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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

J CROLLY

Before: Higgins LJ, Girvan LJ and Coghlin LJ

HIGGINS LJ

[1] This is a an appeal against the sentence imposed at Belfast Crown Court on 22 May 2009 by Morgan J upon the appellant's plea of not guilty to murder but guilty to manslaughter on the grounds of diminished responsibility. The appellant appeals with leave of the single judge. Following the hearing of the appeal we dismissed the appeal and stated that we would give our reasons later, which we now do.

[2] The appellant initially pleaded not guilty to the murder of Daniel Whyte aged 59 years. Later, following the swearing-in of a jury, he was re-arraigned and pleaded guilty to manslaughter on the grounds of diminished responsibility. This plea was accepted by the prosecution. He was sentenced to imprisonment for life and the judge determined that he should serve a minimum term of six and a half years imprisonment before he could be considered for release on licence under the Life Sentences (NI) Order 2001. He does not appeal against the imposition of a discretionary life sentence but appeals against that part of the sentence which determined the minimum term. It was contended on his behalf that a minimum term of 6 ½ years, which is said to be equivalent to a 13 year sentence, was manifestly excessive.

[3] The applicant is aged 46 years. He has a history of alcohol dependency syndrome, with convictions for possession of drugs going back to 1991 and a history of alcohol and multiple drug abuse and associated depression going back to at least 1997. At the time of the offence, he lived in a flat off the Dublin Road, and had a history of self-harm with broken glass and of terrorizing, threatening and trying to attack other residents with knives. On

several occasions he had wakened the caretaker during the night asking him to fight him.

[4] On the night of 2 February 2007 the appellant was drinking in his flat with the deceased, who was a vulnerable person who suffered from agoraphobia, depression and alcohol abuse. They were friends and that afternoon the appellant had accompanied the deceased to hospital for the purposes of obtaining medication. They appeared to spend the earlier part of the evening together without evidence of animosity or difficulty, and spoke to neighbours several times, the last time being about 8pm. At 8.30pm the defendant called a neighbour and asked him to dial 999 for an ambulance as his friend had been glassed in the throat.

[5] On arrival, police and ambulance personnel found the deceased to be already dead, having suffered a stab wound to his neck. A broken vodka bottle with substantial quantities of blood on it was at the scene. The defendant, who had blood on his hands, clothes and shoe said at the scene that "the bottle just went into his neck twice".

[6] The defendant initially said in interview that the injuries were self-inflicted, then that he could not remember what happened. On 27 April 2007 he asked to speak to police again when he admitted killing the deceased accidentally. He said he picked up a broken bottle with a shard of glass on it and jabbed it toward the deceased, misjudging the extent of the shard in the dark room. He had done this because the deceased had irritated him by going on about how he was going to kill himself.

[7] The post-mortem examination revealed that death was due to a stab wound to the neck which passed downwards, backwards and to the left. It divided the jugular vein and penetrated the carotid artery causing massive haemorrhaging which was responsible for his death. In addition there were two lacerations on the face in front of the right ear which could also have been caused by glass and bruising to the upper arms.

[8] Various reports from psychiatrists and a psychologist were submitted to the learned trial judge. The appellant was found to have alcohol dependency syndrome with consequent changes to the brain which amounted to an abnormality of the mind sufficient to warrant acceptance of a plea to manslaughter on the grounds of diminished responsibility. It was suggested that his alcohol consumption may have been involuntary. A Victim Impact Letter from the deceased's sister was also submitted to the court.

