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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v.

DARYL JOHN PROCTOR

Before: COGHLIN LJ and DEENY J

COGHLIN LJ

[1] This is an application on behalf of the appellant, Daryl John Proctor, for leave to appeal against a sentence of 13 years imprisonment, comprising 12 years custody and 1 year of probation, imposed by Hart J at Belfast Crown Court on 6 February 2009. The applicant was represented by Miss Eilis McDermott QC and Mr Talbot while Mr Gary McCrudden appeared on behalf of the Director of Public Prosecutions. We are grateful to both sets of counsel for their carefully prepared and well presented skeleton arguments and oral submissions.

[2] The applicant was originally arraigned upon an indictment alleging the attempted murder of Paul McAuley on 16 July 2006, causing grievous bodily harm with intent to Paul McAuley and Mark Lynch and attempting to cause grievous bodily harm with intent to Gavin Mullin on the same date. The applicant pleaded not guilty to the charges contained in that indictment. On the first day of his trial, 30 January 2009, the applicant pleaded guilty to all counts apart from that of attempted murder. These pleas were accepted on behalf of the Crown Prosecution Service and the count of attempted murder was left on the books. Hart J then adjourned the case for pre-sentence reports and sentencing.

Background Facts

[3] On the evening of 15 July 2006 some 20 young people had gathered at an address in Chapel Road, Derry for a barbeque which had been arranged prior to the host departing from Northern Ireland in order to work overseas. As part of the evening's events a bonfire had been lit in a field adjacent to the rear garden. Notice of the bonfire had been given to the local fire brigade. At about 3.30 am the majority of guests had departed leaving the host, Paul McAuley, Gavin Mullin and Mark Lynch. Mr Lynch is a person whose mobility is impaired as a consequence of a physical disability from which he suffers. At some stage the host went into the house to tidy up while the others remained outside.

[4] At some time between 3.30 and 3.45 am the three young men outside the premises were subjected to an extremely violent attack by some 6 to 10 youths apparently in their late teens to early 20's.

[5] Mark Lynch, who had just turned 16 years of age, was knocked to the ground and kicked sustaining a fractured mandible that required plating. He had a large footprint on his left front temporal scalp and another such mark on his upper right posterior chest wall. Mr McAuley was the subject of a concerted assault involving kicking and stamping as a result of which he suffered a fracture of the skull with gross cerebral oedema. Mr McAuley remains in a minimally responsive state with no significant improvement. He cannot fix or follow with his eyes, he has no response to motor commands and is unable to vocalise or verbalise. He has to be fed through a tube and is totally dependent upon nursing staff and carers for all aspects of his care. He remains vulnerable to infection and there is no potential for any recovery at this stage. He will remain in a low-level conscious, probably vegetative, state and will require full-time care for the rest of his life. His life expectancy has been reduced to between 10 and 15 years from the date of the injury. These injuries were accurately described as "catastrophic" by Hart J who also referred to the heavy burden that had fallen upon Mr McAuley's parents and their other children. Mr Mullin suffered much less serious physical injuries although he did sustain a degree of psychological trauma.

[6] At the time of the attack the applicant was about six weeks short of his 16th birthday and is now 18 years of age. He initially denied all involvement in the offences but ultimately pleaded guilty on the basis that he had been a participant in the joint enterprise to carry out this violent attack. The prosecution accepted that it was unable to prove beyond a reasonable doubt that the applicant himself kicked or stamped on Mr McAuley's head. The applicant accepted that he had struck Mr Lynch but claimed in the pre sentence report that he had not been responsible for breaking his jaw as he had not hit him "very hard". Again, the prosecution accepted that it could not prove that the fracture to Mr Lynch's jaw had been directly caused by a blow struck by the applicant.

[7] It was common case that the assaults to which these young men were subjected were motivated by sectarianism. The attackers, including the applicant, had left a primarily Protestant area of the city to travel to a predominately Catholic area and Hart J stated that he had "no doubt" that Mr McAuley and his companions were picked on because they were close to Chapel Road and thought likely to be Roman Catholics. It was also accepted that the attack had been completely unprovoked.

The approach of the sentencing judge

[8] In sentencing the applicant Hart J referred to a number of aggravating features including:-

(i) The attack had been plainly sectarian.

(ii) The injuries to Mr McAuley and Mr Lynch had been inflicted by kicking or stamping upon their heads.

(iii) The extreme severity of the injuries sustained by Mr McAuley.

(iv) The additional severe injuries sustained by Mr Lynch as he lay on the ground.

(v) The element of premeditation on the part of their attackers who had made their way to a Roman Catholic area and then selected their victims.

[9] Hart J also took into account the following factors by way of mitigation:-

(i) The youth of the applicant who was not quite 16 at the time of the attack.

(ii) The applicant's previous clear criminal record. He felt that this was qualified to some extent because of an incident that had occurred after these offences and subsequent breach of the applicant's bail conditions.

(iii) The fact that the applicant pleaded guilty at the commencement of his trial.

[10] However with regard to his plea of guilty Hart J described the forensic evidence against the applicant as "extremely strong" and noted that he had not pleaded guilty until the last possible opportunity. It is to be noted that not only was the applicant's baseball cap found at the scene but forensic analysis established that blood discovered to be present on the heel of his right training shoe was that of Mr McAuley. Hart J remarked that the applicant could have pleaded guilty to the Section 18 charge at any time and referred to the repeated observation of this court that the fullest discount is reserved for those who plead guilty at the first opportunity. Nevertheless, he was prepared to extend some credit for the guilty plea.

