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Judgment: approved by the Court for handing down | *Delivered:* **19/05/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MICHAEL MONGAN

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

COGHLIN LJ (delivering the judgment of the court)

[1] On 9 January 2014, subsequent to having been found guilty of eight counts upon an indictment alleging attempting robbery, aggravated burglary, causing grievous bodily harm with intent, assault occasioning actual bodily harm, common assault, possession of an offensive weapon with intent, driving while disqualified and using a motor vehicle without insurance, Michael Mongan ("the applicant") was sentenced by His Honour Judge Babington, the Recorder of Londonderry. The learned Recorder imposed an extended custodial sentence of 14 years, together with an extended period under licence of 5 years upon Count 1, attempted robbery, in accordance with Article 14 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Lesser custodial sentences were imposed in respect of the remaining 7 counts. For the purpose of this application the applicant was represented by Mr Frank O'Donoghue QC and Mr Sean Devine while Mr Russell appeared on behalf of the prosecution. We acknowledge the assistance that the court derived from their well prepared and attractively delivered written and oral submissions.

Background facts

[2] The background facts relating to the offences of which the applicant was convicted have been set out in detail at paragraphs [2] to [9] in the judgment of this court, delivered on the 24 February 2015, dismissing the applicant's application for leave to appeal against conviction. In essence, the applicant and another male had reason to believe that an individual named Niall Convery had deposited a sum of approximately £10,000 in a shed at the rear of domestic premises at 82 Mayogall Road, Knockloughrim the home of his mother Theresa

Convery. Niall Convery carried out a car and tyre business to the rear of those premises and it seems that the owner of a scrap yard had given the sum of £10,000 to Niall Convery in return for him running the scrapyard business in the absence of the owner.

[3] When the applicant and his companion arrived at the domestic premises they encountered Theresa Convery, 70 years of age, her son Martin, who was then in his mid-40s and her grandson Philip then aged 16. Martin was assisting Philip with his forthcoming GCSE maths examination. The applicant was unmasked but his companion was wearing a balaclava and pointing a gun. They demanded the money that was in the shed. When they were told that the Converys present did not have any keys to the shed and knew nothing about any money the applicant went out to the vehicle in which he had arrived and returned with a large iron bar. For the purpose of compelling Theresa Convery to provide information about the location of the money the applicant then assaulted her with the iron bar. When Philip Convery attempted to intervene he also was assaulted in a similar fashion. Martin Convery was also struck by the applicant with the iron bar sustaining bruising to his arms, back and legs. These were deliberate, cowardly and brutal assaults visited, in particular, upon two individuals who were vulnerable, respectively, by reason of their age and youth.

Pre-trial reports

[4] Theresa Convery, Martin Convery and Philip Convery were each made the subject of a victim impact report provided by Dr Michael Curran, consultant psychiatrist.

[5] At the time of the assaults Theresa Convery used a rollator to assist her mobility about the house. Photographs illustrated that she sustained extensive and severe bruising to her hip and left lower legs. To use her own words she has been left "a nervous wreck" as a consequence of the assaults. Dr Curran confirmed that there had been psychological sequelae, diagnosing a prolonged adjustment disorder of anxiety type, but noted that the resilience of Theresa Convery was "clearly evidenced". Theresa Convery told Dr Curran that, prior to the attack, the doors of the house had been kept open in accordance with the custom of people living in the country. Her house has now been equipped with surveillance cameras and a keypad code is necessary to enter from the outside. She no longer sleeps well and has lost her interest in socialising.

[6] Philip Convery's condition was deemed to be critical and he was transferred to the Royal Victoria Hospital where he was found to have a fractured skull. More than 60 metal staples were inserted into multiple lacerations on his head. He received 11 days of in-patient care. He was unable to complete his GCSEs. He has difficulty in sleeping and is subject to frequent morbid nightmares. He keeps a hammer under his bed. Philip Convery has never been able to return to his grandmother's house. Dr Curran diagnosed Philip to be

suffering from post-traumatic stress disorder with a marked lowering of mood. Dr Curran noted that he was to undergo trauma counselling which could extend over a period of 12-16 months.