[9] The learned trial judge described the appellant and his lifestyle in the following terms –

> "[5] The defendant is an alcoholic with an established diagnosis of alcohol dependency syndrome. He entered the care system when he was 5 with his twin brother who died aged 16 from solvent abuse. He has convictions in 1991 and 1995 for possession of drugs with intent to supply and several convictions for possession of drugs. He has a history at least from 1997 of multiple drug abuse and a well-documented history of alcohol abuse with associated depression. He has demonstrated craving for alcohol, inability to resist alcohol, primacy of his drinking and tolerance. His alcohol dependency syndrome, which in his case is an abnormality of mind, appears to have been of prolonged duration leading to significant liver damage, cognitive impairment and poor living conditions. He was leading a chaotic lifestyle at the time of the offence. A neighbour described how his flat was covered with bags, bottles, papers, flies and junk mail and had a very strong smell. This evidence is relied upon by Dr Briscoe to sustain his opinion that the behavioural and psychological consequences for the defendant of his alcohol dependency are reasonably attributable to prolonged alcohol usage which constitutes the abnormality of mind. In 2003 his right arm became infected apparently as a result of an assault in consequence of which he had a right below elbow amputation. His immune system had been damaged by his contraction of hepatitis C."

[10] In relation to his alcohol dependency the judge said -

> "[6] The evidence in this case is that the defendant at the time of the killing was unable to function without alcohol. When he woke in the morning the urge to drink was such that without drinking he could not move or get out of bed. Thereafter he would start to feel physically ill and the urge to drink to relieve it would be irresistible. This indicates that his dependency was serious and his ability to control his drinking or choose whether to drink or not was very significantly reduced. The plea in this case is entered on the basis that his consumption of alcohol as a result of his alcohol dependency syndrome is such that it substantially impaired his mental responsibility for the killing."

[11] At paragraph 11 the judge summarised the nature of the offence and the appellant's responsibility for it –

> "[11] I accept that this offence was spontaneous and that there was no premeditation or planning. I further accept that it was not the intention of the defendant to kill the deceased. It remains the position, however, that he used a highly dangerous weapon, a broken bottle, and that this incident forms part of a pattern of similar incidents involving the use or threat of the use of knives or bottles either on himself or others. Although I accept that his mental responsibility for his conduct was substantially impaired by his alcohol consumption I consider that he must bear significant responsibility for his actions on this night. I am satisfied, therefore, that this is an offence in itself grave enough to require a very long sentence."

[12] The applicant has an extensive criminal record comprising 112 offences which commences with a series of thefts and burglaries in 1981 when he was 16 years old, for which he was detained first in a Training School, then a Young Offenders' Centre. His offences of dishonesty continued throughout the 1980s and were followed by drug offences, drink related motoring offences, criminal damage and public order offences. In 2002 a custody probation order of 30 months imprisonment and 12 months probation was imposed for an offence of wounding.

> "A Pre Sentence Report noted the defendant's alcohol and drug history and recognised a high likelihood of re-offending as a result of his extensive record over 27 years, his alcohol dependency and his unstructured lifestyle. He has no family support and if released from prison it is likely that he would reside in probation approved accommodation as he had done previously and which provided some stability in his life. The learned trial judge concluded –
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> > 'In light of the fact that he has two convictions for offences of violence within a period of six years he has been assessed as posing a risk of serious harm to others and in my view the evidence of those who have lived close to him and the medical records provide further support for that conclusion'."

[13] The trial judge considered the circumstances in which a discretionary life sentence might be imposed referring R v Hodgson [1967] 52 Cr App R 113 which was approved by the NI Court of Appeal in R v William Desmond Gallagher [2004] NICA 11.

[14] The appellant appealed on two grounds. Firstly that the imposition of a discretionary life sentence in this case was wrong in principle and that the minimum term (the tariff) was manifestly excessive. The single judge refused leave on the first ground and quite properly this point was not pursued before this court. However leave to appeal on the second ground was granted on the basis that the appellant had an arguable case that a minimum term of 6½ years, the equivalent of a 13 year substantive sentence was manifestly excessive in light of sentences imposed in various cases for manslaughter.

