Neutral Citation no. [2008] NICA 29 | *Ref:* **KER7170**

Judgment: approved by the Court for handing down | *Delivered:* **23/5/08**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

DANIEL McARDLE

Before Kerr LCJ and Campbell LJ

KERR LCJ

Introduction

[1] Leave having been granted by the single judge, this is an appeal from a sentence imposed on the appellant on 8 June 2007 at Craigavon Crown Court by His Honour Judge Markey QC on the charge of causing grievous bodily harm with intent to do grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861. The sentence passed by the learned judge comprised a custody probation order consisting of detention for 13 years and, on release from custody, probation of 1 year.

Factual Background

[2] On Friday 16 September 2005 at around 11pm, as Liam Sumner was returning to his home in Thornhill Crescent, Lisburn he met the appellant whom he knew through his girlfriend's brother. The appellant said that he would accompany Mr Sumner to his home and then walk on to get cigarettes. When they arrived at Mr Sumner's home, however, Mr McArdle asked if he might come in to get a drink. Mr Sumner allowed him to come into the flat and the appellant went to the kitchen, ostensibly to get

water. It transpired, however, that while there he took and secreted on his person a large kitchen knife. On his return to the living room he appeared to be friendly, and indeed this had been his demeanour on the way to the flat.

[3] Some ten minutes later Mr Sumner and Mr McArdle left the flat together to get cigarettes. They discovered that the shop where they planned to buy these was closed so they went to the house of a friend of the appellant. This person was not at home and they walked to the pavement by the wall outside the house. At this point Mr McArdle became agitated. He said to Mr Sumner, "Are you an Orangeman?" Mr Sumner replied, "No, I'm a Catholic". The appellant paused for a minute and then brought up what Mr Sumner thought was his hand to strike him in the face. Mr Sumner felt the blow and his eye "popped and went dark". He stumbled away and at that point could see Mr McArdle some 8 – 10 feet away with a knife in his hand, saying, "You wee cunt". Mr Sumner later described the knife as being 9 inches long with the handle hidden up the appellant's sleeve. Subsequently it was discovered that a knife was missing from Mr Sumner's home. The victim stated that the missing knife was similar to the one that was used to stab him.

[4] A witness, Kimberley Doherty, first saw the appellant and the victim from her bedroom window before the attack took place. She noticed that the appellant had a knife which she described as 12" long and 3" wide. He was holding it in a way that concealed it from Mr Sumner. She observed the appellant become agitated and move from side to side. Then suddenly, and without, apparently, any provocation from Mr Sumner, he jumped in the air and stabbed the victim in the head with the knife. The appellant then pulled his arm back as if going to strike again with the knife. Ms Doherty opened the window and shouted something and Mr McArdle stopped. She is convinced that if she had not shouted, the appellant would have struck his victim again and she estimates that if he had done so, the knife would have entered the back of Mr Sumner's head.

[5] On 22 September 2005 the appellant was arrested for attempted murder. He made no reply after being cautioned. When interviewed he at first denied committing the offence. He said that one of his friends had told him that the victim had been stabbed but that this was the first he knew of the incident. He told police that he met Mr Sumner as he was going home and they then walked together to a friend's house. He said that he had drunk 10 cans of lager that evening.

[6] Later in the interview the appellant claimed that Mr Sumner was "off his face on drugs" and that he kept asking Mr McArdle for drugs. The appellant said that he saw the victim repeatedly "fixing himself". He suggested that, because Mr Sumner was under the influence of drugs, he did not want to be alone with him and that this was why they went to his friend's house. After calling there, the appellant claimed that Mr Sumner pulled out a knife and that they both had 'a bit of a punch up'. Then Mr Sumner ran one way and the appellant ran the other. He said that he had been able to get hold of the knife and he suggested that, in the scuffle, the knife must have struck the victim. He claimed, however, that he did not know at the time that the victim had been hit with the knife. When he ran away he threw the knife in a river and at the request of the police marked its location on a map. (A knife was recovered from the Derriaghy River at the point that Mr McArdle had marked but this was not the knife that had been used in the incident.) It was put to him that a witness had given a different version of events at the scene where the attack took place but he maintained his account. He denied being at the victim's home despite being told that the flat would be examined for fingerprints and DNA.

