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**THE CROWN COURT IN NORTHERN IRELAND**

**SITTING AT ANTRIM**

**REGINA**

**-v-**

**WILLIAM McDONAGH**

**Heard Before**

**HIS HONOUR JUDGE MARRINAN**

**On**

**MONDAY, 23rd DECEMBER 2013**

**SENTENCE**

*Transcript prepared by: S. Birney*
*Official Court Stenographers*

(Transcribed from FTR recording)

SENTENCE:

JUDGE MARRINAN: The defendant is now 28 years of age. He was 25 years of age at the time of these offences. He has pleaded guilty to the following offences: Count 4, possession of an offensive weapon, to wit a machete in a public place; Count 5, the charge of criminal damage to a police car; and Count 6, the Common Law offence of affray.

These offences were committed on the 11th of July 2010 in the early hours of the morning.

Count 6, affray, is both a serious and specified offence under schedule one of the Criminal Justice (Northern Ireland) Order 2008 - the Order.

Count 5, the criminal damage, and Count 4, the possession of an offensive weapon are neither serious nor specified offences under the Order.

Given the date of the offence, and the fact that the affray is a specified and serious offence, the powers regarding sentencing contained within the Order are therefore engaged in this case. Applying article 13 the court must consider whether there is:

"*A significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences*".

If that finding is made then the court moves on to article 14 that is consideration of whether or not an extended custodial sentence is sufficient for the purposes of sentencing for the protection of the public.

The principles appropriate to consideration of how the court may properly arrive at the opinion referred to article 14(1)(b), i.e., dangerousness, have been set out in some detail in the leading English cases of Lang and Johnston. The question, therefore, is how one approaches and comes to be satisfied, or not, that a case meets the test of dangerousness.

Very little guidance is given in the Order itself, apart from the provisions

of article 15, which state that:

"*In a situation* (such as I am faced with) *the court in making the assessment of significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences, 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*".

In the case of R v EB, a decision of our Court of Appeal, cited at 2010 NICA 40, the Lord Chief Justice set out at paragraph 10 a consideration of the principles to be applied. He noted the importance of the Lang decision and said as follows:

*"In Lang, the English Court of Appeal considered how the assessment of significant risk of serious harm should be made in respect of identical provisions in the Criminal Justice Act 2003, in particular noting the following: (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, attitudes towards offending and supervision and emotional state. Information in relation to these matters would most readily, though not exclusively, come from antecedents and pre-sentence probation and medical reports. The sentencer would be guided but not bound by the assessment 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. The sentencer must, therefore, guard against assuming that there is 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".*

The Lord Chief Justice finished his consideration of this portion of the case by saying the following:

*"We consider that this passage constitutes helpful guidance to judges making assessments of dangerousness. There is considerable emphasis on the role of the pre-sentence report".*

In this jurisdiction, as I have said, there have been a small number of relevant and important decisions from the Court of Appeal in recent years. Apart from the decision in R v EB, there was also another important case, R v Leon Owens, 2011, NICA 48, which has guidance of relevance in this present case. I shall return to that.

In applying the statutory test to the present case, the following factors are relevant: What do I know about this defendant? One, he has a short,

relevant criminal record. He has no previous convictions for a specified offence, although he has a conviction in the Crown Court in Belfast in June 2011 for the serious and specified offence of affray. This related to events on the 13th of September 2008.

I have read the pre-sentence report prepared on the 28th of April 2011 in relation to that matter, together with the sentencing remarks of Mr Justice Treacy, delivered on the 2nd of June 2011.
The defendant was tried with a number of other defendants, including one who was convicted of murder and affray, and another man who was convicted of two counts of attempted murder and affray. Other defendants, including this defendant, were eventually acquitted of more serious offences, but convicted of affray in a non-jury trial.
The learned judge described the events of that day as a violent confrontation. There is, however, no reference in his remarks as to this defendant, Mr McDonagh, being responsible for the infliction of serious personal injury. Indeed, none of this defendant's convictions disclose the infliction of serious personal injury. It is, of course, of considerable concern, that at the time of the present offences the defendant was still just within the time span of a two month suspended sentence, imposed in the Magistrates' Court in Ballymena in February 2009 for the offences of possession of an offensive weapon, a Taser gun, and also further offences in September 2007 of the possession of an offensive weapon in a public place, (a hurley stick), and disorderly behaviour, which occurred in March 2008.

