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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT

THE KING

v

THOMASENA BYRNE

Before: Keegan LCJ, McCloskey LJ and Fowler J

Representation

Appellant: Mr Frank O'Donoghue KC and Mr Jonathan P Browne, of counsel, instructed by Madden and Finucane Solicitors

Public Prosecution Service: Ms Natalie Pinkerton, of counsel, instructed by the Public Prosecution Service

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McCLOSKEY LJ (*delivering the judgment of the Court*)

Introduction

[1] Thomasena Byrne (the "applicant") was, upon her plea of guilty, punished by a commensurate sentence of six years imprisonment equally divided between detention and probationary supervision following release for the following four offences: aggravated burglary with intent to cause grievous bodily harm to an adult female, malicious wounding with intent to cause grievous bodily harm to the same person, common assault upon the same person and common assault upon an adult male. Leave to appeal to this court having been refused by the single judge, the applicant has exercised her right to renew her application to the plenary court. This is the unanimous decision of this court.

[2] The applicant is aged 51 years. She is a person of previously good character. All four offences were committed in the course of a single transaction on 1 July 2022. Her trial was scheduled for 24 October 2023. Following discussions between the parties' representatives an amended indictment materialised giving rise to rearraignment and the guilty pleas already noted approximately one week beforehand. The applicant was sentenced on 14 December 2023.

The Sentencing

[3] The applicant was sentenced on the following uncontroversial factual basis. She and the aforementioned adult female were neighbours. There had been tensions between them for several years. During the early hours of 1 July 2022, the applicant was causing a noisy disturbance, fuelled by alcohol consumption. This entailed, *inter alia,* being on the street and shouting threats directed at, *inter alios,* the adult female. Police were called. They advised the applicant to desist from further alcohol consumption and to stay away from her neighbours.

[4] Shortly afterwards the applicant , having armed herself with a knife, barged into the aforementioned lady's home. The applicant made numerous stabbing actions directed to the lady's throat and upper body. The lady, who was seated, defended herself by kicking out. The applicant was physically restrained by a male adult person. She threatened to stab him but was deterred by this physical restraint. The lady suffered three defensive puncture wounds to her leg treated by sterile strips. The gentleman suffered scrapes to his left hand. The incident terminated upon the arrival of police. The female injured party's child, aged six years, was present upstairs throughout.

[5] When interviewed by police several hours later, the applicant confirmed her intoxicated state and claimed to remember very little, while not specifically denying what was put to her. Her replies confirmed the long running *animus* towards her neighbour. The applicant had a laceration to her eye which she attributed to punches from the male injured party who, in turn, asserted that this had been caused by the applicant 's glasses upon falling to the floor.

[6] The path traced by the sentencing judge, having first rehearsed the factual matrix, may be outlined thus: the applicant was a person of previous good character; the aggravating features of her offending were bringing a weapon into a public area, trespass, intoxication and the presence of the young child; regarding her personal circumstances, the applicant's upbringing had been very difficult and extremely distressing; prior to becoming a carer for her paternal uncle and then her mother, she had enjoyed a good working record; she suffered from alcohol dependence syndrome and had been abstinent for some months before the offending; her alcohol ingestion had been compounded by consumption of prescribed medications; concurrent sentences were appropriate; the applicant's culpability was high; the harm inflicted belonged to the low to medium level; the risk of the applicant reoffending was medium; the appropriate sentence belonged to the range of seven to fifteen years

imprisonment; the applicant's guilty pleas warranted credit of 25%; and, finally, a deterrent sentence was required.

[7] The judge addressed the issues of deterrence and mitigation together. It is appropriate to reproduce the relevant passage in his sentencing decision:

> "The effect, however, of the deterrent sentence which I impose means that in reality the mitigating factors in this particular case, your previous good character and your personal circumstances, whilst relevant to the issue of sentencing, carry comparatively little weight in all the circumstances."

