

Neutral Citation No. [2014] NICty 5

Ref:

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

Delivered: **10/04/14**

R v McCartney, McCartney and Neimontas

Sentencing Remarks

His Honour Judge Lynch

The accused in the present case were all charged with the offence of murder. The victim was a Mr David Neill and occurred in the early hours of the morning of 16th September 2012. Daniel McCartney was also charged with two offences of criminal damage on 15th September 2012. On the morning of the trial the Crown applied to amend the indictment to add a count of affray against the accused Neimontas. There was then an application by counsel for all three accused to have them re-arraigned on the amended indictment. Kevin McCartney pleaded guilty to murder, Daniel McCartney to manslaughter and criminal damage and Deividas Neimontas to Affray. The prosecution indicated that they would accept the pleas of guilty as entered by the accused and applied to have the murder count against Neimontas left on the books not to be proceeded with without the leave of the Crown Court or the Court of Appeal. This application was acceded to by the defence. The acceptance by the Crown of the plea of guilty to affray by Neimontas confirms his peripheral involvement in the tragic incident and I have sentenced him already to a term of imprisonment which I suspended for reasons given at the time.

The background to the present offenses concerns a relationship between the daughter of the deceased, Nicole Cahoon, and the defendant Daniel McCartney. They had been in this relationship for about a year before splitting up in February 2012. The relationship was not approved of by the deceased, nor her mother Cathy Cahoon, and this caused friction between this defendant and Mr Neill. Daniel McCartney appears to lay blame upon Ms Cahoon's parents for the breakup of the relationship. This, as an example and according to Cathy Cahoon, is demonstrated by an incident in which Daniel and Mr Neill came to blows when "a bit of a row

broke out" resulting in Daniel hitting Mr Neill, running out of the house and then striking Cathy Cahoon breaking her nose. I come to no view as to the accuracy of this account but it does indicate the degree to which animosity between the parties had developed. Again according to Cathy Cahoon, Daniel proceeded to carry out a campaign of harassment including causing damage to their fence, sending a bullet to the house and a barrage of threatening messages on Facebook.

On Friday 14th February 2012 she and the deceased were in bed at about 1145pm when they heard the sound of glass breaking. Mr Neill got up, looked out and recognised Daniel McCartney, then a stone was thrown through their bedroom window and the defendant ran off. When Police arrived it was discovered that the kitchen window, bedroom window and the rear windscreen in Mr Neill's car were broken. These are the subject of Counts two and three to which Daniel McCartney has pleaded guilty.

On the evening of the 15th September Mr Neill and Cathy Cahoon remained in their house drinking along with Stephen Voce. They were joined by Mark McKinley, in respect of whom, there is evidence that he had a run in with Daniel McCartney earlier over McKinley's alleged possession of a crossbow. Constable Mallon spoke to Daniel McCartney to warn him that there was a threat against him from McKinley and in turn Daniel alleged that McKinley was running around the estate with the crossbow threatening children and that some locals had "gripped" him and sent him on his way. At a later stage, McKinley alleges, he received a phone call from Daniel saying "If anything happens at Davy and Cathy's house tonight it's your fault". McKinley had been driven to the Neill/Cahoon house at 195 Parkmore Gardens Craigavon by Steven Ruddell along with Richard Flowers, Kirsty Cahoon and Gemma McCusker making a total of seven persons in the property at around 0030 on the 16th. The defence case, which I accept, is that the McCartney brothers went round to the Neill household to confront McKinley over the events of earlier that evening. It has been accepted, on behalf of Kevin, that he armed himself with a knife before doing so.

The witnesses were all in the living room of 195 Parkmore, and describe banging at the front door and hearing the sound of glass breaking.

Cathy Cahoon, by her own account went to the door and recognised the accused Daniel McCartney standing on the path some 4-5 feet away. She noticed a second man outside the perimeter of her house and so didn't get a view of him with the possibility of a third man in the general vicinity. Upon being challenged by her Daniel started to back away.

“Next thing I know David has come out the front door past me along with everyone else in the house. The next thing I see was David and Daniel out on the road. They were scuffling, possibly pushing and shoving. This went on for 1-2 seconds it was really quick. The next thing Daniel is running away, so are the others with him in the vicinity. Davy begins to run after Daniel but within about 20 feet he falls or collapses”

Stephen Ruddell followed Cathy Cahoon out of the house and saw a man in a plain hooded top and two other males further back. He then pulled Cathy back into the house but saw David Neill

“(take) a run at the male and all three fellas run towards the cars parked at the car park... I run after Davy ...When David ran he focused on the male who had been at the front door. I ran after David and he had caught the male at the cars. They had a scuffle at the cars for about 2 to 3 seconds before David fell. I was running towards them at this stage.....He was only down for about a second and got straight back up again. The other two males had been at the back of the cars. As I approached one of the other males came from the back of the cars and swung a bat at me and hit me on the right side of my chest....After he hit me all 3 males ran off towards the bottom of the estate. The only time David was in contact with the male was at the cars when he fell. When he got up he ran after the three males and he got as far as the drive into the end of the square and he collapsed and it almost looked like he had tripped up and fell.”

