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Judgment: approved by the Court for handing down | *Delivered:* **28/06/2013**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

TODD NEWTON, RUARI DOEY AND STEVEN DOHERTY

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBERS 8, 9 & 10 of 2013)

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is a reference by the PPS of sentences imposed by Judge Marrinan at Antrim Crown Court on 22 April 2013 on their pleas to the offence of attempted grievous bodily harm with intent. Newton was sentenced to twelve months detention suspended for three years. Doey was sentenced to a Juvenile Justice Centre Order of six months detention followed by six months supervision. Doherty was sentenced to a determinate custodial sentence of three years detention with eight months custody followed by a licence period of twenty-eight months.

Background

[2] At approximately 5 pm in the early evening of 21 December 2011 the injured party was in Coleraine town centre with two friends. He was passing time until his bus arrived and was standing at a shopping arcade close to the Diamond. He observed the offenders, whom he knew to see from around the town, walk towards him. The offender Doherty asked him "Are you going to slabber again?" This was apparently a reference to some comment that allegedly had been made by the injured party or some of his friends about Doherty's mother. The injured party

stated that he had nothing to do with him. The offender Doherty then said "you won't any more after this". Doey then struck the injured party to the right side of his face without warning, causing him to stumble forward. As he did so he was punched to the area of his mouth by Doherty and fell to the ground falling down a set of steps.

[3] What happened thereafter was captured on CCTV. He was kicked by all three offenders. Newton delivered two kicks to the body at the beginning of the CCTV which the recording suggests were rather less forceful than those of his co-accused. Thereafter he remained present watching what occurred without taking any active part. Doey and Doherty continued to kick the injured party as he lay on the ground. Doherty delivered several athletic stamping kicks to the injured party's head as he tried to protect himself. Doey punched and kicked the injured party repeatedly to his head and body and as the attack came to an end delivered a stamping blow to the injured party's head.

[4] The learned trial judge correctly stated that the manner in which this young boy was set upon by these three offenders was chilling to watch and must have engendered considerable fear in those who were unfortunate enough to see the incident develop. Members of the public had to run from the bottom of the steps to avoid getting caught up in the attack and the vicious nature and intensity of the kicking was the undoubted reason why no member of the public felt able to go to the rescue of the injured party.

[5] Fortunately, the injured party received only minor physical injuries consisting of an abrasion to the left temple area and was able to summon the assistance of a passing police officer. He made a statement stating that he is now nervous and afraid to go out in case he meets his attackers. He has received counselling. We agree with the learned trial judge that a professionally prepared report would have been of greater value to the sentencer.

[6] The prosecution case against all three offenders was strong in light of the extensive CCTV footage which graphically depicted the nature and extent of the attack. It included DNA evidence from the presence of the injured party's blood on the offender Doherty's footwear in addition to the identification of the offenders by the injured party. The offenders Newton and Doey admitted their involvement in the attack in the course of their respective police interviews after they had seen the CCTV footage. The offender Doherty remained silent throughout his interviews and refused to answer any of the questions put to him by police.

[7] The offenders were arraigned at Antrim Crown Court on the 20 December 2012 and pleaded not guilty to counts of Attempted Grievous Bodily Harm with Intent and Affray. We were advised at the hearing without objection by the prosecution that pleas to affray and assault occasioning actual bodily harm were offered at this stage. The case was listed for trial at Antrim Crown Court on 6 March

2013. On 22 February 2013, Doey and Doherty were re-arraigned and pleaded guilty to Attempted Grievous Bodily Harm with Intent. On the 26 February 2013, Newton was re-arraigned and pleaded guilty to Attempted Grievous Bodily Harm with Intent. The count of Affray was not proceeded with.

[8] There is one further important aspect of this case which arises from the papers. This was not an isolated incident. The evidence indicates that confrontations have occurred and continue to occur between groups of youths from different localities in Coleraine which have resulted in street violence of the type with which we are dealing in this case. What is more disturbing is that two of those being dealt with in this appeal have been involved in previous similar incidents. Counsel believed that the learned trial judge was informed of this background but we note that there was no mention of it in the sentencing remarks. It seems to us highly unlikely that the learned trial judge was aware of the full background since it was clearly relevant to the determination of the correct sentence and the references to the antecedents of the appellants in the careful and comprehensive sentencing remarks did not include these matters.

