

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PATRICK SOMERS AND PAUL SOMERS

Before: Morgan LCJ, Deeny J and Treacy J

MORGAN LCJ (giving the judgment of the court)

[1] On 7 July 2014 the offenders were committed for trial to Fermanagh and Tyrone Crown Court on a single count that they unlawfully and maliciously wounded Shane Gallagher in the early hours of 27 October 2013 with intent to do him grievous bodily harm. At their arraignment on 28 August 2014, both offenders pleaded guilty to the offence. On 10 November 2014, Her Hon Judge McReynolds sentenced both offenders to a 3½ years determinate custodial sentence, comprising 1 year in custody and 2½ years on licence. On 8 December 2014 the DPP lodged an application for leave to refer the sentences to the Court of Appeal. Mr McGrory QC appeared with Ms Walsh for the prosecution, Mr Mulholland QC appeared with Ms Philips for Paul Somers and Mr Grant QC appeared for Patrick Somers with Mr Barr. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] On Saturday 26 October 2013 the injured party, Shane Gallagher, attended a christening party at the Roundhouse Bar in Enniskillen. The two offenders and their mother were also in attendance and were known to the injured party. The two offenders left the bar in the early evening. Later that evening Paul Somers received a telephone call from his aunt alleging that his mother had been assaulted by the

injured party. He told his brother that they were returning to the bar and the substance of the allegation, which is now accepted as being untrue. The two offenders returned to the bar in the early of hours of the morning in a taxi.

[3] CCTV footage from the bar shows the incident in full. When the two offenders entered the bar, Patrick Somers walked straight up to the injured party and, without warning, punched him in the face and wrestled him to the ground. He then punched the injured party approximately six times and stamped out at the injured party on at least two occasions while the injured party lay on the ground. At least one of these stamps made contact with the injured party's head. In the meantime, Paul Somers had armed himself with a pool cue and used it to strike the injured party approximately seven times. He was pulled away by a member of staff but returned and used the, now broken, pool cue to administer a further blow. Patrick Somers then pulled his brother away from the injured party but Paul Somers again returned and attempted to stamp on the injured party. He then lifted a bar stool and attempted to strike the injured party on the ground with it. He lifted the broken pool cue again and struck out towards the injured party. He then lifted another bar stool and swung it at the injured party on the ground before his brother managed to pull him away.

[4] The two offenders were arrested by police at 10:35am the same morning and several items of clothing matching those seen in the CCTV footage were seized from their house. During police interviews Patrick Somers made a no comment response. Paul Somers remained silent and did not answer any questions.

[5] At some point during the assault the injured party was rendered unconscious. He was taken to hospital after the attack. He discharged himself against medical advice but later returned to the hospital for medical treatment. He was examined by Dr Davidson on 27 October 2013 who observed the following injuries:

- A 4cm x 4cm area of bruising on his left cheek
- A 4cm x 1cm bruise on his left cheek
- A 1cm laceration on his left upper eyelid
- A deep laceration measuring 4cm x 1cm approximately to his left earlobe [this was referred to plastic surgery]
- An 11cm x 7cm bruise overlying his forehead with a bruising similar to the zig zag pattern on the sole of some footwear
- A 2cm laceration to the posterior aspect of his head on the right side

- A 1cm x 1cm abrasion below his left scapula
- Below this a 12cm x 12cm bruise in a typical rail track pattern with overlying abrasion
- Below that a 13cm x 2cm bruise with overlying abrasion again in a rail track pattern
- Below it a 9cm x 2cm bruise with overlying abrasion again in a pattern consistent with rail tracks
- 12cm x 2cm bruise overlying his right loin again in a typical rail track pattern
- Superior to the above a 2cm x 2cm abrasion
- 10 superficial lacerations measuring 0.3cm to 3cm in length on the extensor surface of his left arm
- Below these a 5cm x 0.5cm abrasion
- A 3cm superficial laceration on the extensor surface of his left forearm
- A 4cm x 4cm bruise flexor surface on his right forearm

[6] The injured party stated that he was lucky not to have lost his ear in the assault and even luckier not have lost his life. He said that, since the attack, his day to day life had changed: his mood was low; he often felt anxious; he struggled to sleep; he had flashbacks and nightmares; and he was no longer able to socialise as he was fearful of another attack, which had also impacted on his relationship with his son.