Steven Voce describes events as follows

“Davie pushed the front door back open and he ran out of the door. I could see someone in front of Davie standing in the front path of Davie’s house. Richard and Stephen were near enough out straight away. Davie was about 6 feet in front of us and I was directly behind Richard and Stephen. I seen a male person about two foot in front of Davie. It looked like this male was carrying something in his right hand. I seen Davie chase the male on the footpath in the direction of where Davie’s car was parked. I then noticed Stevie Ruddell was chasing another unknown male person behind where Davie’s car was parked. Davie and the man who was carrying something grabbed each other and they started wrestling and having a bit of a scuffle....During the struggle (his) hood or sweatshirt fell down from over his head and I immediately recognised this male as being Daniel McCartney. ...I would say (they) were scuffling with each other for about thirty seconds. During this scuffle I could see Davie had his arm around Daniel’s shoulder or neck trying to restrain him and Daniel was putting up a struggle. The next thing Davie fell to the floor and Daniel ran off...”

He then describes how Mr Neill collapsed.

Stephen Flowers also followed out onto the street having seen Mr Neill pick up a baseball bat and describing

One of the three figures stopped, turned to Davy and tried to punch him. The punch missed and Davy swung the bat at him I think he missed but I'm not sure. At around this time I was aware that Stephen had confronted a second of the three but my attention was drawn to Davy who had fallen to the ground. The figure he had confronted was standing over him. Davy was on his hands and knees. I was about 10 feet from Davy. The lighting was better at this point in the street....I saw this figure make a punching motion towards Davy's back. The figure then continued to run towards Enniskeen.....

The other witnesses from the house either saw nothing of the events that resulted in Mr Neill's death or add little to the accounts set out above.

The police were at the scene shortly after the incident and paramedics were called arriving about 0103 hours. Police were attending to Mr Neill giving him CPR. It was clear that Mr Neill had lost a lot of blood and when the paramedics used the defibrillator equipment upon him there was no recordable heart activity. He was removed to Craigavon Area Hospital where there was a sustained attempt to revive him by a team under the direction of Doctor Hinds but as he states

"Unfortunately, the injuries found were incompatible with life - Mr Neill had lost an enormous volume of blood and despite an aggressive and prolonged resuscitation attempt, had remained lifeless throughout....I pronounced life extinct at 0213 hours"

The Pathologist, Dr Ingram, examined the body of Mr Neill and concluded

"Death was due to a stab wound to the chest.... situated on the left side of the back of the chest. The blade of the weapon had passed between the ninth and tenth rib and passed upwards forwards and to the right. It had transfixated the lower lobe of the left lung and penetrated the aorta....Massive bleeding, principally from the injury to the aorta was responsible for his collapse and ultimately his death.

...(there was) a V shaped wound on the right side of the back of the chest and had probably been caused by the broad surface of the tip of a bladed weapon but the blade had not penetrated further than the surface layers of the skin"

There were also injuries to Mr Neill's right hand and fingers which

"could have been sustained as a result of his having struck something or someone shortly before his death"

In relation to the main injury he states

"The stab wound was clearly caused by a bladed weapon such as a knife. No more than moderate force would have been required for the infliction of the wound"

The accused were arrested shortly after the stabbing and interviewed. Daniel initially denied being present at the scene at all and then made a limited acknowledgement of presence without making any admissions of criminal conduct. Kevin made no comment at interview but had, subsequent to the killing admitted to relatives that it was he who had stabbed Mr Neill. Statements to this effect were served as additional evidence. By virtue of his plea of guilty to murder Kevin McCartney has accepted responsibility for the fatal stabbing.

The Crown have accepted the plea of guilty to manslaughter from Daniel McCartney on the basis that he intended to participate in an assault (on McKinley I assume) contemplating that some harm would ensue. He accepts that it was he who struck Mr Ruddell during the course of the incident.

