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Judgment: approved by the Court for handing down *Delivered:* **26/09/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MARK JOHN RUSH

Before Girvan LJ and Coghlin LJ

COGHLIN LJ

[1] This is an application for leave to appeal by Mark John Rush from a sentence of 4 years and 6 months custody followed by 2 years probation imposed by Stephens J at Belfast Crown Court on 14 December 2007. The appellant was arraigned on 11 May 2007 and on Friday 9 November 2007, the third day of his trial, he pleaded guilty to the manslaughter of Robert Hillen on 6 September 2006. In the absence of the consent of the applicant to the custody probation order the learned trial judge fixed the appropriate period of custody at 5 years and 6 months.

[2] For the purposes of the appeal the applicant was represented by Mr McCartney QC and Mr Talbot while Mr Gary McCrudden appeared on behalf of the Public Prosecution Service. The court is grateful to both sets of counsel for their succinct and well reasoned submissions.

Factual background

[3] The applicant was sentenced on the basis of a statement of facts agreed between counsel for the applicant and counsel for the prosecution. That statement read as follows:

> "Roy Hillen was a well-known member of the Belfast Homeless Community. He was an alcoholic who spent most

of his time begging and drinking on the streets of Belfast. The accused was an acquaintance of Mr Hillen and lived a similar lifestyle.

On Saturday, 2nd September 2006 Mr Hillen had taken up a position on the steps of the Ulster Hall, Bedford Street, Belfast. He was accompanied by Elaine Hunter, both were drinking cider and vodka. Shortly after 6.00pm the deceased observed the defendant begging on the opposite side of the roadway. Angered by what he perceived to be someone begging on `his patch' he crossed the roadway and punched the defendant once on the face. The defendant retaliated by punching Mr Hillen several times. By themselves, these blows appear to have been of moderate severity. However, when combined with the intoxicated condition of Mr Hillen, they caused him to either strike his head upon a wall or on the ground.

Constable Buch arrived on the scene at 6.10 pm. He observed that the deceased had returned to the entrance of the Ulster Hall. He further observed that Mr Hillen was heavily intoxicated and abusive. He then crossed Bedford Street and spoke to the defendant who was holding a red coloured jumper up to the bleeding nose. Both the defendant and Mr Hillen declined to make any statement of complaint.

Ambulance men who arrived minutes later were unable to identify any obvious injuries to Mr Hillen's face. After initial refusal Mr Hillen agreed to accompany the ambulance crew to hospital. The defendant also left the scene.

Mr Hillen was later admitted to the Regional Intensive Care Unit at 4.30 am the following day. This followed the removal of an acute subdural haematoma. Thereafter his condition deteriorated and he died at 6.27 pm on 6 September 2006."

The grounds of appeal

[4] In the application for leave to appeal, the grounds specified on behalf of the applicant were that the sentence was wrong in principle and manifestly excessive. However, in presenting the application, Mr McCartney QC focused his attention upon a number of specific criticisms of the approach of the trial judge which, he submitted, had resulted in the passing of a sentence that was manifestly excessive.

[5] Mr McCartney QC submitted that the learned trial judge had failed to give adequate weight to the vulnerability of the deceased resulting from his

many years of excessive consumption of alcohol. In particular, he referred the Court to the three possibilities for the causation of the fatal subdural haematoma posed by Dr Cromie, Consultant Pathologist, in his report. These were:

(1) The result of a simple collapse, trip or fall whilst intoxicated.
(2) A sudden collapse following an epileptiform seizure.
(3) Some form of assault by a third party.

In relation to the third possibility, Dr Cromie expressed the view that any force might have been minimal taking into account the significantly intoxicated, unsteady condition of the deceased and he noted that post-mortem photographs of the deceased revealed only relatively minor facial injuries. Dr Cromie also noted the deceased's persistently low blood platelet count which would have rendered him unduly susceptible to traumatic bleeding and would have magnified the effect of any blunt trauma.

