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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **9/1/09**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ALAN STEWART

Before Kerr LCJ, Higgins LJ and Coghlin LJ

KERR LCJ

Introduction

[1] This is an appeal from sentences imposed on 21 December 2007 by McLaughlin J on Alan Stewart in respect of offences of causing grievous bodily harm with intent, wounding with intent and assault occasioning actual bodily harm. Leave to appeal was granted by the single judge. McLaughlin J had sentenced the appellant to a custody probation order of 14 years' detention in the Young Offenders Centre and 1 year probation for the offence of causing grievous bodily harm with intent, 7 years' detention for wounding with intent and 5 years' detention for assault occasioning actual bodily harm, with all three periods of detention to run concurrently.

History of proceedings

[2] On 27 September 2006 the appellant, along with his co-accused Adam Smyth and Philip Irwin, was committed for trial to Belfast Crown Court on the following offences:

a) *Count 1* - Attempting to murder Mark Keller contrary to article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law;

b) *Count 2* - Assaulting Anthony Keller thereby occasioning him actual bodily harm contrary to section 47 of the Offences against the Person Act 1861;

c) *Count 3* – Robbing Anthony Keller of £40 in cash contrary to section 8(1) of the Theft Act (Northern Ireland) 1969;

d) *Count 4* - Wounding Anthony Keller with intent to do him grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861;

e) *Count 6* – Affray contrary to common law;

f) *Count 9* - Causing grievous bodily harm to Mark Keller with intent to do him grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861.

[3] The trial began on 10 September 2007 before McLaughlin J sitting with a jury. The jury found the appellant guilty of a number of offences. The sentences imposed by the trial judge on 21 December 2007 in respect of those offences are as follows: -

Count 9 - Causing grievous bodily harm to Mark Keller with intent: custody probation order comprising 14 years' detention with 1 year probation; (this consisted of a commensurate sentence of twelve years' imprisonment and a protective element of three years under article 20 of the Criminal Justice (Northern Ireland) Order 1996);

Count 4 - Wounding Anthony Keller with intent: 7 years' detention concurrent to the sentence on count 9;

Count 2 - Assaulting Anthony Keller occasioning him actual bodily harm: 5 years' detention concurrent with the sentences on counts 9 and 4.

[4] The jury returned a verdict of not guilty on the charge of attempted murder of Mark Keller. The remaining charges were left on the books not to be proceeded without the leave of the court. The co-accused, Adam Smyth, was sentenced to 20 years' detention for, *inter alia,* attempted murder, whilst Philip Irwin was sentenced to 12 years' imprisonment for, *inter alia*, grievous bodily harm with intent. The commensurate

sentence in Irwin's case was eight years and this was increased under article 20 of the 1996 Order to twelve years.

Factual background

[5] On the evening of 5 November 2005 two brothers, Mark and Anthony Keller travelled with two other friends from Killyleagh to Belfast for an evening's entertainment. They went to Weatherspoon's pub on the Dublin Road and then Skye nightclub on Howard Street. After leaving the nightclub in the early hours of 6 November, they walked to a cashpoint in Donegall Square North in order to withdraw money for a taxi home.

[6] While they were using the ATM, these four young men fell victim to a savage and unprovoked attack from the appellant and the two co-accused, one of whom was carrying a knife with an 8 inch blade. McLaughlin J has captured well the full horror of this attack and the appalling consequences for the young men who were its victims, particularly Mark Keller. In a judgment of admirable quality, the sentencing judge expertly analysed the events of the evening, the roles played by each of the defendants and the shocking prevalence of offences of this type in our society and the necessary reaction of the criminal justice system to that disturbing circumstance. We find it impossible to improve on his eloquent and penetrating exposition of these issues.

