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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

EDWARD STEWART

_____

Mr Patrick Lyttle QC with Mr Barry Gibson BL (instructed by MSM Law, Solicitors) for the Appellant
Mr James Johnston BL (instructed by Public Prosecution Service) for the Respondent

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Before: Treacy LJ, Maguire LJ and Horner J

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MAGUIRE LJ

Introduction

[1] Edward Stewart, ("the appellant") is a man who was born in October 1983 and who is now 37 years of age.

[2] The charges with which he was originally charged were set out in a Bill of Indictment dated 9 December 2019. The Bill contained three counts as follows:

Count 1 Harassment, contrary to Article 4 of the Protection from Harassment (Northern Ireland) Order 1997. Initially, the appellant pleaded not guilty to this charge, whose particulars were that between 12 June 2017 and 13 July 2018 the appellant pursued a course of conduct which amounted to harassment of a female which he knew or ought to have known amounted to harassment.

Count 2 Threats to kill, contrary to section 16 of the Offences against the Person Act 1861. In respect of this charge also the appellant initially pleaded not guilty. The particulars of the charge were that the appellant on 21 July 2018 without lawful excuse made to a female a threat to kill intending that she would fear it would be carried out.

Count 3 Causing another to fear violence, contrary to Article 6 of the Protection from Harassment (Northern Ireland) Order 1997. The appellant initially also pleaded not guilty to this charge, whose particulars were that between 12 June 2017 and 23 July 2018 he pursued a course of conduct which he knew or ought to have known would cause another (a female) to fear on at least two occasions that violence would be used against her.

[3] The appellant was arraigned on 16 January 2020. He formally pleaded not guilty to all charges on this occasion.

[4] On 18 February 2020 the applicant was re-arraigned. This was upon the occasion of his trial. The complainant attended court. However, the appellant took the step of seeking a re-arraignment. On this occasion, the appellant pleaded guilty to counts 1 and 3 above. As regards count 2, it was decided that it should be left on the books and not proceeded with by the prosecution.

[5] Thereafter the appellant's sentencing hearing was delayed due to the coronavirus situation. However, on 22 December 2020, a sentencing hearing began with the judge presiding being His Honour Judge Fowler ("the sentencing judge"), who heard detailed submissions from the parties. On 6 January 2021, he announced the outcome of his sentencing which involved two elements. Firstly, in respect of count 3, the appellant was made the subject of an Extended Custodial Sentence ("ECS"), as the court concluded that the appellant was a dangerous offender. The ECS was arrived at by the judge, in accordance with the provisions of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). It consisted of a period of 20 months as the custodial term, and a period of 24 months as the extension period, making a total sentence of 44 months. For all effective purposes, this was the operative part of the overall sentence. But, in addition, the sentencing judge also sentenced the appellant in respect of count 1. In relation to this count, the appellant was handed down a determinate custodial sentence of one year split equally fifty-fifty as between custody and licence. However, this was to run concurrently with the ECS relating to count 3.

[6] The appeal before this court relates to the ECS which, it is claimed, was "manifestly excessive and wrong in principle." While there is a second issue in the appeal, relating to the effect, if any, of the fact that proceedings had been initiated by the Public Prosecution Service in the magistrates' court but later, at the instigation of the appellant, transferred to the Crown Court, this will be dealt with after the first issue has been considered.

The Appellant's Background

[7] The appellant, it appears, was born in Belfast in 1983. He was brought up by his mother alone. At one stage when he was very young, his mother took him to live in Australia, but they returned to Northern Ireland when he was aged 11.

Thereafter, his school career appears to have been uneventful but relatively successful, in that while at a local grammar school the appellant obtained 9 GCSEs and 3 A levels.

[8] Thereafter, the appellant obtained a place at Portsmouth University to study psychology. Unfortunately, however, he dropped out of this course, and he appears to have lost interest in it. In these circumstances, he returned to Northern Ireland.

[9] For a time, the appellant turned to different forms of casual work and he was able to sustain himself for a period. However, the appellant's interest in work waned and he substantially appears to have retreated into himself and become involved in the consumption of alcohol and drugs of various sorts.

[10] Over time, the appellant began to become a somewhat isolated figure in respect of whom there were concerns for his mental health. In the summer of 2009, the appellant for the first time turned to crime. By the date of this appeal, the appellant had accumulated a criminal record of substantial dimensions, consisting of 74 previous convictions, including offences such as assault on police, breach of the peace, 13 common assaults, an offence of deception, 4 offences related to drugs supply or use, offences of fraud, 3 offences connected to having an offensive weapon, 6 post office communications offences, 2 riotous or disorderly behaviour offences, 3 serious assault offences, 6 theft offences, 2 offences of threats to kill, 5 offences of threatening behaviour, and 13 offences of third party prosecutions.

The facts in relation to the offending aimed at the victim which has given rise to this appeal

[11] The events giving rise to the applicant's current offending started shortly after he had obtained employment in a local call centre. This was in or about June 2017. While at the call centre the appellant met a young lady who worked there, whom the court shall call "the victim." She had only recently joined the staff of the centre and it appears that the appellant sought to engage with her. Initially, he sent her handwritten notes asking her such questions as did she like him and would she be his girlfriend. At one stage he appears to have been communicating with her in this way as often as 5 times a day. The young lady's reaction was to ask him to stop sending her notes but he continued with this course of behaviour. It appears that the appellant increasingly became aware that his victim was not interested in him and this led to him being aggressive, rude and threatening to her. For example, when the appellant walked past her in the workplace, if she was in the company of a male, he regularly resorted to calling her such names as a slut or whore and on one occasion he reacted by way of punching a computer screen. Before long, she viewed herself as being the object of obsessive behaviour on his part with continuing advances and overtures spilling into threats of rape and/or slitting her and/or throwing acid at her face. The appellant also sought to underline the seriousness of his threats by telling her that he had been in prison at an earlier stage in his life as a result of

attacking an ex-girlfriend with acid. This account seems to have been given with the purpose of causing her fear.

