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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

DARRYL HAUGHEY

Ian Turkington KC with Joseph McCann (instructed by Patrick Fahy & Co Solicitors) for the Appellant
Ms Bobbie-Leigh Herdman (instructed by the Public Prosecution Service) for the Crown

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Before: Treacy LJ, Horner LJ and Kinney J

SENTENCING GUIDANCE ON NON-FATAL STRANGULATION

TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against the sentence imposed on the appellant who pleaded guilty to four charges including one count of non-fatal strangulation, contrary to section 28 of the Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022 ('the 2022 Act').

[2] Non-fatal strangulation ('NFS') is a relatively new offence in Northern Ireland about which no sentencing guidelines currently exist in this jurisdiction. In the absence of such guidelines the sentencing judge, Her Honour Judge Bagnall, ('the judge') imposed the following sentences:

(i) NFS: determinate sentence of 32 months (14 months custody/18 months licence);

(ii) Assault Occasioning Actual Bodily Harm (AOABH): determinate sentence of 24 months (12 months custody/12 months licence);

(iii) Threatening to Kill: determinate sentence of 18 months (nine months custody/nine months licence);

(iv) Criminal Damage: Determinate sentence of 18 months (nine months custody/nine months licence).

[3] The appellant applied for leave to appeal and the single judge, McBride J, granted leave in the following terms:

> "Leave to appeal sentence is granted on the ground guidance is needed as there are no sentencing guidelines for the new offence of non-fatal strangulation in Northern Ireland. Further, guidance is required on the appropriate methodology to be adopted when applying the domestic abuse aggravator, specifically whether it uplifts the starting point or whether it should be considered with other aggravating and mitigating factors before setting the starting point."

[4] This judgment seeks to address the appeal points raised by the appellant in his own case and also to address the gaps in sentencing guidelines identified by the single judge.

Background

[5] The facts giving rise to the convictions in this case are taken from the report made by the injured party (IP) to the police shortly after the arrest of the appellant. Her account relates to events occurring between approximately 8:00pm on 23 August 2023 and 3:00pm on 24 August 2023. The sentencing judge's summary of the facts are paraphrased below.

[6] The appellant arrived at the IP's home at approximately 8:00pm on 23 August. He was intoxicated and verbally abusive to her and her sister who was ordered by him to leave the premises.

[7] After she left, he continued to drink and to argue with the IP in the kitchen of the property. He grabbed her by the throat and headbutted her causing her nose to bleed. He then grabbed her by the throat again pushing and holding her on the sofa by the throat and causing her to have difficulty breathing. The IP accepts that she grabbed at his face and scratched his jaw in an attempt to get free from him. As she did so the appellant stood over her and told her "I'm going to kill you." The appellant then grabbed her by the hair and dragged her to the stairs grabbing her by the throat once again and pinning her to the stairs. He then headbutted her again and punched her in the mouth splitting her lip. When the IP got away the appellant went upstairs to bed. The IP then lay on the sofa. She said she was afraid and did

not know what to do as the appellant had earlier taken her phone and said he had thrown it in the bushes.

[8] The next morning the appellant came downstairs and was apologetic. However, he went out to get more alcohol, resumed drinking and became aggressive again. He grabbed the IP by the hair and pinned her to the sofa again by the throat, squeezing her neck. When she managed to get away, the appellant went on a smashing spree, destroying property belonging to the IP and trying to pull the television off the wall.

[9] The ordeal ended when the IP's sister returned and together the women made the appellant leave. Police were called and he was arrested around 3pm on 24 August.

History of the proceedings

[10] During police questioning the appellant made no admissions and said he did not remember anything about the matters alleged. He was initially charged with nine offences comprising three counts of NFS over the two days, one count of AOABH and two counts of common assault over the two days, one count of threats to kill on 23 August, one count of theft on 23 August relating to the theft of the IP's mobile phone, and one count of criminal damage related to the smashing spree on 24 August. Each of the counts on the indictment were aggravated by reason of involving domestic abuse, contrary to section 15 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 ('the 2021 Act).

[11] The appellant was arraigned on 23 April 2024 and entered - guilty pleas in relation to all counts on the indictment.