[7] In a painstaking examination of the judge's analysis of the role of his client in the assault, Mr Laurence McCrudden QC sought to persuade us that this had been gravely overestimated by McLaughlin J. He asserted that Stewart had played a much lesser part than that found by the judge. In promoting this claim, Mr McCrudden sought to rely on still photographs taken from CCTV footage of the incident and a close inquiry into various items of transcribed evidence.

[8] We have considered these carefully. It is clear that a different view might have been taken from that formed by the trial judge on some aspects of the incident but we have no hesitation in saying that the conclusions that he reached were unquestionably tenable on the evidence available to him. McLaughlin J is an extremely experienced criminal judge and the terms of his judgment bear unmistakable witness to the care that he took in analysing the evidence. It is trite to say that he enjoyed a distinct advantage over this court in that he heard the evidence unfold over many days from many witnesses and he had the opportunity to gauge the

accuracy and truthfulness of the accounts given, not only from the content of the evidence that he heard, but also from the demeanour of the witnesses who gave it. We can find no reason to doubt the correctness of the conclusions that the judge reached.

[9] In particular, having reviewed the evidence that Mr McCrudden brought to our attention, we have concluded that the learned trial judge's assessment of the role played by Stewart is unimpeachable. He described this in the following passage of his sentencing remarks: -

> "Stewart remained at the scene throughout and indeed took an active part in the fighting right to the end. Indeed he had to be separated from Anthony Keller at the very end of the events. The CCTV footage and evidence of other witnesses establishes clearly that Stewart and Smyth then walked from Donegall Square North into Howard Street, crossed the road to the opposite side and then went into Brunswick Street. As they passed the junction of Brunswick Street and Howard Street the knife was disposed of by Smyth behind a junction box and it was found there a couple of hours later during the course of police searches of the area. They then continued along Brunswick Street and they then moved through Blackstaff Square, Great Victoria Street, moved across the car park and waste ground near Day's Hotel, Sandy Row, Donegal Road and ended up in Moltke Street."

[10] Mr McCrudden also sought to persuade us that the judge had taken an unwarrantably benevolent view of Irwin's behaviour in relation to the attack. The judge had described this as follows:-

> "The roles of Stewart and Irwin were different [from that of Smyth]. Initially they moved out of Donegall Square North and into Howard Street and returned for the fight. It is clear from the video evidence however that Irwin left the scene at the early stage of the first phase. It was open to the jury to conclude that he took himself away from the scene when he saw what Smyth had done. He was older than Smyth

> and had a bad criminal record but may well have been sufficiently astute to realise that discretion dictated that he should get as far away from the scene as quickly as he could."

The appellant's personal circumstances

[11] These were summarised by the learned trial judge in paragraphs [43] to [48] of his judgment and we are in complete agreement with the conclusions that he there expressed. The previous convictions of the appellant denote a clear propensity to random, senseless violence. From the evidence of those occasions on which violence perpetrated by the appellant has been the subject of criminal charges one has the distinct impression that he has engaged in it for the so-called 'thrill' of inflicting injury on others. We are entirely unsurprised that he has been assessed as presenting a high risk of re-offending.

[12] We share the judge's misgivings about the authenticity of the appellant's much vaunted remorse. This does not rest easily with his attempts to distance himself from the more serious aspects of this attack, in particular, his utterly implausible claim not to be aware that Smyth had been armed with a knife and indeed that he had actually used it in the attack on Mark Keller. We are conscious, as was McLaughlin J, that the appellant comes from a gravely disadvantaged background and that he has led a somewhat rootless existence. We have kept in mind the opinions of Dr Loughrey and Dr Weir and have had regard to the observations of the trial judge in relation to these. We find no reason to conclude, however, that there was any acceptable explanation for the appellant's utter lack of responsibility and the fact that he was arrested after being released on bail for these offences and had his bail revoked does not augur well for any firm commitment to a programme of improvement.