[12] As a result of the appellant's increasingly intolerable behaviour towards her, the victim made a complaint about the appellant to her employer. However, before this complaint was determined by the employer, the appellant was dismissed from his employment for absenteeism. This did not bring to an end the appellant's unhealthy interest in the victim. It is evident that the appellant sent a communication to another worker at the call centre in late August 2017. This may have been intended to reach her ears, though this is not certain. The communication, *inter alia*, stated that in respect of the young lady, an acid throwing incident might occur. The text of the communication ended by him saying that he really wanted to "plan out how to ruin [her] life."

[13] For a time after the appellant's dismissal, things went quiet. For close to a year there was no contact between the appellant and the victim. However, out of the blue, on 21 July 2018, the young lady received a private Facebook message from the appellant which stated that:

> "Me and you are going to have a very interesting conversation the next time I see you. I have been waiting a year to bump into you. You are nothing but a fat, smotty, stinking, trainer [who] wears the same pair of clothes every fucking day…Trust me I have a few things to say to you sweetheart."

[14] As a result of this, the victim felt she was under threat again and reacted fearfully. Understandably, she reported this last matter to the police and a police investigation began. This led to the preferral of charges against the appellant by the prosecution authorities, notwithstanding that the appellant, following interview, continued to deny that he had committed any offence.

The effect on the victim

[15] As a result of the appellant's obsession with the victim, the latter, as is plain from a victim impact statement which she supplied to the sentencing court, suffered extensively from the events summarised above. In a three page statement compiled in February 2020, the victim described how she was affected by the unwanted contact she had with him. Prior to these events she referred to her life as "normal." She was looking forward to beginning her new job. While in the past she had suffered bouts of low form and rare minor panic attacks, these were manageable. She made friends and enjoyed the training she was receiving. She appeared to be getting along well. However, all this changed when she encountered the appellant. She became uncomfortable, scared and anxious. She feared going into work due to the risk of receiving verbal abuse. This affected her attendance at work.

[16] Increasingly, she became isolated in order to avoid his attention and her confidence began to leave her. Often she had to be given a lift in and out of work by her parents. The threat of acid being thrown in her face terrified her, leading her not to wish to go anywhere alone. She felt her mental health was deteriorating and required her general practitioner to increase medication she had been on and prescribe new medication.

[17] When eventually the appellant left the place of work she found that that she remained concerned and continuing to live in fear. She continued to be terrified of seeing him. As she put it:

> "The threats he made to me were things he could carry out in a second should we run into each other. Some may say that he would never carry it out but living with the fear that he might is just as bad."

[18] Over the next year, she found that she could not get thoughts of him out of her head, despite reassurances from her parents and friends. When she received the message from him in July 2018 – out of the blue – her world imploded as she felt that he was again after her and hadn't forgotten or moved on. She asked herself, "Does this mean that he is looking for me to throw acid at me?"

[19] As she waited for the court date to arrive, she struggled to attain sleep and suffered from nightmares and bad dreams such as being killed or raped or made the victim of having acid thrown over her. She worried for her safety and expressed the view that she wanted her life back again.

Dangerousness

[20] The legal concept of dangerousness under the Criminal Justice (Northern Ireland) Order 2008 arises in this case because of the existence of Count 3 on the indictment. This is not in dispute between the parties to this appeal as the offence under Article 6 of the Protection of Harassment (Northern Ireland) Order 1997 (putting people in fear of violence) is for the purpose of the 2008 Order a "Specified Violent Offence"[1], if tried in the Crown Court. In turn, this introduces the issue of whether a protective sentence is to be imposed in the event of a finding of dangerousness. In broad terms, the potential protective sentences which ordinarily will be the candidates for use, are threefold, in accordance with Chapter 3 of the 2008 Order: a life sentence, an indeterminate custodial sentence and an extended custodial sentence ("ECS"). In the present case, the sentencing judge and the parties had properly centred attention on the ECS, the sentencing judge accepting that the other two possibilities should give way to it. In relation to the ECS the key test of dangerousness arose where the court was of the opinion that there was "a significant

[1] See Schedule 2 para 26 of the 2008 Order

risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences."[2]

[21] In contrast, an ECS in this case could not have been imposed by the court in respect of Count 1, as the offence at issue did not relate to a Specified Violent Offence or an offence which gave rise to an issue of dangerousness. In respect of this count, however, the court could, as it did, impose a determinate sentence, here of one year, though it was to run concurrently with the ECS.

[22] Where an ECS is under consideration the court engages is an assessment of dangerousness in accordance with the terms of Article 15 of the 2008 Order[3]. The matter is put as follows at Article 15 (3):

> "The court in making the assessment referred to…(a) shall take into account all such information as is available to it about the nature and circumstances of the offence; (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and (c) may take into account any information about the offender which is before it."

[23] The 2008 Order, as is well known, is a refined version of similar legislation in England and Wales in 2003. Its terms have now come before the courts both in England and Wales and in Northern Ireland on numerous occasions.

[24] In the present case, the sentencing judge had cited to him by counsel and had considered key cases in respect of the issue of dangerousness for the purpose of the 2008 Order. The court will, in brief compass, refer below to passages in several of these judgments. This approach will sufficiently set the scene for the reader. But the court will make plain that at the hearing of the appeal it was accepted that the sentencing judge had properly gone about the task of considering whether the dangerousness threshold had been reached and had considered the law and facts meticulously. No point was made against him in respect of how he carried out his task, as against whether the conclusion he arrived at was legally sound.

