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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 05/05/2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

JACK SIMPSON
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**DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE
(NUMBER 1 of 2017)**
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Before: Gillen LJ, Weir LJ and Stephens J
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STEPHENS J (delivering the judgment of the court)

Introduction

[1] The offender, Jack Simpson, now 26 (DOB: 1 June 1990) was charged with various offences alleged to have been committed on 31 March 2015, as follows

- (a) Count 1 – Robbery, contrary to Section 81 of the Theft Act (Northern Ireland) 1969.
- (b) Count 2 – Possession of an offensive weapon in a public place, contrary to Article 22(1) of the Public (Northern Ireland) Order 1982.
- (c) Count 3 – Theft, contrary to Section 1 of the Theft Act (Northern Ireland) 1969; and
- (d) Count 4 – Attempted theft of a cycle, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Section 1 of the Theft Act (Northern Ireland) 1969.

[2] On arraignment at Belfast Crown Court on 8 November 2016 the offender pleaded not guilty to all counts. He was re-arraigned on 23 November 2016 and he

pleaded guilty to counts 1, 2 and 4. Count 3 was ordered to lie on the books not to be proceeded with without the leave of the Crown Court or the Court of Appeal.

[3] On 1 February 2017 Her Honour Judge McCaffrey deferred sentence under Article 3 of the Criminal Justice (Northern Ireland) Order 1996 in respect of each offence for a period of 9 months until 3 November 2017 imposing conditions that the offender was not to re-offend within the deferral period and he was to engage in such drug or alcohol treatment and mental health support as recommended by his medical practitioners. The purpose of deferring sentence was to have regard in determining his sentence to his conduct after conviction or to any change in his circumstances. It was indicated by the learned judge that if the conditions were adhered to a non-custodial sentence would follow. The learned judge also imposed an Interim Violent Offences Prevention Order under Section 59 of the Justice Act (Northern Ireland) 2015 for 9 months but on 15 February 2017 that order was rescinded on the basis that in the circumstances it was ultra vires.

[4] The Director of Public Prosecutions for Northern Ireland has sought leave to refer the deferral of sentence to this court under Section 36 of the Criminal Justice Act 1988 as amended by Section 41 of the Justice (Northern Ireland) Act 2002 on the ground that the deferral was unduly lenient having regard to the nature of the offence.

The Facts

[5] In the early hours of the morning of 31 March 2015 at approximately 12:18am Cormac Magee and Ronan O’Cuinn were leaving the Parador Bar on the Ormeau Road, Belfast, when the offender approached them as Mr Magee was unchaining his bicycle. Mr Magee recalls seeing the offender moments earlier in the Bar and that he had had been quite loud and had appeared heavily intoxicated. The offender initially asked Mr O’Cuinn for some money and when he refused he asked Mr Magee who also refused at which point the offender produced a small flick knife which he moved in a stabbing motion towards Mr Magee who was some 3 to 4 feet away from him before stating “Give me the money you fenian fucker.” Mr Magee believing that he would be stabbed if he did not comply and in genuine fear for his safety gave the offender all the change in his pockets which totalled about £7 at which point the offender made off. Mr Magee was not injured but was frightened, distressed and upset as a result of being threatened with a knife.

[6] CCTV footage from the Bar was checked and it showed not only the robbery but also that approximately 10 minutes earlier the offender had unsuccessfully tried to steal Mr Magee’s bicycle which had been chained up to a lamp post just outside the bar. A member of the staff spoke to Mr O’Cuinn and believed that the defendant was a male called Jake and that he lived close by. Police attended at the offender’s address arresting him and seizing a small flick knife and £8.20 in change which were in the living room of the house. After caution the offender replied ‘Ain’t nothing on me mate, not tonight’.

[7] At the time that he committed the offences the offender was heavily intoxicated, he states that he had consumed 3-6 litres of white cider earlier in the evening.

[8] The offender states that he had been in the habit of carrying a pocket knife as he had a few run-ins with local individuals whom he believed had paramilitary links. We consider that the offender had developed a pattern of carrying a weapon when under the influence of drink.

The offender's interviews and the police investigation

[9] At 6:30pm on 31 March 2015 the offender was interviewed about the offences. During interview he admitted being in the Parador Bar but denied doing anything wrong. He was shown stills of the CCTV images from the Parador Bar but still maintained his innocence.