Previous Convictions

[7] Patrick Somers had six previous convictions. In July 2011 he was bound over for 2 years and fined £250 for disorderly behaviour and assault on police. In April 2012 he was sentenced to 10 months imprisonment suspended for 3 years for assault occasioning actual bodily harm. In October 2012 he was placed on probation for 18 months for disorderly behaviour and resisting police and on 1 October 2013 he was sentenced to 100 hours community service again for disorderly behaviour.

[8] Paul Somers had three previous convictions. In April 2012 he was sentenced to 9 months imprisonment suspended for 3 years for assault occasioning actual bodily harm. In October 2012 he was sentenced to 140 hours community service for disorderly behaviour and in June 2013 he was conditionally discharged for 12 months for making off without payment.

[9] The suspended sentences imposed on both offenders in April 2012 related to the same incident the circumstances of which were as follows:

“The injured party was assaulted by both defendants and a third male. His injuries were a 5 inch long, deep wound above his left eyebrow and bruising to the head. Both defendants were under the influence of alcohol at the time.”

The pre-sentence reports prepared by the Probation Service indicate that this assault also took place in a bar.

Pre-Sentence Reports

[10] A report by the Probation Service dated 7 October 2014 described Patrick Somers as a 21 years old single man from the Enniskillen area. His younger brother was shot in a tragic accident 9 years ago and suffered a brain injury, an incident which Patrick witnessed. He left school in 4th Form and is now training to be a tattoo artist, although he is currently unemployed. He told the probation officer that by the age of 16/17 he was a heavy user of cannabis but has since weaned himself off drugs. The probation officer stated that Patrick offered his apologies to the injured party and, in hindsight and sobriety, could identify more acceptable ways of dealing with stressful situations. The probation officer assessed Patrick as posing a high likelihood of re-offending. A Risk Management Meeting concluded that he did not pose a significant risk of serious harm given, inter alia, his acceptance that the attack was unjustified, remorse, lack of violent or aggressive tendencies when sober and no further incidents since the index offence, although the probation officer stated that Patrick “nearly met” the required threshold for dangerousness.

[11] A Probation report dated 6 October 2014 described Paul Somers as a 20 year old single man and brother of Patrick. He left school having attained GCSEs in Art, Technology, PE and English, he subsequently started courses in plumbing and media studies but left both as he did not like them and is currently on a Business Management Course at South West College. He said that playing soccer and Gaelic football gave him structure in the evenings and weekends but, following an injury which prevents him from playing now, he developed a party lifestyle which led to increased binge drinking. He admitted that on the day in question he had been drinking both beer and spirits since the early afternoon and had also taken cocaine. The probation officer assessed Paul as posing a high likelihood of re-offending but a Risk Management Meeting considered he did not pose a significant risk of serious harm given, inter alia, his attitude and insight into his offending behaviour, stability and support structures, and willingness to engage in work to address his behaviour.

Sentencing Remarks

[12] The learned judge recalled what she had seen in the CCTV evidence and noted that, whilst Patrick Somers had thrown the first punches and stamps, Paul Somers seemed to be out of control and had to be restrained by Patrick. She noted that both were relatively intelligent, had produced very positive character references, that they had been affected by the family tragedy in which their younger brother was shot and left with brain injuries and that they had stayed out of trouble in the year since the index offence. The learned judge further noted, however, that both offenders had previous convictions for violence, that both were in breach of suspended sentence and that although they were assessed as not posing a significant risk of serious harm, they were both assessed as posing a high likelihood of re-offending. The learned judge considered the aggravating factors to be the breach of their respective suspended sentence, the use of feet as a weapon, the use of the stool and pool cue as a weapon and the ear injury caused to the injured party.