Furthermore, and of concern, is that at the time of the present offences the defendant was on High Court bail for offences which at that time included murder and attempted murder of which he was subsequently acquitted. Although Mr Justice Treacy may well be correct in describing his record as one of violent public order offences, it remains true that I have not been

made aware of any instance where the defendant has been held criminally responsible for the infliction of serious personal injury. This is a matter of no little importance - see R v Owens 2011 NICA 48.

The second substantial matter I know about this defendant is that the facts of this present case are truly alarming. Two police officers in an unmarked police car responded to a call from the defendant's co-accused William Ward in the early hours of the 11th of July 2010. He, Ward, claimed to the police that unnamed males were threatening him with axes, swords and guns. The two police officers who initially attended were in full uniform wearing high visibility police vests. This was in Kew Gardens in Ballymena. Both of the defendants were known to the police officers and to other officers who arrived later. When the police stopped their vehicle, both defendants emerged from a house, Ward carrying a long handled axe, this defendant carrying a 12 inch long machete. Out of concern for his own safety and that of his colleague, one of the officers drew his firearm and ordered Mr Ward to drop the axe. However, Ward kept coming and struck the axe at the front windscreen of the car, shattering the glass. It is of particular concern that Constable Saunderson was still sitting in the passenger seat whilst Ward was doing this, and she immediately left the car in fear for her own safety. Fortunately, she was not injured.

As far as this defendant is concerned, he was noted by Constable Saunderson initially as trying to calm Ward down, saying:

"*They only come to talk to me*".

Constable McClelland, her colleague, who was out of the car with his firearm drawn, shouted to Mr McDonagh to control Ward. However, the defendant approached the Constable, holding the machete in the air, saying words to the effect: "*I'm going to kill you, you bastard, so you'll have to shoot me*".

Although this was sufficiently concerning to cause the Constable to back away, it is important to note that this defendant never came closer to the

police officers than about 15 feet or so, although he did call out: "*Which one of you bastards is going to shoot me*"?

Constable McClelland notes that the defendant soon backed away and the police officer did not believe at that point that there was any immediate threat of personal violence and holstered his weapon.

McDonagh went to the now empty police vehicle and smashed the rear driver's side window with the machete. After this, both defendants retreated back into the house from which they had emerged and the police left the scene on hearing that an angry crowd were seen approaching the area. This was a message on their radio.

A Constable McCloskey also drew his firearm, but after the defendant had struck the car window he also holstered his firearm as he felt there was no longer an immediate threat of personal violence. No one was hurt.

I should say in passing that the police officers, and particularly Constables Saunderson, McClelland and McCloskey deserve the highest credit for the discipline and restraint they showed during this unpleasant and potentially threatening confrontation. This, doubtless, owed much to their training and professionalism in the face of provocation.

Several hours later, the defendant, when told that the police were looking for him, handed himself in voluntarily to the police station.

In interview he claimed to have taken a quantity of drugs from about 10.00 pm onwards that evening, the previous evening, and in fact he remembered nothing of the incident. He had been told that the police were looking for him, he said, and went to the station. He claimed he had received threats some hours before the incident, although my understanding is that this was not corroborated. He agreed that he could not dispute the police account of what he had done, because he couldn't remember. He said he had no grudge against the police and said: "*If I did wrong I would apologise*".

There is no doubt that this was a serious incident with the potential for

serious personal injury, particularly as regards the defendant and his co-accused. The defendants were lucky indeed that the well trained and disciplined police officers showed great restraint. But it is also important to state that no one was hurt and although the defendant behaved in a threatening way to begin with, he made no attempt to attack the officers and never approached very closely to them. At one point he did try to calm Mr Ward down, and the police were soon of the view that they could holster their weapons as they felt it was safe to do so.

Mr Justice Treacy, in reviewing the defendant's criminal record, was of the view that the pattern of previous offences of this defendant, revealed a person who had what he called "*a propensity to use violence against others with little or no provocation, without restraint and with the intention of alarming and injuring those who crossed their path*". He was referring not only to this defendant but to other defendants convicted of affray.

