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(subject to editorial corrections)*

Delivered: 14/05/2014

Bill No: 13/095103

IN THE CROWN COURT IN NORTHERN IRELAND

ARMAGH CROWN COURT SITTING AT BELFAST

THE QUEEN

v

GARETH McKINNEY AND MICHAEL WILSON

Weir J

[1] Gareth McKinney and Michael Wilson, you have each pleaded guilty to the manslaughter of Lee Smyth and you Michael Wilson have also pleaded guilty to the robbery of a cigarette tin from Lee Smyth. I must now sentence you both for those offences.

[2] The background leading to the death of Lee Smyth, whom I shall refer to in these remarks as “the deceased” is somewhat complex but it is important to explain it in order to place the ultimate events into context. I do so principally by reference to the evidence given by his girlfriend, Ms Tracey Louise Flynn, at your trial for the murder of Mr Smyth before the point at which your pleas to manslaughter were accepted by the prosecution. On the late evening of Saturday 5 June 2010 the deceased and she had been at a house party. It appears that the deceased became involved in an argument there which led to a physical altercation. Ms Flynn brought the deceased home to a nearby house where she and he were living with her mother. She said that the deceased was angry as they walked home where they arrived at about 1:30 am on Sunday 6 June. While they were in bed at about 3:30 am something was thrown outside that struck but did not break a window in the house. A man with a hood was seen running away and figures were seen standing nearby. The deceased then ran downstairs past Ms Flynn and chased the running person. He then returned and began looking under Ms Flynn’s bed for an ornamental machete that she kept stored there. She prevented the deceased from taking the

machete but was unable to stop him from leaving the house again to try to find whoever had thrown the item at the house. He left and did not return before the subsequent events in which you too became involved.

[3] At about 4:35 am two police officers on mobile patrol came upon two males in the Glenside area of Armagh. They appeared to be “squaring up” to each other and one of them, the deceased, was armed with a piece of wood. The police calmed the situation and decided to take the other man home. The deceased said that he was going to walk home but when they later called at the deceased’s house they found he had not returned there.

[4] At around 6 am they were tasked to a pathway beside the Ballynahone River where there was a report of a seriously injured man. On arrival they found the man whom they recognised as the deceased lying seriously injured and being attended to by an ambulance crew.

[5] The deceased was brought to hospital but it soon became apparent that he had suffered very grave injuries to the head and brain. He remained unconscious and was in due course transferred to a nursing home where he remained for nearly two years in an almost vegetative state. There were no signs of recovery but rather his condition deteriorated so that ultimately his family was faced with the dreadful decision as to whether his feeding should be withdrawn. In consultation with the doctors, who could give no hope of recovery, they decided that he should be allowed to die and he did so on 12 June 2012, almost exactly two years after he had been injured.

[6] The evidence as to what had happened after the deceased left the police officers and before he was found around 5:30 am by a lady walking her dog on this riverside path was given by a Ms Lindsay Bell who was with you two on the path when you encountered the deceased and the events leading to his severe injury and ultimately death occurred. Ms Bell had previously been the girlfriend of you, Wilson, but by this date was going out with you, McKinney. On this night she had been at a party and later while on her way to meet you, McKinney, was also joined by you, Wilson, and the three of you ended up walking along this riverside path. Both of you had been drinking and you, Wilson, were walking somewhat ahead of you, McKinney and Ms Bell. As you neared the point at which a foot bridge crosses the river the deceased came over it from the other side. You did not know him but he walked towards you, Wilson, and, according to Ms Bell, he “went for” you and you fought back. Ms Bell told you, McKinney, to go and split up the fight but instead you joined in too using your fists and between you, you got the better of the deceased. He went to the ground whereupon, again according to Ms Bell, you McKinney, stopped hitting the deceased but you, Wilson, kept hitting him although he was on the ground and not responding. She said that you hit him with both feet and fists, kicking him on his body. The episode lasted for 5 minutes of more and after it stopped the deceased was left lying motionless on the ground. Ms Bell sent you, McKinney, to see if the man was alright but you returned to say that you did

not know. At some point during all this you, Wilson, took a cigarette tin from the deceased which is the subject of the robbery charge against you.

[7] After the deceased had been rendered motionless and without knowing whether he was alright you all three left and made no effort to summon help for him. Whether, had you done so it would have made any difference to the catastrophic nature of his injuries, it is impossible to say but it would at least have demonstrated some compassion for a man left senseless by your actions.

