

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (Number 6 of 2019)
IAN DAVID PRICE

Before: Morgan LCJ, Stephens LJ and McAlinden J

Stephens LJ (delivering the judgment of the court)

Introduction

[1] Ian David Price ("the offender") eventually pleaded guilty (a) to three firearms offences together with an offence in relation to a machete and (b) to three drug offences. The offender had served approximately 7 months in prison on remand awaiting trial. He appeared for sentencing before HHJ Ramsey QC ("the Judge") at Dungannon Crown Court on 15 November 2019. The judge deferred sentence for 6 months stating that if he was told at the end of that period that the offender had turned his life around without coming to police attention, continuing with counselling and having made efforts to come to terms with his various addictions that the sentence which would be imposed would not involve a return to prison. The Director of Public Prosecutions sought leave to refer the deferral of sentence to the Court of Appeal pursuant to Section 36 of the Criminal Justice Act 1988 on the grounds that it was unduly lenient. On 4 February 2020 at the hearing of the reference we granted leave and the application proceeded on that date. Ms Walsh appeared for the Director and Mr Weir QC with Mr Campbell for the offender.

The guns, the ammunition and the machete

[2] Two guns were found but the firearms offences solely related to one of them. The firearms offences also related to four rounds of ammunition.

[3] The guns and the machete which were found were:

- (a) *A revolver.* A German manufactured .380"/9mmk blank calibre "ME38 Compact" revolver ("the revolver"). It was in fair condition. It contains a series of chambers which revolve when it is fired. The barrel was partially blocked by a partial obstruction which ran along its length. The partial

blockage of the barrel allowed gases produced on firing to be vented forward through the muzzle so that in addition to firing blank cartridges it could be used for primarily defensive purposes if loaded with blank cartridges containing CS, OC, mace or other noxious substances. The revolver was not designed for firing "live" rounds but if of an appropriate size they could be loaded into the chamber of the revolver and if fired the bullet would cause significant damage to the revolver. It is not a lethal weapon but it is a prohibited weapon and a firearm as defined by the Firearms (Northern Ireland) Order 2004 ("the 2004 Order").

- (b) *An air pistol.* A black coloured 6mm plastic BB calibre soft air pistol ("the air pistol"). It was designed to resemble a 'Beretta model 92' type pistol and was the type of air gun where gas was held in a reservoir in the magazine which provided compressed gas to fire a projectile. The pistol was in good condition and was successfully test fired. It was an air gun which fired a projectile with a kinetic energy less than one joule. On that basis it is not required to be held on a firearm certificate as specified by Schedule 1 to the 2004 Order. The offender was interviewed in relation to the air pistol but he was not charged with any offence in relation to it.
- (c) *The ammunition.* This consisted of 4 9x19mm calibre cartridges. Three of the cartridges had lead bullets and appeared to be reloaded/home loaded. The fourth cartridge had a full metal jacketed bullet and was produced in 1974 by Radway Green, UK, for military use. The ammunition whilst it could be partially fitted into the chambers of the revolver were too long so that the cartridges could not be positioned so as to be fired.
- (d) *The machete.* The machete was found by Constable McSherry who described it as "a large black machete knife approximately 2ft long with a wrapped type handle." He handed it to Constable Fitzsimons who described it as "a large green handled knife with a black blade." It was a lethal deadly weapon.

Background including the circumstances of the offending

[4] The offender came to the attention of the police as a result of events which occurred on 25 June 2017 in the vicinity of Fort Park and Fort Terrace, Bangor, Co Down.

[5] At about 1am on that date the offender with a female, Julie Apsley and another male arrived at the home of Natasha Hogsett. Ms Hogsett's partner, Colin Horner, had been murdered four weeks previously and he had been a friend of the offender. Ms Hogsett invited the offender over for a drink as he had missed his friend's funeral having been in custody on other matters at the time. Ms Apsley was extremely argumentative and disruptive. Both she and Ms Hogsett were intoxicated. The offender was also intoxicated. There were in addition some five other people in Ms Hogsett's home joining with her in commemoration of Colin Horner. It subsequently transpired from messages on the offender's mobile

phone that at about this time he was seeking to buy 4 grammes of cocaine for £100.00 from a female called Jenny. It is clear that a considerable amount of drink had been consumed leading to events at Natasha Hogsett's home which we describe as chaotic and disorderly. We also consider that it was the sort of occasion where full blown, unconstrained, irrational, violent drunken arguments could develop.

[6] The offender had in his possession a blue zip type wash bag ("the bag") which it subsequently transpired contained the revolver and the ammunition. The offender threw the bag at Ms Hogsett who did not know what it contained. She threw it back to him.

[7] At one stage the offender, who was angry with Ms Apsley ran out of the house in order to prevent her from driving his car, a silver VW Golf which was parked in proximity to Ms Hogsett's home. Ms Apsley was massively intoxicated and the offender wanted her to get a taxi home. However, she had no handbag or money and no one else was paying for a taxi. The offender was followed out to the car by Ms Hogsett who tried to speak to Ms Apsley who was crying in the front passenger seat. That was followed by the offender running back to the house with Ms Hogsett chasing after him.

[8] At about 5:30am there was a 999 call from Ms Hogsett's home from a Mr John McCormick. From the recording of the 999 call it is obvious that he was extremely fearful. He is recorded as saying "Right the fella is at the front door, could you get somebody here quick because he has got a fucking weapon on him." He then described it as being "a piece" like a weapon. He is recorded as saying that the person was in the house and that Mr McCormick and his young niece were both terrified hiding upstairs. In a second telephone call he was asked whether the person had a knife and he replied that he did not think it was a knife "it could be a pistol." He said that he had been chased with it though the person chasing him did not have it out. He is recorded as saying that "the fella is in the house, I am upstairs, I am with my wee niece and your fella chased me up the street but I know he's got something on him. I don't know if it's a fucking knife but he chased me up the street because I tried to get his girl back into a taxi." He is also recorded as saying "he thinks I touched for his girl but I didn't" and that other people in the house were explaining to the male that he did not.