I remark only that the defendant has never caused serious injury to anyone, and so, with great respect, I would find it hard to endorse the words "*without restraint*". They suggest a much more violent person than I am satisfied this defendant is.

The learned judge heard from the probation officer, Mr Wiseman, who confirmed that the conclusions of the risk management meeting, that there was not in their view a risk, a significant risk, of serious harm to the public, was finely balanced. The judge said:

"*I have before me somewhat more detail regarding the nature and pattern of this defendant's offending*".

On this basis, he formed the opinion that the defendant did pose the requisite significant risk of future serious harm to members of the public.

Of course, I am not bound by that finding, but I do take the learned judge's reasoning closely into consideration. He was dealing with an affray which, sadly, much later on in the sequence of events of that evening, led onto murder and attempted murder. It is, however, important to note that this

defendant was not involved in those later and much more serious events, and indeed was acquitted in relation to charges he faced in relation to them.
I have considerably more information available to me than was available to Mr Justice Treacy.

I have, for example, two medical reports on the defendant from Dr Adrian East, consultant forensic psychiatrist, dated the 6th of October 2011, prepared on behalf of the defendant, and a further report from Dr Fred Browne, consultant forensic psychiatrist, of the 13th of August 2012, on the instructions of the Public Prosecution Service. There was also an addendum letter from Dr East of the 16th of September 2012. I understand these reports were prepared for an appeal against sentence by this defendant in respect of the extended custodial sentence imposed by Mr Justice Treacy.

The Court of Appeal heard this appeal and reserved judgment in this matter in September 2012. I have adjourned sentence in the present matter at the invitation of the parties a number of times, in anticipation of that court's ruling. I have come to the view that the time has come when this court should take the plea and pass sentence to ensure that the defendant's Convention right to a fair trial and sentence within a reasonable time span were respected.

At the time of writing, there is no indication as to when the decision of the Court of Appeal is expected. In any event, each judge takes an oath to act with independence and courage and this court is obliged to satisfy itself on the important issue of dangerousness, whilst of course taking into account, due account, of the opinions of others, including a brother judge of the Crown Court.

Before sentence I asked for the updated views of the Probation Service. A further report of the 29th of November 2013 was provided, together with an explanatory e-mail from Miss Nelson, the probation officer.
I heard evidence from Mr Paul Wiseman, who was the probation officer who not only prepared the pre-sentence report in this case, but also prepared the pre-sentence report for the sentencing exercise conducted by Mr Justice Treacy. He, Mr Wiseman, is a highly experienced probation officer of more than 20 years' standing. He told me of the risk management meeting which took place in May 2011 involving himself, area managers, Probation Board for Northern Ireland psychologist and a representative of the Police Service of Northern Ireland.

This meeting also had before it the factual matrix from the affray charge from 2008, dealt with in June 2011 by Mr Justice Treacy. So it was fully informed in relation to both of the incidents of affray with which this defendant has been involved. Mr Wiseman confirmed that it had indeed been a difficult decision for the risk management meeting, and one, he said, close to the threshold. But ultimately it was the view of that meeting that it did not cross the threshold for the reasons set out in the pre-sentence report of the 19th of April 2011.

That report gave those reasons as follows. It said:
"*There are a number of positive factors which inform this assessment. During interview the defendant expressed a level of remorse regarding the police who had to deal with his offending behaviour. He also stated in interview that generally he has no issues with the police. Mr McDonagh has a history of employment and enjoys the support of a long term partner. The court would be aware that his criminal record does not reflect the pattern of offences involving direct violence towards specific others. As outlined above, Mr McDonagh's previous convictions relate to resisting the PSNI, disorderly behaviour, possession of an offensive weapon, burglary and theft and affray. The defendant also referred to positive*