[12] His plea was entered at a time when the appellant knew the main prosecution witnesses, the IP and her sister, had withdrawn from further participation in the proceedings. In these circumstances he would have understood that his plea would be of great assistance to the prosecution in proving the case against him. Regardless of this knowledge, he entered his guilty plea on 10 May 2024.

[13] During discussions giving rise to the plea, it was conceded by the prosecution that injuries were at the lower level and conceded by the defence that two of the instances where hands were laid on the neck of the IP would form part of the AOABH charge to which he would plead guilty.

[14] Each of the offences to which he pleaded guilty was aggravated by reason of involving domestic abuse contrary to section 15 of the 2021 Act. In this judgment we shall refer to the section 15 aggravator as 'the statutory domestic abuse aggravator' or 'the statutory aggravator.'

The sentencing process

[15] In her sentencing remarks the judge recounts the factual history and then considers the appellant's background. He was 32 at the time of sentencing. He has 32 previous convictions, including convictions for public order offences at his mother's home and convictions for assaults on two previous partners.

[16] He is the eldest of three boys, estranged from his natural father but reporting positive relationships with his mother and stepfather. He has a diagnosis of ADHD which he says impacts his thinking at times. Alcohol dependency has been a feature of his life, and he has long-standing mental health issues for which he receives antidepressant medication. The judge notes that he and his mother were victims of the Omagh bomb. He was six years old at that time. He was injured in the bomb and his mother was hospitalised for some time after it. He says that memories of the bomb still adversely affect his emotional well-being and he still has flashbacks of that day. He has had a range of jobs, but his employment record is negatively impacted by his alcohol dependency.

Aggravating and mitigating features

[17] The judge identifies four aggravating features:

(i) He has a relevant criminal record: part of his record relates to violence against partners and there is a pattern of violence towards women with whom he has had a relationship; she notes as a concern that in 2021 he completed a 'Building Better Relationships' programme under the auspices of a probation order but relatively quickly reverted to his old behaviour.' She has regard to the pre-sentence report which concludes that, until he addresses his alcohol addiction, 'this type of offending will continue with attendant risks to anyone in a relationship with him.'

(ii) The NFS and the AOABH were prolonged assaults, lasting into a second day; she treats the underlying facts of this case as one 'prolonged episode of violence against the injured party which involved both non-fatal strangulation and also assault occasioning actual bodily harm.' She notes that during the violence he threatened to kill the injured party and did damage to her home and property. Having carefully reviewed the detail of the abuse she notes 'just how violent and prolonged this episode was' and the fact that 'the appellant continued with this - his attack on the victim into a second day.'

(iii) He has 'undertaken courses both in relation to alcohol addiction and domestic violence but continues to both drink and re-offend'; and

(iv) He has 'a significant history of abusing a1cohol and substances which is linked to this offending.'

[18] It is notable that her explicit enumeration of the aggravators she took into account does not include the domestic context as an aggravator relevant to setting the starting point.

[19] She identifies two mitigating features namely remorse and the fact that he 'pleaded guilty despite there being a withdrawal statement from the victim.'

[20] Having reviewed the facts and the appellant's antecedents and having identified the aggravating and mitigating features that she will take into account in setting the starting point, the judge considers the pre-sentence probation report and the expert report supplied by the defence. This report from Dr Curran, Consultant Psychiatrist, concludes that "he needs to address his addictive traits and his behaviour within relationships if he is to avoid causing harm and future periods of imprisonment."

[21] The judge considers culpability and harm. The probation report assesses the appellant as a high likelihood of reoffending in the next two years but not a significant risk of serious harm at this time. The judge says, "I agree with those conclusions" and assesses the appellant's culpability as high.

[22] When considering harm, she notes the injured party described having her throat squeezed to the point where she couldn't breathe and had a feeling of being choked. The following day she had a sore neck but 'characteristically, there was no bruising.' She notes that the appellant head butted the injured party twice causing her nose to bleed and causing a split lip. She concludes that the harm suffered by the injured party falls into the medium range. We consider that this classification of harm was within the range available in the circumstances of this case. Factors which justify this conclusion include the fact that the IP had withdrawn from participation in the proceedings with the result that no victim statement was available describing the actual impact these assaults had on her. The pre-sentence report concluded that harm was in the medium range. In these circumstances the classification 'medium harm' was within the permissible range.

