] Kerr LCJ referred to the use of gratuitous violence in the following passage which applies equally to the circumstances of the present case.

> "It is the experience of this court that offences of wanton violence among young males (while by no means a new problem in our society) are becoming even more prevalent in recent years. Unfortunately, the use of a weapon – often a knife, sometimes a bottle or baseball bat – is all too frequently a feature of these cases. Shocking instances of gratuitous violence by kicking defenceless victims while they are on the ground are also common in the criminal courts. These offences are typically committed when the perpetrator is under the influence of drink or drugs or both. The level of violence meted out goes well beyond that which might have been prompted by the initial dispute. Those who inflict the violence display a chilling indifference to the severity of the injury that their victims will suffer. Typically, great regret is expressed when the offender has to confront the consequences of his behaviour but, as this court observed in R v Ryan Quinn [2006] NICA 27 'it is frequently difficult to distinguish authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions".

[17] In R v Magee the Court of Appeal laid down that where:

> "… it cannot be proved that the offender intended to kill or causing really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between 8 and 15 years imprisonment. This is, per force, the most general of guidelines."

[18] In R v Harwood [2007] NICA 49 the Court of Appeal considered and applied these guidelines, and indicated that there could be cases which fell outside the range of 8-15 years to which Kerr LCJ had referred. In that case

the court considered that, had the accused not pleaded guilty, the sentence would have been at least 17 years imprisonment.

[19] The defendant has a number of previous convictions for various offences, both in Northern Ireland and in Poland, and whilst I do not consider that they are of such gravity as to amount to an aggravating factor, he cannot receive any credit for having a clear record. Whilst there are a number of allegations in the committal papers that the defendant used violence to others, these were not pursued by the prosecution at the trial, and so are unproven. I must therefore sentence the accused on the basis that, other than when he attacked the deceased with the golf club on the earlier occasion, the defendant has not displayed a propensity towards inflicting harm on others before he committed the manslaughter of the deceased.

[20] In the present case there are a number of aggravating factors.

(i) He previously attacked the deceased with a golf club and broke his leg, thereby indicating that he was prepared to inflict harm upon him.
(ii) The crutch was used as a weapon in the second attack.
(iii) The defendant struck the deceased repeatedly with the crutch.
(iv) Both attacks were unprovoked in any proper sense of the word.
(v) The nature and extent of the injuries inflicted upon the deceased show that the defendant evinced an indifference to the seriousness of the injuries he was likely to inflict upon the deceased by attacking him in the way that he did.

[21] Mr Grant QC (who appears for the defendant with Mr Blackburn) submitted that there were a number of mitigating factors. The first was that at the time the defendant's mother was dying of cancer in Poland. I accept that may have placed the defendant under a degree of strain and that some allowance should be made for that. The second was that his judgement was affected by alcohol. That is not a mitigating factor. The third was that the relationship between the defendant and the deceased was impaired by the deceased's behaviour. Whilst the deceased's behaviour was undoubtedly annoying, it could not be said to amount to any sort of excuse remotely justifying the degree of violence displayed by the defendant to the deceased on either occasion. The fourth was the jury's acceptance by its verdict that the defendant did not intend serious harm; however, this is already recognised by the jury's verdict of manslaughter rather than murder.

[22] Manslaughter is a serious offence and so it has to be decided whether either (i) a life sentence or (ii) an indeterminate custodial sentence is appropriate under Article 13 of the Criminal Justice (NI) Order 2008 (the 2008 Order). If neither is appropriate I have then to consider whether (iii) an extended custodial sentence under Article 14 of the 2008 Order is appropriate.

Although manslaughter is a serious offence, and one which might otherwise trigger any one of these sentencing options, there are various matters to which I must have regard. The first is that the manslaughter was the result of a sustained attack of exceptional ferocity during which the defendant struck the deceased repeatedly and inflicted many separate injuries. The second is that this was not the first time he had inflicted serious violence on the deceased because he had earlier broken the deceased's leg with the golf club. The third is that the loss of self-control demonstrated by the defendant was contributed to by heavy drinking by the defendant on both occasions. The pre-sentence report confirms that the defendant has a history of heavy drinking, and he acknowledges that he needs to address his use of alcohol.

[23] These factors undoubtedly indicate that the public may be at risk in the future if the defendant were to again engage in violence when drunk. However, there are no convictions for offences of violence on his record, and I again emphasise that the allegations in the committal papers that he had been violent towards others have not been proved against him. Had they been, they would have to be accorded considerable weight.

[24] When considering whether he presents a significant risk of harm towards others, and the type of sentence that is appropriate, I have to take all of these factors into account. With some hesitation I have come to the conclusion that the absence of any other indication in his background that he is prone to violence means that neither a life sentence nor an indeterminate custodial sentence are appropriate because I am not satisfied that there is a significant risk of serious harm to the public occasioned by the defendant committing further serious offences of violence, and for that reason I do not consider that an extended custodial sentence is appropriate either.

[25] This was a sustained and exceptionally violent attack upon the deceased. The aggravating factors are such that this must be regarded as a very grave case of manslaughter, and one that should result in a sentence at the top of the range of sentences appropriate to such cases. On Count Two I sentence the defendant to a determinate term of fourteen years, and in accordance with the provisions of Article 8 of the 2008 Order the defendant will serve seven years of that sentence in custody, and will be on licence for the remaining seven years of his sentence. The period of custody will include the period he has spent in custody whilst on remand. Under Article 23(1) of the 2008 Order I have power to recommend conditions to be imposed during the licence period of the sentence, and in view of his propensity to drink heavily and to resort to violence revealed by these offences I adopt the recommendation in the pre-sentence report that he engage in (1) alcohol and drugs counselling, and (2) in anger management. As the attack which is the subject of Count One was committed before 1 April 2009 Article 8 of the 2008 Order does not apply, and I sentence him to five years' imprisonment on that count. The sentences will be concurrent.

[26] Miss Orr QC (who appears for the prosecution with Miss McColgan) stated that the defendant has not been served with a deportation notice under the Immigration Act 1971, and it is therefore unnecessary for me to consider whether I should recommend the defendant for deportation.