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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

NIAL SHEBANI

Applicant

Ms G McCullough BL (instructed by the Public Prosecution Service) for the prosecution
Mr C MacCreanor QC with Mr A Thompson BL (instructed by Madden & Finucane solicitors) for the applicant

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Before: Keegan LCJ, McBride J and McFarland J

McFarland J (*delivering the judgment of the court*)

[1] This is a renewed application for leave to appeal a determinate custodial sentence of five years, half to be served in custody and half on licence, imposed upon the Applicant following his plea of guilty to unlawfully displaying force and making an affray contrary to common law. Leave to appeal was refused by Mr Justice McAlinden.

[2] On 17 February 2021 the applicant was committed for trial in relation to the offences of grievous bodily harm with intent and possession of an offensive weapon with intent. On 13 April 2021 he pleaded not guilty and on 26 May 2021 a count of affray was added to the original indictment and the applicant pleaded guilty to this count, with the original two counts left on the books of the court on the usual terms. The applicant was then sentenced on 25 September 2021 by His Honour Judge Kerr QC ("the trial judge") to the determinate custodial sentence of five years.

[3] The facts are that on 18 October 2019 a man had been drinking in the Canal Court Hotel in Newry. He described himself as being drunk. As he was walking towards a taxi rank on Canal Street at or about 01:30 the following morning, the applicant was driving a motor vehicle with his co-accused in the passenger seat. The applicant has stated that during the evening he had been in conversation with an unknown female who made an allegation of sexual impropriety against a man who

was a friend of the victim. That appears to be the motive for the attack. The applicant stopped the vehicle, they both exited the vehicle and approached the man. The applicant had armed himself with a Stanley knife, a small work tool which uses a razor blade. The applicant made a slashing motion towards the man's face. The man then tried to run away but the applicant tripped him up and the co-accused kicked the man to the body. Members of the public provided assistance to the man, and the applicant and the co-accused fled the scene in their vehicle. The man sustained a 12cm vertical wound to the side of his face which required 15 stitches and has left a permanent scar. There were lesser injuries to the back of the head and left arm. The entire incident lasted about one minute, and the actual wounding and kicking took place over a period of about 10 seconds. Two vehicles had stopped at a junction immediately adjacent to the affray and the occupants had a full view of events. Several of the occupants came to the assistance of the victim. About a dozen people were waiting at the taxi rank about 50 metres away and several other pedestrians were walking on the street.

[4] The applicant is 37 years of age and has 33 previous criminal convictions in the Republic of Ireland. They date from 2001 to 2007. Most are motoring matters but the following have certain relevance:

- Assault causing harm 2004
- Possession of a knife 2004
- Assaults 2004 & 2007
- Three offences of endangerment all in 2007.

[5] Endangerment is an offence of engaging in conduct which creates a substantial risk of death or serious harm. He received a sentence of four years in 2007 for these, and other offences.

[6] He has one previous conviction in Northern Ireland in relation to no test certificate for which he was fined.

[7] The contents of the pre-sentence report can be summarised as follows:

a) The applicant was living with a friend in the Meigh area of South Armagh before the index offending.

b) He was having difficulties at the time of the index offence as a result of his separation from his fiancée of some 14 years.

c) He migrated to Libya when he was a few months old (his father's homeland) and his family remained there until he was aged 11 when they returned to the Republic of Ireland.

d) The applicant is unemployed and in receipt of Universal Credit.

e) His medical history includes a diagnosis of asthma but no diagnosed mental illness although he claims that he has struggled with poor mental health.

f) The probation officer considered that the applicant presented with a medium likelihood of reoffending but her assessment was that the applicant did not pose a risk of serious harm to the public.

[8] In his sentencing remarks the trial judge stated that the starting point for sentencing would be nine years, which he then reduced by four years.

[9] It is submitted on behalf of the applicant that the sentence imposed was manifestly excessive and wrong in principle in that:

a) The starting point of nine years was too high, it being a sentence more closely fitting with an offence of causing grievous bodily harm with intent.

b) The judge failed to take account of the fact that this was a self-contained incident of affray, of short duration (six - eight seconds) and had an element of spontaneity.

[10] A further ground of appeal was the issue of disparity but the applicant has decided not to pursue this ground.

[11] We consider that there is only one ground of appeal - the starting point was too high.

[12] Affray is a common law offence which is punishable by a maximum of life imprisonment. It is an offence against public order and consists of participating in a fight with one or more persons in a public place when the conduct was such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. The name derives from Law French, with the French - *à l'effroi* equating to the English – terror. This emphasises that the crime is not merely the fighting in public, but includes the impact on members of the public in a position to observe the fighting.

[13] It is a serious offence under the provisions of the Criminal Justice (NI) Order 2008. The trial judge did not consider him to be dangerous.