[25] Firstly, the judge referred to the important decision of the Court of Appeal of England and Wales, in *R v Lang* [2005] 2 AER 410. This was one of the first decisions on the interpretation of the 2003 Act and contains helpful general information and principles about the statutory scheme. It is noted by Rose LJ that serious harm was defined in the legislation (as it also is in Northern Ireland) as meaning "death or serious personal injury, whether physical or psychological." In respect of an ECS, "the sentence will be the aggregate of the appropriate custodial term and a licence extension period. The custodial term must be the shortest term commensurate with

[2] See Art 14 (1) (b)
[3] See Article 15 (2)

the seriousness of the offence or the offence and other offences associated with it. The extension period will be of such length as the court considers necessary to protect the public from serious harm by the commission of further specified offences but must not exceed five years for a violent offence or eight years for a sexual offence."

[26] Overall, Rose LJ remarked that in assessing a significant risk a number of factors should be borne in mind by the sentencer:

> "(i) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean…'noteworthy, of considerable amount or importance.'
>
> (ii) In assessing the risk of further offences being committed, the sentencer should take into account the nature and circumstances of the current offence; the offender's history of offending, including not just the kind of offence but its circumstances and the sentence passed, details of which the prosecution must have available, and whether the offending demonstrates any pattern; social and economic factors in relation to the offender, including accommodation, employability, education, associates, relationships and drugs or alcohol abuse; and the offender's thinking, attitude towards offending and supervision and emotional state. Information in relation to these matters will most readily, though not exclusively, come from antecedents and pre-sentence probation and medical reports…the sentencer would be guided, but not bound by, the assessment and risk in such reports. A sentencer who is contemplating differing from the assessment in such a report should give both counsel the opportunity of addressing the point.
>
> (iii) If the foreseen specified offence is serious, there will clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm. For example robbery is a serious offence. But it can be committed in a wide variety of ways, many of which do not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there is a significant risk of serious harm merely because the foreseen specified offence was serious…in a small number of cases, where the circumstances of the current offence or the history of the offender suggest mental abnormality on

> his part a medical report may be necessary before risk can properly be assessed.
>
> (viii) it cannot have been Parliament's intention, in a statute dealing with the liberty of the subject, to require the imposition of indeterminate sentences for the commission of relatively minor offences. On the contrary, Parliament's repeatedly expressed intention is to protect the public from serious harm…"

[27] Later Rose LJ noted that "[t]he risk to be assessed is to 'members of the public.'"

[28] Secondly, the sentencing judge was referred to this court's decision in *R v EB* [2010] NICA 40. This was a case of a ECS and the court took the opportunity to indicate its approval of the approach taken in *R v Lang*, essentially quoting in substance the bulk of the material discussed in paragraphs [25]-[27] above. The court commented that:

> "We consider [these paragraphs] constitute helpful guidance to judges making assessments of dangerousness."

[29] Later the Lord Chief Justice provided a helpful comment to the effect that:

> "The assessment of whether there is a significant risk of serious harm depends on three dimensions. The first is that the impact of the act must be serious harm. The second is that the act must be likely to occur. The third dimension involves assessing the imminence of the event causing serious harm."

[30] In the court below the sentencing judge also made specific reference to the case of *R v Wong* [2012] NICA 54 but it is unnecessary for this court to deal with it or the useful authority of *R v Cambridge* [2015] NICA 4, which had also been cited to him.

Other evidence considered by the judge on the issue of whether the appellant was dangerous

[31] As has already been indicated, on 20 December 2020, the sentencing judge heard substantial submissions – from each side - relating to the issue of whether the appellant should be viewed as a dangerous offender for the purpose of the 2008 Order. Some of the factors have already been the subject of discussion above while others will be discussed below. In the course of argument before this court, it should

be stressed, there was no suggestion that the judge had done other than consider relevant factors and exclude from his mind irrelevant factors.

[32] It is proposed hereafter to set out the main matters put before the judge without including every detail:

(i) General Matters relating to his behaviour and offending

[33] The judge was invited to and did consider closely the appellant's antecedents. He noted that the appellant had a very relevant criminal record in respect of such matters as assaulting persons, threats to kill, the use of weapons and harassment. As the judge concluded: "He had a history of targeting individuals with whom he had taken umbrage." He proceeded to highlight such matters as had been pointed out to him by the prosecution. First, the judge referred to the appellant's behaviour as it related to the taxi company, Value Cabs. This began in or about 2010 after he had been dismissed from his employment with them. In the aftermath of the dismissal he telephoned them and made sectarian remarks and claimed to be from the IRA. He specifically threatened to cut the throat of a female call handler. A short time later, he assaulted the person whom he believed got him sacked from Value Cabs. Matters, however, did not stop there. In January of 2011, the appellant assaulted his former boss at Value Cabs. This occurred in the office and was accompanied by threats to kill his son. At court in May 2011 when he faced charges, he verbally abused civilian prosecution witnesses before and after court. He was, on this occasion, made the subject of a fine, after which he followed the witnesses out and started to goad them, saying to them that "I'll take £200 a day." This appears to be a reference to his willingness indirectly to pay for the pleasure he was receiving in attacking them verbally.

[34] Secondly, on 22 February 2016 he was concerned in an incident which involved him making a threat directed at a security officer within the Social Security Agency. On this occasion the threat took the form of him wanting to bite off the officer's nose. At or around the same time, there was another similar incident, involving the issue of a threat to a male with a Stanley knife. This resulted in him being arrested which was followed up by the appellant damaging the cell into which he was placed and assaulting detention staff.

[35] Thirdly, also in 2016, there were further incidents. One was early in the year and involved the appellant in using a hammer to damage a female's car. He also hit her once to her back as part of this incident. Still in 2016, the appellant caused a scene at his then solicitor's office. He assaulted female reception staff and a male member of staff.