[7] During the second interview the appellant admitted being at the victim's flat. He said that he had not mentioned this previously as he "didn't think it was important". Of course, it had been put to him directly in the first interview that he *had* been at the flat. On that occasion he had denied being there (not merely omitted to mention it), so this answer would have been, at best, somewhat incongruous. But his adherence to this position, despite its utter implausibility, suggests strongly that he was determined to conceal the fact that he had been in Mr Sumner's home, lest it be discovered that he had obtained the knife there. On the account of how Mr Sumner came by his injury the appellant persisted in his claim that it was Mr Sumner who had pulled the knife on him, despite again being told that the witness had stated that it was he who had launched an unprovoked attack on his victim and stabbed him in the head with a knife.

The injury to Mr Sumner and its effects

[8] Mr David Frazer, a consultant ophthalmologist provided a report on Mr Sumner's injuries. He had seen Mr Sumner when he was admitted to the accident and emergency department of the Royal Victoria Hospital. He gave this report on his condition: -

> "… he had a laceration just below the left eyebrow, on the temporal side, measuring about 6 cm and consistent with the history of a stabbing injury. The left eye had been unable to see anything since immediately after the injury, according to Mr Sumner. An MRI scan of the left orbit area showed evidence of optic nerve injury behind the eye, but the eye itself was still intact. There was also bleeding and swelling in the orbit, and as a result the eye was pushed forwards in the socket (proptosed). It was apparent right from the outset that Mr Sumner's eye was completely blind, as the pupil did not react to light. The history and MRI scan were consistent with complete division of the optic nerve fibres connecting the left eye to the brain (although the insulating covering of the nerve appeared intact). Mr Sumner's eyebrow laceration was sutured and a lateral canthotomy performed (a deliberate incision under local anaesthetic at the outer corner of the eyelids to release the pressure on the eye by allowing it to move further forwards). This deliberate wound was sutured a few days later when the proptosis had receded…"

[9] Mr Sumner was discharged from hospital on 19 September 2005. Mr Frazer examined him on 20 October 2005 when all sutures were removed and the left eye was still completely blind. He made the following report: -

> "…the appearance of the eye was now unsightly, as scarring in the orbit had pulled it upwards. The eye itself was intact and uninjured. All treatment for Mr Sumner has ceased for the time being – some remedial treatment for the position of the eye will be necessary in the future for cosmetic reasons. There will be no return of sight in the left eye …"

[10] In a statement of 19 March 2007 Mr Sumner has described how he and his family have been affected by this shocking incident. At that time he had been living with his girlfriend and their two children aged three years and seven months respectively. His life was happy and, in his words, he

had "everything I ever wanted". All that changed dramatically and forever as a result of this outrageous and wanton act of violence upon him. He was absent from his work as a chef for seven months. His relationship with his girlfriend suffered and eventually in January 2006 they separated and he left Northern Ireland to live in England. He has lived there ever since. He has not seen his girlfriend or children since then although he keeps in contact with them by telephone. He has said that he does not trust anyone and is "constantly looking over my shoulder". He struggles to sleep at night.

[11] The devastation wrought by this senseless, horrific attack is difficult to exaggerate. Not only has this young man lost the sight of an eye – a grievous and appalling loss of faculty – he has lost his family and they have lost his society. His formerly happy life has been shattered, his future is uncertain and he may never regain the sense of contentment and fulfilment that he previously experienced - all because of the appellant's gratuitous, meaningless and arbitrary aggression.

Pre-sentence report

[12] The pre sentence report prepared by a probation officer, Briege McKee, is dated 24 April 2007. It was recorded that, even at the time of this report, the appellant was continuing to deny that he had been the instigator of the attack on Mr Sumner and persisted in his claim that he had been acting in self defence. He told the probation officer that he could remember head butting Mr Sumner but had no recollection of stabbing him. He claimed to have been drunk.

[13] Ms McKee, in making an evaluation of the risk of re-offending, noted that the appellant had committed a second violent offence of assault on police on 7 April 2006. He was assessed as posing a risk of physical harm to others and it was considered that, on his release from prison, the risk of such harm was likely to be particularly high. The factors influencing this assessment were: misuse of alcohol and drugs; having a negative peer group; suffering from a lack of structure or routine in his daily life; and a preparedness to behave recklessly and impulsively when under the influence of alcohol.