[8] When Ms Bell heard two years later of the death of the deceased she decided that she would finally tell the police what she knew and, with great bravery, she did so. That information led to the arrest of you two and to this prosecution.

[9] In view of the very grave nature of the head injury sustained by the deceased it would have been important to establish, if possible, how the damage to his head was caused. Unfortunately, the Deputy State Pathologist, Dr Bentley, was unable to establish this with any certainty bearing in mind that he was largely dependent upon the medical history, photographs and x-rays from a date two years earlier than the death. He found large abrasions to the outside of the head and, at post-mortem, evidence of previous haemorrhages and bruising to the brain and brain damage due to reduced oxygen supply. He was however unable to determine whether the head injuries were caused by blows to the head while the deceased was standing or while lying prone on the ground or from striking the ground hard with his head on falling after being struck. Accordingly, I treat the evidence against you, McKinney, as establishing that you punched the deceased while he was still standing and against you, Wilson, as having punched and kicked him both while standing and after he had fallen to the ground, but the evidence does not establish that you kicked him around the head.

[10] I do not know why the deceased was in an angry and aggressive mood on this night but it is plain from the evidence of both women and the police officer that he was. It is also the evidence that he struck the first blow and that, initially, that provoked a fight with you, Wilson, until you McKinney, who had been sent to stop it, joined in and together you knocked him to the ground where he became insensible. In her poignant Victim Impact Statement the deceased's mother, having described in great detail all that she and the wider family tried to do for the deceased during the two years following his injury, the anguished decision to cease maintaining his life and allow him to die and the physical effect upon her resulting from the stress of caring for the deceased followed then by the stress of this trial, ended her statement by saying:

“Lee was not an angel and he had a lot of his own problems but he was my only son and I miss him so much. He did not deserve to be attacked and left in the way that he was.”

[11] It is trite to say that the range of culpability and, correspondingly, of sentence in cases of manslaughter is extremely wide. In this case there was broad agreement between prosecuting and defence counsel as to the appropriate starting point for each of you which Mr Mooney QC for the prosecution identified as falling in the range of 8-10 years while Mr Harvey QC and Mr Ramsey QC for the defence contended that it ought to be at the lower end of that range. I accept the prosecution's submission as to the appropriate range and, so far as the circumstances of the offence are concerned, I do not propose to distinguish between you because while you, Wilson, continued the attack after the deceased had ceased to fight and was on the ground, while you, McKinney, stopped when he went to the ground, on the other hand the deceased attacked you, Wilson, so that your initial response was one of legitimate self-defence while you, McKinney, had no such justification, having been sent to stop a fight in which you were not concerned and instead joined in in a cowardly fashion for which you had no excuse at any stage.

[12] Turning to deal with your personal circumstances, I have the benefit of excellent Probation Reports on both of you which provide considerable detail. Dealing firstly with you, McKinney, you were 20 years old when this offence was committed at which stage you had no previous convictions so I treat you as a person who was at that time of good character. The Probation Service has assessed you as being at medium likelihood of re-offending and considers you do not meet the threshold for presenting as a significant risk of serious harm to the public at this juncture. You have been in full-time employment as a skilled tree surgeon and continued in that employment both while on bail awaiting trial and after the trial while awaiting this sentence. Your employer has written an impressive reference testifying to the quality of your work and of your attendance and offering to re-employ you if a vacancy should occur following your release from prison. In your case I take the starting point as one of 8 years. It is agreed that, in common with Wilson, you did not admit your involvement in this matter at the first opportunity and therefore cannot receive the maximum allowance for your plea. At the same time, again, as in Wilson's case, it is agreed that after the murder charge was preferred against you your legal representatives indicated at an early stage that if a plea of guilty to manslaughter were acceptable to the prosecution it would be offered. It was not until the factual circumstances surrounding these events were clarified by the evidence given for the prosecution at the trial that acceptance of pleas to manslaughter was considered appropriate by Senior Crown Counsel. I therefore sentence you to 6 years' imprisonment. Under the legislation I am obliged to apportion that sentence as to 3 years in custody, on which you will receive no remission, followed by three years on licence under the supervision of a probation officer. The conditions of that licence are not for me to impose but I recommend that they include:

- (i) Engagement in all such programmes, interventions and assessments as may be directed by the supervising probation officer.