[36] Fourthly, in March 2017, there began a series of incidents involving probation staff, whose offices he had been attending for legal purposes. Following a minor disagreement, the appellant told the officer "I hope you die of cancer and I hope you get raped." He then shoulder charged the officer onto the floor. Later in the same

year, he is reported as having harassed the same officer in the middle of Belfast city centre. This involved him shouting at the officer, "What are you going to do now?", as he had just been released from prison. He slapped the officer 5-8 times in the back in a hard and aggressive manner. Within days, a further similar incident occurred with the same officer, who, this time, was confronted by the appellant in the city centre. On this occasion, the appellant persistently shouted at him and invaded his personal space. When the officer tried to avoid him by going into a bank, the appellant followed him in and hung around for a time before leaving. In the end the officer concerned felt he had to leave the office he had been working in due to fear.

[37] Fifthly, in April 2018 the appellant was discovered to have posted a message targeting police officers. This indicated that he hoped they would hang or cut themselves or drink bleach. The appellant imparted the view that their families should be in a car crash. The appellant was arrested and when questioned indicated that he stood by what he said.

[38] Sixthly, in 2017, there was the beginning of a sequence of incidents involving the appellant and a former landlord. At that time, the appellant had been evicted by this person but, subsequently, in 2018 the appellant sent him Facebook messages accusing him of sexual improprieties which were designed to blacken his name. Later further texts, messages and phone-calls were received from the appellant. These included a threat to bite his nose off and cut his throat. While this did not eventuate, the appellant did, shortly afterwards, assault an employee of the landlord by way of punching him when he had been walking in the street.

[39] Seventhly, in or about 18 February 2018, as already noted above, the appellant was re-arraigned in respect of the charges relating to the current proceedings. Having pleaded guilty to 2 of the 3 charges, the court imposed a 10 year civil restraining order on him and also granted him bail. On this basis, he was released. However, within a short period of time he returned to acts of harassing the young woman who was the complainant. The appellant approached her in the centre of Belfast, encroached into her personal space and made a rude gesture to her. He shouted at her "one year" which appears to be a reference to the likely length of sentence he felt he would receive in respect of the charges for which he was due to be sentenced. He also referred to her as a "fat bastard." The complainant feared she would be subject to an assault and contacted the police. The appellant was later convicted of common assault and disorderly behaviour in relation to this matter and was found to have breached the restraint order which had only just been imposed. His convictions had the effect of breaching pre-existing suspended sentences which were put into effect.

Medical reports submitted at the sentencing hearing on behalf of the appellant

[40] For the purpose of the judge's sentencing exercise two medical reports were submitted on the appellant's behalf; these were considered by the judge.

[41] The first was from Dr Kieran Mulholland, a Consultant Psychiatrist. It is dated 15 August 2020 and is to be read with a supplementary report from the same source dated 5 November 2020.

[42] Notably, Dr Mulholland's original report is based on a Zoom call and sight of "some relevant written material but not medical records." In general terms, he described the appellant as giving the impression that he lives a chaotic lifestyle with no substantial employment history; often with no fixed abode; and with little or no support from friends or family. It is recorded that while in the past he drank heavily he denied drinking alcohol now. Likewise, he denied "current use" of illicit drugs. Under the heading "Past Psychiatric History" Dr Mulholland indicates what he understood to be an established diagnosis of schizophrenia. He also indicated that he understood that the appellant had previous diagnoses of ADHD and alcohol dependence syndrome. At the time of his consultation, it appears that the appellant was not under the care of any psychiatric service. Dr Mulholland describes his contact with mental health services as being intermittent and somewhat chaotic. There is within the doctor's report a discussion of current medication and his current situation and symptoms. In respect of the latter, the appellant is quoted as describing himself as "very paranoid" and "stressed and depressed."

[43] Dr Mulholland's summary and opinion reads:

> "Based on the interview I completed with Mr Stewart, a diagnosis of schizophrenia is confirmed."
>
> Mr Stewart is troubled by a severe mental illness. He ought to be in close contact with specialist mental health services. [His] medication requires regular medical review …"

[44] A supplementary report was prepared by Dr Mulholland dated 5 November 2020. This also was based on a Zoom consultation. Again, he had not seen the appellant's medical records. Consequently, he refers expressly to his inability to attempt to arrive at a fully rounded out view of his subject. Much of the earlier report is repeated. The diagnosis of paranoid schizophrenia is confirmed but Dr Mulholland was unable to comment on ADHD and alcohol dependence syndrome due to his inability to access the appellant's medical records. He notes, however, that a diagnosis of bipolar affective disorder "would seem likely." He quotes Mr Stewart as being somewhat aggrieved to be told that he was and is dangerous.

[45] Dr Mulholland offered the view that "on the basis of my interviews with Mr Stewart there is no objective evidence of significant dangerousness."

[46] He speaks of the appellant as being troubled by a severe mental illness and as needing specialist medical health services.

[47] It does not appear that Dr Mulholland had seen the report of Dr East on the appellant (which is discussed below) notwithstanding that it was the product of a referral by the appellant's solicitor. Nor is there any evidence that Dr Mulholland had seen the reports of the Probation Service for Northern Ireland.

[48] Dr East is a Consultant Forensic Psychiatrist, and his report is dated 25 November 2020. The report is described as prepared to address the finding by the Probation Service of dangerousness. It appears that Dr East interviewed Mr Stewart at Laganside Court on 19 November 2020. Unlike the other way round, Dr East had been provided with Dr Mulholland's reports. He also has been provided with pre-sentence reports from the Probation Service. While there is a reference to him seeing medical records, he does not specify what these exactly consisted of.

[49] The main points emerging from Dr East's 13 page report are as follows:

- He says there is an extensive history of substance abuse (but not alcohol abuse) on Mr Stewart's part. Mr Stewart is described as using a variety of hypnotic and stimulant medication which were both prescribed and illicitly sourced. The comment is made that he would "use these to intoxication." Additionally, reference is made to Mr Stewart indicating that he associated his intoxication with his criminality.

- It is noted that Mr Stewart reported that he had an extensive history of problems with his mental health but Dr East questioned this noting, *inter alia*, that in the latest report on his file with mental health services, there was no evidence of acute mental illness and an absence of confirmation of a diagnosis of paranoid schizophrenia (though there was a reference to the condition but without any detail).

