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

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

EDWARD STUART CAMBRIDGE

Before: Girvan LJ, Gillen LJ and Treacy J

GILLEN LJ (giving the judgment of the court)

Introduction

[1] The appellant, following pleas of guilty on arraignment at Belfast Crown Court, was sentenced on 27 June 2014 and 3 July 2014 to an indeterminate custodial sentence of five years imprisonment on a count of robbery contrary to Section 8(1) of the Theft Act (Northern Ireland) 1969 and concurrently an extended custodial sentence of two years plus a licence period of three years for an offence of assault occasioning actual bodily harm contrary to Section 47 of the Offences Against Person Act 1861. Two other counts, namely of burglary and threats to kill to which he had pleaded not guilty, were ordered to be "left on the books". His total sentence was therefore an indeterminate custodial sentence of five years.

Grounds of Appeal

[2] The grounds of appeal can be separated into three categories:

(i) That the applicant's criminal record and the instant offences did not justify a finding of a significant risk of serious harm to the public occasioned by commission of further specified offences i.e that he was dangerous (ground 1).

(ii) That an indeterminate custodial sentence was not justified (ground 2).

(iii) That the learned trial judge's conclusion that a determinate sentence would have been one of ten years imprisonment was manifestly in error (ground 3).

Leave

[3] Burgess J granted leave to appeal on grounds 1 and 2. Leave was refused in respect of the appeal on ground 3.

The factual background

[4] In the early hours of 30 June 2013 a 58 year old woman suffering from numerous medical conditions which included spinal problems, arthritis and asthma was at home in her apartment in sheltered accommodation for the elderly or infirm. The appellant entered her flat shouting "Where is your money?" and asking for her bank account details. He then repeatedly punched her about the head saying to her "Do you know who I am? I am Gary Wade from Mount Vernon. Where is your money? I am going to kill you".

[5] The victim, in fear of her life, summoned police by telephone and the accused left her property with her blackberry telephone and a few loose coins. The police responded to the call and shortly thereafter arrested the appellant on the Shore Road in Whitewell carrying a leather belt.

[6] The victim was taken to the Mater Hospital where Dr Boyle records her injuries as:

> "On examination her right eye was bruised and swollen. There was bruising to the upper lip and a laceration to the inside of her lip. There was some soft tissue swelling of the forehead."

She also sustained an injury to her thumb whilst trying to protect her head and a welt mark on her leg.

[7] A victim impact report indicated that the offences had a very significant impact on the victim and concluded that she was suffering post-traumatic stress disorder as a result of the applicant's offending. A report dated March 2004 from Dr Michael Patterson, consulting clinical psychologist, diagnosed that she was suffering from post-traumatic stress disorder, a debilitating condition which has a marked effect on one's psychological and social functioning. He suggested referral to her general practitioner and to clinical psychology services in her local area for therapies treating this disorder. The symptoms were described by him at that time to include re-experience of the event, not leaving her home, apprehension about opening the door, inability to watch television programmes with themes of violence,

and increased levels of psychological and emotional arousal with poor concentration.

[8] The appellant, when interviewed by the police, denied involvement. Subsequently the victim had to attend an identification parade where she picked out the applicant. Thereafter DNA profiling evidence unequivocally connected the appellant to the offences. On 21 March 2014 he pleaded guilty on arraignment to the counts of robbery and assault occasioning actual bodily harm.

The appellant's previous convictions

[9] The appellant has 27 previous convictions dating back to 2004 when he was aged 12 and was convicted of criminal damage and common assault. Thereafter his record comprises two convictions for burglary, three for theft, one for assault, one for assault occasioning actual bodily harm, one for aggravated assault on a female or boy under 14, five for criminal damage, one for obstructing police, one for possessing an offensive weapon in a public place and one for sexual assault of a child under 13. The remaining offences comprise road traffic offences. In particular it is to be observed that at the time the instant offences were committed, the appellant was six months into a three year probation order imposed for the sexual assault of a child under 13. As part of this order he had completed 12 sessions with a substance abuse counsellor and had been attending a literacy and numeracy counsellor. In addition, the instant offences were committed two weeks after the imposition of a nine month sentence suspended for two years for assault occasioning actual bodily harm.

Pre-sentence reports

[10] A pre-sentence report described the appellant as having a troubled background, elements of which included his father's drug use and imprisonment, domestic violence, separation of his parents and his own significant use of alcohol and drugs.

[11] Whilst expressing remorse about the instant offences, he was unable to explain his actions in any great detail or describe his emotional state because he asserted he could not remember the events.