Personal Background

[10] The offender was 24 years old at the time of these offences. He comes from the Ballyhackamore area of East Belfast, his father is a retired health service manager and social worker and his mother is a social worker. He has two older siblings who have been successful in their careers. The offender was raised in a middle-class environment attending Strandtown Primary School, Cabin Hill and then Campbell College. He started drinking alcohol aged 11-12 years and started to use cannabis aged 12. From the age of 14 years he used party or recreational drugs including ketamine, MDMA, amphetamine and cocaine. The offender was an alcoholic from age 15 drinking daily and consuming up to 6 litres of cider per day. He had associated severe behavioural problems leading to his expulsion from school in 2015 and the breakdown of his relationship with his parents. He states that his parents could not handle him anymore and this led to him having to leave the family home at the age of 16. Subsequently, he lived in various hostels and in Housing Executive accommodation but his anti-social behaviours have led to termination of a number of housing executive tenancies and to the loss of accommodation in hostels.

[11] The offender has also used mephedrone and street diazepam. In 2014 whilst in prison he started using subutex and after a short time started snorting it daily. He has misused co-codamol and tramadol. From July 2014 he began to smoke heroin switching to intravenous use. In December 2016 the offender informed Dr Cherry, Consultant Psychiatrist, that he continued to use heroin but was unclear as to the quantity. It can be seen that the offender has a long history of polysubstance misuse, he has both an alcohol and an opiate dependence, he has longstanding social and functional impairment secondary to his substance misuse. Sleep, appetite, energy, interest and motivation are chronically impaired but relatively stable. The offender reports multiple attempts to stop drinking but has always relapsed, his longest period of abstinence from alcohol in the last 15 years outside of a prison setting has

been 7 months. The offender's alcohol dependence included a longstanding compulsion to drink, inability to control his drinking and persistence despite harm.

[12] The offender has a lengthy and relevant criminal record, he has 60 previous convictions including convictions for 5 assaults on police, 6 convictions for common assault, a conviction for possession of an offensive weapon with intent to commit an offence and two convictions for possession of offensive weapons. In relation to possession of offensive weapons those offences occurred in 2014 and 2015. The first offence involved the offender stealing a set of Chef knives from a party resulting in him being asked to leave and police intervening. The second offence was on 31 October 2015 subsequent to these offences and it involved the defendant brandishing a knife but not making threats to a male victim. The third offence occurred when a member of the police saw the offender in a shop with a knife in his pocket.

[13] The offender has been sentenced to the full range of disposals available to the court including a number of custodial sentences. He was last released from prison on 7 October 2016, his mother recounted to the probation officer who prepared the pre-sentence report on the offender that since his release he was living in a stable hostel environment, that he had been abstinent from alcohol to her knowledge for the past few weeks, that he spent Christmas 2016 in the family home and that he has had increased contact with his family. The offender has engaged with Alcoholics Anonymous stating to the probation officer that he attends on a daily basis whilst stating to Dr Cherry that he attends twice weekly. He also states that he regularly attends at Narcotics Anonymous. The offender also stated to the probation officer that he had recently attended his general practitioner and had sought a referral to the Community Mental Health Team. However, due to a waiting list he was only to be seen by them in May of this year. The probation officer stated that the offender seemed to have settled well into his current hostel placement and that there was a degree of structure and support in place though we note that Dr Cherry considered that the offender has very limited, if any, meaningful support networks outside of Alcoholics Anonymous. The probation officer considered that he had demonstrated motivation to address his lifestyle though adding that this needed to be proven and sustained over a more significant period. The probation officer in her pre-sentence report concluded that there was a high likelihood of the offender re-offending but that the offender was not currently assessed as meeting the PBNI's significant risk of serious harm threshold. She invited the court to consider a period of deferment of sentence to test the offender's stated commitment to avoid re-offending, maintain his hostel placement, abstain from drugs and alcohol and engage with relevant supports.

[14] There are various accounts of the time over which the offender has been abstinent from alcohol. We prefer that given to Dr Cherry which is that he had been abstinent from November 2016. We note that to Dr Cherry the offender blamed alcohol for his behavioural problems but not heroin and we also note that the offender informed Dr Cherry that he continued to use heroin by intravenous

injection. This is in contrast with the offender's statement to the probation officer to whom he stated that he had not progressed to intravenous use of heroin and that he had not abused any drugs for weeks. We note that on examination by Dr Cherry there was evidence of fresh venepuncture in the antecubital fossa bilaterally and that he also stated to Dr Cherry that he uses a city centre needle exchange scheme. We consider that the offender continued to use heroin despite the information that he provided to the probation officer.