The victims' injuries

[13] Mark Keller has suffered catastrophic injuries. He is effectively blind. He has permanent damage to his bowel function. He has foot drop in both feet so that his mobility is greatly decreased. His future has been shattered. The psychological impact on him is even now incapable of being fully measured but it has been and undoubtedly will continue to be considerable. Rather as in the case of *McArdle* (*R v McArdle* [2008] NICA 29) one finds that a young life has been completely unhinged as a result of

lunatic, inexplicable violence. As McLaughlin J astutely observed, this young man's family and friends have been acutely – indeed, overwhelmingly – affected by the outrage perpetrated by this appellant and his co-accused.

[14] Such is the devastation wrought to his life by the injuries sustained by Mark Keller, there is a tendency to overlook those suffered by the other victims. They were in themselves serious although, of course, of an entirely different order from those of the principal victim.

The appellant's arguments

[15] The purpose of Mr McCrudden's carefully presented submissions on the avowed clemency towards Irwin was to suggest that the sentence imposed on him was disproportionately more lenient than that received by Stewart. If, as counsel suggested, Irwin played as significant a role as Stewart, the sentence imposed on the former should have been at least as great as that received by the appellant, Mr McCrudden argued. Indeed, he submitted, since Irwin had evaded arrest and only gave himself up after Stewart and Smyth had been convicted and since he had a significantly more substantial criminal record, arguably the sentence imposed on him ought to have been greater. The fact that a lesser sentence was imposed created an unfair and unjustifiable disparity between the two accused, Stewart and Irwin. Mr McCrudden therefore suggested that Stewart felt a sense of grievance which should be reflected in a reduction of the sentence that was imposed on him.

[16] Subsidiary arguments were presented on behalf of the appellant. The first of these was to the effect that the commensurate sentence chosen by the judge (12 years' detention) was in itself excessive. Reference was made to the decision of this court in *R v McArdle* [2008] NICA 29 where it was indicated that the range of sentence for this type of offence should be between seven and fifteen years' imprisonment when conviction followed trial rather than a plea of guilty. It was suggested that, on the basis of that guideline, a commensurate sentence of something less than twelve years was appropriate in the present case.

[17] It was also argued that, given the length of the commensurate sentence, a further protective element of two years' detention under article 20 of the 1996 Order was not required. While acknowledging that the length of the protective element could not be dictated by the commensurate

sentence, Mr McCrudden contended that the overall sentence arrived at – fifteen years – was disproportionate.

[18] Finally, counsel submitted that a longer period of probation should have been chosen by the judge. It was suggested that the combined force of opinion expressed in the pre-sentence report and the medical evidence relating to Stewart ought to have impelled the Court towards a longer, if not the maximum, period of probationary support and supervision. This would have been at least as likely to ensure protection of the public as the imposition of an enhanced period of detention under article 20.

The disparity argument

[19] We have already expressed the view that the conclusions reached by the judge on the role played by the appellant in this attack are beyond reproach. We turn now to the claim that he formed an unwarrantably benign view of the extent of Irwin's involvement. We have carefully considered Mr McCrudden's arguments on this aspect of the appeal and his criticisms of the Crown acceptance that Irwin had played a significantly lesser part than the other two. We have looked again at the photographs and the relevant passages from the transcript. We do not accept the case that has been made for the appellant on this issue. We consider that there was ample material available to the judge on which to form the confident view that Irwin was not directly present when the more heinous events took place and that he had deliberately removed himself from the scene at that point.

[20] Since we have concluded that there was ample basis for the distinction drawn between Stewart and Irwin, it is not strictly necessary to consider the disparity argument further but since this argument has been a feature in a number of recent appeals and since, we believe, some misconceptions appear to exist as to the correct principles to be applied, we take this opportunity to say something about it.