[23] The judge notes that there are no local guideline cases governing sentencing for NFS. She had been referred by counsel to the cases of *R v BM* [2023] NICC 5 and *R v Cook* [2023] EWCA Crim 452. In *R v BM* strangulation attacks took place in the context of attempted rapes by a man on his wife. The strangulation elements were charged as Attempting to Choke with Intent to Commit an Indictable Offence contrary to section 21 of the Offences against the Person Act 1861. This offence carries a maximum sentence of life imprisonment. The context of the strangulation in that case was therefore very different from the present one, and for this reason the judge did not find it useful when considering sentence in the present case.

[24] The English case of *R v Cook* did involve an offence of NFS but it was the English offence which carries a maximum sentence of five years' imprisonment whereas the Northern Ireland equivalent offence carries a maximum penalty of 14

years' imprisonment. Because of the huge difference in the underlying sentencing regimes the judge found *R v Cook* was of limited assistance in identifying the sentencing range in the present case. The judge therefore had to sentence without any relevant guidance.

[25] The judge refers to the statutory domestic abuse aggravator and confirms her view that the conditions for applying it are satisfied in the present case. She identifies NFS as the lead offence for the purposes of sentencing and describes her sentencing approach as follows:

> "Having considered all the factors in this case, had the appellant been convicted after a contest and taking all the aggravating and mitigating factors into consideration, I would have assessed a starting point of 36 months."

[26] So far this reflects standard sentencing practice in Northern Ireland as described in the well-known case of *R v Stewart* [2017] NICA 1.

She continues:

> "I consider this offence aggravated by domestic abuse within the meaning of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 and, therefore, increase the sentence by 12 months ... This increases the starting point in the case to 48 months."

[27] She then applies the maximum one third plea reduction to the total. This reduction brings the effective sentence down to 32 months.

The appeal

[28] The main grounds of appeal may be summarised as follows:

(i) the starting point was too high because of the way the judge approached the aggravating and mitigating features;

(ii) the judge erred in the way she applied the statutory domestic abuse aggravator resulting in an excessive uplift to sentence and double counting of aggravating features;

(iii) the reduction given for the plea should have been more than one third in this case.

Consideration

Starting point too high

[29] The appellant asserts that the starting point of 36 months is too high. He seeks to make good on this assertion by referencing caselaw on NFS from other jurisdictions, specifically England & Wales and New Zealand. Different versions of the offence of NFS have been in operation in those jurisdictions for some time. The versions of NFS that exist in these jurisdictions are significantly different from the Northern Ireland version, particularly in regard to the sentencing regime that applies in each case. In England and Wales the maximum sentence for NFS is five years, in NZ the maximum is seven years and in Northern Ireland the maximum is 14 years, so it is clear that the sentencing regimes are not comparable as between these jurisdictions.

[30] During the hearing the judge stated that she did not find the English case she was referred to helpful for sentencing purposes because of the differences in the sentencing regimes. We agree with this distinction and note that it is the duty of sentencing judges in Northern Ireland to give effect to the legislative intent of our own local Assembly which brought in this legislation. It has applied a maximum penalty of 14 years to the offence of NFS in an effort to improve protection for victims of attacks like this. It has done so to reflect public concern that domestic violence has become such a pervasive scourge on society in this jurisdiction.

[31] Speaking about the introduction of a suite of measures designed to tackle this, the Justice Minister Naomi Long said:

> "Public safety and protecting people from violent and abusive behaviours are key priorities for me I wanted to make a real difference for all of those in our society who are affected by any form of domestic abuse. This now becomes a reality...
>
> The introduction of the new domestic abuse offence is one of three pieces of legislation that I will have in place by the end of this mandate. Shortly, we also have the final stages of the Protection from Stalking Bill and the Justice (Sexual Offences and Trafficking Victims) Bill.
>
> Together, these offer greater protections across our society to those that are subject to both violent and non-physical abusive behaviours.

[32] One way to protect vulnerable people from abusive behaviours is to have available high sentences designed to deter offenders from engaging in abuse. NFS is a particularly risky behaviour where it is just too easy for perpetrators to cause

catastrophic damage to victims. We have no doubt that the Assembly intended to deter such behaviour by giving the option of imposing a deterrent sentence on those who engage in it.