Sentencing guidelines

[9] The use of gratuitous violence by young males has been a persistent problem for many years. In R v Coyle [NICA 11/06/97] MacDermott LJ noted that those who injure others by kicking will suffer condign punishment. The fact that offenders are young is not a reason why they should not be punished severely when they behave in this vicious manner. In R v Carlin [NICA 11/07/97] Carswell LCJ dealing with a case of kicking and stamping by a 15 year old said that the element of deterrence required to stop such behavior must be large and must override the factors which would otherwise tend to keep such sentences down, such as good character and the youth of the offender.

[10] It is a disturbing aspect of the work of this court that in recent years there has been an increasing prevalence of such violence. In R v Magee [2007] NICA 21 the court noted that shocking instances of gratuitous violence by kicking defenceless victims while they were on the ground were common in the criminal courts. As noted by the learned trial judge this court gave guidance on the appropriate sentencing range for cases of this type in DPP's Reference (Nos 2 and 3 of 2010) McAuley and Seaward [2010] NICA 36 at paragraph 7.

> "We consider that the sentencing range identified in McArdle of seven to fifteen years imprisonment after conviction on a contest is generally appropriate where the offence under section 18 is committed by attacking a victim who is lying on the ground with a shod foot with intent to cause him grievous bodily harm. In virtually every case the fact that an attack of

> this kind is launched will of itself be an indicator of high culpability in the commission of the offence under section 18. The place within this bracket will generally be determined by the extent of the harm caused and any other aggravating and mitigating factors. Exceptionally there may be cases of slightly lower culpability, such as where only one blow was struck, and where the harm caused is at the lower end of the scale which would justify a marginally reduced starting point."

[11] The Sentencing Guidelines Council for England and Wales has now published its definitive guidance for this offence. Among the factors indicating higher culpability is the use of a weapon such as a shod foot. Where the culpability is high and the harm low the starting point is 6 years imprisonment with a range of 5 to 9 years. A criminal record for previous similar conduct is identified as a factor increasing the seriousness of the offence within the bracket. We have previously indicated that we generally find it helpful to take into account the aggravating and mitigating factors identified by the Council although the sentencing ranges chosen by us will generally allow the sentence a greater degree of flexibility.

[12] R v Joseph [2001] 2 Cr App R (S) 88 is a helpful authority on the approach which should be taken to the sentencing of young people and the manner with which an attempt should be dealt. In that case the appellant, aged 14 at the time of the offence, was convicted of attempted robbery. The appellant and a group of others, including a young woman, approached a man who was on his way home from work and carrying a laptop computer. The young woman asked the man for money. When he refused to give her any money, she became abusive and flicked his spectacles off, causing them to fall to the ground. The appellant then went up to the man and punched him in the face and head butted him. As he did so, he told the others to take the man's wallet and computer. The appellant produced a knife with a four inch blade and the man ran off. The appellant and one of the others chased him and forced him to the ground. The man managed to hold on to his computer and run away. The appellant was sentenced to three years detention.

[13] On appeal the court said that it was universally accepted that when sentencing a person of the age of 14 or 15, the appropriate sentence would almost always be shorter than that which would be appropriate for an adult. A balance was required between the youth of the offender and deterrence and the effect of a long sentence on the perception of the offender. The court has also to consider the gravity of the offence which has been committed. A further consideration was that attempted offences usually carried a lesser sentence than that imposed for the commission of the full offence. That was not a potent factor in that case because it was only the determination of the victim which prevented the offence from being carried out. The important features of the case were that the appellant was convicted

after a trial; the robbery was committed at night; the appellant was with others but took a prime role; the robbery took place at a location where robberies were very prevalent. The Court had concluded that the sentence was not manifestly excessive or wrong in principle.

[14] The leading authority on the sentencing of children in this jurisdiction is R v CK, a minor [2009] NICA 17. The court identified the aims of the youth justice system in section 53 of the Justice (Northern Ireland) Act 2002.