[7] The applicant was made the subject of a pre-sentence report compiled by a probation officer. The interviewing officer noted that the applicant disputed much of the information that he had previously provided for a pre-sentence report prepared in March 2013 and that he also challenged information contained in PBNI records. In the circumstances, she considered that the credibility of his account of his lifestyle would have to be viewed with a degree of scepticism. In dealing with the circumstances of the offence the probation officer recorded that:

> "It is of particular concern that Mr Mongan had left the house and returned with the iron bar. This indicates willingness to exacerbate the level of threat to the victims. However, his use of the iron bar to beat the elderly woman, who had already voiced her health problems, is of concern. This lady had not offered any threat to the assailant, but was severely assaulted. Similarly Mr Mongan's violent attack on the young schoolboy illustrated his disregard for the vulnerability of the victims, both young and older."

The probation officer referred to the applicant's criminal record comprising 76 offences since 2006 including theft, burglary, criminal damage, assault on the police, intimidation and 43 convictions for car crime and driving relating offences. The officer noted that the applicant had been dealt with by a range of disposals, including youth conference orders, probation supervision, statutory supervision and periods of detention/imprisonment none of which appeared to have had any deterrent effect. She noted that the current offences had occurred five months after he had appeared at Enniskillen Crown Court when he had been made subject to a suspended sentence. In her view the current offences reflected "… a significant escalation in the nature and gravity of Mr Mongan's criminal behaviour". She considered that the applicant's record indicated a persistent lifestyle of criminality. The probation officer recorded that a Risk Management Panel had been convened with regard to the risk of serious harm at the termination of which the Panel concluded that the defendant posed a significant risk of serious harm and that the current offences represented a "significant escalation" in the nature and gravity of Mr Mongan's criminal behaviour. The Panel took into account a number of factors including:

(*i*) The degree of planning and premeditation of the offences and the targeting of the victims,

(*ii*) The use of weapons to both instil fear and to physically assault the victims.

(*iii*) Mr Mongan's departure and return to the house with the iron bar illustrated a willingness to exacerbate the gravity of the offences.

(*iv*) The vulnerability of the victims in terms of age, gender and health factors.

(*v*) The unprovoked attack on the elderly lady reflected a disregard for the consequences visited upon the victim.

[8] The applicant's solicitors submitted a medical report to the court from Dr Maria O'Kane, consultant psychiatrist. It is to be noted that, during examination, the applicant appears to have told Dr O'Kane that he had a stable upbringing and was caring towards his family including his children. He denied alcohol and drug misuse. It is difficult to reconcile such an account with previous probation records noting volatile family relationships, parental separation and negative family influences contributing to criminal behaviour. In addition, it seems that a previous probation report confirmed that the applicant had indicated that his involvement in criminal activity had been as a result of a previous dependency on Valium and that he had admitted misusing prescribed medication to deal with the stress of family feuds.

The sentencing remarks of the learned trial judge

[9] The learned trial judge noted that the pre-sentence report assessed the applicant as having "a high likelihood of re-offending" and that he posed a "significant risk of serious harm". He identified the offences as containing a number of aggravating factors including:

(*a*) Premeditation and planning.

(*b*) The threat to take Theresa Convery away unless the money was forthcoming.

(*c*) The use of wanton violence.

(*d*) The occurrence of the offences within the family home.

(*e*) The vulnerability of two of the injured parties.

(*f*) The significant and extensive injuries sustained.

(*g*) The continuing effects upon the injured parties illustrated in the Victim Impact Reports.

(*h*) The length of the applicant's criminal record and the significance of some of the convictions including those for assault, burglary, handling, intimidation, possession of an offensive weapons and theft. The learned trial judge considered that the only mitigating factor that could be put forward was the age of the accused, 21 years at the time of the offences.

[10] The learned trial judge noted the debate between the prosecution and the defence as to the appropriate classification of the incident, namely, whether it should be viewed as a "commercial robbery" or "aggravated burglary" for the purpose of sentencing. The learned trial judge reminded himself that Niall Convery carried on a car business at the premises, photographs of which indicated vehicles and tyres in the yard to the rear of the house. He took into account the history of the £10,000 having been provided to Niall Convery to run the scrapyard in the absence of the owner. In the context of commercial robberies the learned trial judge referred to the authorities of Attorney General's Reference (No. 1 of 2005) [2005] NICA 44 and Attorney General's Reference (No. 6 of 2006) McGonigle [2007] NICA 16. In particular, he referred to the observations made by Kerr LCJ at paragraph [22] of the latter case when he said:

> "We wish, therefore, to make absolutely clear that for a commercial robbery carried out as a well-planned venture, where firearms or imitation firearms are used and where the perpetrators use or are prepared to use violence, the starting point after a contest should be fifteen years."