[9] The police response to the 999 call was to deploy both uniformed police and an armed response unit to the property which was vacated in a controlled manner. The offender was one of those who left the property. Also present in the property was John McCormick. The property was searched but nothing of significance was found. The offender was allowed to leave the scene.

[10] Mr McCormick did not make a witness statement so that he did not identify the male as the offender. However, the recording of the 999 call is admissible as res gestae or as hearsay evidence. The contents of it with the reference amongst other matters to getting his girl back into a taxi does identify the male as the offender. The

recording does not establish that the offender was brandishing the revolver but it does establish that he successfully intimidated Mr McCormick causing him to run up the stairs with his niece to hide and that both of them were terrified of him.

[11] At approximately the same time there was a report to police that a female was trapped inside a silver VW Golf and that the car's alarm was sounding. Constable Fitzsimmons went to the vehicle. He smashed the window in order to gain access to it. Ms Apsley wished to retrieve her mobile phone from the car so Constable McSherry searched for it. During that search he located in the back of the vehicle under the rear seat the machete which he seized.

[12] At approximately 8.05am the police were in the process of removing the silver VW Golf when the offender approached and challenged them about removing his car. He smelt of alcohol and was unsteady on his feet. He was arrested and detained at the scene. He confirmed that the vehicle was his. He was searched. A pair of black gloves was located in his jacket pocket which he stated he used for lifting scrap metal as part of his work. Also found was a set of latex gloves together with two mobile telephones. The police seized all these items. The mobile phones were subsequently analysed which analysis revealed a photo of the revolver and the rounds of ammunition taken at approximately 9am on 19 June 2017 and messages from and to the offender which comprised the sole evidence of the drugs offences.

[13] At 5pm on 25 June 2017 the offender's home was searched. Located on the top shelf of a high kitchen cupboard was the air pistol.

[14] At 8:10pm on 25 June 2017 Shirley Moore was outside her apartment block in Fort Park close to Fort Terrace. There were several children running around including a young boy. The boy ran over to her and told her that they had found a gun in a bag. She took this bag off him. It was the same bag that the offender had thrown at Ms Hogsett in the early hours of 25 June 2017. Ms Moore opened it and saw that it contained a gun which she described as a revolver. She could see that there were some bullets lying at the bottom of the bag. She phoned the police and retained the revolver and ammunition until police arrived. The children told her that they had found the bag lying over at the flats outside on the ground. She said that the boy had told her he had taken the revolver out of the bag and had been trying to use it to see how it worked.

[15] The police attended the scene and the revolver and ammunition were recovered.

[16] The offender was interviewed by the police on 25 and 26 June 2017.

[17] On 27 June 2017 the offender was remanded in custody but was released on bail on 12 January 2018. He breached his bail on 26 April 2019 and was in custody for a further period of 4 days. In total the offender spent 204 days in custody prior to his trial which is a period of approximately 7 months. The offender would be time

served if a sentence of imprisonment of 1 year and two months was imposed (half in custody and half on licence).

Offender's responses at interview

[18] The general tenor of the interviews was that the offender treated the police with disdain and contempt. He blustered and lied. He attempted to brazen out his connection with the revolver, the ammunition and the machete.

[19] During the course of the first interview he told police he was getting angry as he had been kept the whole day for nothing. He described the situation as 'a joke' and 'a disgrace.' In the second interview he stated that he had been arrested on some "bullshit" about a firearm and the police had wasted enough of his time. He challenged police for not speaking to his 13-year-old son about the air pistol and told them to do their job. During a further interview he complained to his solicitor he was being "hounded" by police.

[20] In relation to the air pistol found at his home address he stated it was his son's.

[21] In relation to the revolver found in the vicinity of Fort Park he initially made no reply then later replied "not guilty." He stated that he knew absolutely nothing about it and he had no further comment to make. He was going to remain silent. He denied having possession of it in the early hours of 25 June 2017 but answered no comment to all questions asked about it. He was asked about the bag which he then denied ever seeing. His initial response to the photo of the revolver on his phone was that that photo was from the internet. He was told the photo was not from the internet but had been taken using the camera facility on the phone. He said that he had obviously been set up; there was no PIN on his phone and anybody can take a picture on it. It was put to him that his phone did have a pass code and he had refused to answer previously who had access to the pass code. He stated that "anybody" could have had access to it. It was put to him that the photo had been taken on 19 June at approximately 9am and could he account for the whereabouts of his phone at that time. He said, "Fuck knows, no"; anybody could have had access to his phone, he did not know. It was put to him that this was a day that he had told police he had gone fishing and he said that the phone could have been left in the house. Asked who could have taken the photo, he said he wasn't psychic. Asked who had access to the house, he said that the person who owned it did. Asked if the house could have been broken into, he stated that it had been broken into, burgled every day of the week. It was put to him that he had taken the photo and he said "And I'm putting it to you listen you can put the fuck whatever you want to me.....Basically I couldn't give a fuck". It was put to him that Ms Hogsett had informed police that he had thrown the bag at her when he was present in the house and he stated, "Her fucking husband was shot dead and carried firearms every day of the week, very convenient stuff's planted in my fucking car and then now she's saying this is mine, very convenient Tasha just comes out of the woodwork with a

fucking statement. Yeah very convenient.....very fucking convenient, do your fucking homework. Her fucking husband was running about with firearms every day of the fucking week". When charged he stated "but I didn't" and, "go and ask Tasha was it Colin's gun, being set up, not guilty" (Colin being the deceased Colin Horner).