Finally, having specified credit of 25% for the guilty pleas, the judge pronounced the commensurate sentence of six years imprisonment.

Deterrence In Sentencing

[8] As a matter of basic sentencing dogma, every sentence has an inherent element of deterrence, namely as one of its purposes it is designed to deter the offender from reoffending and to deter others from offending or, as the case may be, reoffending. See Ashworth and Kelly, Sentencing and Criminal Justice (7th ed) ("Ashworth & Kelly"), para 3.3.2 ff. The authors describe this as "general deterrence" (para 3.5.1ff).

[9] The topic of deterrence finds a useful starting point in *R v QWL & Ors* [2023] NICA 11, at para [103]:

> "… as a matter of long-standing sentencing theory, every sentence presumptively has elements of retribution and deterrence. This will be a given in the minds of those who examine or reflect on any given sentence. This truism should prompt the sentencing judge to consider carefully whether any "added value", in the form of such declarations is appropriate as a matter of sentencing principle or good sentencing practice."

The "declaration" mentioned in this passage was the sentencing judge's statement that a deterrent sentence was required – without more. We have some difficulty with this approach, as explained *infra*.

[10] In the jurisdiction of England and Wales, the purposes of sentencing are now spelled out in statute. One of these, albeit in parenthetical mode, is deterrence. Section 57 of the Sentencing Code, established by the Sentencing Act 2020, provides:

> "Purposes of sentencing: adults

(1) This section applies where—

(a) a court is dealing with an offender for an offence, and

(b) the offender is aged 18 or over when convicted.

(2) The court must have regard to the following purposes of sentencing—

(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.

(3) Subsection (1) does not apply—

(a) to an offence in relation to which a mandatory sentence requirement applies (see section 399), or

(b) in relation to making any of the following under Part 3 of the Mental Health Act 1983—

(i) a hospital order (with or without a restriction order),

(ii) an interim hospital order,

(iii) a hospital direction, or

(iv) a limitation direction."

This provision does not extend to Northern Ireland and this jurisdiction has no equivalent statutory provision. However, as a result of well-established sentencing practice and principle, the courts in this jurisdiction have adopted essentially the same approach.

[11] The next stage in the analysis is the following. In many cases a sentencing court will make no express mention of deterrence. Those cases are captured by the starting

point adopted above. In some cases, however, deterrence will feature expressly in a sentencing decision. Two hypothetical – and inexhaustive - case illustrations are appropriate. In the first, the sentencing judge might state that by virtue of specified facts and factors, it is considered necessary to impose a sentence designed particularly to deter the individual offender from reoffending. This might arise, for example, where there is a significant criminal record and repeated offending of a particular type.

[12] In the second hypothetical case illustration, the judge might expressly state that the sentence to be imposed must be designed particularly to deter the offender from reoffending and to deter others from offending or, as the case may be, reoffending. This might arise, for example, in the case of an offence which has become increasingly and disturbingly prevalent either in certain areas or more widely. A pertinent current example might be offences of violence against migrants or women. Historically, sentencing for repeated domestic burglaries provides a concrete illustration: see *R v Megarry* [2002] NICA 29, with its emphasis on increasing prevalence and heightened public concern. Notably, the stamp of deterrence is unmistakeable in the judgment of Carswell LCJ (at p 15ff) although not expressly mentioned. Sentencing for riotous assembly provides another illustration: see *R v McKeown and others* [2013] NICA 63, at para [11].

[13] In these illustrations, deterrence as a particular aim of the sentence imposed differs from deterrence as a general, implied aim of most sentences – "most", not all, because it is difficult to identify any deterrent element in disposals such as an absolute discharge or a conditional discharge, or in the "remain on the books" mechanism.