In *R v McCandless* 2004 NICA 1 Lord Carswell in delivering the judgment of the Court of Appeal stated

[8] It was against this background that Lord Woolf CJ on 31 May 2002 issued a *Practice Statement*, reported at [2002] 3 All ER 412, in which he dealt in more detail with the appropriate minimum terms for both adult and young offenders. It replaced the previous normal starting point of 14 years by substituting a higher and a normal starting point of respectively 16 and 12 years, rather than adopting the Panel's recommendation of three groups. These starting points then have to be varied upwards or downwards by taking account of aggravating or mitigating factors. We think it important to emphasise that the process is not to be regarded as one of fixing each case into one of two rigidly defined categories, in respect of which the length of term is firmly fixed. Rather the sentencing framework is, as Weatherup J described it in paragraph 11 of his sentencing remarks in *R v McKeown* [2003] NICC 5, a multi-tier system. Not only is the *Practice Statement* intended to be only guidance, but the starting points are, as the term indicates, points at which the sentencer may start on his journey towards the goal of deciding upon a right and appropriate sentence for the instant case.

[9] The *Practice Statement* set out the approach to be adopted in respect of adult offenders in paragraphs 10 to 19:

"The normal starting point of 12 years

10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position.

I accept that this is a case for the normal starting point

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty.

The Crown accepted that there was only the one aggravating feature in relation to Kevin McCartney namely that he had armed himself with a knife. Mr O'Rourke QC, who appears for him, submitted that this was not an aggravating feature since he had only brought the knife because of his apprehension that McKinley was armed with, at least the crossbow, and the knife was only for self-defence if needed. I accept that this scenario may be less serious than if the weapon was with him intending to use it in an offensive manner but do not accept the proposition that his arming himself does not constitute an aggravating feature, when as in the present case the accused sets out to confront the very person he fears may be armed.

I accept that the actual stabbing was a spontaneous reaction to the circumstances he found himself in and not a premeditated act, although it is clear that he apprehended that there may be some violence during the course of the intended confrontation. Mr O'Rourke also submits that there was no specific intent to kill on the part of this accused as opposed to an intent to cause grievous bodily harm. I accept this submission on the basis of the fact that this was a spontaneous reaction to the situation he found himself in, the fact that there was a single stab wound and the pathologist's assessment that only moderate force would have been required to inflict the fatal injury. Mr O'Rourke also submits that this is a case of self-defence where the accused went beyond the use of reasonable force to defend himself. I do not accept that this was the position. It would be anomalous that an individual who goes out to cause trouble, as undoubtedly Kevin McCartney did, should then avail himself of the concept of self-defence in this case where there is limited evidence to support such a proposition. At best there was a scuffle with Mr Neill during the course of which the accused wielded and used his knife.

The accused is entitled to credit for his plea of guilty, albeit on the morning the trial was due to commence. Mr O'Rourke submits that, counteracting the lateness of the plea is that the Crown case was at all times until that morning that the accused Daniel McCartney stabbed Mr Neill and Kevin was an accessory to the murder. The Crown view was, understandably, based upon the witness evidence set out above which now, it is accepted, constitutes a clear case of mistaken identity. By virtue of his plea he has avoided a possible miscarriage of justice, in that Daniel may have been convicted of the murder as principal. Kevin, himself, has sacrificed the

possibility that a jury may not infer that he, as a secondary party, knew or contemplated the use of a knife or that the principal intended to kill or cause grievous bodily harm and acquitted him altogether. I accept there is some validity in these points and have taken them into account.

Mr Kevin McCartney is aged 29 and has a considerable criminal record but nothing approaching the gravity of the present offence. I have taken into account what I have read about him in a pre-sentence report.

I now turn to Daniel McCartney. He has pleaded guilty to unlawful act manslaughter at, I accept, the first opportunity he had to do so. Until the morning of the trial the Crown had intended to proceed on the basis that the accused was the principal in the murder of Mr Neill. This is no longer their case. The accused accepts that he was involved in a joint enterprise to assault Mr McKinley, that he was wielding a metal bar and that he struck Mr Ruddell with it. Mr Grant QC submits that his client's plea was entered on the basis that there was a plan to commit an assault on McKinley but that he was unaware that his co-accused was in possession of a knife. At the scene his action of striking Mr Ruddell and restraining him was encouragement to Kevin in his struggle with Mr Neill. He emphasises that the focus of their attention that evening was McKinley, rather than the Neills, and the threat he posed to the McCartneys.

The Court of Appeal, in a judgment delivered by Lord Kerr then Chief Justice, in the case of *R v Magee* (2007) NICA 21 considered the sentencing ranges in manslaughter cases

[22] It is not surprising that there are relatively few decisions in this jurisdiction which could properly be described as guideline cases for sentencing for manslaughter. Offences of manslaughter typically cover a very wide factual spectrum. It is not easy in these circumstances to prescribe a sentencing range that will be meaningful. Certain common characteristics of many offences of violence committed by young men on other young men are readily detectable, however, and, for reasons that we will discuss, these call for a consistent sentencing approach.