[6] Mr McCartney QC also drew the Court's attention to the fact that the learned trial judge had treated as aggravating factors the fact that the applicant had struck multiple blows, the fact that the assault occurred in a public place, that the applicant was under the influence of alcohol and that the pre-sentence report from Mr Darnbrook, Probation Officer, had assessed the likelihood of re-offending as currently high and the applicant as representing a high risk of harm to the public. Mr McCartney QC submitted that, in doing so, the learned trial judge had failed to give adequate weight to the fact that any blows struck by the applicant were of only moderate severity, that the fact that the incident happened in a public place was, in practice, not his responsibility, that the evidence did not support the suggestion that the applicant had been particularly heavily intoxicated and that his criminal record did not confirm a history of violence when under the influence of alcohol. Both Mr McCartney QC and Mr McCrudden accepted that the decision of this Court in R v Ryan Arthur Quinn [2006] NICA 27 functioned as a guideline for this type of case.

Conclusions

[7] It is clear from reading his detailed sentencing remarks that Stephens J gave conscientious and careful consideration to the salient features of this case. He accepted that the applicant had pleaded guilty at the earliest reasonable opportunity, having regard to the need to obtain the entire medical picture and to receive relevant legal advice. The medical issue was a critical matter and the learned trial judge was prepared to give the maximum discount available for a plea of guilty. He entertained some reservations about the extent to which the applicant had been frank when making his statement to the police and, by way of contrast, referred to the evidence of several bystanders as to the number of blows that he had visited upon the

deceased. However, the learned trial judge also accepted that the accounts from the witnesses had to be considered in the context of the medical evidence in the course of which such blows were described as being of moderate severity. He also acknowledged that the deleterious effects of the deceased's alcoholism had played a significant contributory role in the fatal outcome of the incident. He was well aware of the applicant's own alcoholism, his motivation to reform his behaviour and the fact that Mr Darnbrook had described his presentation as being deeply remorseful. He referred to the assessment of risk expressed by the probation officer but also noted that such risk would be reduced if the applicant received appropriate treatment and sustained his motivation to remain alcohol free. In the circumstances the Court is satisfied that no error of principle was disclosed in the sentencing remarks and the only question for this Court to decided is whether the sentence was manifestly excessive.

[8] The learned trial judge referred to the case of R v Quinn as setting sentencing guidelines for manslaughter cases in which death resulted from a single blow and he sought to apply the principles set out in that case including the relevant range of sentences.

[9] There seems to be little doubt, since he mentioned the specific feature upon more than one occasion in the course of his sentencing remarks, that the learned trial judge considered that the fact that multiple blows were struck was a serious aggravating feature. He took into account the applicant's addiction to alcohol but expressed the view that, upon this occasion, his consumption of alcohol had also been aggravating feature since it had increased the likelihood of numerous and sustained punches being inflicted upon the victim and the persistence of the attack despite the inability of the deceased to defend himself. On the other hand, the learned trial judge accepted that, as a result of his heavy degree of intoxication, the applicant's perception of events may have been badly distorted. He took the view that the lack of pre-meditation or planning as a consequence of the consumption of drink was a neutral rather than a mitigating feature. He recognised and took into account as a mitigating factor, the fact that the initial blow was struck by the deceased at a time when he was subjecting the applicant to abuse.

[10] The difficulty in performing the sentencing exercise in this type of case in which there is a tension between a relatively modest level of culpability and the calamitous consequences of the relevant criminal behaviour has been expressly recognised by the Court of Appeal in this jurisdiction in R v Quinn and in England and Wales in R v Furby [2005] EWCA Crim 3147. In the course of giving the judgment of the court in R v Quinn, Kerr LCJ observed at paragraph [13]:

> "[13] Given that the consequences of the criminal action must be reflected in the sentence, it is clear that where death has resulted this must weigh heavily in the choice of penalty. The present case strongly exemplifies that requirement. The deceased was a young man at the threshold of life. He was member of a loving family and his loss is felt grievously by them. The judge at first instance in Furby said that it had recently been recognised that too little attention had been paid in the past to the loss of human life, implying that there had been too much concentration on the culpability of the offender. We make no comment on that suggestion beyond saying that, in deciding on the appropriate sentence in the present case, it is important that we remember that a young life was loss as a result of the applicant's actions."

In the present case, we simply observe that no judge could fail to be moved by the sensitive and eloquent statement placed before the Court by the deceased's son, Darren Hillen.