[12] The probation officer's report concluded that the offences were indicative of a return to a past lifestyle which was unstructured, aimless and fuelled largely by substance abuse which further heightened impulsivity, poor decision-making and problem solving skills. It was suggested that these offences represented a capacity to cause harm when intoxicated which increased his potential volatile, unprovoked and violent behaviour.

[13] The report went on to observe that prior to these offences he had been in contact with the Probation Service and other agencies in the context of the probation order but had not caused any concerns and the lifestyle issues evident in the current offences had not been apparent.

[14] The appellant was assessed as presenting a high likelihood of re-offending and it was noted that he had four adjudications whilst in prison and had failed a drugs test.

[15] As regards "dangerousness", he was assessed as presenting a significant risk of serious harm with the factors identified including impulsiveness, substance misuse, volatility, unpredictability, violence, poor coping skills, poor emotional management, accommodation instability and lack of social supports.

[16] We observe that in this report the Probation Service fell into error in describing previous offences as matters of "serious harm" which they clearly are not. However the learned trial judge did not fall into this trap and this error played no part in her conclusions.

The report of Dr Loughrey consultant psychiatrist

[17] Dr Loughrey reported on the mental health of the appellant at the request of his lawyers. Dr Loughrey had produced two reports. In his earlier report he recorded that the appellant had decided against seeing anyone about treatment whilst in prison. In his second later report, he also noted that the appellant had failed to attend mental health services on numerous occasions. He concluded "All that can be said at this stage is that there is certainty that this man should address his harmful use of alcohol and drugs and that he may have significant mental health problems, whether depression or psychosis, in addition to, but not independent of, his abuse of alcohol and drugs."

[18] It is important in the context of this case to record that these reports do serve to provide a diagnosis of the appellant's condition. Dr Loughrey diagnosed the appellant's condition as depression with paranoid ideas contributed to by harmful use of alcohol and drugs. Reviewing the general practitioner's records, he found confirmation for his diagnosis with reference to significant emotional problems and at times psychotic symptoms. Addressing his harmful use of alcohol and drugs was a pathway forward which he outlined. He drew attention to the fact that the appellant may have mental significant health problems in addition to, although not independent of, his abuse of such alcohol and drugs. Nothing in his findings contradicted the findings in the pre-sentence report in relation to the appellant's likelihood of re-offending.

The sentencing remarks of the learned trial judge

[19] The trial judge, having invoked guidance from the leading legal authorities, concluded that this applicant did pose a significant risk of serious harm. It was her view that an extended custodial sentence would not be adequate to protect the public from serious harm. Essentially she based this finding on the reports about the applicant, the circumstances of his current and prior offending, and in particular the fact that he was currently on a probation order and a mere two weeks into his suspended sentence when the instant offences occurred.

[20] The trial judge determined that a starting point in the case of robbery of a householder where violence is used was one of ten years imprisonment and observed that in appropriate cases a sentence of 15 years would not be excessive. Properly she drew attention to the fact that such robberies may have a destabilising effect on other people living in the same community in circumstances similar to those of the victim in this case.

[21] Adopting the conventional guidelines, she indicated that an appropriate determinate sentence would at a minimum have been 10 years comprised of 5 years custody and 5 years on licence.

Statutory background

[22] The offence of robbery is a serious offence and a specified violent offence for the purpose of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order). Article 13 of the 2008 Order provides for the imposition of an indeterminate custodial sentence as follows:

> "13.-(1) This Article applies where –
>
> (a) A person is convicted on indictment of a serious offence committed after 15 May 2008; and
>
> (b) The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
>
> (2) If –
>
> (a) The offence is one in respect of which the offender would apart from this Article be liable to a life sentence; and

(b) The court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence,

the court shall impose a life sentence.

(3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall –

(a) impose an indeterminate custodial sentence; and

(b) specify a period of at least two years as a minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[23] Article 14 of the 2008 Order deals with the imposition of an extended custodial sentence in the following terms:

"14.-(1) This Article applies where –

(a) A person is convicted on indictment of a specified offence committed after 15 May 2008; and

(b) The court is of the opinion –

(i) That there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and

(ii) Where the specified offence is a serious offence, that the case is not one which

the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence.

(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of –

(a) The appropriate custodial term; and

(b) A further period ('the extension period') for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.

……

(8) The extension period under paragraph (3)(b) or (5)(b) shall not exceed –

(a) five years in the case of a specified violent offence ….."