[15] Having determined that a discretionary life sentence was appropriate the learned trial judge then considered the minimum term which should be served in order to meet the requirements of retribution and deterrence. At paragraph 13 of his sentencing remarks he stated–

> "[13] By virtue of article 5(1) of the Life Sentences (Northern Ireland) Order 2001 I must now fix the period which is appropriate to satisfy the requirements of retribution and deterrence. I take into account your plea, albeit entered at a late stage, the fact that this was not premeditated or planned and the impairment of your mental state. I also accept that you were noted to be weeping at the scene and that there is evidence of genuine remorse. I consider that the release provisions should apply after you have served the appropriate tariff period which in this case is one of 6 1/2 years, to include the period served to date in custody."

[16 It was submitted by Mr Ramsay who with Mr Doherty appeared on behalf of the appellant that the minimum term of 6½ years was manifestly excessive. He accepted that the plea was entered at a late stage after the jury was sworn and that credit would be reduced thereby. He relied on the fact that the Judge accepted that the offence was spontaneous and not premeditated, that there was no intention to kill and that the appellant had shown genuine remorse about the killing of the deceased whom he regarded as a friend. He accepted that culpability in this case was clearly high but relied on the spontaneity of the incident. He submitted that if this was a murder case it would fall within the lower starting point of 8 to 12 years as outlined in R v McCandless [2004] N.I. 269. In the skeleton argument comparison was made with sentences imposed in manslaughter cases both in

Northern Ireland and in England. These included McCullough [1998], Donnell [2006], Magee [2007] and two English cases Hodginson [1997] and Silver [1994]. While recognising that in sentencing matters each case tends to turn on its own facts he submitted that a minimum term of 6 ½ years was manifestly excessive.

[17] Miss Smyth who appeared on behalf of the Crown submitted that this case was not comparable with cases of involuntary manslaughter. The culpability of the appellant was high and if the case had been one of murder a minimum term in the region of 12 years would have been entirely appropriate. She submitted that this was a particularly violent incident and referred to the other injuries which suggested a jabbing motion with the broken bottle prior to the fatal blow and bruising to the arms which suggested that the deceased's arms had been grasped at some stage. She submitted that the minimum term was imposed to reflect retribution and deterrence. Culpability was inextricably linked to the former and apart from deterrence of others, that deterrence of the appellant was required as was evident from the nature of this killing and from his criminal record. It was submitted that the learned trial judge had correctly identified the relevant factors and imposed an entirely appropriate minimum term.

[18] Article 5 of the Life Sentences (Northern Ireland) Order 2001 (the 2001 Order) requires a court where it passes a life sentence, for whatever reason, to order that the release provisions of Article 6 (3) to (7) of the 2001 Order shall apply to the offender as soon as he has served the period specified in the court order. By Article 5(2) the period specified shall be such as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. This period is the minimum term or tariff. In R v McCandless and others [2004] N.I. 269 the Northern Ireland Court of Appeal confirmed that courts in this jurisdiction should adhere to the Practice Statement of Lord Woolf CJ when fixing minimum terms. The relevant passages dealing with the normal starting point, the higher starting point and variation from the starting point are set out below.

> *"The normal starting point of 12 years*
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> 10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a nontechnical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or

> mitigating factors, which relate to either the offence or the offender, in the particular case.
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> 14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.
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> 15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.
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> 16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.
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> 17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty."

[19] This Practice Statement deals with minimum terms for the offence of murder and not with such terms as are appropriate in a case of manslaughter by reason of diminished responsibility.

[20] Section 5 of the Criminal Justice Act (Northern Ireland) 1966 (the 1966 Act) introduced the concept of impaired mental responsibility such as to reduce a verdict of murder to one of manslaughter. At the time of the appellant's trial it was in these terms –

> "5.-(1) Where a person charged with murder has killed or was a party to the killing of another, and it appears to the jury that he was suffering from mental abnormality which substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing, the jury shall find him not guilty of murder but shall find him guilty (whether as principal or accessory) of manslaughter.

> (2) Where a person is found guilty of manslaughter subsection (1), the powers of the court to make a hospital order under section 48(1) of the Act of 1961 may be exercised as if the condition required by paragraph (a) of that subsection were fully satisfied and as if in subsection (4) of that section the words from 'and such an order' to the end of the subsection were omitted therefrom; and where any such hospital order is made, the court shall make an order under section 53 of that Act restricting the discharge of that person as if subsection (2) of the said section 53 did not apply to him, but nothing in this section shall restrict the powers of the court to sentence that person for the offence of manslaughter of which he is found guilty."