[11] It has frequently been observed that offences of manslaughter, in company with most offences of violence, cover a very wide factual spectrum and, in such circumstances, there is always a need to observe caution when considering the application of guideline cases. However, bearing that in mind, the Court is satisfied that, in the circumstances of this case, the learned trial judge was correct in seeking to apply the principles articulated in R v Quinn. After giving the matter careful consideration, this Court has formed the view that there are a number of significant factors that differentiate that decision from the instant case. They are as follows:

(i) In R v Quinn the court reached a conclusion that the deceased had not offered any provocation whatsoever and was not expecting to be struck at the time of the assault. He was wholly unprepared for the attack and not in a position to defend himself. Furthermore the court specifically recorded that the assailant knew that his victim was unprepared and should have been aware that a blow inflicted in such circumstances could have felled his victim thereby causing further injury. The court was satisfied that the accused had deliberately sought out and targeted his victim for attack and conceived an intention to assault him some little time before the attack took place. His actions were condemned as callous and cowardly. By contrast, it was accepted by both sides that, in this case, it was the deceased who crossed the road and deliberately struck the applicant subjecting him to abuse. Having done so it is likely that, even in his intoxicated condition, he must have anticipated some reaction. While it seems clear that the applicant over-reacted, this Court considers that it is a matter of some

importance that he was not in any way responsible for the initiation of this incident.

(ii) While the applicant undoubtedly struck Mr Hillen a number of blows, the prosecution accepted that these were of moderate severity and, therefore, to be contrasted with the conclusion of this Court in the Quinn case, that the accused had intended to and did strike the deceased with considerable force.

(iii) In the Quinn case one of the possible aggravating factors identified by this Court was the occurrence of the assault in a public place. As we have already pointed out, the fact that the assault in this case took place in similar circumstances was, in practical terms, not of the applicant's choosing.

(iv) In both Quinn and in the instant case, the assailants were intoxicated at the time of the offence. The excessive consumption of alcohol is a depressing but regular feature in the commission of violent offences but experience suggests that its role may vary considerably with the nature of the offence/offences and the particular circumstances. In R v Quinn the accused was of good character without any criminal record and the court in that case noted that there was no evidence that his intoxicated state had made it more likely that he would attack the deceased, adding that such evidence should normally be present before the taking of alcohol should be regarded as an aggravating factor. In the instant case, contrary to the suggestion by Mr McCartney QC, the applicant does have previous convictions for assault and disorderly behaviour almost certainly associated with the consumption of alcohol. In all, these seem to total some 5 instances over a 25-year period. The learned trial judge in this case stated in the course of his sentencing remarks:

> "Your consumption of alcohol on this occasion made it more likely that you would attack your victim and that you were not in a position to limit that attack. At the very least your intoxicated state made it more likely that you would inflict numerous and sustained punches upon your victim. I take into account that you are addicted to alcohol but in the circumstances of this case, and in view of the role played by the alcohol in the incident, I consider that your consumption of alcohol is an aggravating feature in your case."

There is absolutely no doubt that excessive consumption of alcohol remains a serious and growing problem within this jurisdiction but we consider that a distinction may be made between the aggressive, and generally younger,

binge drinker who indulges in excessive consumption thereby fuelling his or her aggression and the long-term alcoholic whose condition impairs his ability to react to and defend himself against an attack. However, it should not be thought that in making this observation in the context of the specific circumstances of this particular case, this Court is in any way intending to downgrade the serious level of physical violence that appears to be inherent in and permeate through relationships between those who are addicted to alcohol.

[12] In R v Quinn the appropriate range of sentence for this type of case in this jurisdiction was said to be 2 years rising to 6 years after a plea of guilty and the court commented that the sentence of 4 years imprisonment passed upon Mr Quinn "could not be described as lenient". Accordingly, standing back and taking into account all of the circumstances, we have reached the conclusion, not without some reservation, that this sentence of 5 years and 6 months' imprisonment was manifestly excessive. In the circumstances, we propose to grant leave and allow the appeal to the extent of reducing the custody element of the sentence from 4 years and 6 months to 3 three and 6 months. The period of 2 years probation following conclusion of the custody element, will remain unaltered.