*goals".*

I should say in passing, I could not find convictions for theft or burglary in the defendant's record, but this is of no great matter.
The reasons given by the Probation Service in their 19th of April 2011 report continue:
*"The defendant has also referred to positive goals for the future involving a focus on family life and the further development of his boxing career. During interview, he also expressed his intention to abstain from alcohol and avoid illicit drugs, acknowledging the effects that these substances have on his social functioning and offending behaviour. These attitudinal and situational factors have contributed to the assessment of risk as stated above".*
In her report of the 29th of November 2013, Miss Nelson updated the court with a generally positive report of progress and engagement with prison authorities and prison programmes of rehabilitation. In that report, Miss Nelson notes that:
*"Since his remand to custody, Mr McDonagh has been involved with the following:*
*On the 6th of November 2013 he met with NIPS psychology and agreed to attend MEG and ETS programmes. He completed the MEG programme, that's the Motivational Enhancement Group, and attended on the 6th and 8th of November, which is a precursor to the ETS programmes, in other words the Enhanced Thinking Skills programme. He also attended five sessions of the Enhanced Thinking Skills programme which commenced on the 15th of November 2013, and has been attending a media studies course whilst in custody. He has also been attending a Barnardo's Parenting Matters Programme since the 7th of November 2013. He completed an Alcohol Management Programme on the 4th of February 2013 and Mr McDonagh has said to be await to go commence the Victim Impact Programme and re-engage with Adept, an alcohol and drug agency based in the prison".*

It was the opinion of Miss Nelson that it would appear that Mr McDonagh is presently engaging in his sentence plan. He presents as motivated to engage in programmes and would like to be released when eligible for parole in 2014.

Mr McDonagh has been an enhanced prisoner since the 4th of July 2012. During his time in custody he received five adjudications, the last adjudication received on the 29th of August 2012. He has been drug tested on four occasions whilst in custody, passing three and failing one. And the last test was completed on the 2nd of March 2012, and was passed.
Mr Wiseman advised the court that it is not the policy of the Probation Board for Northern Ireland to conduct further risk management meetings when the test for dangerousness has not been met, in the opinion of those involved, in the original meeting. This is even so in the case where a judge, in the intervening period, has come to a different conclusion and relied on that conclusion and was guided by that conclusion in relation to sentence. He confirmed, as had Miss Nelson, that there had been no significant change in the defendant's circumstances to indicate any change in the Probation Board's original assessment, which was that the defendant did not reach the threshold of dangerousness.
In his report of October 2012, Dr East notes that the defendant does not have a significant history of violence. After assessing all the relevant factors, including the clear association between alcohol use in the 2008 affray case, he concludes that the likelihood of further specified violent offences, by which I take it to include serious offence such as wounding under Section 18 and Section 20 of the Offences Against the Person Act 1861, and similar offences which are specified, it is no more, he believes, than a mere possibility.

In paragraph 18(7) he sets out his reasoning for this. He said:
"*The most significant factor in this regard is the lack of a demonstrated capacity*

*for offending which has caused physical or psychological harm to others. There is a lack of violence prior to the offences of September 2008. The subsequent offences of affray have not in themselves given rise to serious harm. As Mr McDonagh has been acquitted of the more serious offences of murder and attempted murder, I have accepted his account that he had no intent to harm others on the night of the 13th of September 2008, and that no act or omission on his part led to such harm. The later offences of July 2010 could be said to have caused harm to the police officers present in the context of psychological injury, but I can see no evidence to support the view that such harm could be considered as serious. Mr McDonagh has demonstrated a willingness to harm himself which has come to the attention of the police. I did not find his accounts as to why he was in possession of such weapons as described in forensic history, to be credible. The use of a weapon in the most recent offence of affray to cause criminal damage is of significant concern. However, the fact remains that Mr McDonagh has never actually used a weapon to cause serious harm to others, and given the lack of such demonstrated capacity to cause harm, I do not believe that his history of weapon possession in itself indicates an increased likelihood of serious harm to others. There is a substantial difference between the willingness to carry a weapon and the ability to use a weapon to cause harm. I accept the statement contained in the pre-sentence report that Mr McDonagh has expressed remorse for his involvement in the index offences, and at interview with me he showed genuine concern for the victims of his co-accused, particularly the women injured by the car. However, this remorse was not sufficient to prevent the subsequent offence of affray"*

Finally he says at paragraph 18(10):

*"On balance I find that in the absence of a demonstrated capacity to cause serious physical or psychological harm to [others], I cannot state that the likelihood of such harm in the future is such as to warrant a sentence for the purpose of public protection. I believe that this statement is in accord with the findings given in the pre-sentence report".*

Dr Browne, another very experienced forensic psychiatrist, reviewed all the papers from the 2008 case, including the Crown Court transcript, Dr East's report and the sentencing remarks of Mr Justice Treacy. In effect, he neither agrees nor disagrees with Dr East's assessment, that the defendant does not satisfy the standard of significant risk of serious harm to the public. He does point out, in paragraph 14, that:
"*Violence may increase as a problem with substance misuse worsens*".