[14] In cases where a sentencing judge opts for the adoption of an expressly deterrent sentence, observance of the guidance in paras [102]–[103] of *QWL* is essential:

> "In the present case the sentencing judge declared that a deterrent sentence was required. The judgment, however, does not spell out either the reasoning underpinning or the precise meaning of this declaration. What is clear is that this declaration was clearly influenced by the prosecution recitation of certain suggested aggravating features which were clearly questionable. As a matter of good sentencing practice, the underlying reasoning, and the precise meaning of declarations of this kind should be articulated.
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> [103] Adherence to the immediately preceding discipline will have one beneficial effect in particular. It will challenge the judge, in preparing the sentencing decision, to reflect on whether this species of declaration is appropriate. This will entail giving careful consideration to what the concept of deterrence actually means, together

> with the kind of case in which it should properly be given emphasis. One of the reasons for this is that, as a matter of long-standing sentencing theory, every sentence presumptively has elements of retribution and deterrence. This will be a given in the minds of those who examine or reflect on any given sentence. This truism should prompt the sentencing judge to consider carefully whether any "added value", in the form of such declarations, is appropriate as a matter of sentencing principle or good sentencing practice.
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> [104] The need for particular caution before resorting to this kind of declaration is reinforced by the following consideration. Sentencing theory and principle, in common with every area of legal practice, are not static. Rather they evolve in response to new and different societal circumstances and learning. They are also responsive to the world becoming wiser as it grows older. In this context, a recent publication of the Sentencing Council of England and Wales is worthy of study. It draws together a review by certain academics of all the existing sentencing literature. Of particular interest is the chapter devoted to deterrence (see paras 4.1–4.4). This calls into question what was previously the widely accepted notion that a more severe sentence has general or specific deterrent effect. Notably, the view that suspended sentences are more likely to have deterrent effect is canvassed. The need for further research is acknowledged."

We would add that due adherence to this guidance by the sentencing judge will limit the scope for intervention by this court on appeal, applying the "review" principle (see *R v Ferris* [2020] NICA 60, para [58] especially).

[15] Thus the aim of deterrence in a given sentencing decision may be either expressed or unexpressed. Next, it is necessary to address the consequences of a judicial declaration of the kind mooted in the second case illustration and instanced in *QWL*. Once again, any temptation to generalise should be resisted, as every case will be intrinsically different. In some cases, the sentencing judge may spell out that the need for deterrence (of whatever kind) is such that the sentence to be imposed will be more severe than would otherwise have been considered appropriate. This may arise, for example, in a case hovering around the borderline separating a non-custodial disposal from its custodial counterpart. In other cases, it might arise because of expressed judicial concern about the nature of the offending and the broader context to which it belongs. An illustration of this kind of case is provided by *R v Blaney and Others* [1989] NI 286. The relevant passages are reproduced in *QWL* para [99].

Notably, the Lord Chief Justice did not employ the language of deterrence in the first passage (though he did so in a later one). Notwithstanding, the theme of deterrence in this passage is abundantly clear. The consequence was, clearly, the imposition of a punishment heavier than might otherwise have been appropriate.

[16] Summarising, the aim of deterrence in a given sentencing decision may be either expressed or unexpressed. In the former case, general deterrence is in play. In the latter case, considerations of particular deterrence, with potentially more serious sentencing consequences, arise.

[17] A further consideration must be addressed. In this jurisdiction (to be contrasted with that of England & Wales) suggested sentencing ranges, or brackets, derive from the guideline decisions of this court. Sentencing judges must be alert to instances where a prescribed sentencing range incorporates deterrence not in the general explained in para [8] above but in a more specific way which, depending on how this court has expressed itself, may be comparable with one of the two case illustrations outlined in paras [11]–[12] above or the *Blaney* type case. The importance of this is that sentencing courts must take care to avoid double counting.

