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Judgment: approved by the Court for handing down | *Delivered:* **26/9/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

PAUL McGARRIGLE

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Before: Girvan LJ, Coghlin LJ and Weatherup J

WEATHERUP J (delivering the judgment of the court)

[1] This is an application for leave to appeal against the imposition of a determinate custodial sentence of eight years, being four years in custody and four years on licence, for four offences relating to an assault on the victim in his home on 22 December 2012. Ms Kennedy appeared for the prosecution and Mr Duffy QC for the applicant.

[2] The applicant pleaded guilty to assault occasioning actual bodily harm on 19 September 2013 and pleaded guilty to the other three counts of aggravated burglary with intent to inflict grievous bodily harm, criminal damage and attempted grievous bodily harm with intent on 18 November 2013. Sentence was imposed on 17 January 2014 and for aggravated burglary the sentence was 8 years, for criminal damage, 2 years, for attempted grievous bodily harm with intent, 6 years and for assault occasioning actual bodily harm, 4 years, all concurrent.

[3] There was an agreed statement of facts as follows. The injured party Jonathan Johnston had moved into a rented house at 17 Ebrington Street at approximately three weeks before Christmas 2012. He shared the house with two male friends David Ashcombe and Keith Gardner. They decided to hold a housewarming party on the night of Friday 21 December 2012. People came and departed in the course of the night but the numbers remained fairly constant at about 20 at any given time. The party was winding down about 2 am and people were beginning to leave when a group of men arrived outside the house, one of whom was the defendant Paul McGarrigle. He used a hammer which he had in his

possession to break the living room window and the group forced their way into the house. Having gained entry into the house there followed shouting of sectarian comments by the intruders. The injured party recalls the defendant shouting initially '*Jonathan Johnston you fenian bastard where you are and all because he's a fenian living in Bonds Street*.' At that point the injured party had got up and was punched in the face by the defendant causing him to fall on the floor in the vicinity of the broken window. When he got up from the floor he was struck again on the head by the defendant with a hammer. This caused him to fall on the floor again. When he was lying on the floor he was subjected to further kicks and punches and hit with bottles that other party goers had been using. This appears to have been done by the intruders and not just the defendant. Again various sectarian remarks were addressed to the injured party along the lines of '*You are a fenian living in Bonds Street and you shouldn't be here at all*'. The attackers then left and some of the partygoers telephoned for the police who arrived 10 minutes later. The police gave the injured party first aid until the ambulance arrived and took him to Altnagelvin Hospital. He was detained in the hospital and was found to have a 7 cm laceration to the back of his head together with a 2 cm laceration to his left shoulder with underlying haematoma. There was further bruising to his left clavicle in the midline of his back. He was found to have a reduced level of consciousness and a CT scan of his brain was carried out. No evidence of skull fracture or haemorrhage within or around the brain was detected.

[4] The Judge's sentencing remarks refer to the 42 years old applicant's criminal record comprising 31 convictions, six of which related to criminal damage, one possession of an offensive weapon, two assaults occasioning actual bodily harm, other convictions for dishonesty and eight convictions for disorderly behaviour. The majority of the offending was during the years 1987 to 2000 and the assaults were committed in 1992 and 1996. There was a reference to the pre-sentence report in which the applicant was assessed as posing a high risk of future general offending and was assessed as not posing a significant risk of serious harm to the public. Aggravating factors were noted to be that the injured party was at home, significant physical injury sustained, a weapon had been used, there was deliberate targeting for sectarian reasons, a group of men were involved, the applicant was under the influence of alcohol and the injured party had to move house. The Judge referred to the applicant's plea of guilty and as Ms Kennedy stated, the prosecution accepted that the applicant was entitled to considerable discount because there had been on-going discussions between prosecution and defence as to the basis of plea. The applicant made some admissions at interview and was entitled to considerable discount although not at the maximum level. There were four references relied on by the applicant which all spoke highly of the applicant and which have also been produced to this court. The Judge referred to the English Sentencing Guidelines and to the decisions in Vokes [2009] NICA 63, and Kernaghan [2003] NICA 52 and Donegan [2005] NICC 6. The Judge imposed the sentence for aggravated burglary of eight years and concluded his remarks by stating that if the defendant had contested the charges and been found guilty he would have imposed a sentence in the region of 12 years imprisonment.

