**Neutral Citation No. [2014] NICA 62** | *Ref:* **MOR9385**

*Judgment: approved by the Court for handing down* | *Delivered:* **12/09/2014**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

---

**THE QUEEN**

**-v-**

**PAUL DUNCAN POLLINS**

---

**Before: Morgan LCJ, Coghlin LJ and Treacy J**

---

**MORGAN LCJ**

[1] This is an application for leave to appeal against sentence. On 2 September 2013 the applicant was arraigned and pleaded not guilty to one count of criminal damage (count 2). On 12 September 2013, he was re-arraigned and pleaded guilty to aggravated burglary (count 1) and criminal damage (count 2). On 7 November 2013, before HHJ Miller, at Belfast Crown Court, the applicant was sentenced to an indeterminate custodial sentence with a minimum term of 3 years for the aggravated burglary and a concurrent term of 10 months custody for the criminal damage.

[2] At the end of the oral hearing we allowed the appeal and substituted for the indeterminate custodial sentence on count 1 an extended custodial sentence comprising a custody period of 6 years and an extension period of 5 years. These are our reasons for the decision which involve consideration of the circumstances in which an indeterminate custodial sentence might be appropriate.

**Background to the offence**

[3] The circumstances of the offence as found by the learned trial judge were that in the early hours of Sunday, 14 April 2013 the female householder was in her bedroom on the ground floor of a two storey four bedroom house at Stranmillis Gardens, Belfast, which she rented. She was awoken by the sound of glass smashing and realised that someone was in the adjoining kitchen. She immediately rang the

police and a few minutes later heard the voices of two young men from the adjoining room, saying "It's the police, run."

[4] Police officers arrived at the house shortly thereafter. Constable Halliday entered the rear of the premises and observed the co-accused on top of a fence separating adjoining houses in Stranmillis Gardens. He also observed the applicant emerging from the interior of the victim's house through a broken window. A bread knife was found in the garden and a large black handled knife was also subsequently found on the kitchen table.

[5] Although neither can be forensically linked to the applicant, the victim confirmed that neither belonged to her nor came from the house. It is significant that although the ground was wet the knife found in the garden was dry. When interviewed after caution several hours after his arrest because of his heavily intoxicated condition, the applicant made "no comment" responses.

[6] The applicant's account to the probation officer was that he and a friend had gone to a party where they drank spirits and smoked cannabis. They were looking for more alcohol and decided to walk through the Stranmillis area. They saw wine bottles in the backyard of a house and entered the house with the expectation of getting wine. The applicant believed himself to be under threat from paramilitaries and accepted that he was carrying a knife which he said was to protect himself. It was submitted on his behalf without objection that he had previously been attacked by paramilitaries. Although the applicant denied that he had tried to get into any other part of the house, the victim indicated that she heard him trying to open the internal kitchen door into her room which fortunately was locked.

**The applicant's background**

[7] The applicant was born on 28 July 1990. He had a troubled home background and in 2003 was transferred to an educational resource centre because of behavioural issues in school. He has 32 previous convictions the first of which was for assault occasioning actual bodily harm when he was 12 years old. By the age of 15 he had developed a pattern of binge drinking combined with habitual use of cannabis. When he was 16 he committed offences of aggravated burglary with intent to rape and indecent assault on a female. The background to those offences was that he entered the home of an adult female who woke up to find the applicant crawling on top of her bed towards her. He kissed her but she was able to push him away. He demanded sex and grabbed her but she pushed him out of the room. She held the door closed and used a mobile phone to get help. She heard him return to the outside bedroom door demanding sex and pushing the blade of a knife between the

door and the wooden door saddle. He was detained for a period of 29 months and was subject to a probation order for three years as a result of his conviction.

[8] He was released in 2008 and was required to reside in a probation approved hostel. Unhappily he continued to abuse drugs when residing in the hostel. On 4 August 2008 he committed a further offence of aggravated burglary and stealing as a result of which he was sentenced to 3 years' detention on 20 January 2010. In June 2010 he committed the offence of burglary for which he received a determinate custodial sentence of 27 months and in July 2010 he was convicted of possessing an offensive weapon in a public place for which he was ordered to be detained for four months.