[21] In *R v O'Neill* [1984] 13 NIJB (2) two defendants were properly sentenced by one judge on pleading guilty. A third contested the charge and the case came on before another judge. He then changed his plea and was sentenced to a substantially lesser term which the Court of Appeal regarded as 'clearly inadequate'. In dismissing the appeal of one of the earlier defendants who claimed to be aggrieved at the disparity of

treatment between him and the third defendant, the Court of Appeal (*per* Gibson LJ) said at page 6: -

> "The fact that a judge in sentencing a co-defendant has passed a sentence below the range which this court has laid down or would consider justified is not a valid ground for reducing the sentence which is in no way excessive imposed on another accused. It is probably true that the appellant feels aggrieved having regard to the sentence passed on McCrory [the third defendant]. But the fact that an appellant feels aggrieved that a co-defendant has received a substantially smaller sentence is not a proper ground for interfering with his sentence if that is the only ground. We consider, as did the English Court of Appeal in *R v Weekes* 74 CAR 161, that it is only if the grievance is justified that this court should interfere. Where, as here, the sentence of 7 years obviously made every allowance for mitigating circumstances and was in itself a lenient one and where the sentence on McCrory is clearly inadequate and must have been known by the appellant to be well below the minimum for the offence of armed robbery, there can be no room for any justified sense of grievance."

[22] The principle expressed in this passage is quite clear. An appellant who has been properly sentenced cannot benefit from an inadequate sentence wrongly passed on a co-defendant. He cannot expect a reduction on his sentence solely on account of the unjustifiably lenient treatment of someone involved in the same offence. The fact that the 'sense of grievance' is unjustified is secondary to the primary import of the principle which is, as we have said, that a properly passed sentence cannot be altered because of an error in sentencing a co-accused.

[23] The clarity of that principle may have become somewhat blurred by interpretations placed on some later judicial pronouncements on the same issue. In *R v Delaney* [1994] NIJB 31, the applicant had been convicted on several charges of burglary after admitting offences, some of which had been committed with an associate. He had been sentenced to the same term of imprisonment even though he had committed fewer crimes and had received less property. It was therefore argued that there should have

been a clear difference in sentence, to reflect the disparity in the offences and that therefore Delaney had a justified sense of grievance. Of this argument Carswell LJ said at page 33: -

> "In so arguing counsel was invoking the well known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered: see *R v Brown* [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: *R v Bell* [1987] 7 BNIL 94, following *R v Towle and Wintle* (1986, The Times, 23 January).
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> It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification. The examples in the decided cases where reductions have been made are generally cases of very considerable disparity. Where the disparity is not of such gross degree the courts have tended to say that the appellant has not a real grievance, since his own sentence was properly in line with generally adopted standards, and if his associate was fortunate enough to receive what is now seen as an over-lenient sentence that is not something of which the appellant can complain."

[24] The statement that 'right thinking members of the public looking at the respective sentences would say that something had gone wrong' has tended to become isolated in some submissions made to this court in appeals where a disparity of sentencing has occurred. Even in those cases where it is accepted that the appellant has received a perfectly proper sentence, it is nevertheless argued that a member of the public would think that something had gone wrong where a co-accused had received a significantly lesser sentence. And, of course, it is in one sense true that something has gone wrong. What may have gone wrong, however, is the passing of an unduly lenient sentence on the co-accused. In those circumstances, we do not consider that any interference with the proper sentence is warranted for this would do no more than compound the error. It is clear that the court in *Delaney* was of a similar view because at page 34 Carswell LJ said: -

> "It is only if a fair-minded and right-thinking person would feel that the disparity involved *some unfairness to the appellant*, as distinct from a possibly rueful feeling that his associate has been more fortunate in his treatment that a court should intervene: cf *R v Ellis* [1986] 10 NIJB, per Lowry LCJ" (emphasis added)

[25] It is not unfair to an appellant who receives a perfectly proper sentence that a co-accused is punished less severely. It is therefore important to recognise that the two concepts of 'something having gone wrong' and 'unfairness to the appellant' are inextricably linked in this exercise. In this context, we should say that the degree of disparity does not inevitably supply the answer to the question 'has there been unfairness to the appellant?' Some cases (such as *Delaney* and *R v Murdock* [2003] NICA 21) suggest that a disparity in sentences will not be regarded as requiring to be redressed unless the difference in treatment is marked. One can understand that the question of unfairness to an appellant cannot arise where the disparity is less than marked but it does not follow that solely because the discrepancy is substantial, unfairness to an appellant will inevitably accrue.