[5] The application for leave to appeal against sentence is based on the sentence of eight years being manifestly excessive. This relies on a number of grounds. First, that the Judge misdirected himself as to the appropriate starting point for sentencing when he identified 12 years. Secondly, that the Judge misinterpreted the Guidelines by placing the present case in Category 1. Thirdly, the Judge failed to have regard to the Northern Ireland authorities namely Vokes [2009] NICA 63 and McAuley and Seaward [2010] NICA 36 and Doherty [2013] NICA 38. Lastly it was contended that in all the circumstances the sentence was outside the proper range. These grounds essentially give rise to consideration of two matters (1) the application of the Sentencing Guidelines and (2) the application of the Northern Ireland cases.

[6] First of all, the Sentencing Guidelines. At paragraph [11] of Doherty this Court stated in relation to the Sentencing Guidelines in respect of grievous bodily with intent that this Court generally finds it helpful to take into account the aggravating and mitigating factors identified by the Council although the sentencing ranges chosen by this Court will generally allow the sentencer a greater degree of flexibility. On the 12th of this month in McCaughey and Smith [2014] NICA 61 this Court reiterated the view that although the Guidelines can be useful in identifying aggravating and mitigating factors and appropriate sentencing ranges they should not be used so as to distract the Court from finding the right sentence for the individual case.

[7] The Sentencing Guidelines on aggravated burglary set out three categories. The first category is greater harm and higher culpability, the second category is greater harm and lower culpability or alternatively lesser harm and higher culpability and the third category is lesser harm and lower culpability. The Judge placed the present case in Category 1. The applicant contends that placing the present case in Category 1 was a mistake and seeks to place the case in Category 2. The Guidelines state that where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category. It was agreed on behalf of the applicant that the factors indicated higher culpability. The issue was whether factors indicating greater harm arose in the present case. The applicant contends that the injuries sustained by the victim could not be classed as greater harm. The factors indicating greater harm as listed in the Sentencing Guidelines are not limited to physical injury. For example they include damage to property, causing a significant degree of loss to the victim, whether economic, commercial, sentimental or personal value, soiling, ransacking or vandalising property, the victim being at home or on the premises or returning while the offender was present, significant physical or psychological injury or other significant trauma to the victim and violence used or threatened against the victim particularly using a weapon. A number of these non-personal injury factors are present and they indicate greater harm. The treatment of the present case as falling into Category 1 was entirely justified.

[8] The Guidelines determine the starting point in the category range. Category 1 starting point is 10 years and the range is 9-13 years. The second category, relied on by Mr Duffy, is 6 years where the range is 4-9 years. Having fixed the starting point the sentencer looks to additional factors that lead to the upward or downward adjustment from the starting point. The next stage is mitigation. In the present case the Judge reduced the sentence of 12 years on a contest to one of 8 years. It appears that it was but one consideration by the Judge that he would look to the Guidelines in addressing the appropriate sentence and it is the view of the Court that he was entitled to do so. Further the approach that he adopted in determining the offence category and reaching the sentence imposed was within the terms of the Guidelines.

[9] The second matter on which the applicant relied was that this sentence was not compatible with the Northern Ireland cases. In Kernaghan [2003] NICA 52 at paragraph [19] this Court stated -

> "Comparisons of sentences in other cases must be carefully undertaken, especially where offences of violence are involved since these are usually highly fact specific and cannot therefore provide an infallible guide to the appropriate sentence even where the circumstances appear similar."

[10] With that caveat the cases referred to are considered. In McArdle [2008] NICA 29 this Court, in relation to grievous bodily harm with intent, stated –

> "In cases such as the present where there can be no question that the grievous bodily harm was inflicted deliberately and that the appellant intended that his victim should sustain grievous injury, we do not belief that the range of sentences should be significantly different simply because fortuitously a fatal injury was not sustained….
>
> We have concluded, therefore, that for offences of wounding with intent to cause grievous bodily harm the sentencing range should be between seven and fifteen years following conviction after trial. An appropriate reduction on this range should be made where the offender has pleaded guilty…."