Psychiatric report

[14] Dr Bownes, consultant psychiatrist, prepared a report at the request of the appellant's solicitors. In the following passage from that report, he discussed his diagnosis of the appellant's condition: -

> "…it would appear that since the dissolution of his parent's relationship, his mother's subsequent emotional investment in a new partner and the death of his grandparents … Mr McArdle has evinced in relapsing and remitting form – particularly at times of stress or demand – psychologically distressing symptomatology including feelings of anxiety, low mood, irritable mood, feelings of being alone in life, feelings of not being able to cope, feelings that his life was no longer worth living, 'paranoia' and low levels of drive and motivation consistent with a diagnosis of dysthymia as defined by the ICD-10 International Classification of Mental and Behavioural Disorders".

[15] Dr Bownes explained that dysthymia is a condition characterised by a chronic symptom profile that is thought to originate in an individual's personality structure rather than as a result of a biological mental illness process. The symptoms are never so severe as to threaten the life of the sufferer or require long periods of psychiatric hospitalisation.

[16] Dr Bownes reported that the appellant refused to shift from his original defensive stance regarding the commission of the offence. From reading witness statements, Dr Bownes made the following observations: -

> "…Mr McArdle appeared to have little by way of structure or gainful activity in his day, was abusing alcohol and mood altering substances and may have been experiencing dysthymic symptoms – particularly lowered mood, brooding introspection, feelings of loneliness and not belonging, irritable mood, a feeling of grievance and persecutory thoughts".

[17] There was nothing to suggest that the appellant was other than perfectly capable of understanding that what he did was wrong, however, and Dr Bownes expressed his conclusions about the case in the following passage: -

> "Hence in my opinion the prognosis in the case is potentially very poor unless Mr McArdle is assisted first in maintaining abstinence from alcohol and other mood altering substances, stabilising his lifestyle, pursuing a pro-social prerogative and then to engage in a genuine self-reflective process to address his personality based deficits and deficiencies on his return to the community through a combination of professional supervision and a programme of the therapeutic interventions…"

The sentence

[18] The judge considered whether to impose a life sentence. He expressed the view that "the offence itself is intrinsically so grave that a life sentence must be considered and might well be appropriate" but concluded that the second necessary element of lack of stability and inherent dangerousness on the part of the appellant was not established with sufficient certainty to warrant a sentence of life imprisonment. As has been held in such cases as *Attorney-General's Reference No. 32 of 1996 (Whittaker)* [1997] 1 Cr App R (S) 261, a discretionary life sentence should only be imposed where the offender has been convicted of a very serious offence *and* "there [are] good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence".

[19] The judge, not without hesitation, refrained from imposing a life sentence, having taken into account the appellant's previous clear record, his youth (he was born on 17 May 1988) and the fact that he had not been in serious trouble previously, although it is noteworthy that the appellant was sentenced at Lisburn Magistrates court on 17 April 2007 to 18 months driving disqualification in respect of offences of dangerous driving and driving while under the influence of alcohol on 25 November 2006 and that, according to the probation report, he was convicted of assault on police on 7 April 2006.

[20] Having concluded that a life sentence was not appropriate, the judge then turned to consider whether an enhanced penalty under article 20 of the Criminal Justice (Northern Ireland) Order 1996 should be imposed. He referred to the medical evidence and in particular to the fact that Dr Bownes was not able to predict how the applicant would behave in the future. The judge had regard to Dr Bownes' opinion that the prognosis was poor unless the appellant was assisted in maintaining abstinence from alcohol and other substances, stabilising his lifestyle and pursuing a pro-social prerogative.

[21] Drawing on the decision of this court in *R v McCandless and others* [2004] NICA 1, Judge Markey concluded that the sentencing range for this type of offence was up to twelve years' imprisonment. He considered that, in light of the appellant's youth, his clear record and his plea of guilty the commensurate sentence should be eight years' imprisonment. The judge made it clear that protection of the public was a very strong element in this case. He commented on the difficulty of the exercise of estimating the required element of protection on what he knew about the defendant but ultimately decided that the appropriate sentence for this aspect of the matter was six years' imprisonment.