In a further report of the 16th of September 2012, Dr East deals effectively with a number of the concerns regarding methodology that had been raised by Dr Browne. He concludes at paragraphs 13 and 14:
"*I remain of the view that there is no evidence that Mr McDonagh has ever demonstrated the capacity to cause serious harm to others. I accept that he has been convicted of offences of the possession of a weapon with intent to commit an indictable offence. I would caution against an assumption that the indictable offence in itself equates to serious harm*".

It does not appear to me that this comment is absolutely correct, because the defendant has not been convicted of possession of a weapon with intent. He continues:
"*In the absence of such demonstrated capacity to cause serious harm, I can find no evidence to support the view that Mr McDonagh presents a significant risk of serious harm to others*".

I have already referred to the approach in R v Lang, cited and approved of by our Court of Appeal in R v EB.

In R v Owens, this thinking is taken further and refined. In particular, I note the words of the Lord Chief Justice, from paragraph 16 to paragraph 20. He says:

*"The guidance in Lang also provides that if the foreseen specified offence is 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".*

I pause there to say I regard that particular comment as especially relevant in the present case. The learned Lord Chief Justice continues at paragraphs 17and 18:

*"Article 3 of the 2008 Order defines serious harm as meaning death or serious personal injury, whether physical or psychological.*

*In R v Terrell (2007) EWCA 3079 Crim Ouseley J stated: "The seriousness of the harm required by the Criminal Justice Act is emphasised by the words death or serious personal injury. The latter phrase is deliberately coloured by the associated word death, and stands in contrast with the language of the Sexual Offences Act. And it is on the serious harm occasioned by that offender's reoffending, which the Criminal Justice Act requires attention to be focused."*

*In R v Johnston & Others, 2006 EWCA Crim 2486, the Court of Appeal looked at Rose LJ's suggestion in Lang, that the prosecution should be in a position to describe the facts of previous specified offences. This is plainly desirable but not always practicable. There is no reason why the prosecution's failure to comply with this good practice, even when it can and should, should either make an adjournment obligatory or indeed preclude the imposition of the sentence when appropriate. In any such case, counsel for the defendant should be in a position to explain the circumstances on the basis of his instructions. If the Crown is not in a position to challenge those instructions, then the court may proceed on the information it has".*

I should say in passing in this case, I have been given the fullest assistance and help by both the Crown and prosecution as to the defendant's previous and subsequent offending, and in particular the circumstances of the affray dealt with by Mr Justice Treacy.

The learned Lord Chief Justice continues at paragraph 19 of Owens:

*"We have set out in some detail the injuries sustained by the victim at paragraph 4 above. These were accurately described by the trial judge as multiple, superficial injuries. In their assessment of the risk of serious harm the multi-agency risk management meeting of the 20th of April 2009 proceeded on the basis that the offender was likely to reoffend and that the injuries inflicted in committing the offence constituted serious harm. We entirely accept the conclusion in relation to the risk of reoffending but our review of the case law above indicates that the multiple superficial injuries are highly unlikely to constitute serious personal injury within the meaning of this legislation. The trial judge relied heavily on the conclusion in the pre-sentence report that the offender gave rise to a significant risk of serious harm, but in our view that conclusion was flawed, because of its assessment of serious personal injury".*

The Chief Justice continues:

*"We have carefully examined the offender's previous convictions and have had the benefit of an analysis of the harm inflicted by him. None of the previous convictions for violent offences disclose the infliction of serious personal injury, and there is no change to the assessment of risk in relation to sexual offences from the assessment made in 2007. It is a necessary condition for an extended sentence that there should be a significant risk of serious harm as a result of the commission of further specified offences. In our view, this was not established in this case and we were accordingly obliged to allow the appeal and revoke the extended custodial sentence".*