[13] In terms of mitigation, she highlighted that the guilty pleas were entered at arraignment, that the injured party discharged himself from hospital the same day, the considerable level of remorse and victim empathy and their positive use of the year since the index offence. The learned judge agreed with the Risk Management meeting assessment that neither offender passed the dangerousness threshold. Referring to the relevant sentencing guidelines issued by the Court of Appeal, the learned judge opined that the offence was one of considerable culpability, with each offender being equally culpable, but with the harm falling at the lower end of the scale. She determined that the appropriate sentence was one of 3½ years but considered that in order to protect the public from harm and prevent the commission of further offences the licence period should be 30 months, leaving a custodial period of 12 months. The learned judge further stated that given the length of the licence period she was not activating the suspended sentences.

The submissions of the parties

[14] Mr McGrory relied upon DPP's Reference (Nos. 2 and 3 of 2010) (McCauley and Searward) [2010] NICA 36 in which this court said that for offences under section 18 of the 1861 Act in which the victim was attacked on the ground with a shod foot, the sentencing range after contest was 7 to 15 years imprisonment, other than in exceptional cases such as where the attack is limited to one blow. The DPP submitted that the present case did not fall within the exceptional clause in the guidelines and that the following aggravating factors are present:

- Premeditation in that both offenders returned to the bar in a joint enterprise to assault the injured party

- The unprovoked nature of the attack
- The injured party was outnumbered by the offenders
- The use a shod foot as a weapon by Patrick Somers, and the use of a pool cue and bar stool as weapons by Paul Somers
- Both offenders were under the influence of alcohol and Paul Somers admits to also being under the influence of cocaine
- Both have previous offences of violence are were in breach of suspended sentences

Furthermore, the credit for their guilty pleas should be limited as both offenders were in effect caught red-handed by the CCTV footage but still refused to admit their guilt during police interviews (see AG's Reference (No.1 of 2006) (McDonald, McDonald and Maternaghan) [2006] NICA 4).

[15] It was further submitted that the learned trial judge was in error in dividing the 3½ year sentence into 1 year in custody and a 2½ years licence period. She failed to give reasons as to why the cases were exceptional so as to require the licence period to be more than half of the overall sentence (see DPP's Reference (No.2 of 2013) (McKeown) [2013] NICA 28). The learned judge further erred in law in not activating the suspended sentences as there was no sufficient reason for not activating them (see R v Hughes [2003] NICA 17).

[16] Mr Mulholland conceded that the learned trial judge did not identify a starting point before making an appropriate allowance for the guilty plea, nor did she set out how she reached the 3 ½ year determinate custodial sentence imposed. He further accepted that the learned trial judge gave at best limited reasons for making no order with respect to the suspended sentence. The requirement to give reasons for such a course is found in section 19 of the Treatment of Offenders Act (Northern Ireland) 1968. He stated that there was no positive indication from the prosecution to activate the suspended sentence and pointed out that the learned trial judge identified it as an aggravating factor in her judgement. He pointed out that the solicitor attending the interviews with police indicated that the defence had not been provided with any statement of complaint, forensic evidence or CCTV at that point.

[17] In mitigation he submitted that this was a case in which there was an early guilty plea. Although there was an extensive array of injuries, these were by no means the most serious in the context of this offence. There was evidence of remorse both in the presentence report and in Dr Pollock's report. Dr Pollock noted that Paul Somers had expressed himself committed to change and the presentence report identified him as

a young man with potential if he could address issues related to his offending behaviour. Dr Pollock strongly recommended that he engage with the Think First programme, that he participate in anger management work and that he undergo a substance awareness programme to assist him in remaining abstinent. He considered that those programmes could be undergone within the community.

[18] Mr Grant on behalf of Patrick Somers agreed that the learned trial judge had not fixed a starting point before giving the discount for a plea. He suggested that the starting point might have been anything between five and seven years. He submitted that the learned trial judge may have focused on the Sentencing Council Guidelines. These suggested a starting point of six years in a case of high culpability and low harm with a range between five and nine years.