[11] On the other hand, the learned trial judge acknowledged that the defence submission that the offence should be seen rather as an "aggravated burglary" had some merit although the many aggravating factors had to be borne in mind. In relation to that classification he referred to R v Kernaghan [2003] NICA 52, R v Donegan [2005] NICC 6, Attorney General' Reference No. 1 of 2008 [2008] NICA 41 and R v Shannon and Nolan – DPP's References Nos. 3 and 4 of 2012 [2012] NICA 34.

[12] The learned trial judge acknowledged that the applicant had been convicted of attempted robbery rather than the substantive offence and that attempted offences normally carried a lesser sentence than those imposed for the commission of the full offence. However, he did not think that was a relevant factor in this case because "If any or all of the injured parties had been aware of the money available it is clear to me that the money may well have been taken and the full offence thus completed. It was only the lack of that fact that made it impossible for the full offence to be carried out – see paragraph [13] of the DPP's Reference Nos. 8, 9 and 10 of 2013 [2013] NICA 38."

The grounds of appeal

[13] Mr O'Donoghue helpfully focused his grounds of appeal upon two matters:

(*i*) The learned trial judge erred in classifying the offences as a commercial robbery and thus the sentence was wrong in principle.

(*ii*) The learned trial judge erred in assessing the applicant as posing a significant risk of serious harm.

Discussion

Classification as a commercial robbery for sentence

[14] Mr O'Donoghue submitted that the learned trial judge had clearly reached his starting points of 15 years as a consequence of classifying the incident as a "commercial robbery." The judge had relied upon authorities that conformed to such a classification. In the course of delivering the judgment of this court in Attorney General's Reference (No. 1 of 2005) Rooney and Others Kerr LCJ referred to the increase in frequency of bank and Post Office robberies in which firearms were used as meriting deterrent sentences. McGonigle concerned armed robberies of a restaurant, in which members of the public were present, and an off-licence. Mr O'Donoghue argued that, unlike the instant case, those authorities concerned armed robberies of premises that were clearly being regularly used by the general public for commercial purposes.

[15] However, as noted above, the learned trial judge expressed some sympathy for the argument made on behalf of the applicant that he had been involved in an "aggravated burglary" rather than a commercial robbery. The authorities advanced by his representatives in support of such a classification included attacks upon couples in their own private residences during the early hours of the morning.

[16] While the type and circumstances of the premises concerned may well be a relevant factor to be taken into consideration when sentencing for this type of offence, this court would have significant reservations with regard to the proposition that sentencing should be specifically linked to the type of property concerned or that such a factor should be given disproportionate weight. In this case the offences took place within a domestic dwelling house the rear yard of which appears to have been used by one of the occupants for some degree of commercial activity. The £10,000 sought by the offenders seemed to have related to a scrapyard at a different location. The learned trial judge was clearly aware of and took into account the somewhat hybrid nature of the incident in the context of the undisputed number of serious aggravating factors.

Dangerousness

[17] The applicant's primary submission was that, based on this single offence, no matter how serious, there was no proper basis to find that he constituted a significant risk to the public of further serious offences. There was no positive or compelling evidence that the applicant was pre-disposed to commit further similar offences. He was not a member of any committed criminal gang or organisation and there was no evidence of any mental pathology indicating a predisposition to committing further violent offences. In such circumstances, it was submitted that there was no positive evidence of any significant or substantial risk of further violent offences in accordance with the test laid down in R v Laing [2006] 2 Criminal Appeal Reports (S) 3 and R v Pedley, Martin and Hamadi [2009] 1 WLR 2517.

[18] As noted above Article 14 of the 2008 Order places a duty on the court to impose an extended custodial sentence upon an offender where the court is of the opinion "… that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences". Such a sentence comprises the appropriate custodial term together with an extension period during which the offender is to be subject to a licence which shall not exceed five years in the case of a specified violence offence.

[19] When considering the equivalent provision in the legislation applicable in England and Wales in Laing Rose LJ said, at paragraph [17]:

> "In our judgment the following factors should be borne in mind when a sentencer is assessing significant risk:
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> (*i*) The risk identified must be significant. This was a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Oxford Dictionary) 'noteworthy, of considerable amount or importance'.
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> (*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 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, attitude 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 contemplates differing from the assessment in such a report should give both counsel the opportunity of addressing the point."