[14] The defence rely on a comparison of what they submit would have been the sentence had the defendant pleaded guilty to a section 18 grievous bodily harm with intent charge. They refer to the authority of *DPP References No 2 and 3 of 2010, (Seaward and McAuley)* [2010] NICA 36 (a kicking to the head case) and the guideline of the seven – 15 years range for the section 18 offence. It followed an earlier decision of *R v McArdle* [2008] NICA 29 which involved the use of a knife in a public place. The defence further relied on a comparison with the section 20 offence

(grievous bodily harm or wounding) with a maximum penalty of seven years' imprisonment which they assert should act as a cap on the sentence available to the judge

[15] There is no sentencing guideline authority specific to the offence of affray. Kerr LCJ in *Att-Gen's Ref 1 of 2006* [2006] NICA 4 and Lord Lane CJ in *R v Keys* (1987) 84 Cr App R 204 both observed that the infinite variety of circumstances and participation meant it was impossible to devise guidelines. Lord Lane at 206 stated that:

> *"The facts constituting affray and the possible degrees of participation are so variable and cover such a wide area of behaviour that it is very difficult to formulate any helpful sentencing framework. Even if one succeeds, it is equally difficult to fit in a particular case into the framework."*

[16] The English maximum sentence of three years which attaches to the offence of affray in that jurisdiction has no application to Northern Ireland, and this court in *R v Fullen & Archibald* (2003 unreported) considered that it had no relevance.

[17] We reject the applicant's argument that affray can somehow be regarded as a lesser alternative to the section 18 grievous bodily harm with intent offence. It is a different offence with different constituent elements, and does not sit in any particular order of seriousness. They share an identical maximum of life imprisonment. We also reject the argument that the sentencing is somehow capped by the maximum sentence of seven years available for the section 20 grievous bodily harm or malicious wounding offence. This offence is also a different offence with different constituent elements.

[18] We agree with the comments of Kerr LCJ and Lord Lane CJ that it is impossible to devise guidelines for sentencing in affray. The general approach that should be adopted is to first consider the nature of the affray itself and in particular how it is perceived by innocent members of the public. Relevant factors will be the number of participants, the duration of the affray, the ferocity of the fighting, whether weapons were used, the injuries sustained, the number and proximity of the public, and the impact on the public. A judge could also take into account local conditions in his or her area and the prevalence of this type of activity. This preliminary assessment should apply to all participants falling to be sentenced. The judge should then consider the role of the offender in the affray and any relevant aggravating and mitigating factors. A further stage would be the consideration of any personal aggravating and mitigating factors. The judge will then have reached a sentence which would apply in the event of a conviction. The final stage is to reduce the sentence to take into account any plea of guilty.

[19] We have taken the opportunity to view the CCTV footage and we consider that the relevant features relating to this incident are that:

a) The incident took place in the full view of members of the public. Some were immediately adjacent to it;

b) The affray was particularly violent in nature involving two men, one armed with a knife, attacking a man unable to defend himself, wounding that man, and then bringing him down with kicks and punches then aimed at his body;

c) The victim sustained a significant injury to the face;

d) The affray would have had a significant impact on those innocent passers-by observing it;

e) It was of limited duration lasting about one minute in total from the defendant leaving and re-entering the vehicle, with the intense period lasting about 10 seconds.

[20] We consider that the features at [19](a)–(d) are aggravating factors. We specifically reject the assertion that the affray was spontaneous in nature.

[21] We acknowledge that the affray itself lasted for just less than a minute with an intense period of violence taking place over a matter of 10 seconds or thereabouts. We do not regard this as a mitigating factor, but duration is a relevant factor to the determination of the starting point.

[22] Aggravating factors relating to the defendant's involvement in the affray are:

a) The applicant deliberately initiated the affray;

b) The applicant pre-planned the affray;

c) There was a vigilante element to the affray as the victim was targeted as a result of complaints made to the applicant by a stranger, although bizarrely not directly involving the victim;

d) The applicant armed himself with the Stanley knife as part of his preparation;

e) The applicant was the main participant in the affray by driving the vehicle to the scene, stopping the vehicle, approaching the victim, using a knife to wound the victim, and then tripping the victim as he attempted to escape thus permitting the co-accused to kick the victim.

[23] A further aggravating factor relating to the applicant is that his criminal record includes six violent offences and an offence of possessing a knife. He has received a significant sentence of imprisonment of four years.

[24] As Mr MacCreanor QC acknowledged, there are no mitigating factors either in relation to the defendant's participation in the affray or personal to the defendant.

[25] Although counsel have referred us to other cases and sentences, we derive very little assistance from them given the nature of the offence of affray.

[26] A key factor in this case is the use of the Stanley knife with its razor blade in public and the nature of the injury inflicted. We have already mentioned the case of *McArdle*. In that case Kerr LCJ at [26] referred to, and quoted from this court's earlier decision in *R v Magee* [2007] NICA 21, and it is worthwhile that we remind ourselves as to what he 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.*
> …
> *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] Bearing all this in mind we have considered whether the sentence of five years is manifestly excessive or wrong in principle. We agree that a starting point of nine years is excessive, but we also consider that Judge Kerr may have incorrectly described it as a starting point. In our view a starting point is the sentence which a defendant would receive after a contest and on conviction. It should be reached by the approach adopted in [18] above.

[28] Applying this approach, the assumed starting point in this case is seven and a half years, to which the one third reduction for the plea applies. We do not consider that a reduction of more than one third could be merited in this case notwithstanding the defendant's statement to the probation officer in which he confessed to his role. The plea was entered at the first opportunity when the count was added to the indictment.

[29] Based on a corrected starting point, before plea, of seven and a half years, we consider that the resulting sentence of five years is certainly a stiff sentence. There

are significant aggravating factors, but the duration of the incident is also relevant. It is even arguable that the sentence could be regarded as excessive. However, we remind ourselves of the words of Kerr LCJ in *Magee* of the need for condign punishment to mark society's utter rejection of this type of conduct and the use of knives in public.

[30] In conclusion we consider that the sentence is not manifestly excessive or wrong in principle. We will, however, grant leave to appeal, but will dismiss the appeal.