[24] The assessment of dangerousness is dealt with in Article 15 of the 2008 Order in the following terms:

"15.—(1) This Article applies where—

(a) a person has been convicted on indictment of a specified offence; and

(b) it falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission of the offender of further such offences.

(2) The court in making the assessment referred to in paragraph (1)(b)—

(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."

Discussion

Ground 1 –A significant risk of serious harm?

[25] Clearly the appellant had been convicted on indictment of a serious offence, namely robbery, as contained in Schedule 1 of the Order.

[26] This court shares the opinion of the learned trial judge that the appellant presented a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

[27] R v Wong (2012) NICA 54 is instructive in this regard. Citing with approval R v Pedley and Others (2009) EWCA Crim. 840, Wong is authority for the proposition that in addressing the question whether the risk of serious harm is significant, the judge is entitled to balance the probability of harm against the nature of it if it occurs. The harm under consideration must of course be serious harm before the question even arises. At paragraph [11] Morgan LCJ cited the following extract from Pedley:

> "But we agree that within the concept of significant risk there is built in a degree of flexibility which enables a judge to conclude that a somewhat lower probability of particularly grave harm may be significant and conversely that a somewhat greater probability of less grave harm may not be."

[28] In short each case is fact specific based on a careful analysis of all the relevant facts in each particular case.

[29] In coming to our conclusion we have considered the guidance given in R v Lang (2005) EWCA Crim. 2864 (in respect of identical provisions in the Criminal Justice Act 2003) which was cited with approval in R v EB (2010) NICA 40 at paragraph [10]:

"(i) The risk identified must be significant. This was a higher threshold than mere possibility of occurrence and could 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 demonstrated any pattern; social and economic factors in relation to the offender including accommodation, employability, education, associates, relationships and drug or alcohol abuse; and the offender's thinking, attitude towards offending and supervision and emotional state. Information in relation to these matters would most readily, though not exclusively come from antecedents and presentence probation and medical reports. The sentencer would be guided, but not bound by, the assessment of risk in such reports. A sentencer who contemplated differing from the assessment in such a report should give both counsel the opportunity of addressing the point.

(iii) If the foreseen specified offence was serious, there would clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm. For example, robbery was a serious offence. But it could be committed in a wide variety of ways, many of which did not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there was a significant risk of serious harm merely because the foreseen specified offence was serious. A pre-sentence report should usually be obtained before any sentence was passed which was based on

significant risk of serious harm. In a small number of cases, where the circumstances of the current offence or the history of the offender suggested mental abnormality on his part, a medical report might be necessary before risk can properly be assessed.

(iv) If the foreseen specified offence was not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant. Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, did not give rise to significant risk of serious harm."

[30] Without conducting an audit of all the factors set out in Laing, the following matters satisfied this court that the applicant came within the category of Article 13(1)(b). First, the risk factors adverted to in the pre-sentence report (see paragraphs 10 et seq of this judgment).

[31] Secondly, his previous convictions. Mr Campbell, who appeared on behalf of the appellant and who presented this appeal in exemplary fashion, contended that the applicant's previous criminal record did not include offences where the appellant had inflicted serious harm on his victims on any occasion and the instant case, albeit terrifying for the victim, had occasioned no serious or grave injuries. Whilst there may be some substance in that assertion relating to his previous convictions we do not agree with this assessment of the instant offences. It overlooks entirely the psychological effect on this woman. The learned trial judge correctly recorded that, although only 23 years of age, he has already amassed 27 previous convictions for various types of offences and there is an air of gathering momentum about this violent offending. The instant offence was committed two weeks after the imposition of a nine month suspended prison sentence imposed at Ballymena Magistrates' Court for an assault occasioning actual bodily harm and six months into a three year probation order for a sexual assault of a child under 13. He also had a previous conviction in 2010 for an aggravated assault on a child under the age of 14. The current offence—yet another example of a bullying attack on a vulnerable person -- was without doubt a significant escalation in the pattern of offending and a serious matter in which the physical harm may well have been much less serious and of shorter effect than the psychological harm inflicted on this defenceless and infirm woman.

[32] Thirdly it was a troubling feature that not only had he been non-compliant with the prison regime and failed to avail of help whilst there, but he had demonstrated to the satisfaction of the author of the pre-sentence report that he presents as someone with an inability to learn from past mistakes and presents a high likelihood of re-offending.

[33] The learned trial judge correctly invoked the assistance of the guidelines in R v EB and in our view her conclusion that he does propose a significant risk to members of the public of serious harm occasioned by the commission of further such offences of violence is flawless. We therefore reject ground one of his appeal.