[22] In relation to the machete the offender said it had been planted in his car by South East Antrim UDA. He alleged that his girlfriend had caught the person planting the machete in his car and was attacked by this individual, who then rang the police to report him. He denied having ever had any contact directly or indirectly with the machete. He stated that he had not done anything wrong and was being set up. He also stated that the machete could have been in the car when he bought it some two months previously. Shown the machete, he denied ever having seen it in his life. He stated that he was being genuine and it was nothing to do with him whatsoever.

Evidence of the drug offences on the offender's mobile phone

[23] On 22 June 2017 the offender received a message requesting "a wee bag" "or 2"; to which he responded, "of white?" Subsequent references referred to "pure." This exchange related to the offer to supply by the offender of a small quantity of cocaine.

[24] On 24th June 2017 the offender messaged a contact of his asking, "Anyone for 2 boxes of buds m8." He later messaged "There is 84 100s and 84 50s m8 in box real ones maje (sic) me a bid on them." The contact replies that he will see him when he gets down. A little later to another contact, he states "Here to boxes of buds there m8 lol real ones do u want to buy them". Asked how much he wanted for them, the offender texted, "84 in each box 21 on a strip m8 need 2 you m8 50 both boxes there real m8". Asked if they were "200 or 300", he replied "100s and 50s." Buds m8 are pregabalin and these and subsequent exchanges related to the sale or supply of medicinal products (namely pregabalin).

[25] It is apparent from the report of Dr. Loughrey, Consultant Psychiatrist that the offender had been prescribed pregabalin by his GP for pain in his legs

The arraignment of the offender and the offences to which he pleaded guilty

[26] There were two indictments. The first related to the firearms offences and the offence involving the machete. The second related to the drugs offences.

[27] On 21 November 2018 the offender was arraigned in relation to the *first indictment* and entered not guilty pleas to all counts. On 14 January 2019 the trial on that indictment commenced. The prosecution opened the case and a professional witness was called. On 15 January 2019 the offender was re-arraigned and he entered guilty pleas to all counts.

[28] On 4 October 2019 the offender was arraigned in relation to the *second indictment* entering a not guilty plea to count one but guilty pleas to counts two and three. On 15 November 2019 he was re-arraigned in relation to count one to which he then entered a guilty plea.

[29] Count one on the first indictment related to *possession of the revolver between 18 June 2017 and 26 June 2017* without a firearms certificate contrary to Article 3(1)(a) of the 2004 Order. The period of possession started prior to 25 June 2017 relying on the evidence of the photograph of the revolver taken at approximately 9 am on 19 June 2017 which was found on the offender's mobile phone.

[30] Count two on the first indictment related to *possession of the revolver on 25 June 2017 in suspicious circumstances* contrary to Article 64(1) of the 2004 Order.

[31] Count three on the first indictment related to *possession of the ammunition on 25 June 2017 in suspicious circumstances*, contrary to Article 64(1) of the 2004 Order.

[32] Count four on the first indictment related to possession of an article with a blade or a point (namely the machete) in a public place on 25 June 2017 contrary to section 139(1) of the Criminal Justice Act 1988.

[33] Count one on the second indictment related to offering to supply a controlled drug of Class A (namely cocaine) on 22nd June 2017, contrary to section 4(3)(a) of the Misuse of Drugs Act 1971.

[34] Counts two and three on the second indictment related to the sale or supply of medicinal products (namely pregabalin) not subject to general sale, on 24th June 2017, contrary to Regulation 255(1)(c) of the Human Medicines Regulations 2012.

Antecedents

[35] In 1999 at the age of 12 the offender first appeared in criminal justice system. Since then he has been convicted of a further 167 offences so that he has a long criminal record. We note that the overwhelming majority of his previous convictions are for road traffic offences. We accept that many of his offences were comparatively minor and his longest previous custodial sentence was two years and six months imposed in 2010. We also note that the last conviction on his record was for a road traffic offence committed on 22 December 2015 so that there has been a period prior to these offences of some 1 year and 6 months during which he did not commit any further offences. We also note that the offender's record does not contain any previous firearm offence. However, he has a number of relevant previous convictions:

(a) *Weapons offences:*

- i. On 27 February 2003 at Newtownards Youth Court the offender was convicted of the offence of possessing an offensive weapon in a public

place on 18 December 2001 for which a conditional discharge for 12 months was imposed.

- ii. On 27 November 2013 at Newtownards Magistrates Court he was convicted of the offence of possessing an offensive weapon in a public place on 9 February 2013. This offence involved the offender attending at the home of a Mr Babb with another male. The second male held the front door handle and the offender smashed the outer pane of the double-glazing unit with a wooden baton he was carrying. A sentence of 4 months imprisonment suspended for 3 years was imposed for possessing the offensive weapon and 1 year suspended for 3 years for criminal damage.

(b) *Drug offences:*

- i. On 7 February 2007 at Castlereagh Magistrates' Court he was convicted of the offence of possessing Class C controlled drug on 21 July 2006 for which a fine of £60 was imposed.
- ii. On 2 May 2013 at Lisburn Magistrates' Court he was convicted of the offence of possessing Class B controlled drug on 1 December 2011 for which a fine of £150 was imposed.
- iii. On 23 August 2017 at Laganside Magistrates' Court he was convicted of the offence of possessing Class B controlled drug on 30 December 2016 for which a fine of £100 was imposed.
- iv. On 2 October 2017 at Lisburn Magistrates' Court he was convicted of the offence of possessing Class B controlled drug on 19 May 2014 for which on appeal imprisonment of 1 month suspended for 1 year and 6 months was imposed.