I find those words of particular resonance in the factual matrix before me. I have also derived considerable assistance from the decision of the Court of Appeal in England and Wales in R v Pedley 2009 EWCA Crim 840. In

that case the court gave further guidance on the question of the assessment of significant risk of serious harm. The court said:

*"The requirement there had to be a significant risk, not only of reoffending but of harm that could properly be called serious. And this requirement could not be watered down. The question whether the risk of serious harm was, in any individual case, significant so as to justify an IPP sentence, was highly fact sensitive. It had to remain a decision for the careful assessment of the judge in addressing the question whether the risk of serious harm was significant. The judge was entitled to balance the probability of harm against the nature of it if it occurred. The harm under consideration had to be serious harm before the question even arose. Within the concept of significant risk was built in a degree of flexibility which enabled the judge to conclude that a somewhat lower probability of particularly grave harm might have been significant, and conversely the somewhat greater probability of less great harm might not. However, there was no justification for attempting a redefinition of the plain English expression of significant risk of serious harm. There was no occasion to rewrite the statute. The dictionary definition of significant, namely 'not worthy, of considerable amount or importance', was not to substitute a different expression for the statute. It was and remained a helpful indication of what kind of risk was in issue. It was wholly unhelpful to attempt to redefine significant risk in terms of numerical probability, whether it was more probable or by any other percentage of likelihood. No attempt should be made by sentencers to attach arithmetical value to the qualitive assessment which the statute required of them".*

In the light of all of these matters, I am not satisfied that this defendant is someone who fulfils the assessment of dangerousness test as described in articles 13, 14 and 15 of the 2008 Order. I realise that two Crown Court judges have now come to different views about the application of that test to the same defendant. And that in some ways is a rather uncomfortable position to be in. However, I have had further advantages denied to Mr Justice Treacy - the helpful and detailed reports from Dr East, Dr Browne,

and further significant input and updated views from the Probation Service.

As I pointed out, I have a duty to act independently, applying my best judgment to all of the matters before me in an individual case. I accept the reasoning of the Probation Service. As Mr Wiseman said, this was not an entirely easy decision, bearing in mind that the defendant committed a further serious and specified violent offence whilst on bail for a similar offence, and more serious offences.

There was clearly a not insignificant risk of the commission of further specified violent offences. However, I share the opinion of the risk management team and Dr East, that there is only the possibility of serious harm, to use the words of the statute, in being caused to members of the public following the definition in the legislation. That being so, and applying the tests set out in Pedley and in Owens, referred to above, the key element in a finding of dangerousness is obviously missing in this case. In the circumstances, I will be passing a sentence under the provisions of Article 8 of the 2008 Order.

Now, as Mr Justice Treacy pointed out in paragraph 28 of his sentencing remarks for the 2008 affray case:
"*Affray carries a maximum sentence of life imprisonment. Given the infinitely varying circumstances in which affray may occur, and the wide diversity of possible participation of those engaged in it, other fact specific sentences in other cases, whilst relevant, are of little practical assistance. Context [of] specific sentences in other cases should not artificially constrain the sentencer, particularly in a contested case, where having heard and seen and evaluated all the witnesses, the court is especially well placed to judge the culpability of those appearing before it*".

This case, whilst obviously potentially dangerous, resulted in no one being injured. As far as aggravating features are concerned, I find the following: The defendant was the subject of a suspended sentence for two counts of possession of an offensive weapon and disorderly behaviour when he committed these offences. He was also on High Court bail for serious, violent offences at the time of the commission of these offences, and he has a previous criminal record of relevant offences.
In passing, I note he was also bound over for 12 months in April 2011 for disorderly behaviour, but that, of course, was after the commission of these offences.