Ground 2 –the indeterminate sentence

[34] Neither the learned trial judge nor this court considered that the case fell within the ambit of Article 13(2) requiring the imposition of a life sentence.

[35] Turning to Article 13(3), the learned trial judge concluded that an extended custodial sentence would not be adequate to protect the public from serious harm in this instance. She based that on an overall view of the case and "significantly on the fact that this accused was on probation at the time of the commission of these offences having been imposed just six months prior to this incident and also had been in court two weeks prior to this incident on an assault charge and had had a suspended sentence imposed".

[36] It is at this point that we depart from the findings of the learned trial judge. We pause to recite extracts from the judgment of Morgan LCJ in R v Pollins (2014) NICA 62 – a case which the learned trial judge did not have the advantage of seeing as it occurred after the instant matter-- which dealt with the concept of indeterminate custodial sentences in the following terms:

> "[26] The central issue in this case concerned the approach to the imposition of an indeterminate custodial sentence. Although the sentence of imprisonment for public protection has now been abandoned in England and Wales some of the earlier case law is relevant. We have been significantly assisted by the observations of Lord Judge in AG Reference (No 55 of 2008) [2008] EWCA Crim 2790. Apart from a discretionary life sentence an indeterminate custodial sentence is the most draconian sentence the court can impose. A discretionary life sentence is reserved for those cases where the seriousness of the offending is so exceptionally high that just punishment requires that

> the offender should be kept in prison for the rest of his life. It is not a borderline decision …An indeterminate custodial sentence is primarily concerned with future risk and public protection …
>
> [27] However, in a case in which a life sentence is not appropriate an indeterminate custodial sentence should not be imposed without full consideration of whether alternative and cumulative methods might provide the necessary public protection against the risk posed by the individual offender. **In that sense it is a sentence of last resort (***our emphasis***).** The issue of whether the necessary public protection can be achieved is clearly fact specific. That requires, therefore, a careful evaluation of the methods by which such protection can be achieved under the extended sentence regime."

[37] Whilst we have no doubt that this was a serious offence, we are not satisfied it falls into the category required for an indeterminate sentence. Dr Loughrey's report served to provide a positive diagnosis of this appellant's condition (perhaps for the first time) and suggested, albeit in general terms, a programme for change with him addressing his harmful use of alcohol and drugs together with his significant mental health problems. That does afford an alternative method whereby the necessary public protection against the risk posed by the appellant can be dealt with and renders an indeterminate sentence no longer the last resort open to the court. A careful evaluation of this report suggests that such protection can be achieved with careful monitoring under an extended sentence regime. A realistic program for change could be delivered within a context where the appellant would remain subject to supervision both within and without the prison environment.

[38] We are therefore satisfied that this is a case which falls within Article 14 of the 2008 Order in that:

(a) the appellant has been convicted on indictment of a specified offence.

(b) this court is of the opinion that he presents a significant risk to members of the public of serious harm occasioned by the commission of a further specified offence but that this is not a case in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

[39] We therefore allow the appeal on this ground and set aside the indeterminate sentence.

Ground three -----The ten year sentence

[40] We are of the view that the determination of the learned trial judge that the minimum sentence a court could have passed on this accused had a determinate sentence been imposed was one of ten years imprisonment comprising five years custody and five years on licence is unimpeachable.

[41] There is an unbroken line of authority to the effect that in Northern Ireland the starting point in cases of robbery of householders where violence is used should be 10 years and in appropriate cases a sentence of 15 years is not excessive: see R v Skelton and Dale Mooney (1992) 3 NIJB 26, R v Ferguson (unreported 21 April 1989 per O'Donnell LJ, and Attorney General's Reference (No. 6 of 2006), McGonigle [2007] NICA 16.

[42] We take this opportunity to reiterate the following principles.

(i) The starting point for robbery of householders where violence is used should be ten years.

(ii) This will increase depending on the age, vulnerability, or infirmity of the occupiers, any previous history for offences of violence and in the appropriate case a sentence of 15 years will not be regarded as excessive.

(iii) These offences are often carried out by young people. The youth of the offender and any personal background, whilst to be taken into account in the selection of sentence, will not weigh heavily in reduction of penalty where offences of this nature are extremely serious.

[43] Aggravating factors will include:

- The failure to respond to previous sentence.
- Previous convictions, particularly where a pattern of repeat offending is disclosed.
- A failure to respond to warnings or concerns expressed by others about the offender's behaviour.
- The offence committed whilst on licence or on probation.
- Deliberate targeting of vulnerable victim(s).
- Commission of an offence whilst under the influence of alcohol or drugs.