[9] He was released to reside in probation approved hostel accommodation on 7 October 2011 but was recalled to custody on 29 October 2011 because of an escalation in risk owing to his consumption of alcohol. He was released on the direction of the Parole Commissioners on 8 February 2012 but recalled on 29 February 2012 because of daily alcohol and drug use. He was then released from custody on 10 April 2013 four days before the commission of the subject offences.

**The dangerousness assessment**

[10] A detailed psychological report was prepared by Dr Pollock. He noted a number of relevant internal factors such as deficits in empathy and coping. He considered that the applicant was motivated to work with professionals. The applicant identified a need for personal change and had applied for prison programmes to address and target factors of concern. The applicant took part in such programmes in the past when imprisoned but returned to substance misuse and criminality within short periods of time when released into the community. Dr Pollock was of the view that it was essential that the applicant participated in and benefited from programmes to achieve changes in terms of risk reduction. He did not assume responsibility for and ownership of risk potential and dismissed any insinuation he might represent a risk to others. Dr Pollock stated that this was suggestive of a lack of insight which was not encouraging when predicting the likely response to change efforts. Dr Pollock stated that the prognosis for change in the applicant's case was, on balance, very guarded.

[11] The applicant presented with Anti-social Personality Disorder with psychopathic and emotionally unstable facets. He had shown chronic polysubstance abuse with some clinical indicators of dependence. Factors were identified which were established predictors of harmful interpersonal conduct. There were a relatively small number of present and likely present protective factors. Therefore,

the applicant presented with more risk factors than protective factors and harmful conduct was more likely to occur than not in the future.

[12] Dr Pollock was of the opinion the applicant was most likely to commit an acquisitive offence for material gain. The likely victims would be those residents of any home that he might burgle. The likely motivation would be for acquisition of property for financial gain. The applicant was in possession of a weapon in the index offences and there was potential for psychological harm caused by threat of a weapon against a victim if he encountered a victim during a burglary. Dr Pollock contended that the applicant would be more likely to employ threat of harm or physical violence against a victim during a burglary than to exhibit actual physical violence. He was a serial offender who was more likely than not to persist in antisocial conduct into the future unless he actively and constructively involved himself with psychosocial interventions and achieved positive change.

[13] Dr Pollock considered that the applicant should be required to engage in work with professionals that targeted personal issues to reduce risk potential. It was recommended that the applicant participate in interventions to address antisocial tendencies, lifestyle issues and substance abuse. The accumulated evidence suggested the applicant had failed to achieve changes in the past despite engagement with services. In interview the applicant was extremely keen to convince that he was committed to making the necessary changes but Dr Pollock considered that the prognosis for positive, sustained change was very guarded. It was acknowledged that the applicant was making efforts to prove he is capable of achieving personal changes while imprisoned.

[14] The pre-sentence report noted the applicant's previous offending and the assessment made by Dr Pollock. As a result of his conviction for burglary with intent to rape the applicant was reviewed under the Public Protection Arrangements for Northern Ireland on 14 March 2013 when he was assessed as a category two offender, being someone whose previous offending presented clear and identifiable evidence that the offender could cause serious harm through carrying out a contact sexual or violent offence. The fact that the offences were committed four days after release from custody suggested that the applicant lacked the necessary motivation to change his behaviour. For the reasons set out in the report including his previous record, his substance abuse, his lack of insight and concerns about the risk of sexual offending the applicant was assessed as presenting a significant risk of serious harm. It was acknowledged that he was working as an orderly in the prison and had abstained from drug misuse. He had self-referred to the ADEPT programme dealing with alcohol and drug misuse.

[15] The PBNI assessment was that to manage the risk that the applicant presented in the community he needed to: –

(i) participate in psychological assessments and engage in a programme of work as directed by the supervising probation officer;

(ii) engage in constructive use of time;

(iii) engage in treatment in relation to the underlying reasons for his alcohol and drug misuse;

(iv) engage in the PBNI Think First Programme; and

(v) reside in Probation approved accommodation.