As regards mitigating features, firstly, it may be more the absence of an aggravating feature, but no one was hurt. And I have already described the Constable's reaction to the defendant's behaviour, and note, for example, that at one point McDonagh tried to calm down Mr Ward. Secondly, he handed himself into the police when he was told that they were looking for him, and did not waste any time in doing this.
Thirdly, he is entitled to full credit for his plea of guilty. He effectively said in interview that he accepted what the police said because he couldn't remember anything. And in applying the principles set out in Attorney General's Reference number 1 of 20062006 NICA 4 I find that he is entitled to full credit for his acceptance of guilt at an early stage, and his plea of guilty in this court.

The defendant has had to wait some two and a half years to be sentenced in the present case, and this is another factor that should be taken into account. This arose because all concerned, including the court, thought it best to await developments in the appeal process. I have formed the view that it is no longer appropriate to wait, the court having a duty to resolve this case and sentence the defendant in a time scale that is reasonable and

proportionate.
Further, the pre-sentence report suggests that there is a low to medium risk of further offending. I find this a somewhat surprising finding. It is a relevant factor by way of mitigation, although, with due respect to the author of the pre-sentence report, given the sequence of events between 2008 and 2010, my own view is that there is a medium risk of further offending.

Finally, it is accepted that the defendant has expressed a level of remorse regarding the police who had to deal with a frightening situation.
I am of the view that this offence is sufficiently serious to cross the custody threshold, particularly when one bears in mind the defendant's previous record, the suspended sentence and the fact that he was on bail at the relevant time. I pause before sentence, however, to consider the sentence passed on the co-accused William Ward. In relation to affray, he was sentenced to two years imprisonment; criminal damage 18 months; possession of an offensive weapon, that is the long handled axe, one year in prison. These sentences were to run concurrently but were to be suspended for a period of two years. Mr Ward was considerably older than the accused. He had previous convictions, including arson and making and throwing a petrol bomb, for which he was sentenced in 1991to two years imprisonment. He was convicted of disorderly behaviour in 1998, in 2007 and twice in 2008. Like this defendant, he was not assessed by the Probation Board as dangerous, but was assessed at being at high risk of committing further offences.

The learned judge's decision to impose a suspended sentence in his case was truly merciful, largely influenced by the remorse and regret shown by Ward, the fact that his last significant offence of violence was in 1996 and his willingness to address alcohol abuse. He had completed a lengthy anger management course and was regarded as suitable for further

courses identified by the Probation Service. The plea made in mitigation also referred to the defendant's charitable work. It would also appear that the police acknowledged that he had apologised and one police officer apparently was prepared to speak up for him. There were also reports, which were extremely helpful to him, from Dr East and from Dr Carol Weir, the consultant psychologist who specialises in drug addiction. Nevertheless, despite all of that, it was a very merciful sentence.

I have no doubt that a custodial sentence should be imposed in this case. I see no basis for suspending that sentence. The aggravating features that the defendant was subject to a suspended sentence and was on High Court bail for very similar and more serious offences justifies a difference in treatment to that meted out to Ward. I bear in mind, however, that Ward appeared to be the more serious offender on the night in question, being prepared to strike with a long handled axe at a car containing a police officer. He was much older than this defendant. His record is worse. I note that this defendant has been on remand for some approximately 11 months purely in regard to the present matter.

Taking all these factors into account, the length of the determinate sentence for the most serious count of affray, will be one of 18 months. The same sentence will attach to criminal damage and also to the possession of an offensive weapon, to wit the machete. All of these sentences will be concurrent with each other.

I should say that it would have been open to the court to make these sentences consecutive to that being served for the 2008 affray.
But taking all the factors into account, and in particular making appropriate comparison with the sentence passed on Ward, it would not be fair to do so.

I have determined that the period after your release, Mr McDonagh, during which you will be supervised by a probation officer in order to protect the public from harm and to prevent the commission of further offences, will be nine months. This is called the licence period. Deducting this licence period from the overall term of the sentence means that the custodial term is nine months. I understand that this is time served. I recommend that the Minister of Justice impose licence conditions seeking to monitor excessive consumption of alcohol and drugs, with a specific licence condition that the defendant report for counselling when he is available to do so, to a venue specified as directed by the officer in charge and participate actively in an alcohol and drugs management treatment programme during the licence period, and to comply with all of the instructions given by or under the person in charge.

My understanding is that the co-accused was required to pay compensation in full for the damage to the police car. I make no Order in respect of this defendant.