[26] In the present case there is no question of the appellant having been unfairly treated. Even if we had felt that something had gone wrong in this case by Irwin having received unnecessarily lenient treatment, we would

not have regarded that as justification for adjusting the sentence passed on Stewart.

The selection of the commensurate sentence

[27] In *R v Magee* [2007] NICA 21 we commented on the shocking and persisting prevalence of violence perpetrated by young men on each other. At paragraphs [23] and [24] we said: -

> "[23] It is the experience of this court that offences of wanton violence among young males (while by no means a new problem in our society) are becoming even more prevalent in recent years. Unfortunately, the use of a weapon – often a knife, sometimes a bottle or baseball bat – is all too frequently a feature of these cases. Shocking instances of gratuitous violence by kicking defenceless victims while they are on the ground are also common in the criminal courts. These offences are typically committed when the perpetrator is under the influence of drink or drugs or both. The level of violence meted out goes well beyond that which might have been prompted by the initial dispute. Those who inflict the violence display a chilling indifference to the severity of the injury that their victims will suffer. Typically, great regret is expressed when the offender has to confront the consequences of his behaviour but, as this court observed in *R v Ryan Quinn* [2006] NICA 27 "it is frequently difficult to distinguish authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions".
>
> [24] The courts must react to these circumstances by the imposition of sentences that sufficiently mark society's utter rejection of such offences and send a clear signal to those who might engage in this type of violence that the consequence of conviction of these crimes will be condign punishment. We put it thus in *Ryan Quinn*: -

> '… it is now, sadly, common experience that serious assaults involving young men leading to grave injury and, far too often, death occur after offenders and victims have been drinking heavily. The courts must respond to this experience by the imposition of penalties not only for the purpose of deterrence but also to mark our society's abhorrence and rejection of the phenomenon. Those sentences must also reflect the devastation wrought by the death of a young man …'"

[28] These remarks provide a useful context for our consideration of the sentence in the present case. Although the appellant was not the principal offender here, it is clear that he participated in this assault in a full-blooded and unrestrained fashion. He was aware that Smyth had armed himself with a knife and witnessed him use it on Mark Keller. He is bound to have anticipated its use. His participation in the fight must have encouraged Smyth. If he had refrained from fighting Anthony Keller and stayed away from the scene of conflict, it is at least possible that such grievous injuries as were sustained by Mark Keller would not have been inflicted.

[29] The appellant contested the charges against him. He brazenly denied knowing that Smyth had a knife or even that he had used it in the attack on Mark Keller when, as the judge pointed out in his sentencing remarks, the evidence that he witnessed the stabbing was unmistakable. He is a young man who has already accumulated a disturbing number of previous convictions and his behaviour post arrest and release on bail provide little hope for reform on his part. Such steps as he has taken in this direction appear to us to be principally motivated by a desire to influence the sentence to be passed on him rather than betokening any true desire to transform his behaviour. In all these circumstances, we consider that the selection by the trial judge of a commensurate sentence of twelve years is entirely consistent with the sentencing range given by this court in *McArdle*.

The protective element and the choice of the probation period

[30] These related subjects may be taken together. All the reports on the appellant that have been provided supply unambiguous evidence of the risk of his re-offending. There is some debate as to how that risk might be managed but none as to its existence. The choice made by the judge of the combination of a protective element to the sentence under article 20 of the 1996 Order and a period of probation post release seem to us to properly reflect a careful consideration of the various views expressed. We can find no reason to criticise, much less disagree with, this disposal.

Conclusion

[31] None of the grounds on which this appeal was advanced has succeeded. The appeal is dismissed.