(c) *Violent offences:*

- i. On 24 June 2004 at Newtownards Youth Court he was convicted of the offence of assault on police on 23 December 2002 for which he was detained in a young offenders centre for 1 month.
- ii. On 30 June 2004 at North Down Magistrates' Court he was convicted of the offence of assault on police on 16 March 2004 for which he was detained in a young offenders centre for 3 months.
- iii. On 12 April 2010 at Antrim Crown Court he was convicted of the offences of assault occasioning actual bodily harm, threats to kill and

attempted hijacking all committed on 16 January 2009. The facts were that the offender tried to drag the female occupant out of a car in order to steal it. He assaulted her around the upper body and head and threatened to kill her if she refused to give it up. She was able to fight him off and he left the area on foot. He denied involvement when interviewed by police. For these offences he was imprisoned for 2 years and 6 months.

- iv. On 28 February 2012 at Newtownards Magistrates' Court he was convicted of three offences of assault occasioning actual bodily harm on 21 March 2011. The facts were that Police had received a report of a disturbance involving somebody being kicked in a public street. On attendance, three victims were identified and injuries sustained included broken ribs, a head wound requiring 4 staples, a cut to the head that required 5 stitches and a missing tooth. The three injured parties named the offender as being one of two assailants. The offender denied to the police any involvement in the assaults. For these offences he was imprisoned for 6 months.
- v. On 9 May 2014 at Newtownards Magistrates' Court he was convicted of the offences of disorderly behaviour and assault occasioning actual bodily harm on 18 January 2014. The facts were that the offender was seen by a police officer to head butt the injured party and pull him to the ground whilst shouting and screaming. The police officer then observed the offender stamping on the injured parties' head. When the police officer intervened the offender grabbed him by the back of the neck. In interview the offender stated that he was acting in self-defence. For these offences he was imprisoned for 6 months.
- vi. On 8 January 2015 at Ballymena Magistrates' Court he was convicted of the offence of assault on police on 1 November 2014 for which he was imprisoned for 4 months.
- vii. On 8 January 2015 at Ballymena Magistrates' Court he was convicted of two offences of common assault on 14 September 2014 for which he was imprisoned for 4 months.

Pre-sentence report and the psychiatric evidence

[36] The offender was 31 years old at the time of the offences. He is now 33 years old. He has a number of children to a previous partner. In his adolescence he began to misuse alcohol, drugs and solvents. He left school at 15 with no formal qualifications. He has been the victim of paramilitary assaults on the basis of his alleged involvement in anti-social behaviour. The offender informed the author of

the pre-sentence report that since his release from custody in January 2018 he has refrained from misusing substances, he has distanced himself from negative associates, he has engaged in counselling and he has benefited from attending church which he joined as a means of accessing spiritual support with a view to leading a more settled lifestyle. The probation officer observed that he made a similar claim in the past but ceased attending church. The Probation Service assessed him as presenting a high likelihood of re-offending primarily on the basis of his prior offending history but also on the basis of his association with pro-criminal influences, distorted thinking, unstructured lifestyle, susceptibility to misuse illicit substances and alcohol, impulsivity, risk taking behaviour, reckless behaviour, lack of consequential thinking and limited victim awareness. The probation officer also stated that the offender did not meet *PBNI's criteria* to be assessed as posing a significant risk of serious harm at this time. The Probation Officer recommended that if the court wished to impose a custodial sentence that certain licence conditions should be incorporated into the post-custody licence period. In the alternative and in the event of the court considering alternatives to custody the offender was assessed as suitable and had consented to the imposition of an enhanced combination order.

[37] The offender was examined by Dr G Loughrey, Consultant Psychiatrist who considered that the most appropriate psychiatric diagnosis was one of a personality disorder. He considered this often showed a certain trend towards attenuation in the individual's 20s and 30s and that the offender's account of relative stability in the last year and half, if it is true, is consistent with this, and also consistent with a prospect of a reduction or cessation of offending behaviour. Dr Loughrey indicated that he has seen no corroborative report.

The judge's sentencing remarks

[38] We summarize some of the features of the judge's sentencing remarks.

[39] The judge when considering the question of dangerousness for the purposes of the Criminal Justice (Northern Ireland) Order 2008 relied on the pre-sentence report which did not assess the offender as dangerous and on the fact that the prosecution did not seek to establish that he was dangerous. The judge decided that the offender was not dangerous within the meaning of the Order.

[40] The judge stated that "the most difficult aspect of this case and the one that is effectively central to it is the issue of the mandatory sentence that is carried by count 1, the possession of the firearm without a licence." In relation to exceptional circumstances the judge stated that the central theme of the defence case related to the nature of the revolver which was described on behalf of the offender as "technically" a firearm at the very bottom end of the scale of firearms. The judge recorded the prosecution as conceding that it was an unusual type of weapon. The judge agreed with the assessment "this is very much technically a firearm."

[41] The judge referred to the case of *R v Avis & others* [1998] 1 Cr App R 420 which set out four questions which it would usually be appropriate for a sentencing court to ask. We set out those questions and the answers provided by the judge.

[42] The *first question* is “*what sort of weapon is involved?*” From *R v Avis* it can be seen that in assessing the significance of the answer to that question that:

“genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.”

The judge answered that question by stating that “it’s a technical firearm.”