Aggravating and mitigating factors

[15] We consider that the offences were unsophisticated, opportunistic and impulsive. We do not consider that there was any degree of planning. We consider that he did not select Mr Magee as a victim on the basis of any assessment of the amount of money that he was likely to be carrying. This is not a case where the offender has deliberately chosen to target an individual. However, the small amount of money involved was also fortuitous and entirely dependent on the amount of money that the victim was carrying at the time of the robbery. The following are the aggravating factors in relation to the robbery offence:

- (a) the production of a knife;
- (b) the sectarian, racial and religious abuse, said for effect to facilitate the robbery;
- (c) the offence took place in the early hours of the morning;
- (d) at the time the offender was subject to a probation order and was also on bail for a theft offence, both of these demonstrating his failure to comply with court orders.
- (e) the offender's relevant and extensive criminal record; and
- (f) the offender's intoxicated condition which presented the victim with a person who was not behaving rationally.

[16] The offender's pleas of guilty are a significant mitigating factor. We consider that he is not entitled to a full discount given his responses at interview. The offender's personal circumstances will not weigh heavily in reduction of penalty as the offence of robbery is an extremely serious offence. The lack of any actual physical harm and the relatively minimal psychological harm to the victim are also factors which we take into account.

Sentencing for robbery

[17] This court has given guidance in relation to the offence of robbery in a number of decisions including *R v Devine* [2006] NICA 11, *Attorney Generals Reference (No. 6 of 2006) Niall David McGonigle* [2007] NICA16 *Attorney Generals Reference (No 2 of 2002)* [2002] NICA 40 and *Attorney Generals Reference (No. 10 of 2003) (Jamie Clarke)* [2003] NICA 39. We have been referred during the course of submissions today to *Devine* in which at paragraph [16] it is suggested that for street robbery or mugging where a weapon is produced or force is used which results in injury the starting point is 4 years' custody with the sentencing range being between 2 and 7 years' imprisonment. It is clear that the norm in street robbery cases must be a custodial sentence even when a weapon is not used and that a custodial sentence is particularly the norm when a bladed instrument such as a flick knife, as in this case, is produced. Anyone using a knife to threaten the bodily integrity of their victim must realise an immediate custodial sentence is virtually inevitable.

[18] We also have considered the approach taken by this court to guidelines published in England & Wales. In *R v McCaughey and another* [2014] NICA 61 Morgan LCJ delivering the judgment of the court recognised the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance but stated that this court has discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance. In that context we note that under the robbery definitive guidelines effective from 1 April 2016 the starting point is also 4 years' custody though the category range is 3 - 6 years' imprisonment.

[19] In the present case we consider that the appropriate starting point given the high culpability involved in the use of a knife is one of 4 years' imprisonment.

Whether the deferral of sentence was unduly lenient

[20] In approaching this issue we set out again the observations of Lord Lane CJ in *Attorney General's Reference No:4 of 1989* in which he stated that a sentence is unduly lenient where it falls outside the range of sentences which the judge applying his mind to all the relevant factors could reasonably consider appropriate. In that connection regard must of course be had to reported cases and in particular to the guidance given by this court from time to time in so-called guideline cases. We consider that this case is an example of the need to preserve a balance between the need to impose severe sentences on offenders to act as a deterrent to others and the need of the offender himself for rehabilitative treatment. We consider that the disposition adopted by the judge focussed unduly on the needs of the offender and insufficiently on the importance of deterrence, particularly deterrence of knife crime. We consider that insufficient focus was placed on the offender's pattern of carrying a knife and his previous convictions particularly his previous conviction for a knife crime.

[21] We hold that the sentence passed by the judge was unduly lenient.

Disposal

[22] We quash the deferment of sentence. The appropriate starting point is one of 4 years' imprisonment. We take into account all the aggravating features except the use of a knife which we have already taken into account in fixing the starting point. We consider that those aggravating features are serious but are counter-balanced by the mitigating features including guilty pleas. Accordingly the appropriate disposal, apart from the issue of double jeopardy, is one of 4 years' imprisonment, half on licence and half in custody.

[23] The offender has had to face the ordeal of a second sentencing exercise and the worry and anxiety that this inevitably entails. Taking this factor into account and particularly taking into account the personal circumstances of this offender we allow a significantly greater discount than we would ordinarily allow. Accordingly, we substitute concurrent sentences of 3 years on count 1, 12 months on count 2 and 4 months on count 3.