> "53 Aims of youth justice system
>
> (1) The principal aim of the youth justice system is to protect the public by preventing offending by children.
>
> (2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.
>
> (3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

[15] It also recognised the weight to be given to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules) and the United Nations Convention on the Rights of the Child (UNCRC) when considering how to deal with juvenile offenders. Paragraph 5 of the Beijing Rules states that deprivation of liberty should only be imposed after careful consideration. It should be for a minimum period and should be reserved for serious offences. It is clear, however, that where children are convicted of serious offences substantial periods of detention may be required and specific provision for this is contained in Article 45(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 (the 1998 Order).

[16] The 1998 Order also contains special provision in relation to detention of children at juvenile justice centres in Article 39.

> "39 (1) Where a child is found guilty by or before any court of an offence punishable in the case of an adult

> with imprisonment (other than an offence the sentence for which is, in the case of an adult, fixed by law as imprisonment for life), the court … shall have power to make a juvenile justice centre order, that is to say, an order that the child shall be sent to a juvenile justice centre and be subject to a period of detention in a juvenile justice centre followed by a period of supervision.
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> (2) A juvenile justice centre order shall be for a period of six months unless the court specifies in the order a longer period not exceeding two years."

The individual cases

Doherty

[17] Doherty was 18 at the time of the offence and is now 20. He was the instigator of the incident and played an active and leading role. He enthusiastically lent himself to the enterprise. It was a matter of good fortune that no serious physical injury was caused to the injured party and one can well understand why he might be fearful of meeting these attackers again. This attack took place in the public street in full view of members of the public using the shopping and transport facilities in the vicinity. The attack was carried out by a number of attackers. Doherty had previously carried out common assaults in the public streets of Coleraine on 5 February 2011 and 8 July 2011 along with Doey as part of some street or gang feud and this was a continuation of it. He also had one other conviction for common assault but the circumstances of that conviction were not available. The pre-sentence report suggested that this was also precipitated by inter group rivalry. Where such convictions are material to the sentence the details should be provided to the court by the prosecution and if possible agreed with the defence.

[18] In mitigation Mr Mallon QC accepted that Doherty had not co-operated at interview even when shown the CCTV and that there was overwhelming evidence by virtue of the recording. He pointed out, however, that Doherty had in fact offered a plea of guilty to affray and assault occasioning actual bodily harm at an early stage and was entitled to some credit for that. Very little credit should be given for the absence of harm in this case since that was entirely a matter of good fortune. He and his family have been subject to attack by paramilitaries and his father was shot in both legs while protecting his son. As a result the pre-sentence report noted his complaint that the appellant's mental health had been adversely affected. He has a history of drug misuse. No medical evidence was available to indicate the nature and extent of his condition. For the reasons we have given his youth was not a significant factor in this sort of case. The pre-sentence report noted some degree of remorse.

[19] This was a case of high culpability and entirely fortuitously low harm. The previous conduct of the appellant was a serious aggravating factor. Making every allowance for the mitigation the sentence on a contest would have been somewhere close to 7 years imprisonment. Giving him the maximum possible allowance in the circumstances for his plea the minimum appropriate sentence was 5 years imprisonment. We consider, therefore, that the determinate custodial sentence of 3 years was unduly lenient. We have taken into account double jeopardy and substitute for that a determinate custodial sentence of 4 years.

[20] In his sentencing remarks the learned trial judge decided to temper justice with mercy by reducing the custodial element of the sentence well below 50%. We have recently dealt with a number of cases where judges have taken this course. We have considered the statutory scheme in Article 8 of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order) in DPP's Reference (No 2 of 2013) (Gary McKeown) [2013 NICA 28. This decision would not of course have been available to the learned trial judge at the time of passing sentence. The determination of the custodial period does not give the sentencer a chance to revisit mitigation. That should be taken into account when selecting the appropriate sentence. There may be material, usually in the pre-sentence report, which indicates some benefit from an extended licence arrangement which might assist in protecting the public from harm and preventing the commission by the offender of further offences. It is to that kind of case that these provisions are directed.