[43] The *second question* is “*what (if any) use has been made of the firearm?*” Again, from *R v Avis* it can be seen that in assessing the significance of the answer to that question that:

“... the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.”

The judge answered that question by stating that:

“And, again, the - the prosecution circumstances are that it’s quite limited. Effectively, the ... firearm was seen, there’s been a bulge in his clothing. There’s no question of him brandishing or using the item in any way.”

The reference to a bulge in his clothing was a reference to a description in the 999 call made by John McCormick.

[44] The *third question* is “*with what intention (if any) did the respondent possess or use the firearm?*” The comment in *R v Avis & others* in relation to the answer to that question is that “generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.” The judge answered that question by stating:

“And, of course, the absence of any charges such as fired with intent to endanger life or to cause fear or violence or resist arrest or anything of that nature is missing. That all suggests that the answer to that is also in the positive.”

[45] The *fourth question* is “*what is the defendant's record?*” The comment in *R v Avis & others* in relation to the answer to that question is that the “seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.” The judge answered that question by stating that:

“Now there are no firearms offences on his record. There are crimes of violence on his record. ... but ... when one examines the record in detail which at first blush looks to be very formidable, but one immediately takes into account that the large majority of those offences are road traffic offences. When there are offences of violence that occur they are - they are at magistrates’ court level generally and, in addition to that, there is an offence of - there are offences of offensive weapon which would raise a concern but I have seen that in both - that in those offences they are in the middle of - of motoring offences and there’s no offences of violence connected with them. So, the record, although it is conceded by everybody - conceded by the defence and everybody it reads as a dreadful record nonetheless on closer examination it also does not indicate that there’s an established record of committing firearms offences or crimes of violence.”

[46] The judge concluded that all the questions in *R v Avis* “are answered in the positive.” The judge relied on those positive answers including that the revolver was only “technically” a firearm to find exceptional circumstances so that it was not necessary to impose the sentence of 5 years’ imprisonment required by Article 70 of the 2004 Order. The judge deferred sentence relying on the pre-sentence report and the offender’s account that he was attending counselling and was committed to reform.

The Avis questions and answers

[47] We will address the issue as to whether the *Avis* questions assist when considering whether there are exceptional circumstances under Article 70. Prior to that we set out our views in relation to the answers provided by the judge.

[48] We consider that the judge to a degree obscured the significance of the revolver by describing it as “technically” a firearm. We consider that the answer to the first question in *Avis* ought to have been:

“The revolver was a firearm only by virtue of the fact that it was designed to discharge noxious gas. It did not have any ammunition accompanying it to achieve that function. However, it was accompanied by ‘live’

ammunition which could not have been fully loaded in the revolver or fired. On a scale of dangerousness it was a firearm with greater potential impact than an imitation firearm but it was not a lethal weapon and was far less dangerous than firearms capable of firing live rounds. It was at the lowest end of the scale of firearms though more dangerous than an imitation firearm.”

[49] In relation to the second question the only use established by the prosecution was that the firearm was photographed by the offender, was brought to Bangor in his car, was carried by him into Ms Hogsett’s home and was then discarded by him in a residential area.

[50] In relation to the third question we consider that the judge was correct in that the prosecution had not proved to the requisite standard for instance a specific intention to fire the revolver with intent to endanger life. However, we would add that

a) the offender had the revolver with the intention that it could be used to intimidate not by brandishing but by reputation; and

b) he had an intention of disposing of it in whatever drunken manner was convenient to him with total disregard for the safety of others.

These we consider to be intentions of significance. We would also add that stating that the prosecution had not established an intention obscures that the possession on 25 June 2017 was when the offender was intoxicated and attending an event where violent arguments could easily develop so that there was a clear potential for the use of the revolver.

[51] In relation to the fourth question we consider that the weapons offences and the violent offences in the offender’s criminal record were obscured by judge’s answer to this question. In our estimation the question in relation to the criminal record could not be answered “positively.” The offender had used the equivalent of a baseball bat to smash the door of a person’s home, he had threatened to kill and tried to drag a female out of her car, he had occasioned actual bodily harm to three victims and he had stamped on a person’s head. These are all serious offences.

Sentencing for firearm offences

[52] Article 3(1)(a) provides that a person who has in his possession, ... a *handgun* without holding a firearm certificate ... shall be guilty of an offence.” Article 2 defines a “*handgun*” as meaning “any *firearm* which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air gun, a muzzle-loading firearm or a firearm designed as a signalling apparatus.” Article 2 defines a *firearm* as meaning “a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged” but also includes “(a) any *prohibited weapon*, whether it is such a lethal weapon or not.” Article 45

provides that a *prohibited weapon* includes “any weapon of whatever description designed or adapted for the discharge of ... any noxious ... gas” The revolver is not a lethal barrelled weapon from which any shot, bullet or other missile can be discharged but as it is designed to discharge noxious gas it is a prohibited weapon and accordingly a firearm. Possession of it required a firearms certificate.

[53] The rubric to Article 70 of the 2004 Order is “Minimum sentence for certain offences.” The situations in which Article 70 applies includes “where— (a) an individual is convicted of— (i) an offence under Article 3(1)(a).” The offender had in his possession a prohibited weapon designed for the discharge of noxious gas which required a firearms certificate which he did not have. Accordingly as the offender was convicted of an offence under Article 3(1)(a) Article 70 applied. The application of Article 70 is regardless as to the nature of the firearm concerned so that it applies not only to the most dangerous and most lethal of weapons but also to non-lethal weapons such as the revolver which was designed to discharge noxious gas.