[19] He relied upon the assessment by Dr Pollock that Patrick Summers risk potential warranted designation as medium but not high risk of future violent offending. Dr Pollock noted that this offence in both cases was motivated by apparently protective and misguided loyal intentions to retaliate against an outside person alleged to have inflicted harm on a family member. He submitted that the recommendation in the presentence report and in Dr Pollock's report for community work was onerous which may have explained the view taken by the learned trial judge of the licence period.

Consideration

[20] There is a long line of authority from this court dealing with the problem of wanton violence by young males often after the consumption of large amounts of alcohol. Where such an attack is carried out with the use of weapons or involves an attack with a shod foot on a victim on the ground the sentencing range will lie between seven and 15 years depending on the issues of culpability and harm other than in exceptional circumstances. This sentencing range is designed to deter those who may be minded to engage in such violence and to protect the community in the event that such violence occurs by imprisoning or detaining the offenders. Since this is a deterrent sentencing range the personal circumstances of the offender are unlikely to carry great weight. They are not, however, altogether excluded. We should make it clear as we have before that although the aggravating and mitigating factors identified by the Sentencing Council are proper matters for consideration by the sentencer the starting points and ranges identified by the Sentencing Council ought not to be treated as guidelines in this jurisdiction unless expressly approved by this court.

[21] This was a case of high culpability. There was an element of premeditation in returning to the bar. The injured party was outnumbered by the offenders. Patrick

Somers used a shod foot as a weapon and Paul Somers used a pool cue and bar stool. Both offenders were under the influence of drink and Paul Somers admitted to being under the influence of cocaine. In relation to the offenders both have previous convictions for offences of violence and both were in breach of suspended sentences. It is apparent that both responded to the inaccurate telephone call from their aunt which at least explains but does not excuse their outrageous conduct. Although the pre-sentence reports suggest remorse and motivation towards changing their ways that has to be balanced against the fact that these offences were committed within 18 months of receiving suspended sentences for similar offences and the assessment in each case that there was a high risk of reoffending. Making every possible allowance for the mitigating factors the starting point before considering discount for a plea was somewhere between seven and eight years.

[22] Both pleaded guilty at arraignment. Neither made admissions during police interview apparently because no statement of complaint or other material was then available. When the CCTV was made available it is clear that there was no other course available to them. That does not, however, deprive them of reasonable discount for the course taken. We consider that the minimum sentence on the section 18 count after the plea was five years.

[23] In this case each of these respondents was subject to a suspended sentence in relation to similar conduct. The implementation of the suspended sentence is not in any sense double counting since it is related to the penalty imposed for the previous offence rather than an element of the subsequently committed the offence. The decision to implement such a sentence is, of course, subject to the principle of totality. Having regard to the similarity of the criminal conduct in the prior offence we consider that this was an entirely appropriate case for the implementation of the suspended sentences consecutively.

[24] We are satisfied, therefore, that the sentence in each case was unduly lenient. In light of the principle of double jeopardy we consider that we should impose a determinate custodial sentence of five years on the section 18 count and implement the suspended sentences concurrently.

[25] In R v McKeown [2013] NICA 28 we considered the approach towards the assessment of the licence period. Where the licence period is to be extended beyond one half of the term of the sentence the judge must explain why such a disposal will achieve the statutory objectives contained in Article 8 (5) of the Criminal Justice (Northern Ireland) Order 2008. In this case the most that can be said is that there is some support for the view that both appellants should undertake courses during the post-custody period. There is no information about the duration of such courses. No

material has been opened to us which would have justified a period of licence of more than one half of the term.

Conclusion

[26] For the reasons given we substitute for the sentence of 3 ½ years a determinate custodial sentence of five years comprising 2 ½ years in custody in 2 ½ years on licence. Because of double jeopardy we implement the suspended sentences in each case concurrently.