[21] In this case the pre-sentence report assesses the appellant as presenting a medium likelihood of reoffending. The report concludes that his professed motivation to change can only be properly tested post sentence. There is no material which engages Article 8 of the 2008 Order. Accordingly we impose a determinate custodial sentence of 4 years consisting of 2 years custody and 2 years on licence. The periods already served on remand and sentence should be taken into account.

Doey

[22] Doey was 14 years and 8 months old at the time of the offence. He is now 16 years and 3 months. He lent himself vigorously to this enterprise. The aggravating factors in his case are broadly the same as those in Doherty. He has previously engaged on 5 February 2001 and 8 July 2011 in fighting between groups of youths in the streets of Coleraine and accepted youth conference orders on each occasion. It was quite shocking to see such a young person engage in such a vicious way in this attack.

[23] We accept that his youth distinguishes him from Doherty and he also made admissions once shown the CCTV. The pre-sentence report paints a picture of a poor home life with an absence of boundaries. The report noted that his mother would have particular difficulties being available for him over the summer because of her

work difficulties. It was to his credit, however, that while in the Juvenile Justice Centre he had engaged fully in education, offence focused work and diversionary activities. He was released from the Juvenile Justice Centre on 27 May 2013 having completed his detention. It is perhaps an indication of how prevalent these confrontations between youths have become that he has already been involved in 2 incidents on 9 June and 13 June where there was public disorder involving groups of youths. His counsel advised us that he was a victim on both occasions. He has a history of alcohol and drug misuse. The pre-sentence report suggests that the volatile nature of his relationship with his mother is likely to lead to accommodation issues in the foreseeable future.

[24] This was a difficult sentencing exercise. The learned trial judge may not have been aware of the extent of the appellant's previous involvement in street violence. His actions in this case raise serious issues concerning the protection of the public which need to be set beside his youth. We consider that the need for deterrence in this case was significant. We consider that the minimum appropriate sentence on a contest was 4 years detention reducing to 3 years because of his plea. We note that he has benefitted from his time in the Juvenile Justice Centre and in light of his age we should take that into account. We also recognize that an increase in his sentence will require him to return to detention which will be difficult for him. We impose a Juvenile Justice Centre Order of 2 years. His earlier periods in custody should be taken into account.

Newton

[25] Newton was 17 years and 9 months old at the time of the offence and is now 19 years old. Like the learned trial judge we consider that he is in a different position from his co-accused. He has pleaded to his part in the enterprise and he is therefore fixed with the intention to do serious harm to the injured party. He delivered kicks to him while he lay on the ground and waited in the vicinity while his co-accused persisted in the most serious aspects of the assault. He also has a record for common assault and disorderly behaviour. He committed a further offence after this attack on 24 March 2012 when he threw a bottle of wine when he was refused service in an off licence. He does not, however, have any record for this kind of street violence.

[26] Although he was introduced at an early age to alcohol and drugs the pre-sentence report indicates that he has made very considerable progress since this incident. He has been involved with the Youth Justice Agency since February 2012 and completed his community responsibility orders successfully. Since August 2012 he has continued to work with the Agency on a voluntary basis. He has completed the Princes Trust programme and the Stride programme and has shown great leadership qualities. The Youth Justice Agency has noticed a positive change in his attitude and behaviour and this also seems to accord with the experience of police.

[27] We accept that Newton's responsibility should lie below that of Doherty. He was not an instigator nor was he an enthusiastic participant but he was still part of

an enterprise which might well have inflicted catastrophic injuries on the victim and which intended to do him serious harm. In our view the culpability arising from his part in the enterprise is not reflected in a sentence of 12 months detention which we consider is unduly lenient. Making every allowance for his plea and the other mitigating factors we consider that a sentence of 3 years detention allowing for his plea and double jeopardy is appropriate. We agree with the learned trial judge, however, that his is a young man who may well have turned an important corner in his life. We consider the matters contained in the pre-sentence report make this an exceptional case. We will, therefore, suspend the sentence of 3 years detention for a period of 3 years.