**The conclusions of the learned trial judge**

[16] The learned trial judge noted the circumstances of the offence and the background of the offender. In particular, this was the third offence of aggravated burglary involving the use of a knife and the applicant had a previous conviction for possession of an offensive weapon. He was recalled to custody in October 2011 and February 2012 as a result of risks associated with alcohol and substance abuse and this offence was committed four days after his release from custody in circumstances where he had consumed alcohol.

[17] He considered the pre-sentence report and found it unsurprising in light of the background that the applicant was assessed as presenting with a high likelihood of offending. The applicant's counsel at first instance had accepted that he satisfied the dangerousness provisions. He noted the assessment made on 14 March 2013 which indicated that the applicant was someone in respect of whom previous offending and/or current behaviour and/or current circumstances presented clear and identifiable evidence that the offender could cause serious harm through carrying out a contact sexual or violent offence. He also noted the conclusion of Dr Pollock that the applicant was most likely to commit an aggravated burglary in which he might encounter a victim whilst in possession of an offensive weapon. Dr Pollock expressed the view that it was more likely than not that he would use the weapon as a means of threatening and intimidating a victim. There is no determination of which of those assessments of risk was accepted by the learned trial judge.

[18] He concluded that the fact that these offences were committed a mere four days after release from custody indicated a concern that the applicant had no motivation to change his pattern of behaviour. He applied the criteria set out in

R v EB [2010] NICA 40 and accepted the concession that the applicant was a dangerous offender within the meaning of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). He then correctly recognised that an indeterminate custodial sentence was concerned with future risks and public protection. He decided, not without some hesitation, that this was a case where the future risk was such that the imposition of an extended custodial sentence would not be sufficient to protect the public. He took the view that, bearing in mind the late plea of guilty, the record and the facts established, a determinate custodial sentence would have been one of six years and accordingly imposed a tariff of 3 years. There is no issue in this appeal about the appropriateness of the 6 year determinate custodial sentence.

**Statutory background**

[19] Aggravated burglary is a serious offence and a specified violent offence for the purposes of the 2008 Order. Article 13 of the 2008 Order provides for the imposition of an indeterminate custodial sentence:

> "13.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a serious offence committed after 15 May 2008; and
>
> (b) 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.
>
> (2) If—
>
> (a) the offence is one in respect of which the offender would apart from this Article be liable to a life sentence, and
>
> (b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence,
>
> the court shall impose a life sentence.
>
> (3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from

serious harm occasioned by the commission by the offender of further specified offences, the court shall—

(a) impose an indeterminate custodial sentence; and

(b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it. "

[20] Article 14 deals with the imposition of an extended custodial sentence:

"14.—(1) This Article applies where—

(a) a person is convicted on indictment of a specified offence committed after 15th May 2008; and

(b) the court is of the opinion—

(i) 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; and

(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence.

(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of

(a) the appropriate custodial term; and

(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm

occasioned by the commission by the offender of further specified offences."

**The application to amend the grounds of appeal**

[21] At the commencement of the hearing the applicant applied to amend the grounds of appeal to include an argument that the learned trial judge erred in finding that the applicant posed a significant risk of serious harm. It was submitted that the concession by junior counsel at the plea and sentencing hearing that the applicant posed such a risk should not have been made. Ms MacDermott QC accepted that the test for dangerousness was that set out in R v Lang [2005] EWCA Crim 2864 and approved by this court in R v EB [2010] NICA 40.

[22] She maintained that the basis for the finding of dangerousness was the conclusion of Dr Pollock that it was more likely than not that the applicant would commit acquisitive crimes in which there was the potential for psychological harm as a result of him threatening victims with a weapon. She noted that the learned trial judge had not made any finding in relation to the concerns expressed about the risk of sexual offending and submitted that it was not open to this court, therefore, to assess the issue of risk on that basis. She noted that the victim had stated that the incident had left her terrified and uncomfortable in her own home but there was no medical evidence of serious harm. In those circumstances she maintained that there was no significant risk of serious harm.