[23] It is the experience of this court that offences of wanton violence among young males (while by no means a new problem in our society) are becoming even more prevalent in recent years. Unfortunately, the use of a weapon – often a knife, sometimes a bottle or baseball bat – is all too frequently a feature of these cases. Shocking instances of gratuitous violence by kicking defenceless victims while they are on the ground are also common in the criminal courts. These offences are typically committed when the perpetrator is under the influence of drink or drugs or both. The level of violence meted out goes well beyond that which might have been prompted by the initial dispute. Those who inflict the violence display a chilling indifference to the severity of the

injury that their victims will suffer. Typically, great regret is expressed when the offender has to confront the consequences of his behaviour but, as this court observed in *R v Ryan Quinn* [2006] NICA 27 "it is frequently difficult to distinguish authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions".

[24] The courts must react to these circumstances by the imposition of sentences that sufficiently mark society's utter rejection of such offences and send a clear signal to those who might engage in this type of violence that the consequence of conviction of these crimes will be condign punishment. We put it thus in *Ryan Quinn*: -

"... it is now, sadly, common experience that serious assaults involving young men leading to grave injury and, far too often, death occur after offenders and victims have been drinking heavily. The courts must respond to this experience by the imposition of penalties not only for the purpose of deterrence but also to mark our society's abhorrence and rejection of the phenomenon. Those sentences must also reflect the devastation wrought by the death of a young man ..."

[26] We consider that the time has now arrived where, in the case of manslaughter where the charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between eight and fifteen years' imprisonment. This is, perforce, the most general of guidelines. Because of the potentially limitless variety of factual situations where manslaughter is committed, it is necessary to recognise that some deviation from this range may be required. Indeed, in some cases an indeterminate sentence will be appropriate. Notwithstanding the difficulty in arriving at a precise range for sentencing in this area, we have concluded that some guidance is now required for sentencers and, particularly because of the prevalence of this type of offence, a more substantial range of penalty than was perhaps hitherto applied is now required.

[27] Aggravating and mitigating features will be instrumental in fixing the chosen sentence within or - in exceptional cases - beyond this range. Aggravating factors may include (i) the use of a weapon; (ii) that the attack was unprovoked; (iii) that the offender evinced an indifference to the seriousness of the likely injury; (iv) that there is a substantial criminal record for offences of violence; and (v) more than one blow or stabbing has occurred.

The facts of this case are somewhat unusual in that the principal, Kevin, did intend to cause grievous bodily harm but Daniel gave assistance to him he with only an intent to assault. Nonetheless the culpability of this accused is in his going out, with his co-accused, with intent to assault an individual and arming himself for that purpose. This brings the accused within the sentencing range as set out in Magee.

The accused is 21 years of age. He has a minor criminal record. The probation have assessed that he does not pose a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offence. I accept this conclusion and therefore he stands to be sentenced under Article 8 of the Criminal Justice (Northern Ireland) Order 2008.

He is, as I have stated, entitled to the benefit of having pleaded guilty at the first opportunity presented to him in relation to manslaughter. I have taken account of his relative youth, what I have read about him in the presentence report and the matters referred to by Mr Grant in his plea in mitigation.

I have received a victim impact statement from Ms Cahoon, Mr Neill's partner. The Court can only have the utmost sympathy for her and the family for the untimely and unjustifiable cutting short the life of a partner and father and understand the deep feeling of loss and outrage that is understandably felt by all those who knew and cared for Mr Neill.

I have already sentenced Mr Kevin McCartney to the only sentence prescribed by law for the offence of murder namely life imprisonment. I must now set the "tariff" period. This I emphasise is the minimum period that Mr McCartney must spend in jail before he may be released. Whether or not he is, in fact released, upon the expiry of the nine years will be a matter of assessment by the Parole Commissioners as to whether he it is safe to be released. I set the tariff figure that is the minimum he has to serve at 9 years.

In respect of Mr Daniel McCartney I impose a determinate sentence under Article 8 of 7 years. This will comprise of 3.5 years in custody and 3.5 years on license on such terms as the Secretary of State may deem appropriate. But for the plea of guilty the sentence would have been 10 years. After considering of all the materials before me I have determined that any further extended license period within the 7 year sentence is unnecessary. There will be concurrent 6 month sentences in respect of the two criminal damage charges.