Article 20

[22] So far as is material article 20 provides: -

> "*Length of custodial sentences*
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> 20. - (1) This Article applies where a court passes a custodial sentence other than one fixed by law or falling to be imposed under Article 70(2) of the Firearms (Northern Ireland) Order 2004 or paragraph 2(4) or (5) of Schedule 2 to the Violent Crime Reduction Act 2006.
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> (2) The custodial sentence shall be-
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> (a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the

> offence, or the combination of the offence and one or more offences associated with it; or
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> (b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

[23] The 'longer term' referred to in article 20 (2) (b) may only be imposed, therefore, when two conditions are met. The first is that the offence should be a violent or sexual offence. (Clearly, that condition was fulfilled in the present case). The second requirement is that the court must reach the view that the longer sentence of imprisonment which it proposes to pass is such as is necessary to protect the public from serious harm.

The appeal

[24] Although several grounds were adumbrated in the Notice of Appeal, Mr P T McDonald QC, who appeared on behalf of the appellant, concentrated on two principal submissions. He suggested firstly that the commensurate sentence of eight years that Judge Markey had chosen was too high and secondly that there was not sufficient evidence to support the conclusion that the judge purported to reach that the risk posed by the appellant warranted the imposition of a longer period of imprisonment under article 20 (2) (b).

The appropriate commensurate sentence

[25] In *R v McCandless, Johnston, Johnston, Anderson and Scott* [2004] NICA 1 this court had occasion to consider in the case of *Scott* the proper range of sentences for offences of causing grievous bodily harm with intent. Scott had pleaded guilty to two charges of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861. He was sentenced to imprisonment for life, the minimum term being fixed at eight years. Allowing the appeal against sentence, Carswell LCJ said at paragraph [51]: -

> "The minimum term fixed by the judge of eight years equates to a determinate sentence of 16 years. … A sentence of 16 years in a case of grievous

> bodily harm represents a very high point on the scale of sentences on a plea of guilty in that type of offence. It would normally only be justified if the court were imposing a term, pursuant to Article 20(2)(b) of the Criminal Justice (Northern Ireland) Order 1996, which is longer than that which is commensurate with the seriousness of the offence, in order to protect the public from serious harm from the offender. … We accordingly are of opinion that the minimum term of eight years fixed in this case is longer than is required to reflect the elements of retribution and deterrence. We consider that a term of six years, which equates to a determinate sentence of twelve years, would suffice for this purpose."

[26] In *R v Stephen Magee* [2007] NICA 21 this court considered the endemic problem of violence inflicted by young males on each other, although that case involved the manslaughter of the victim. At paragraphs [23] and [24] we said: -

> "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.
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> …

> 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."

[27] In *Magee* we gave this guidance on the range of sentences for manslaughter: -

> "We consider that the time has now arrived where, in the case of manslaughter where the charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between eight and fifteen years' imprisonment."

[28] In cases such as the present where there can be no question that the grievous bodily harm was inflicted deliberately and that the appellant intended that his victim should sustain grievous injury, we do not believe that the range of sentences should be significantly different simply because, fortuitously, a fatal injury was not sustained. This is particularly so because, we are satisfied, if Ms Doherty had not intervened, the appellant would have stabbed Mr Sumner again, quite possibly with fatal consequences. We have concluded, therefore, that for offences of wounding with intent to cause grievous bodily harm the sentencing range should be between seven and fifteen years' imprisonment, following conviction after trial. An appropriate reduction on this range should be made where the offender has pleaded guilty but in the present case that cannot be significant. The appellant maintained his innocence virtually until trial, despite overwhelming evidence against him. Any reduction on this account must be modest.

[29] Although the omens for future offending are not propitious, the appellant is entitled to have taken into account his previous good record before this offence was committed and the fact that he was young when it occurred. Making every allowance for these factors, however, we find

nothing to fault the learned trial judge's choice of eight years as the commensurate sentence.