- (ii) That you refrain from the consumption of alcohol and engage in any treatment or counselling determined as appropriate by the supervising probation officer.
- (iii) That you reside only in accommodation approved by the supervising probation officer.
- (iv) That you comply with any electronic monitoring or curfew restrictions considered appropriate by the supervising probation officer.

[13] Dealing now with you, Wilson, you were almost 20 years of age when these matters occurred. Even at that age you had a significant number of previous convictions for offences of violent disorder including one that involved striking someone with a golf club requiring treatment to his left eyebrow. You appear to have been leniently dealt with for these prior offences, possibly with hindsight rather too leniently. I therefore increase the starting point in your case to one of 9½ years by reason of your prior offending record and allow a similar proportionate reduction for your plea of guilty.

[14] However, what greatly concerns me about your offending behaviour is that following and despite the terrible consequences of the present incident you have continued to behave violently on repeated occasions which also appear to have been associated with the consumption of alcohol. After the present incident you joined the Army and while in England on 19 June 2011 you attacked a man at a train station, punching him on the head in an argument apparently about whose regiment was the best. On 12 December 2011, again in England, you punched a man in the face while backing up a friend over a dispute between neighbours. On 8 January 2012 you were involved in an incident in Co Armagh when the police were endeavouring to clear a public house that was open illegally out of hours. On that occasion you were convicted of disorderly behaviour, resisting and assaulting the police and when arrested had to be placed in handcuffs and leg restraints before you could be put into the police cell van. On 20 October 2013 while on bail for the present offences you overturned a car with several passengers inside and were convicted of driving with excess alcohol thereby breaching the 'no alcohol' condition of your bail.

[15] Against this background both pre- and post the present offences, it is not surprising that the Probation Service has assessed you, in what Mr Harvey rightly characterised as a "sophisticated" report, as posing a high likelihood of re-offending and also as a significant risk of serious harm to others. The reasons for these conclusions, which I entirely accept, are aptly summarised in the closing paragraphs of the Probation Report as follows:

"PBNI would have significant concerns regarding the defendant's attitude and propensity to behave in a reckless and violent manner when intoxicated. This is

evidenced by subsequent convictions and minimisation of the impact of his behaviour upon his victims. There are a number of offences committed after the assault on Mr Smyth which would indicate that the life threatening injuries the victim suffered and his subsequent death was not enough to curtail or deter Mr Wilson from further offending behaviour.”

I note also that the PBNI assessment of the connection between your violent offending behaviour and your consumption of alcohol is corroborated in the reference provided to the Court by your Army Platoon Commander.

[16] Having taken account of all the information available to me I am of the opinion that there is a significant risk to members of the public of serious harm occasioned by you of further specified offences. You have been convicted on your plea of guilty of a specified serious offence but I am not of the opinion that I am obliged to impose a life sentence or an indeterminate custodial sentence. I am fortified in that latter conclusion by the submissions of your counsel, Mr Harvey QC, and the fair concession of Mr Mooney QC in response to a direct inquiry from me that the imposition of an extended custodial sentence might in the circumstances be more appropriate.

[17] Accordingly, I consider that the imposition of an extended custodial sentence is necessary and would be adequate in your case. The appropriate custodial term will be one of 7 years. After you have served at least half of that period the date of your release will be determined by the Parole Commissioners.

[18] I determine that the extension period to that custodial term shall be one of 3 years. After you have been released from prison by order of the Parole Commissioners that is the additional period during which you will be subject to licence. I consider this to be the period needed to protect members of the public from serious harm.

[19] On the count of robbery of the cigarette tin I sentence you to a custodial term of 2 years with an extension period to that custodial term of 3 years, that sentence to be concurrent with that imposed on the first count.

[20] Finally, while I have no control over the licence conditions that may be imposed upon you during your periods on licence I recommend that they include:

- (i) Engagement in all such programmes, interventions and assessments as may be directed by your supervising probation officer.
- (ii) An obligation to engage with such addiction and psychology services as may be directed by your supervising probation officer.

- (iii) That you should reside only in accommodation approved by the supervising probation officer.
- (iv) That you comply with any electronic monitoring or curfew restrictions considered appropriate by the supervising probation officer.
- (v) A prohibition on the consumption of alcohol or of drugs other than those prescribed for you by a medical practitioner.