[33] The judiciary has already indicated that we understand the problem and will play our part in countering it. For example, in the case of *R v Hutchinson* [2022] NICA 55, the Lady Chief Justice said:

> "In this jurisdiction we are now more alert to the scourge of domestic violence which has become all too prevalent in our society."

She said the high sentence in *Hutchinson*:

> "Reflects ... society's utter condemnation of such behaviour and should be taken as a signal that offending of this nature will attract commensurate sentences."

[34] This new approach to sentencing is intended in part to reflect better understanding of the impacts on victims. For example in the case of *Hughes* [2022] NICA 12 the LCJ said:

> "Such sentences are a reflection of the growing appreciation of the seriousness of this type of offending, the frequency of it within our societies and the effects on victims.
>
> Higher sentencing reflects society's need to deter this type of behaviour and mark an abhorrence of it. This behaviour is not normal, it should not be tolerated, and if it does occur it will result in a significant sentence."

[35] Because our local Assembly has deliberately adopted a different path in relation to the treatment of domestic violence, and because the permissible maximum sentence in this jurisdiction is designed to facilitate deterrent sentencing where necessary, we derive little benefit from examining sentencing decisions in other jurisdictions. For this reason, we do not intend to address in detail those arguments of the appellant that are based on comparative case law. Suffice to say that our local Assembly has deliberately adopted a different approach to this issue and the role of judges going forward will be to implement the approach that our local legislature has chosen.

Loss of consciousness

[36] The appellant also claims the starting point was too high because of the way the judge treated the aggravating factors. Specifically, he says that the IP in this case

"did not lose consciousness or suffer any of the other distressing sequalae of strangulation such as loss of bladder or bowel control." He says that while "some harm is implicit in every instance of NFS, the sentencing process must leave room for an uplift where the harm ... is more significant …"

[37] We reject this argument and stress that evidence of loss of consciousness or other 'distressing sequalae of strangulation' are **not** prerequisites for a finding of high harm in cases of NFS. Part of the reason that NFS has been introduced as a freestanding offence in jurisdictions across the globe is the new recognition of the inherent harm that the experience of strangulation causes to victims particularly at the psychological level. It is also intended to reflect the new understanding that 'harm' has for a long time been wrongly categorised by reference only to the visible marks strangulation leaves on the body.

[38] The rationale for a change in the evaluation of harm for sentencing purposes is concisely summarised in the reflections of the judge in *R v BM* which I recommend that all judges sentencing in this area should read. Also, judges may wish to read the Written Evidence submitted by the Centre for Women's Justice (CWJ) to the Domestic Abuse Committee when considering the need for an offence of non-fatal strangulation in England and Wales. This gives a useful summary of relevant research on the harms caused by strangulation.

[39] In particular, the CWJ written evidence indicates that the act of non-fatal strangulation can have long-term physical and mental impacts on the victim. The physical impacts might often be non-visible, but they will likely be long-lasting, for instance by causing internal bleeding or neurological injuries, among many other physical issues which are mentioned in the CWJ evidence. The psychological impacts are also manifold, with victims often suffering from post-traumatic stress disorder due to feelings of fear of imminent death that might occur in a case of NFS. Furthermore, NFS or asphyxiation might be used as a psychological tool by abusers to make their victim vulnerable and exert control and influence in a relationship. The evidence highlights that prior to recognition of NFS as a separate offence, it was difficult to bring incidents of this nature under other offences such as assault, due to the non-observable nature of the injuries. During training sessions carried out by CWJ for local domestic abuse services in England and Wales, support workers revealed that often, NFS was coming under common assault charges. This, in turn, meant that available sentencing options were limited. This led to an overall failure to recognise the gravity of the offence within the criminal justice system and its disproportionate impacts on women.

[40] The main points raised in the CWJ evidence were:

- The CWJ evidence indicates how strangulation and asphyxiation might be used by abusers to achieve a multitude of purposes.

- The act of strangulation, which makes the victim unable to breath, creates a feeling of primal fear in the victims.

- The evidence summarises the range of physical effects that can occur after strangulation, most of which are non-visible.