[54] In so far as relevant to this reference Article 70 requires a court to impose “*an appropriate custodial sentence for a term of at least*” five years for the offence under Article 3(1)(a) “unless ... the court is of the opinion that there are *exceptional circumstances relating to the offence or to the offender which justify its not doing so*” (emphasis added).

[55] This court has considered the impact of Article 70 in *R v Corr* [2019] NICA 64 at paragraphs [30] and following. The following are the applicable principles which can be taken from that and other authorities together with the legislation:

- a) “The unlawful possession and use of firearms is generally recognized as a grave source of danger to society,” see *R v Avis & others*.
- b) The purpose of firearms legislation is to impose tight and effective control on the possession and use of firearms.
- c) The legislative importance of that control is emphasised by Article 70 of the 2004 Order which requires the imposition of minimum sentence for certain offences “unless ... the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.”
- d) The purpose of Article 70 is deterrence which is a feature of sentencing in this area see paragraph [31]-[33] of *R v Corr*.
- e) The legislator has set the bar very high by choosing the phrase “exceptional circumstances,” see paragraph [39] of *R v Corr*. A finding of exceptional circumstances will be “rare”, see paragraph [30] of *R v Jordan, Alleyne and Redfern* [2004] EWCA Crim 3291.
- f) The circumstances are exceptional for the purposes of Article 70 if it would mean that to impose five years’ imprisonment would result in an arbitrary

and disproportionate sentence, see *R v Rehman and Wood* [2005] EWCA Crim 2056 at paragraph [16].

- g) A guilty plea has no material impact on exceptional circumstances, see paragraph [40] of *R v Corr*.
- h) An holistic approach should be adopted when considering exceptional circumstances though there will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. The guiding authority in this respect is *R v Rehman & Wood* [2006] 1 Cr. App. R. (S.) 77 at paragraph [11] where it was stated that:

“it is not appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance. A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional.”

i) This holistic approach, which also has regard to the policy of the legislation was adopted in *Morton (Henry) v HM Advocate* [2017] HCJAC 21. In that case the court stated that in “order to identify exceptional circumstances for the purposes of the legislation it is important to have regard to the policy and intention of Parliament and the need to avoid a sentence which is arbitrary and disproportionate in respect of a particular individual. If in any particular case, *taking account of all the relevant circumstances*, it appears that the case falls outside the range of cases which Parliament can be taken to have had in mind as the norm, an imposition of the statutory minimum may be said to be arbitrary and disproportionate. In such a case the court may have little difficulty in concluding that the exceptional circumstances provision applies” (emphasis added).

j) The test for exceptional circumstances is that contained in *Cochrane (Gail) v HM Advocate* [2010] HCJAC 117. In that case it was stated that the “norm established by (Article 70) is that possession of a prohibited weapon is a sufficiently serious offence to require the imposition of a term of imprisonment of at least five years for the purpose of deterring the commission of other such offences. *If however, taking into account all the circumstances relating to a particular offence or a particular offender*, such a term of imprisonment *appears arbitrary and disproportionate*, that case is an exception to the norm” (emphasis added).

k) At the stage of identifying exceptional circumstances the “*Avis* questions have no very obvious role in determining whether there are exceptional circumstances.” This is because the “purpose of the judgment in *Avis* was to provide guidance as to how (sentencing) discretion should be exercised over a range of offences of varying severity. The *Avis* questions have to be seen in that context. They provide an analytical structure for sentencers when exercising a discretion which is unrestricted other than by the statutory maximum. This is not the situation faced by the sentencer who has to consider the application of (Article 70 of the 2004 Order). (The legislator) has intervened to limit his discretion unless there are exceptional circumstances” see *Morton (Henry) v HM Advocate*.

l) Once a judge has properly identified exceptional circumstances the sentence is at large, see *R v Jordan, Alleyne and Redfern* [2004] EWCA Crim 3291, at paragraph 30. It was stated in that case that “the minimum sentence ... is a factor which the judge can take into account, as he will also take into account the guideline case of *Avis* and all available mitigation. This will not only involve the exceptional circumstances themselves, but also good character and a timely plea of guilty.” It can be seen that at this stage the *Avis* questions may be of assistance in providing an analytical structure.

[56] We consider that exceptional circumstances may more readily be found in relation to a firearm such as the revolver than in relation to for instance a machine gun. However, just because the firearm was not lethal and was designed to discharge noxious gas this does not of itself lead to a finding of exceptional circumstances on consideration of all the circumstances. In that respect it is relevant to note that the legislator required the revolver to be possessed with a firearm’s certificate and the legislator determined that unless there were exceptional circumstances a minimum sentence should be imposed. It is also relevant to note that the revolver was not an imitation firearm but even if it was it could cause significant harm. In *R v Avis* Lord Bingham stated that where “imitation firearms are involved, the risk to life and limb is absent, but such weapons can be and often are used to frighten and intimidate victims in order to reinforce unlawful demands. Such imitation weapons are often very hard to distinguish from the real thing – for practical purposes, impossible in the circumstances in which they are used – and the victim is usually as much frightened and intimidated as if a genuine firearm had been used. Such victims are often isolated and vulnerable.”

Sentencing for knife crime

[57] The maximum sentence for the offence of having an “article with blade or point in public place” contrary to section 139 of the Criminal Justice Act 1988 is (a) on summary conviction, imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both and (b) on conviction on indictment imprisonment for a term not exceeding *four years*, or a fine, or both.

[58] The maximum sentence for the offence of possessing an offensive weapon in a public place contrary to Article 22(1) of the Public Order (Northern Ireland) Order 1987 is (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both and (b) on conviction on indictment, to imprisonment for a term not exceeding *four years* or to a fine, or to both.