[23] We did not accept that submission. The finding postulated by Dr Pollock was the likelihood of a confrontation between the applicant and a householder in which the applicant would threaten the householder with a weapon such as a knife. We consider that such a circumstance, particularly in relation to vulnerable people such as the victim in this case, plainly may give rise to serious psychological consequences. In any event, however, the response of the householder to being threatened with the weapon is unpredictable and the risk of serious physical injury arising from such a confrontation is plainly very real. We concluded, therefore, that on the basis of the risks recognised by Dr Pollock, the test was satisfied. Accordingly we refused the application to amend the notice of appeal in that regard.

**Consideration**

[24] It was submitted on behalf of the applicant that the learned trial judge erred in not advising counsel in advance that he was considering the imposition of an indeterminate sentence. We accept that where the circumstances are such that counsel might have inferred that the judge was not considering such a sentence there was a clear unfairness which would require the Court of Appeal to consider the

matter afresh (see R v Pithiya [2010] EWCA Crim 1766). It did not follow, however, that the sentence would be set aside (see R v Cross [2009] 1 Cr App R (S) 34). That is not, however, this case. It is clear from the transcript that the learned trial judge expressly drew to counsel's attention the fact that this was a case in which the circumstances pointed more to an indeterminate sentence than an extended custodial sentence.

[25] Indeed, as a result of the judge's intervention counsel on behalf of the applicant then requested an adjournment of the case in order to have Dr Pollock give evidence to the court. In support of that application all that was advanced was the content of Dr Pollock's report that work with the probation service and the applicant's motivation suggested that there was room for improvement. The learned trial judge refused the application for the adjournment and in our view there was no proper basis upon which he could in the circumstances have acceded to the adjournment application.

[26] The central issue in this case concerned the approach to the imposition of an indeterminate custodial sentence. Although the sentence of imprisonment for public protection has now been abandoned in England and Wales, some of the earlier case law is relevant. We have been significantly assisted by the observations of Lord Judge in AG Reference (No 55 of 2008) [2008] EWCA Crim 2790. Apart from a discretionary life sentence an indeterminate custodial sentence is the most draconian sentence the court can impose. A discretionary life sentence is reserved for those cases where the seriousness of the offending is so exceptionally high that just punishment requires that the offender should be kept in prison for the rest of his life. It is not a borderline decision (see R v Jones and others [2005] EWCA Crim 3115 approved in R v Hamilton [2008] NICA 27). An indeterminate custodial sentence is primarily concerned with future risk and public protection (See R v Johnson [2007] 1 CR App R (S) 112).

[27] However, in a case in which a life sentence is not appropriate an indeterminate custodial sentence should not be imposed without full consideration of whether alternative and cumulative methods might provide the necessary public protection against the risk posed by the individual offender. In that sense it is a sentence of last resort. The issue of whether the necessary public protection can be achieved is clearly fact specific. That requires, therefore, a careful evaluation of the methods by which such protection can be achieved under the extended sentence regime.

[28] In this case Dr Pollock found that the applicant displayed deficits in empathy and coping abilities but noted that he had a strong attachment to his mother. His

assessment was that the applicant was motivated to work with professionals. He considered that the applicant presented in the contemplation stage of the model of change and that the applicant identified a need for personal change. He considered it essential that the applicant participate and benefit from programmes to achieve change in terms of risk reduction. He noted that this was a case in which there were a range of external factors by way of his family relationship, his access to professional care, the new environment in which his mother was living and the external controls of supervision which were likely to be of benefit. He also noted a lack of insight on the applicant's part which was not encouraging and that the prognosis for change was, on balance, very guarded.

[29] The pre-sentence report built on that information and identified the needs set out at paragraph 15 above for the risk that the applicant presented in the community to be managed. The important aspects of this evaluation were that there was nothing to suggest that the needs identified in the pre-sentence report were unavailable to the applicant and further nothing to suggest that he himself was in any way unwilling or unable to participate in them.

[30] Properly understood, therefore, this was a realistic programme for change which could be delivered within a context in which the applicant would remain subject to supervision both within and without the prison environment for a period of 11 years. He was 23 years old and his earlier lifestyle indicated that change was going to be difficult but the fact that he was in the contemplation stage was evidence that the path to change was open.

[31] In our view this was not a case where the last resort of an indeterminate custodial sentence was appropriate and we allowed the appeal as set out at paragraph 2 above.