- There is equally a plethora of negative effects on the victim's mental health, including post-traumatic stress disorder, stemming from the feeling of fear of imminent death. In addition, impacts such as depression, anxiety, suicidality, nightmares, and disassociation are noted.

- Prior to the creation of an offence of non-fatal strangulation or asphyxiation, there was no offence which recognised how strangulation can be used as a tool to make victims vulnerable without intending to kill. Bringing it under other offences such as assault etc were not effective, since these require observable injuries.

- The CWJ carries out training sessions for local domestic abuse services in England and Wales, and during these, support workers had indicated that cases involving strangulation came under common assault charges.

- The side effects of failing to recognise non-strangulation as an offence fails to recognise its gravity and also limited the sentencing options available.

- This has a systemic impact on public protection and the criminal justice system, which impacts women disproportionately.

- Recognising NFS will also assist police in identifying domestic abuse in relationships and noting it as a critical risk factor.

- It is a problem which has been recognised in different jurisdictions, such as New Zealand, the US and Australia.

[41] Finally, in relation to this appeal point we note that the maximum penalty of 14 years available in Northern Ireland for this offence allows plenty of room for an uplift in cases where the harm suffered is more severe. We consider that setting a starting point of 36 months for a case where the harm is assessed as 'medium' was appropriate in all the circumstances of this case and we are not minded to interfere with it.

Repeated strangulation

[42] The defence asserts that the judge listed as an aggravating factor the fact that there was 'repeated strangulation' in the present case. They recall that the appellant was originally charged with three counts of NFS but during plea discussions it was agreed that two instances where 'hands were laid on the neck of the IP' would be

treated as part of the AOABH charge. That left only one charge of NFS in play. As a result of these changes in the charges the defence asserts: 'it could not be said that there was repeated strangulation in the strict legal sense as the elements of the offence of NFS were not said to be made out in the other instances.' They say that for this reason the judge fell into error.

[43] We reject this argument. We do not believe that the judge was using the term 'strangulation' in the 'strict legal sense' of NFS when discussing the appellant's behaviour in her sentencing remarks. It is plain from her remarks that the judge was fully aware she was sentencing principally for one count of NFS and one count of AOABH.

[44] The ordinary meaning of 'strangulation' was discussed in the case of *Campbell and Allen* [2020] NICA 25, a case which pre-dated the introduction of the offence of NFS in Northern Ireland. The relevant context was a plea to common assault, contrary to section 47 of the Offences Against the Person Act 1861. An act of strangulation had occurred in the context of that assault which prompted the following comments from then Stephens LJ:

> "Strangulation is a form of asphyxia (lack of oxygen) characterised by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck. The neck is an unprotected and vulnerable part of the body... Strangulation is an effective and cruel way of asserting dominance and control over a person through the terrifying experience of being starved of oxygen and the very close personal contact with the victim who is rendered helpless at the mercy of the offender. The act of strangulation symbolises and abuser's power and control over the victim."

[45] It is plain that the act of 'strangulation' in the sense discussed above can be part of a common assault and of an AOABH every bit as much as it will be part of an NFS assault.

[46] In the present case the judge concentrated on the evidence of what happened to the injured party during the prolonged episode of violence she endured. Her unchallenged evidence was that on 23 August the appellant 'grabbed her by the throat pushing and holding her on the sofa by the throat and causing her to have difficulty breathing.' On the same day he grabbed her by the throat and 'pinned her to the stairs.' The following day he grabbed her by the hair and 'pinned her to the couch by the throat squeezing her neck.' The unchallenged evidence in the case is that on these three occasions hands were laid on the neck of the victim and sufficient force was used to 'pin her' into positions of the appellant's choosing. The judge is both entitled and obliged to have regard to these facts when assessing the sentence due for the charges in play. There is no suggestion that she wrongly sentenced him

for three counts of NFS and the appellant's assertion that she fell into error is baseless. She sentenced him for a sustained and violent attack that included NFS and AOABH, and strangulation behaviour was a repeated part of this attack.