[59] It can be seen that both the offence under section 139 and the offence under Article 22(1) carry the same maximum on conviction on indictment which we consider reflects the legislative intent that on indictment these are equally serious offences.

[60] The unlawful possession of knives like guns is abhorrent. Possession in a public place creates an obvious risk that the knife could be used for instance to intimidate, or to inflict wounds in the heat of an argument, in a drunken response to some perceived slight or to guard drug territories. If used they have the capacity to cause grievous life threatening injuries or injuries that affect the bodily integrity of a victim. Furthermore possession of knives can be the hallmark of or the badge of criminal honour of dangerous thugs seeking to achieve inappropriate and malign authority in the eyes of those in the community with whom they have dealings.

[61] It is important in any sentencing exercise to give appropriate weight to an offence involving possession of a knife for instance in this case having due regard to the fact that the machete was a lethal deadly weapon.

Sentencing for drug offences

[62] The maximum sentence for an offence under section 4(3)(a) of the Misuse of Drugs Act 1971, if the drug involved is class A on summary conviction is 12 months or the prescribed sum, or both and on indictment is life or a fine, or both.

[63] A person guilty of an offence under Regulation 255(1)(c) of the Human Medicines Regulations 2012 is liable (a) on summary conviction to a fine not exceeding the statutory maximum; or (b) on conviction on indictment to a fine, to imprisonment for a term not exceeding two years, or to both.

[64] The applicable sentencing guideline cases in this jurisdiction are *R v Gary McKeown and R v Han Lin* [2013] NICA 28, *R v Hogg and others* [1994] NI 258, *Attorney General's Reference No 8 of 2004* [2005] NICA 18, *R v McIlwaine* [1998] NI 136 and *R v Hughes & others; Director of Public Prosecution's Reference (Nos. 1, 2, 3 and 4 of 2015)* [2015] NICA 53.

[65] In *R v Hogg and Others* at page 262 letters d-f Hutton LCJ giving the judgment of this court set out a number of guidelines concerning sentencing for offences involving drugs which included:

“Supplying drugs is the next in descending order of gravity, with possession with intent to supply a short

distance behind. In many cases there may be little distinction between them, for the charge may depend on the stage of the proceedings at which the defendant was apprehended. *In all but exceptional cases they will attract an immediate custodial sentence, which may range from one of some months in the case of a small quantity of Class B drugs to one of 4 or 5 years or more in the case of supply of appreciable commercial quantities of Class A drugs. We do not find it possible to narrow the range any more closely, for much will depend on the circumstances of the supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record, together with his or her individual circumstances*" (emphasis added).

The second part to which we have added emphasis was repeated by this court in *Hughes* at paragraph [32] with the addition that the "aggravating and mitigating factors identified by the Sentencing Guidelines Council can be of great assistance in helping the judge to find the appropriate sentence." An aspect of the Guidelines is that the assessment of the amount of harm is usually by reference to the quantity of the drug involved with the high or low purity of the drug potentially being an aggravating or mitigating factor. However, the Guidelines indicate that where the offence is selling directly to users ('street dealing') the quantity of the drug is less indicative of the harm caused. We consider that in relation to street dealing much will depend on the circumstances.

Aggravating and mitigating features

[66] The following aggravating features are present:

- a) The revolver was discarded by the offender in a residential area.
- b) The revolver was an attraction to and was found by children playing near their homes one of whom then tried to use it.
- c) If concurrent sentences are to be imposed then the gravity and number of the other offences have to be taken into account as aggravating features of the most serious offence. We will proceed on the basis that the most serious offence is possession of the revolver without a firearms certificate given the legislative approach in Article 70 of the 2004 Order. All the other offences are aggravating features in respect of that offence. We consider that the possession of the machete in a public place is a particularly serious aggravating feature and that the drugs offences are serious aggravating features.
- d) The offender was intoxicated and was actively seeking to obtain cocaine when in possession of both the revolver and the machete.

- e) The offender's relevant criminal record for crimes of violence, for drug offences and for possession of offensive weapons.
- f) There is an element of breach of trust in relation to the offer to supply pregablin which had been prescribed to the offender by his GP. The offender was seeking to profit from the health service which trusted him to use the medication for his own pain relief.

[67] Two of the following mitigating features are present.

- a) Guilty plea (the discount for which has to be applied in accordance with the approach set out by this court in *R v McKeown and Han Lin* [2013] NICA 28 at paragraph [28] *Attorney General's Reference (No. 1 of 2006)* [2006] NICA 4 at paragraph [19], *R v Maughan and another* [2019] NICA 66 at paragraphs [66] and following and *DPP's Reference No1 of 2016 (David Lee Stewart)* [2017] NICA 1 at paragraph [28]). We note that the guilty plea for the counts on the first indictment came on the second day of trial and the last guilty plea on the second indictment came after arraignment. We also note the response of the offender during the police interviews.
- b) The offender's personal circumstances including his personality disorder though these are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42 at paragraph [15]; *R v Pollock* [2005] NICA 43; *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33 at paragraph [37] and *R v Keith McConnan* [2017] NICA 40 at paragraph [49].
- c) The revolver was not capable of firing live ammunition. However, we consider that this to be the absence of an aggravating feature.