- Deliberate or gratuitous violence or damage to property, over and above what is needed to carry out the offence.

- An especially serious, physical or psychological effect on the victim even if unintended.

- A sustained assault or repeated assaults on the same victim.

- The location of the offence (for example, in an isolated place).

[44] There were thus several aggravating factors in the instant case. We are satisfied that the learned trial judge carefully took into account the appellant's plea of guilty on arraignment, his relative youth, the fact that he acted alone without a mask or weapon, he had no history of robbery and that he had been responding to his probation order up to time of these offences. However such was the seriousness of this offence with attendant aggravating features that the period determined by the judge was wholly condign in the circumstances. We reject ground three of this appeal.

Extended custodial sentence

[45] In view of our finding that this case falls within the provisions of article 14(1) of the 2008 Order, the Court must impose an extended custodial sentence. An extended custodial sentence will be the aggregate of a custodial term and an extension period. The custodial term will be a commensurate sentence and will not make any reduction for a notional remission. This will be built into the release provisions.

[46] The extended period will be for such period as is considered necessary to protect the public from serious harm. The protective element should not be fixed as a percentage increase of the commensurate sentence. On the contrary, the protective element should be geared specifically to meet the statutory objective i.e. the protection of the public from serious harm and to secure the rehabilitation of the offender to prevent his further offending. The punishment element cannot dictate the period required to ensure the necessary level of protection. The two aspects of sentence thus serve different purposes. The first is to punish and the second is to protect. See Valentine "Criminal Procedure in Northern Ireland" 2nd Ed at 18.64, R v McColgan [2007] NIJB 254 at paragraph [24] and R v Cornelius [2002] Cr. App. R.(S)69 at paragraph [10].

[47] The protective element cannot exceed 5 years for a violent offence. The aggregate of the custodial term and the extension period cannot exceed the maximum period for the sentence. The effect of this is that after the appellant has served the relevant part of a sentence, the Secretary of State shall release him if the Parole Commissioners direct his release when they are satisfied it is no longer

necessary for the protection of the public that he should be confined. The relevant part of the sentence is one half under Article 28 of the 2008 Order. The Secretary of State, on the recommendation of the Parole Commissioners, can revoke the appellant's license and have him recalled to prison. Thus the offender may, in the events that happen and depending on his behavior, have to serve the whole or part of the extension period. Unlike a determinate sentence; the Court does not recommend licence conditions to the Secretary of State where an extended custodial sentence has been imposed. These conditions are to be imposed by the Secretary of State, after consultation with the Parole Commissioners, pursuant to Article 24(5) of the 2008 Order.

[48] It is pertinent to observe that whilst the statutory provisions do not expressly advert to the concept of proportionality between the sentence passed and the gravity of the offence, nonetheless Parliament has imposed a restriction on the length of the protective element that can be imposed. Parliament cannot have intended that the Order be used to pass sentences that are wholly disproportionate to the nature of the offending. However, whilst proportionality has to be observed, strict proportionality between the length of the extension period and the seriousness of the offence will always be secondary to the main purpose of the provision which is protection of the public. See similar expressions of view on similar statutory provisions by Kerr LCJ in McColgan's case at [27] in the context of the Criminal Justice (Northern Ireland) Order 1996 and Mackay J in Cornelius' case at paragraph [10] in the context of s.85 of the Powers of Criminal Courts (Sentencing) Act 2000.

[49] We have concluded that the commensurate period for the custodial aspect of this extended custodial sentence will be the period of 10 years determined by the learned trial judge (see our reasoning set out in paragraphs [40]-[44] of this judgment). Whilst this does constitute a stiff sentence and is probably at the higher end of the appropriate bracket, nonetheless we do not consider it to be manifestly excessive or wrong in principle in a case of this despicable nature where deterrence and the need to protect the elderly and infirm are highly relevant components.

[50] Turning to the length of the extension period, we observe that no specific recommendation of time is contained in any of the material before us. However given the proximity of the instant offences to the earlier opportunities afforded by courts for him to reform which he has spurned, the significant escalation in the pattern of offending revealed in the present offences and his period of non-compliance with the prison regime and failure to avail of help whilst there, he clearly presents as someone with an inability to learn from past mistakes and a high likelihood of re-offending. Such an offender requires lengthy medical assistance and supervision if the public is to be adequately protected. For those reasons we consider that an extended period of 3 years is not only a proportionate response but is consistent with the principle of totality in this instance. The extended custodial sentence therefore shall be 10 years in custody with an extended period of 3 years.