[11] In Vokes [2009] NICA 63, upon which much reliance was placed by Mr Duffy, this Court was concerned with a reference in relation to an attempt to inflict grievous bodily harm in respect of which the defendants had pleaded guilty and received a sentence of 12 months imprisonment. A custody probation order was imposed that involved I month in custody. That case too involved breaking into a house and attacking the inhabitants with a weapon. Fortuitously, minor injuries were sustained. It was not stated that there was any sectarian aspect. The Court at paragraph [12] noted that on behalf of the offenders it was pointed out that this was

not one of those cases where elderly people are preyed upon or where an attack was carried out for financial gain and stated –

> "While that was so it was nonetheless a different genus of the offence of aggravated burglary which was serious in itself. In the case of attacks on the elderly sentences in excess of 10 years imprisonment would be appropriate. Such a sentence may well be appropriate in the present type of aggravated burglary depending on the circumstances."

The Court then considered the degree of premeditation, the use of the weapon and the open manner in which the force was used and concluded that the range that would have been appropriate was one of 3 to 5 years having regard to the late stage at which the pleas were entered.

[12] The remarks about attacks on the elderly were concerned with a particularly vulnerable group. Another vulnerable group might be those who are home at night with their families when attacked in their home by a gang of men. Such families are not in a position to defend themselves adequately against numbers of intruders. The circumstances of Vokes involved a charge of attempted grievous bodily harm with intent as opposed to the present case involving aggravated burglary with intent to inflict grievous bodily harm. In addition this case is plainly sectarian. This country has been beset for many generations by sectarian attacks between parts of the community. What clearly drove the present incident was a form of religious hatred. That is a statutory aggravating factor. Further, the victim was forced to leave his home and it is assumed that that was the intention of those who committed the offences as indicated by the remarks quoted in the agreed statement of facts that the victim should not have been living in that street. The above factors clearly distinguish the present case from Vokes.

[13] In McAuley and Seaward [2010] NICA 36 this Court was dealing with a reference where the offenders stamped on a victim who had been knocked to the ground. The Court stated that the sentencing range identified in McArdle, being 7 to 15 years on conviction after trial, was generally appropriate where the offence of causing grievous bodily harm with intent was committed by an attack with a shod foot while the victim was lying on the ground. The place within the bracket will be determined generally by the extent of the harm caused and other aggravating and mitigating factors. The range of sentence on a contest was there reiterated as 7 to 15 years.

[14] In Doherty [2013] NICA 38, this Court was dealing with a reference on a plea to attempted grievous bodily harm with intent where a sentence of 3 years imprisonment had been imposed and the sentence was increased to 5 years. The charges arose out of a dispute between groups in Coleraine. Comments were allegedly made by the injured party about the offender's mother so there may have been personal animosity rather than sectarianism. Fortunately only minor physical

injuries occurred. The Court identified the comments just referred to in McAuley and Seaward and the Sentencing Guidelines. The differences from the present case concern the fortuitously low harm resulting, the spontaneity of a street fight between youths, despite a history of such conflict, and the personal antagonisms that fuelled the incident.

[15] The Judge referred to Kernaghan [2003] NICA 52. This Court refused an application for leave to appeal a sentence of 12 years in respect of causing grievous bodily harm and a sentence of 8 years in respect of aggravated burglary. The offences arose out of a troubled marital relationship and the offender attacked the husband and wife by breaking into their house at night and attacking them with a hammer. Thereafter he surrendered to the police. The husband suffered catastrophic injuries. This Court dismissed the appeal against the sentences, noting that the applicant had given himself up, pleaded guilty, had a clear record and was suffering emotional turmoil because of the relationship issues. On the other hand, in light of the devastating consequences, a prolonged attack and the abduction of the wife the sentence was not manifestly excessive or wrong in principle.

[16] The Judge also referred to Donegan [2005] NICC 6. The offenders broke into a number of houses and attacked the occupants before stealing a car. In respect of aggravated burglary one offender was sentenced to 8 years imprisonment and the other to 5 years imprisonment.

[17] This discussion started by indicating that one cannot rely on a particular case as the measure of the sentence to be imposed in the next case. The cases are fact specific. We are satisfied that the Northern Ireland cases do not indicate that the sentences imposed in the present case could be described as manifestly excessive or wrong in principle. The application for leave to appeal against sentence is refused.