[18] We turn next to address the issue of the interplay between the imposition of an expressly deterrent sentence and personal mitigation. It is important to emphasise that, as in so many facets of sentencing, there are no absolute rules or principles. A detailed essay on this is not required. Rather, it suffices to recall the factor of judicial discretion, the axiom that sentencing is an art and not a science (*QWL para [93])*, there is always scope for a merciful sentence (*QWL, para [86]*) and, to like effect, exceptional circumstances may have to be recognised and given appropriate weight in any given case (*QWL,* para [91*). QWL* also enunciates the following principle, at para [95]:

> "… an offender's personal circumstances will rarely qualify to be accorded much weight, particularly in a context where a deterrent sentence is required."

We draw attention to the degree of flexibility enshrined in this formulation.

[19] This discourse on the issue of deterrence in sentencing requires the court to address one further issue. In response to the judicial panel, Ms Pinkerton submitted that all cases of the present kind require the imposition of expressly deterrent sentences. She based this submission on the cases of *R v Wilson* [2021] NICA 38 and *DPP References (Nos 2 and 3 of 2010)* [2010] NICA 36. We disagree. The juridical basis for rejecting this submission is the factor of judicial discretion, prevalent throughout the court's exposition of "The Framework of Sentencing Principle" in *QWL*, para [86]ff, coupled with the emphasis in paras [16]–[18] above on the absence of absolute rules or principles.

The Present Case

[20] Reverting to the immediate context, we address firstly three particular features of the sentencing decision under challenge. First, the judge's selection of the bracket of 7 to 15 years as the appropriate sentencing range, which was in accordance with previous decisions of this court: see in particular *R v McArdle* [2008] NICA 29. Second, his assessment of the harm to the injured party as low to medium. Third, his application of 25% credit to the applicant's pleas of guilty, which unfolded in a context of inter-counsel discussions (always to be encouraged) and a resulting amended indictment. We are satisfied that there was neither any error of principle nor any trespass into the prohibited territory of the manifestly excessive sentence in either of the first two respects, while the third fell within the judge's margin of appreciation and has not been referred to this court by the DPP in any event.

[21] We consider, however, accepting the submission of Mr O'Donoghue KC, that the judge's approach to the issue of personal mitigation was in substance one of applying an absolute rule and, hence, not compatible with the principles expounded above, in a context of having erroneously declared this to be a case requiring deterrence, without more. The judge should have approached the issue of personal mitigation more flexibly and, having done so, explained the weight which he had determined to allocate to it. The impugned sentencing decision is not to this effect. Furthermore, the judge's decision is not in accordance with the *QWL* guidance at paras [102]–[103].

[22] The final material consideration in our review of the impugned sentence is the following. In accordance with its decision in *R v Ferris* [2020] NICA 60, paras [29]-[32], this court determined that certain new information should be admitted. The sentencing judge did not have the opportunity of considering this because of its recent vintage. It takes the form of three testimonials prepared by teachers and instructors of Hydebank Wood College and Women's Prison relating to the applicant's participation and progress in a range of courses and her associated interaction with fellow prisoners. While the court has considered these testimonials with appropriate circumspection, they are positively glowing in nature and we have no reason to doubt their content, particularly as regards the applicant's serious reflection on her wrongdoing and her very high potential for successful rehabilitation. We consider that if available at the sentencing stage this material would surely have impelled the judge to both squarely confront the issue of personal mitigation more fully and to do so in terms more favourable to the applicant.

Conclusion

[23] Summarising, for the reasons explained, this court considers that the impugned sentencing decision is not harmonious with the governing principles expounded above. Secondly, again for the reasons explained and accepting the force of Mr O'Donoghue's submission, we consider that a more generous view of the applicant's personal mitigation is appropriate. Standing back, the effect of these two

conclusions is that there are identifiable elements of error of principle and the manifestly excessive in the impugned sentencing decision. As these are not inconsequential an adjustment is required. Eschewing a mechanical arithmetical approach, we reduce the commensurate sentence of six years imprisonment to five years imprisonment, to be divided equally between custody and ensuing probationary supervision. It follows that leave to appeal is granted and the appeal succeeds to the extent indicated.