- There is a section in the report in relation to the index offences, which is useful, but need not be set out here.

- Dr East, in respect of Dr Mulholland's report, is critical. For example, in respect of the latter's absence of access to the appellant's medical records, Dr East notes that this situation "falls short of the requirements of an expert report as established by the Royal College of Psychiatrists and, to my mind, invalidates the report." Dr East also takes issue with Dr Mulholland's diagnosis of paranoid schizophrenia, saying that Dr Mulholland had made no attempt to formulate how this diagnosis was arrived at or what diagnostic criteria were met.

- In reporting his mental health assessment of the appellant, Dr East said that he was not able to elicit evidence of any symptoms that might reflect the presence of an underlying mental illness. Consequently, Dr East later opines

that he did not believe (contrary to the view of Dr Mulholland) that Mr Stewart met the diagnostic criteria for the presence of any mental illness.

- Dr East felt that the appellant's presentation was "complicated by his extensive history of illicit substance abuse" which, he said, can mimic some of the features of mental illness.

- When adverting to the issue of dangerousness, Dr East was prepared to accept that Mr Stewart incontrovertibly presented as a person with a likelihood of future offending which was significant (consistently with the finding of the Probation Board).

- He also accepted that in considering whether Mr Stewart presented an increased likelihood of causing serious physical or psychological harm to others, the most reliable factor in predicting further patterns of offending is past behaviour.

- However, on balance Dr East concluded that in respect of physical harm Mr Stewart had "never demonstrated the capacity to cause serious physical harm to others." Consequently, he did not believe that the appellant met the significant likelihood of serious physical harm to others test.

- In respect of the risk of psychological harm to others, Dr East considered that the issues were more finely balanced. There was, in his view, "clear evidence in the victim impact statement and in the witness statements that psychological harm [had] been caused by the index offences." As he put it, "the threats and comments made by Mr Stewart are such as would cause distress to most people, let alone an individual with pre-existing anxiety." Moreover, "the offences also took place over a period of time rather than being a single episode. This again would take a significant toll [on the victim]." The offences on his record, Dr East accepted, would be such as would cause psychological harm.

- Nonetheless, Dr East felt that the psychological harm did not meet the standard of seriousness. It did not bring about "death, life threatening injury or injury from which recovery would be difficult or impossible." As Dr East put it:

> "I find it unlikely that the psychological harm suffered as a result of Mr Stewart's actions would be such that recovery would be difficult or impossible."

- Dr East's overall conclusion was that Mr Stewart's actions had not met the threshold of causing psychological harm that meets the criteria to be described as 'serious' and that there was no evidence to suggest they would be met in the future. In this regard, he took issue with the pre-sentence report

which had taken the view that the appellant presented as a significant risk of serious harm to others.

Reports prepared for the court by the Probation Board for Northern Ireland

[50] The Probation Board for Northern Ireland prepared three reports in respect of the sentencing of the appellant. The first was prepared on or about 19 March 2020; the second was prepared in September 2020; and the third was prepared following the receipt of the reports of Dr Mulholland and Dr East. All of these reports were available to and were considered by the judge.

[51] As regards the first of the three, it was prepared after the appellant's pleas had been taken. The report is short but offers the assessment that the appellant was and is a person at high risk of re-offending, taking into account his specific offending; his breach of suspended sentences and other court orders; and the content of other reports available. The author – Janet McClinton, a Probation Service Area Manager – indicated that the appellant "needs to engage with the forensic medical health team, as he needs to meet and manage his mental health to prevent further offending against further potential victims.

[52] As regards the second report, it is also written by Janet McClinton. It is more substantial and is based on a video-link interview with the appellant (who was at the time on remand at HMP Maghaberry); records held by the Probation Board; discussion with police; and the outcome of proceedings of a risk management meeting held on 22 September 2020.

[53] The report discusses the appellant's social and personal circumstances, laying some emphasis on a diagnosis the appellant had of paranoid schizophrenia and affective bipolar disorder together with his mental health difficulties and, in particular, his failure to engage with community health teams. The appellant is described by the author as "socially isolated" and as spending most of his time alone. It is also discussed that the appellant's offending behaviour and, in particular, his treatment of his victim, was an important factor. The author offered the view that the appellant appears to have caused significant psychological harm to the victim, as outlined in the victim impact statement. The appellant, the author also noted, acknowledged that he had ruminated over his relationship with the victim and felt she was the cause of him losing his job. It is further recorded that the appellant expressed remorse for the harm done to the victim. In the view of the Probation Board, it was assessed that "today's offences reflect similar recent offences committed by the defendant in that he ruminates on his thoughts of resentment due to perceived slight and then behaves inappropriately."

[54] The report records that the appellant was viewed, using the Probation Board for Northern Ireland ACE risk assessment tool, as being at high risk of re-offending.

[55] The report then goes on to deal with the issue of risk of serious harm to the public. In this regard the following passage is worthy of quotation, as the judge later accepted the view expressed therein:

> "PBNI assess an offender as a significant risk of serious harm if there is a high likelihood of an offender committing a further offence, causing serious harm, where serious harm is defined as death or serious personal injury, whether physical or psychological. Such an assessment reflects on past harmful behaviour and considers the balance between risk and protective factors. It is felt that the defendant has caused psychological harm to his current victim as evidenced by her victim impact statement.
>
> Mr Stewart appears before the court today for offences of a serious psychological nature with direction from the court to assess for serious harm. A risk management meeting to assess risk was held on 22 September 2020 and it was agreed that the defendant does have the pattern of offending behaviour which causes psychological harm with an escalation in seriousness in his offending behaviour. Therefore, he has been assessed as meeting PBNI's criteria for presenting a significant risk of serious harm to the public.
>
> While I understand the defendant's mental health is currently relatively stable within the confines of custody, concerns remain with regard to his willingness [to] engage in both physical and psychological behaviour whilst in the community. In relation to these current offences it has resulted in significant impact on a victim's life. Factors supporting this assessment include:
>
> - Mental Health
> - Limited victim awareness
> - Non-adherence to medication/misuse of drugs
> - Recklessness
> - Lack of consequential thinking
> - A developing pattern of aggressive behaviour
> - Propensity for carrying weapons
> - Previous non-compliance with PBNI supervision
> - Breach of various court orders."