The need to protect the public

[30] Mr McDonald suggested that article 20 (2) (b) of the 1996 Order should only be invoked where there was an established pattern of violent offending on the part of the defendant. He suggested that, absent such unambiguous evidence, it was impossible to conclude that an offender would represent a risk of serious harm to the public. We do not accept these submissions. Of course the presence of a significant criminal record of violence may well satisfy the requirement of the provision, but its absence does not necessarily betoken an absence of risk. Each case must be examined on its own individual facts to see whether such a risk is present and is of sufficient gravity to call for a protective element in the sentencing disposal. As this court said in *R v McColgan* [2006] NICA 41: -

> "The sentence in respect of the protective element should reflect what is considered necessary to protect the public from serious harm. The sentencing exercise for this aspect therefore calls for an evaluation of the risk that the offender is likely to present and the selection of a period of imprisonment designed to meet that risk."

[31] In our judgment, there was ample cause to conclude that the appellant represented a considerable risk to the public. We say this for several reasons. The first of these is the nature of the attack. As we have said, this was mindless and utterly unprovoked. Indeed, it appears that the appellant created a synthetic dispute in order to provide a pretext for his attack. But it cannot be regarded as unpremeditated or impulsive since he had obtained the knife earlier and it can only be assumed that he did so with the intention of using it to inflict injury.

[32] The second factor to be taken into account is the appellant's steadfast refusal (until he finally pleaded guilty) to accept responsibility for this attack. This appears to us to clearly indicate a person without moral scruple. The third factor is the probation officer's assessment of the risk of re-offending which she rated as high. Finally, we are strongly influenced to our conclusion on this matter by the opinion of Dr Bownes as to the prognosis for the appellant. He considered that the outlook for the

appellant was poor unless substantial support mechanisms are put in place. There is no indication at present that this level of support would be readily available to him or that he would take advantage of such mechanisms if they were provided. Moreover, the dysthymia from which the appellant suffers and which appears to have contributed to his lifestyle (which in turn led to his offending) is a chronic condition. All of these matters, in our opinion, combine to make an unassailable case that he does indeed represent a risk of serious harm to the public.

[33] The totality of the sentence produced by the aggregate of the commensurate sentence and the protective element must be examined for its proportionality. We dealt with this aspect in *McColgan* at paragraphs [25] to [28] as follows: -

> "[25] In *R v Mansell* [1994] 15 Cr App R (S) 771 Lord Taylor CJ, dealing with the equivalent provision in England and Wales, examined the relationship between the protective element of the sentence and the principle of proportionality. At page 775 he said: -
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> > "However, when one goes on to consider what would be the appropriate period to add, the learned judge has to perform a balancing act. In theory, someone who is addicted to conduct which could cause serious harm to members of the public may need to be prevented from doing that for a very long time. In the ultimate case, an indeterminate sentence may be necessary where the harm is likely to be very serious and the predilection for indulging in such conduct looks likely to continue for an indefinite time, but the learned judge in each individual case has to try to balance the need to protect the public on the one hand with the need to look at the totality of the sentence and to see that it is not out of all proportion to the nature of the offending."
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> [26] More recently, Lord Bingham CJ in *R v de Silva* [2000] 2 Cr. App. R. (S) 408 said that there had

> to be "some proportion" between the total sentence and the gravity of the offences.
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> [27] The need for proportionality between the sentence passed and the gravity of the offence (as opposed to, for instance, the magnitude of the risk of harm to the public) does not arise from the text of the provision. This enjoins the sentencer to pass a sentence appropriate to the protection of the public from serious harm. But as Mr Mooney has pointed out, the legislature clearly decided that some restriction on the length of the protective element in the case of determinate sentences was appropriate since it stipulated that this must not exceed the maximum penalty otherwise permitted. No such restriction is specified for offences where there is no statutory maximum but we incline to agree with Mr Mooney that it cannot have been intended that article 20 (2) (b) would be used in order to pass sentences that were wholly disproportionate to the nature of the offending.
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> [28] The principal factor in the selection of this element must always be the protection of the public and while the need for proportionality will serve as a check against a wholly excessive sentence, this will always be essentially secondary to the main purpose of the provision."

[34] We have examined the total sentence passed with these principles in mind and have concluded that it is not disproportionate. The appeal is dismissed.