That approach to the concept of "significant risk" was approved by Hughes LJ delivering the judgment of the Court of Appeal in England and Wales in Pedley, a case concerning indeterminate terms of imprisonment for public protection, when he said at paragraph [16] and [17]:

> "16. The question whether the risk of serious harm is, in any individual case, significant so as to justify an IPP sentence, is highly fact-sensitive. It must remain a decision for the careful assessment of the judge before whom the case comes. He will need to consider all the information he has about the defendant: see section 229 and *R v Considine [2008] 1 WLR 414* . The focus is, as explained in *R v Johnson (Practice Note) [2007] 1 WLR 585*, not principally upon the facts of the instant case but upon future risk.
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> 17. All the parties before us agreed that in addressing the question whether the risk of serious harm is significant the judge is entitled to balance the probability of harm against the nature of it if it occurs. The harm under consideration must of course be serious harm before the question even arises. But we agree that within the concept of significant risk there is built in a degree of flexibility which enables a judge to conclude that a somewhat lower probability of particularly grave harm may be significant and conversely that a somewhat greater probability of less grave harm may not be."

The court expressed considerable doubt whether the probability of future harm was capable of numerical evaluation and expressed the view that no attempt should be made by sentencers to attach arithmetical values to the quality and assessment which the statute requires of them.

[20] R v Johnson and Others [2007] 1 Criminal Appeal Reports (S) 112 at page 674 the President of the Queen's Bench Division, Sir Igor Judge, delivering the judgment of the Court of Appeal (Criminal Division) in England and Wales, said at paragraph [10]:

"We can now address a number of specific issues:

(*i*) Just as the absence of previous convictions does not preclude a finding of dangerousness, the existence of previous convictions for specified offences does not compel such a finding. There is a presumption that it does so, which may be rebutted.

(*ii*) If a finding of dangerousness can be made against an offender without previous specified convictions, it also follows that previous offences, not in fact specified for the purposes of Section 229, are not disqualified from consideration. Thus, for example, as indeed the statute recognises, a pattern of minor previous offences of gradually escalating seriousness may be significant. In other words, it is not right, as many of the submissions made to us suggested, that unless the previous offences were specified offences they are irrelevant."

[21] The approach adopted by the Court of Appeal in England and Wales in Laing and Johnston has been approved in a number of decisions of this court emphasising the importance of having regard to the circumstances of the particular case and the importance of the discretion of the judge at first instance - see R v Owens [2011] NICA 48, R v Wong [2012] NICA, R v McClarnon [2014] NICA 16 and R v Cambridge [2015] NICA 4.

[22] In carefully assessing whether the applicant posed a significant risk of serious harm the learned trial judge took into account the substantial criminal record of the applicant, the nature and extent of the injuries resulting from the physical violence applied by the applicant to the vulnerable victims, the report from Dr O'Kane and the assessment of the Risk Management Meeting, convened by the PBNI, recording the concerns about the credibility of the applicant, his persistent criminal lifestyle and the serious degree of escalation in criminal behaviour evidenced by the current offences. We are of the opinion that, in the circumstances of this particular case, the judge was quite entitled to reach the conclusion that such a risk existed.

Disposal

[23] For the reasons given we have not been persuaded that this sentence was wrong in principle. However, we have also given careful consideration as to whether it was manifestly excessive. The learned trial judge did take into account the fact that the applicant's conviction related to attempted robbery rather than to

the substantial offence but, in our view, he was also correct to take into account that it was only the lack of knowledge about the whereabouts of the money on the part of the victims that resulted in the failure to carry out the full offence. He also had regard to the applicant's youth at the time of the offences. In R v N,D &L [2010] EWCA Crim 941, delivering the judgment of the Court of Appeal of England and Wales, Lord Judge LCJ said, at paragraph 27:

> "27. It is an old and well-established principle of sentencing that the youth of an offender should normally lead to a lower sentence. It is to be found in the first edition of Thomas on Sentencing, which goes back to the 1960s in these words:
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> 'Youth is one of the most effective mitigating factors.'
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> That is a stark, simple, unequivocal statement of principle. The principle has been repeated time and time again."

On the other hand, as this court has observed on a number of previous occasions, the youth and/or personal circumstances of the offender will not weigh heavily in reduction of penalty where the offences are serious and, in particular, where they involve the infliction of significant personal violence. However, after giving the matter very careful consideration we propose to reduce the custodial element from 14 years to 12 years and the period of extended licence from 5 years to 3 years. Accordingly, we shall allow the appeal to that extent.