[56] The reasoning above caused the author of the report to conclude that the appellant should be viewed as a person at significant risk of serious harm together

with a high likelihood of offending. In particular, his tendency to ruminate on a perceived slight, in the author's view, indicated that when his mental health needs are not met he would respond in a way which negatively affected the victim's peace of mind. Accordingly, he seemed to be unable to change his thought processes which is an aspect of his limited insight into his mental health and the impact of his offending on others. The author also noted that it was concerning that he had a history of carrying weapons.

[57] The third report from the Probation Board was also written by Janet McClinton. It appears to be a response principally to Dr East's report which the judge had supplied to her, though she had also read Dr Mulholland's two reports and other reports to which she refers.

[58] She noted that there was a significant difference in diagnosis as between the position adopted by Dr East and Dr Mulholland. This, she says, was a source of confusion which PBNI was not in a position to offer an opinion about.

[59] In this report, the author principally seeks to bring together the PBNI position. She states that PBNI's position was that Mr Stewart was "a very disturbed individual who does not reflect on his behaviour or the harm that he is psychologically causing." She goes on:

> "He seems to have anti-social traits … [and] it is vitally important to recognise that [the appellant's] behaviour has an impact on people from which they have not recovered. It is important to note the vulnerability element of his victims; this seems to reflect his attitudes in general."

[60] Janet McClinton then confirms PBNI's assessment of the appellant as creating a risk of serious harm.

Cross-examination of Janet McClinton

[61] The only one of those who provided reports who gave oral evidence before the judge was Janet McClinton who attended court on 22 December 2020 and was examined and cross-examined before the judge. Her evidence generated a lengthy transcript which was plainly the subject of the judge's consideration in the period between 22 December 2020 and the giving by him of his sentencing decision on 6 January 2021. In these circumstances this court does not propose to do more simply note some of the main features of the cross-examination.

[62] Much of the debate before the court related to the admissibility of the written evidence of Dr East and Dr Mulholland, in the light of the decision of this court in *R v McDonagh* [2015] NICA 24. This decision appears to draw a distinction between the role of a psychologist giving evidence in a case of this nature as opposed to that

of a psychiatrist. The Court of Appeal appears to have viewed the former as having a role but not the latter, at least in the generality of cases. The Court of Appeal had offered the view that in most cases where the issue is an assessment of dangerousness, psychiatric evidence will not be admissible. In respect of this argument, no ruling was made by the sentencing judge who adopted the view that he would facilitate a request made on behalf of Mr Stewart for a psychological assessment, if he so wished. As the judge put it:

> "It would be wrong of me not to allow [counsel for the defendant] the opportunity, at least, to address 'this one' [but] it is a discrete point … my job is to look at dangerousness in the round and perhaps in a more holistic way … I am not constrained by the expert reports nor am I constrained by the view of Probation. But what is important for me to do is to look at all of the information …"

[63] Counsel for the defendant decided he would speak to his client about the question of a further report, which he did. Having done so, he reported back to the judge that he wished to proceed with the case without pursuing any issue of obtaining any form of further report on the dangerousness issue.

[64] It therefore was the case that at the request of the defendant, the case was to proceed (which it did) but against the back cloth that the judge had indicated that he would consider the materials placed before him which he appears to have done.

[65] Thereafter, Janet McClinton was cross-examined along the lines of the differences between the views of PBNI and those of Dr East, in particular. As these have already been exposed at some length it is not proposed to replicate the course of that discussion.

The sentencing judge's decision

[66] The sentencing judge's handed down his sentencing decision on 6 January 2021. The transcript of it runs to some 13 pages but as this court has already summarised the main aspects of the evidence put before the sentencing court at the December 2020 hearing, it will be unnecessary to do more than to indicate that the sentencing remarks contain, *inter alia,* discussion of the background to the case, including a statement of the key allegations at the centre of the case; a resume of the victim impact statement; and a very detailed statement of the appellant's personal background and history. In addition, the sentencing judge provided a summary of aggravating and mitigating features of the index offences and extensive reference to Dr Mulholland's and Dr East's reports, together with a similar reference to the reports of PBNI. Next, the sentencing judge comments at some length upon the concept of dangerousness, setting out, *inter alia*, a substantial quotation of the correct legal approach taken from the case of *EB*, which in turn had taken it from *Lang*.

[67] At page 10, the sentencing judge, in the context of his assessment of dangerousness, stated that he had heard the Senior Probation Officer cross-examined on the contents of her statements in relation to the case. It is at this point he notes that he was satisfied that the test set out in such cases as *Lang*, *EB*, and *R v Wong* had been met with the consequence that he found the defendant dangerous in accordance with the terms of the 2008 Order.

[68] The judge than turned to consider his sentencing options, ultimately deciding that an ECS was the right option to take, and rejecting the more serious and draconian steps of imposing a discretionary life sentence or an indeterminate custodial sentence.

[69] At page 11, the judge indicated that he felt the case was one of high culpability on the part of the offender as the offender's conduct was intended to maximise fear and distress to the victim. He found that the offender's behaviour caused significant psychological distress to the victim, referring in this context to his "extensive and relevant" criminal record.

[70] Ultimately, the judge used a starting point of 18 months but then adjusted it upwards to 24 months to take into account aggravating factors. He then reduced it to 20 months to reflect the offender's plea of guilty. This would constitute the custodial element in the sentence. The extension applied by the judge was 24 months creating an overall ECS of 44 months. While on count one a sentence of 12 months was imposed, it was ordered to be served concurrently with the ECS.