[21] Thus an offender who, other circumstances apart, would otherwise be found guilty of murder may be found guilty of manslaughter if it appears that he was at the relevant time suffering from a mental abnormality which substantially impaired his mental responsibility for his actions which led to the killing of another. In section 1 of the 1966 Act mental abnormality is defined as an abnormality of mind which arises from a condition of arrested or retarded development of mind or any inherent causes or is induced by disease or injury. In paragraph 5 of his sentencing remarks, set out above, the learned trial judge identified the abnormality of mind suffered by this appellant namely alcohol dependency syndrome. By virtue of Section 5(2) the court has the option of making a hospital order with or without restriction in time. Otherwise the offender is sentenced for the offence of manslaughter consistent with the act of killing committed and his responsibility for it.

[22] In R v Magee [2007] NICA 21 Kerr LCJ commented on the difficulty in determining guidelines for the offence of manslaughter due to the many and varied factual situations in which the offence can arise. The same is true of convictions for, or pleas to, manslaughter by reason of diminished responsibility. Nonetheless the guidance provided in that case for sentences in manslaughter cases in which it cannot be proved that the offender intended to kill or cause really serious harm is of assistance in considering the approach to sentencing for manslaughter by reason of diminished responsibility. This is so because of the underlying similarity of an absence of intent to kill or cause really serious harm and impaired mental responsibility for a killing. In Magee Kerr LCJ said –

> "[22] It is not surprising that there are relatively few decisions in this jurisdiction which could properly be described as guideline cases for sentencing for manslaughter. Offences of manslaughter typically

cover a very wide factual spectrum. It is not easy in these circumstances to prescribe a sentencing range that will be meaningful. Certain common characteristics of many offences of violence committed by young men on other young men are readily detectable, however, and, for reasons that we will discuss, these call for a consistent sentencing approach.

[26] We consider that the time has now arrived where, in the case of manslaughter where the charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between eight and fifteen years' imprisonment. This is, perforce, the most general of guidelines. Because of the potentially limitless variety of factual situations where manslaughter is committed, it is necessary to recognise that some deviation from this range may be required. Indeed, in some cases an indeterminate sentence will be appropriate. Notwithstanding the difficulty in arriving at a precise range for sentencing in this area, we have concluded that some guidance is now required for sentencers and, particularly because of the prevalence of this type of offence, a more substantial range of penalty than was perhaps hitherto applied is now required.

[27] Aggravating and mitigating features will be instrumental in fixing the chosen sentence within or – in exceptional cases – beyond this range. Aggravating factors may include -

(i) the use of a weapon;

(ii) that the attack was unprovoked;

(iii) that the offender evinced an indifference to the seriousness of the likely injury;

(iv) that there is a substantial criminal record for offences of violence; and

(v) more than one blow or stabbing has occurred."

[23] While it must be recognised that these remarks were made in the context of a case involving young men and the use of knives there are sufficient similarities to make these comments both apposite and relevant. All except one of the aggravating factors identified in paragraph 27 above are present in this case and there is little in the way of mitigation apart from the plea of guilty and the extent to which the abnormality of mind has impaired the appellant's mental responsibility for the killing. The abnormality of mind itself has already effected the reduction of the offence from murder to one of manslaughter. In R v Harwood 2007 NICA 49 this Court upheld a sentence of 13 years imposed following a last minute plea to manslaughter by stabbing with a knife. This case also involved two inebriated men known to one another.