Consideration

[68] In the pre-sentence report the PBNI stated that it "assesses an offender as a significant risk of serious harm when *there is a high likelihood* that they will commit a further offence, the impact of which is serious harm (death or serious injury, whether physical or psychological) caused either directly or as a consequence of other actions." The statutory test is that "the court is of the opinion that there is *a significant risk to members of the public of serious harm* occasioned by the commission by the offender of further specified offences." The judge assessed the offender as not being dangerous within the test of dangerousness in the Criminal Justice (Northern Ireland) Order 2008 relying on the pre-sentence report. This reference does not contain any challenge to that finding. The only point which we make is that in considering pre-sentence reports in relation to a significant risk of serious

harm it is important to bear in mind the observations of this court in *R v Loughlin (Michael) (DPP Reference No 5 2018)* [2019] NICA 10 in relation to the need for care in the assessment of dangerousness even where the probation assessment is that the offender is not assessed as posing a significant risk of serious harm. The concentration should be on the statutory test not on the test adopted by the probation service. The difference between the PBNI test and the statutory test were emphasised by this court in *Toal's (Mark Patrick) Application (No. 2)* [2019] NICA 34 at paragraphs [10] – [12]. This court again stated that the proper approach is contained in paragraph [17] of *R v Lang* [2006] 2 All ER 410 the entirety of which “was considered by this court in *R v EB* [2010] NICA 40 “as constituting helpful guidance to judges making assessments of dangerousness.”

[69] It is clear that when the judge stated that the revolver was “technically” a firearm he did not mean that it was legally such in the eyes of the law but for all practical purposes, including the sentencing exercise, it was not a firearm. Such a meaning would defeat the legislation and would seriously obscure the real danger caused by blank firing revolvers which look and if fired sound as if they are firearms capable of firing bullets. On that basis they can be used by criminals to create real fear and to control. Firing a blank round at a person would generate extreme terror. Decidedly they are not the equivalent of imitation firearms which in any event can be used by criminals to intimidate and to control, see for instance the offences in relation to imitation firearms under Articles 58, 59, 61, 62 and 66A of the 2004 Order and the observations of Lord Bingham in *R v Avis*.

[70] We consider that the judge meant and was correct to mean that on a scale of dangerousness the revolver was at the lowest end of the scale of firearms. On this basis and in considering all the circumstances in relation to the offence and the offender we agree that one particularly striking circumstance is that the revolver was at the lowest end of the scale of dangerousness of firearms.

[71] However, we consider that there are other particularly striking circumstances which were:

- a) the offender’s intoxicated condition on 25 June 2017 when in possession of the revolver, the ammunition and the machete;
- b) his attempts to obtain cocaine at about that time;
- c) the clear and obvious risk posed by his possession of the revolver, the ammunition and the machete on an occasion where full blown, unconstrained, irrational, violent drunken arguments could develop;
- d) the offender’s intimidatory conduct towards Mr McCormick;
- e) his total disregard for the safety of others when discarding the revolver and ammunition in a residential area with the obvious risk created for children which to a large extent materialised;

- f) his previous criminal convictions for weapons offences, drug offences and violent offences; together with
- g) the attitude of the offender as demonstrated during his police interviews.

In our opinion the circumstances of the offence in the present case are serious and plainly fell within the type of offending behaviour which the legislature intended to prevent. We consider that there is an obvious contrast between an arbitrary and disproportionate sentence on an individual with a good work record, no criminal convictions and who co-operates with the police and the drunken escapades of the offender on 25 June 2017 who chose to ignore or was impervious to the risk of the revolver being found by children with consequential impacts on family life. The legislative norm is that the community should be protected from such circumstances. They are corrosive and a menace. We consider that this was the deliberate type of offending with the potential to cause serious public harm which the legislature intended to prevent by the sentencing regime in Article 70 of the 2004 Order. We consider that to impose five years' imprisonment taking into account all the offences would not result in an arbitrary and disproportionate sentence. This means that there were no exceptional circumstances in this case so that the judge ought not to have deferred sentence.

Conclusion

[72] The sentences that were imposed were unduly lenient. We quash those sentences.

[73] We do not consider that double jeopardy has any impact on the appropriate sentences given the requirement of the minimum sentence in Article 70 which we will impose.

[74] In relation to the counts apart from count one on the first indictment which attracts the minimum sentence it is submitted that the offender is entitled to some discount for the mitigating features in relation to the other counts. We consider that they have limited effect given that the offender was either caught red handed or there was no viable defence available, see *R v Pollock* [2005] NICA 43 and paragraphs [91] - [95] of *R v Maughan & another* [2019] NICA 66.

[75] In relation to the first indictment we impose concurrent sentences of 5 years' imprisonment on counts 1, 2 and 3 together with a concurrent sentence of 2 years' imprisonment on count 4. In relation to each of those sentences half is to be in custody and half on licence.

[76] In relation to the second indictment we impose concurrent sentences of 1 year's imprisonment on count 1 and 6 months imprisonment on counts 2 and 3.

[77] The sentences on each indictment are to be concurrent so that the total effective sentence is 5 years' imprisonment half in custody and half on licence.

[78] We recommend conditions of his licence that (a) the offender is to attend and participate in any assessments and/or treatment as deemed necessary by his Designated Risk Manager to address his offending behaviour and (b) that the offender will present himself in accordance with the instructions given by the Probation Officer to the PBNI Programme Delivery Unit, 40-44 Great Patrick Street, Belfast or another venue specified by the Probation Officer, to participate actively in an alcohol/drug counselling and/or treatment programme during the licence period and to comply with instructions given by or under the authority of the person in charge. The offender should anticipate that any breach of these conditions may well lead to the revocation of his licence and his recall to prison and he should also anticipate that if he commits any further offence whilst on licence that it is highly likely that revocation and recall will occur, see *Re Mullan's Application* [2007] NICA 47 and *Hegarty (Neil) v The Department of Justice and The Parole Commissioners for Northern Ireland* [2019] NICA 16.

[79] The offender should present himself at Maghaberry prison by 10am on 6 February 2020 to serve his sentence.