Did the sentencing judge err in concluding that the appellant was a dangerous offender or in relation to the sentence he imposed?

[71] It is important that the court bears in mind the parameters involved in carrying out a consideration of the questions referred to above.

[72] The test of dangerousness is not to be viewed as boundary-less and the language of the statute has to be respected, as does the width of the inquiry carried out by the sentencing judge.

[73] As noted earlier, the appellant has accepted that the sentencing judge carried out an extensive inquiry, as is indeed evidenced by the summary of the materials which is to be found in this judgment, which includes only the main points.

[74] Mr Lyttle QC pointed out to the court that the courts have recognised that there implicitly are limits to the width of what is within the concept of dangerousness. In this regard he referred to the passage in *Lang*, where Rose LJ stated that:

> "It cannot have been Parliament's intention, in a statute dealing with the liberty of the subject, to require the imposition of indeterminate sentences for the commission of relatively minor offences. On the contrary, Parliament's repeatedly expressed intention is the protection of the public from serious harm."

[75] Similar remarks of Ouseley J were also cited to the court by Mr Lyttle from the case of *R v Terrell* [2007] EWCA Crim 3079. These refer to the provisions of the legislation being "interpreted purposively" and to those provisions not being applied "far more extensively than Parliament intended." As Ouseley J put it:

> "It is on the serious harm occasioned by the offender's re-offending which the Criminal Justice Act 2003 (the England and Wales provision) requires attention to be focussed."

[76] This court accepts that it needs to bear in mind and pay due regard to these statements, which it will proceed to do.

[77] But the role of the court – as an appellate court – has also to be viewed as having its limits.

[78] As noted in *R v Chowdhury* [2016] Cr Appeal R(S) 41 at 457:

> "The court will not normally interfere with a finding of dangerousness unless it can be shown that the sentencer has failed to apply the correct relevant legal principles or has reached a conclusion to which he was not entitled to come on the material before him."

[79] Similar language is found in the more recent case of *R v Howlett* [2020] 1 Cr App R (S) 14 where the Court of Appeal makes it clear, at paragraph 27, that:

> "we do not accept that *R v Bailey*…provides the court with a wide authority in sentencing in cases such as this. It will be a rare case in which an appellate court, which has not conducted the trial and seen the offender, would overturn on sentence an exercise of judicial discretion in relation to an assessment of dangerousness."

[80] Bearing all of the above in mind, the court must ask itself in the present case whether the sentencing judge has wrongly viewed the appellant as being a dangerous offender. On this question, the court is satisfied that the sentencing judge has committed no breach of legal principle and has not taken any step which he was

not entitled to on the material placed before him. In short, he acted within the ambit of his discretion.

[81] It is not in dispute that the judge had before him extensive and detailed evidential materials and he plainly gave careful consideration to them. He considered the appellant's background; his upbringing; his education; his employment; his health and, in particular, his mental health; his personal circumstances; his criminal record and the circumstances surrounding his offending. It has been possible for the court to go into substantial detail in respect of very many of these matters.

[82] Additionally, the judge had the advantage of being in receipt of reports from two psychiatrists which were tendered on behalf of the appellant by his legal representatives, though they suffered from at times being at odds with one another. Indeed, Dr East was critical of the approach taken by Dr Mulholland and largely dismissed it. No fewer than 3 reports were put before the court by the PBNI and the court had the benefit of seeing Janet McClinton give oral evidence and be cross-examined upon them.

[83] This court has no significant doubt that this is a case where the various factors relating to the issue of dangerousness were fully considered by the judge. The emphasis was on how he had behaved in the past; how he had treated the victim; the extent to which she had suffered, as evidenced *inter alia* by the victim impact statement and the need to protect the public from a repeat of the same or similar behaviour in the future. The judge's evaluation, in this court's view, implicitly if not explicitly, recognises that the standard of seriousness had been met, in the context of the effect of the appellant's actions *vis a vis* the victim. This was a judgment call for the judge and in our collective view it stands up to examination. The court will, therefore, uphold it, bearing in mind that in this sphere the particular facts of the case will ordinarily be the predominant factor for consideration. In our view, the sentencing judge's assessment is neither manifestly excessive nor wrong in principle.

[84] In respect of the elements within the ECS, the sentencing judge explained his reasoning as to how he calculated the custodial term and how he calculated the extension period. As regards the former, the choice of 2 years as the point from which to discount, in the context of this case where an ECS is being shaped, for an offender who comes before the court with a substantial criminal record is unexceptionable and well within the maximum penalty for the offence in question which was 7 years, especially when the principle of totality is borne in mind. As regards the latter, the use of an extension period of 2 years, given the function which it is to perform *viz* protecting the public from serious harm, is unobjectionable in a context where the statutory cap is 5 years[4]. The court can see no basis upon which it should intervene in respect of these matters and declines to do so.

[4] Paragraph [83] of *R v Cambridge* (supra) [2015] NICA 4

The Second Issue

[85] At the outset of these proceedings, as already mentioned, the appellant chose not to be tried in the magistrates' court. Rather he chose instead to be tried in the Crown Court. He appears to have taken this position because of the presence of count 2 on the indictment. At the time of so opting, the appellant had the benefit of legal advice and it cannot be in question that he will have known or have been warned that where the case is dealt with in the Crown Court any reasonable sentence can be imposed within the statutory maximum laid down in law.

[86] It is also the case, again as already mentioned, that once the case proceeds in the Crown Court, where a count before the court relates to a specified violent offence in respect of which the issue of dangerousness arises, this must be considered, for the purpose of the 2008 Order. In contrast, had that count on the indictment been tried in the magistrates' court the dangerousness aspect of the 2008 Order could not have come into play.