[24] As I observed in Harwood comparison between sentences imposed for the offence of manslaughter in whatever guise is unhelpful. In an appeal alleging that the sentence is manifestly excessive more is to be gained by concentrating on the particular circumstances of the killing and the appellant's part in it. In a case of manslaughter by reason of diminished responsibility the sentencing court is concerned principally with three separate matters – the seriousness of the offence, the abnormality of mind and the extent to which it diminishes the offender's responsibility for the killing and the background of the offender. Like manslaughter the options available to the court are many and varied depending on the circumstances of the case. In R v Chambers [1983] 5 CR App R(S) 190 Leonard J, giving the judgment of the court in which Lane LCJ presided, said -

> "In diminished responsibility cases there are various courses open to a judge. His choice of the right course will depend on the state of the evidence and the material before him. If the psychiatric reports recommend and justify it, and there are no contrary indications, he will make a hospital order. Where a hospital order is not recommended, or is not appropriate, and the defendant constitutes a danger to the public for an unpredictable period of time, the right sentence will, in all probabilities, be one of life imprisonment. In cases where the evidence indicates that the accused's responsibility for his acts was so grossly impaired that his degree of responsibility for them was minimal, then a lenient course will be open to the judge. Provided there is no danger of repetition of violence, it will usually be possible to make such an order as will give the accused his freedom, possibly with some supervision. There will however be cases in which there is no proper basis for a hospital order;

> but in which the accused's degree of responsibility is not minimal. In such cases the judge should pass a determinate sentence of imprisonment, the length of which will depend on two factors: his assessment of the degree of the accused's responsibility and his view as to the period of time, if any, for which the accused will continue to be a danger to the public."

[25] This judgment was given at a time when minimum terms or tariffs were not set by the trial judge. However, this passage was approved by a five judge court presided over by Lord Judge LCJ in R v Wood [2010] 1 Cr App R(S) 2, albeit in the context of a life sentence imposed for manslaughter by reason of diminished responsibility under section 252 of the Criminal Justice Act 2003 which has no equivalent in Northern Ireland. In the course of his judgment Lord Judge LCJ said –

> "15. Our approach is consistent with the authorities, in particular, Chambers (Stephen Francis) (1983) 5 Cr. App. R. (S.) 190 where the various sentencing options then available to judges in cases of diminished responsibility were summarised. Although reference was made to a hospital order if recommended by a psychiatric report and justified, where the defendant constituted a danger to the public for an unpredictable time, the right sentence would probably be life imprisonment. However if the defendant's responsibility for his acts was so grossly impaired that his degree of responsibility was minimal, then a lenient course would be open, but the length of any determinate sentence depended on the judge's assessment of the degree of the defendant's responsibility and his assessment of the time for which the accused would continue to represent a danger to the public. At the time when Chambers was decided imprisonment for public protection was not available. Nevertheless Chambers remains relevant to our decision. This is because the judge concluded that, notwithstanding the acceptance by the prosecution of manslaughter on the grounds of diminished responsibility, what the judge described as a "very substantial amount of mental responsibility remained". The Court did not consider that his observation, and the process of proceeding to sentence on the basis of it, provided

> any grounds for criticism. Indeed the Court decided that the conclusion was right. This approach has not, so far as we are aware, been called into question."

[26] In the instant case the appellant and the deceased were together when the deceased was injured several times with the jagged edge of a broken bottle, suffering a fatal injury. Why, and in what precise circumstances, has not been fully explained. The appellant is a person with a history of violence against other persons with a significant alcohol dependency which affects his behaviour. An indeterminate sentence was entirely appropriate in the circumstances. The learned trial judge determined that the appropriate minimum term to reflect the element of retribution and deterrence was 6½ years. Clearly the offence was very serious in view of the nature of the weapon used and the injury inflicted with it. This is not a case in which the appellant suffered from a mental illness which caused him to act as he did, nor is it one in which his mental responsibility was almost extinguished by the abnormality. Despite the abnormality of mind by reason of alcohol dependency syndrome the trial judge was entitled to come to the conclusion that the appellant's responsibility for what occurred was significant. In light of all these circumstances and considerations we do not consider that such a minimum term can be said to be manifestly excessive and for these reasons the appeal against the minimum term fixed by the trial judge was dismissed.