The submissions advanced on behalf of the applicant

[11] Miss McDermott sought to focus her admirably well marshalled submissions upon three primary aspects of the application. These were:-

(a) The applicant's plea of guilty. Miss McDermott laid emphasis upon the fact that the case against the applicant was based entirely upon forensic evidence and that there had been a prolonged and detailed dispute between opposing experts as to the significance of the recovered samples of DNA, some of which had to be subjected to further analysis at the Cellmark laboratory in England. While she accepted that the applicant was not entitled to the full extent of discount referred to by this court in Attorney General Reference (No 1 of 2006) McDonald, McDonald and Maternaghan [2006] NICA 4, she nevertheless argued that the applicant was entitled to have the forensic

evidence expertly explored and tested and to receive the professional advice of counsel.

(b) Miss McDermott reminded the court that, apart from the blow struck to Mr Lynch, the Crown could not establish beyond a reasonable doubt that the applicant had personally subjected the injured parties to violence and that his involvement was limited to being a participant in a joint enterprise.

(c) Miss McDermott asked the court to have particular regard to the youth of the applicant at the time of the offences. She submitted that, in the context of the general estimate of the ages of the attackers, the applicant must have been one of the youngest participants. She referred to the applicant's difficulties at school culminating with his exclusion at age 14 as a result of his disruptive behaviour, the early age at which he commenced drinking and smoking cannabis and the generally unstructured and aimless lifestyle recorded in the pre-sentence report. She also referred to the recommendation in the pre- sentence report that the applicant would benefit from a custody probation order despite being assessed as presenting a high risk of re-offending. She submitted with some force that rehabilitation, as opposed to simply custodial constraint, offered more benefit not only to the applicant but also to the public. Miss McDermott asked the court to modify the sentence so as to enable the entire custodial element to be spent in the Young Offenders Centre.

Discussion

[12] This court fully accepts that, in the context of the adversarial system, the applicant was entitled to have the benefit of professional legal advice based upon scientific consideration and analysis of the relevant evidence. However, it is important not to lose sight of the fact that this applicant ultimately pleaded guilty to taking part in the assault upon the injured parties and, in particular, to personally assaulting Mr Lynch. In practical terms, he knew at all times that he had been present participating in the attack and, at any stage, had he chosen to do so, he could have pleaded guilty to a count alleging an offence contrary to Section 18. Time and again

this court has emphasised that the fullest discount for a plea is reserved for those who plead guilty at the earliest possible stage of the proceedings.

[13] Based upon the degree of involvement that he ultimately admitted it is perhaps difficult to place a great deal of weight upon the submission that the applicant was not a major participant. The learned trial judge, in his sentencing remarks, noted that it was permissible to make some distinction between those who actually inflicted the injuries and the applicant. On the other hand, he emphasised the cowardly and highly dangerous nature of the attack which was undoubtedly sectarian. As Hart J observed, "the mob or pack mentality" that takes over in such attacks is all too often fuelled and sustained by the support given to the actual attackers by supporters who stand by or join in. Those who take any significant part in such brutal beatings must expect to be severely punished even if they themselves do not inflict some, or even a majority, of the serious injuries.

[14] In accordance with Miss McDermott's submission, there is no doubt that the youth of an offender may play a significant role in the sentencing process requiring particular focus upon the prospects of rehabilitation. That requirement is underpinned by extensive legislation applicable in both this jurisdiction and England and Wales and reflected in the provisions of a significant number of international rights and obligation – see for example Article 40(1) of the United Nations Convention on the Rights of the Child ("UNCRC"). This court observed in R v. CK, a minor [2009] NICA that a common theme is the need to have particular regard to the welfare of the child or young offender while at the same time recognising the need to prevent offending. Where it is concluded that detention is required, there is a need to focus on what is the minimum period that will accommodate that requirement. In this context the court recognises that it is important to bear in mind that no-one is born with sectarian attitudes or beliefs, whether political or religious or a mixture of both. Rather they are transmitted as a consequence of exposure to warped and malign influences exercised by the culture and environment in which individuals are raised and violent attacks such as this are likely to be repeated until such influences have been completely eradicated by the communities in which they have been hitherto allowed if not encouraged to flourish.

[15] However, as this court observed in Attorney General's Reference (No 6 of 2006) [2007] NICA 16, while they are rightly to be taken into account in the selection of sentence, personal circumstances, including the youth of the offender, do not alleviate culpability and it is well settled that they will not

weigh heavily in reduction of penalty where the offences are extremely serious. It is also important to bear in mind that the absence of a criminal record is not, in any strict sense, a mitigating factor. It simply denotes the absence of an aggravating factor. In recent years this court has repeatedly commented upon the shocking and persistent prevalence of violence perpetrated by young men upon each other in cases such as R v. Ryan Quinn [2006] NICA 27, R v. Magee [2007] NICA 21 and R v. Alan Stewart [2008] NICA. In Magee the court observed, at paragraph 24:-

> "[24] The courts must react to these circumstances with 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."

[16] In this case the applicant participated actively in a totally unprovoked sectarian assault that resulted in the appalling injuries sustained by Mr McAuley. While we accept that the sentence passed upon the applicant was severe, courts in this jurisdiction have a duty to respond to such sectarian violence by imposing sentences that are severe enough to sufficiently mark the total abhorrence of law abiding society and adequately comply with the requirements of deterrence and retribution. In the circumstances we do not consider that the sentence passed was either manifestly excessive or wrong in principle and, accordingly, the application for leave will be dismissed.