[87] It should be noted that the judge in the Crown Court, in fact, is bound to deal with the question of dangerousness where it arises and under the legislative scheme he or she must, if the offender is viewed as dangerous, impose one or other of the particular sentences available for use in this situation. Consistently with this, the judge in the present case imposed an ECS, which is the least severe of the sentences available to him.

[88] The appellant, in relation to this second issue, suggests that by virtue of common law authorities the sentencing judge ought to have moderated the sentence he imposed to take account of the fact that initially the counts on the indictment could have been dealt with in the magistrates' court and that, if this had occurred, a lesser sentence would have been imposed.

The Authorities

[89] The legal authorities upon which reliance is placed by the appellant are *R v Finkle* [1988] 7 NIJB 78 and, more recently, *R v Kennedy and Kennedy* [2011] NIQB 42.

[90] The court considers that the case of *Finkle* should be treated with a measure of reserve, as the issue which arose in that case arose in passing and there is little sign of extensive argument or the citation of authority in respect of the point now at issue.

[91] In *Finkle* the Court of Appeal was considering an appeal against sentence on the part of an appellant who had been found guilty of shoplifting. It appears that the appellant could have chosen to have had the proceedings dealt with at first instance in the magistrates' court but he chose instead to have them dealt with in the Crown Court.

[92] Lord Lowry LCJ, speaking for the court, at one point remarked as follows:

> "We also bear in mind what was likely to have happened to him if he had elected for trial by the magistrates' court. It is not a principle that accused persons must be especially heavily sentenced if they avail of their right of going to the Crown Court in certain cases, such as accusations of theft, which could have been tried by a magistrate. If Parliament sees fit to keep open that kind of option for accused persons, the exercise of that option should not be discouraged by the implied sanction of not only a heavier sentence that the magistrate might have inflicted, but a sentence which would really be out of all proportion to what the magistrate would have done."

The learned judge then went on, on behalf of the court, to reduce the sentence which had been imposed.

[93] It seems to this court that *Finkle* needs to be read carefully. On one view, the most it says is that it is not a principle that an accused person must be especially heavily sentenced if they avail of their right to go to the Crown Court in certain cases which could have been tried by a magistrate. Avoiding, if possible, the Crown Court acting out of all proportion to the way a magistrate might reasonably have dealt with the matter appears to be viewed as a factor which can be placed in the balance and considered, where appropriate on appeal, at least in some cases.

[94] The case of *Kennedy and Kennedy* related to an appeal to the Court of Appeal against sentence in respect of attempted robbery and assault charges. This was not, however, a case in which the two appellants had opted for trial in the Crown Court.

[95] At the Crown Court the trial began but after a period the prosecution offered to drop the attempted robbery charge against the first-named defendant if there were pleas by the defendants in respect of the common assault charges. This was agreed to and in due course an agreed statement of facts was drawn up on this basis. At the sentencing hearing an argument deployed by the defence (which was not disputed by the prosecution) was that if there had not been a count relating to attempted robbery the whole case would have been dealt with at the magistrates' court and a much lesser penalty would have been imposed. At the Crown Court the trial judge imposed sentences of 9 months' imprisonment but in each case the Court of Appeal reduced the sentence, citing *R v Finkle* upon which the defendants had relied.

[96] Following his consideration of the arguments, Morgan LCJ, speaking for the court said:

> "The appellants place considerable reliance on the decision of the court in *R v Finkle* … that was a theft case in which the appellant had elected for trial before a jury. The court indicated that it should bear in mind what was likely to have happened to the appellant if he had elected for trial in the magistrates court when considering the sentence that should be imposed. It concluded that an accused person should not be especially heavily sentenced because of exercising their right to go to the Crown Court. The issue in each case is whether the sentence was out of proportion to what the magistrate would have done.
>
> We accept that in a case of this kind the same general principles apply. The applicants did not elect to go to the Crown Court but were dealt with there because of a charge no longer pursued by the prosecution. That does not mean that the sentence cannot exceed the maximum which the magistrates' court can impose but it is relevant to examine the sentence to see whether it is out of all proportion to what the magistrates might have done."

[97] Notably, at a later stage in his judgment, the Lord Chief Justice specifically indicated that "neither applicant [was] assessed as posing a risk of serious harm to the public."

Assessment

[98] It seems to this court that there are factors in this case which are different from those at issue in relation to the two cases cited. In particular, the court considers that it is obliged to have regard to the fact that the regime under the 2008 Order in respect of dangerousness was in play in the present case and had to be pursued by the Crown Court, as the statutory scheme demands. This is not a case where the issue, properly analysed, is about carrying out a comparison between what might have happened in the magistrates' court and what did or might have happened in the Crown Court. What counts in a case of this nature is the outcome of the dangerousness process, which is mandated in law and which cannot be run in the magistrates' court. While the situation might be different if either this court or the court below had concluded that the appellant did not fall into the category of a dangerous offender, it seems to us that where the Crown Court has found the offender to be within the category of a dangerous offender, he then must be sentenced as such. This does not involve any obligation of the nature of that found in *Finkle* or *Kennedy* but does involve an obligation to act consistently with the carefully composed statutory regime which is underpinned by the objective of protecting the public from serious harm. In considering how best to achieve this, the Crown Court, in effect, is invited to have regard to a wide range of factors which

may be relevant. This is what occurred here and we do not think that the sentencing judge can be criticised for sentencing the appellant in a way which reflects the purpose of the legislative scheme.

[99] The court has, in any event, considered whether it should alter the sentence arrived at by the sentencing judge, having regard in particular to *Finkle* and *Kennedy*. It concludes that it should not, as the outcome which the sentencing judge arrived at appears to us to have been the product of a careful examination of the relevant factors in this case[5].

Conclusion

[100] This court dismisses the appellant's appeal for the reasons which it has given and upholds the decision of the sentencing judge.

[5] This is not a case where the sentencing judge will have been unaware of *Fingle* and *Kennedy* as the argument under discussion was raised with him in the course of the sentencing hearing. He does not, however, refer to it in his decision