Previous offending and double counting

[47] The appellant asserts that the judge listed as separate aggravating factors the facts that the appellant (a) had a relevant record and (b) had done probation courses before. The defence say that this involves double counting because 'anyone who has previous convictions will have received a previous sentence' and their 'very presence before a criminal court again shows that, in some way, they have failed to respond to those earlier sentences.' On this basis the defence asserts that the judge really counted the same aggravating feature twice.

[48] We reject this argument. It is self-evident that an appellant's previous record may be relevant when assessing his culpability for any new offence with which he is charged. That is the reason why courts consider previous records when sentencing: they may speak to the person's culpability in relation to the offence in hand. The previous record may be relevant, or it may not. For example, an old record for driving offences says nothing of relevance when sentencing a person now charged with an assault. But in all cases, the record must be considered so the judge knows what, if anything, it has to say about his culpability.

[49] Here there is a relevant record for previous offences of violence including offences of violence against two previous partners. That tells the judge that this appellant has been around this course before. He has lived through it, so he understands perfectly how such offending makes him feel about himself. He also understands from lived experience what the consequences of such offending are for his victims. Yet, knowing all of this, this man is back before the court for the same type of offending. Despite all he knows about the damage this type of misbehaviour causes to himself and to other people, he has done it again and is back before the court for another turn of the same wheel. That fact is very relevant when assessing his culpability.

[50] Also in this case, but not in every case as the appellant implies, there is the fact that this appellant has had the benefit of courses about alcohol abuse and about domestic violence. This appellant has had the tools for behavioural change placed into his hands through these earlier inputs yet, so far, he has shown himself unable or unwilling to make the change that is always possible for him. That is another, separate fact that the court may take into account. It speaks either to the depth of his addiction or to the level of his desire to change himself - the level of his motivation. In sentencing terms, it is relevant to deciding how much time away, sheltered from his demons, would be of most benefit to him, and how much time free of the risk he continues to pose is most helpful for his current or potential future partners.

[51] We see no double counting here. We see proper consideration of two factors relevant to this sentencing exercise.

Mitigating factors

[52] The appellant complains that the judge did not list the appellant's personal circumstances as a mitigating factor meriting any reduction in sentence. These circumstances include his ADHD, his PTSD as a result of the Omagh bomb, his mental health issues and his alcohol addiction, all of which were before the court via the pre-sentence report and Dr Curran's report. The appellant complains that these personal circumstances appear to have been disregarded in the calculation of his sentence.

[53] Almost every appellant who comes before a criminal court comes with a list of adverse personal circumstances which are fully deserving of personal sympathy, yet not every person with adverse personal circumstances in their background behaves in a way which brings them to the dock of a criminal court. Experience shows that adverse personal circumstances can be overcome, or at least managed in such a way that they do not generate behaviours that are outlawed by the criminal law.

[54] Sentencing judges have wide discretion in how they treat adverse personal circumstances. A useful approach when exercising that discretion is to weigh the personal circumstances against the criminal behaviour they are said to have contributed to. In the present case the criminal behaviour in question included the extremely dangerous behaviour of strangulation of a vulnerable woman. In this case the sentencing judge was fully aware of and set out in some detail the adverse personal circumstances of the appellant. She also had the benefit of an expert report and a very full pre-sentence report. She was not required to identify in a mechanistic way the precise impact that this had on her approach to sentencing. His circumstances and any impact they had has to be seen in the context of the serious nature of the offending and the statutory response in this jurisdiction to such offences. We discern no legal error in the manner in which the judge treated his personal circumstances.

Remorse

[55] Finally, the defence complains that the judge listed 'remorse' as a mitigating factor 'but given the eventual sentence' say the judge 'must have' placed an under-emphasis on this mitigating factor.

[56] On our reading of this case only two pieces of evidence of remorse were present. The first is the evidence that on the morning of 24 August 2023 the appellant was apologetic about his abuse of the IP the previous day. The judge deals with this in her sentencing remarks where she says:

> "I consider his apologies for his actions in the morning of 24 August to be of no value as he shortly thereafter drank more alcohol and resumed the attacks on the victim."

[57] The judge clearly felt that this 'remorse' was not genuine and did not deserve any credit.

[58] The second piece of evidence that remorse may have been present is the appellant's guilty plea in circumstances where the Crown might have had difficulty proving the case against him.

[59] The treatment of this plea is a separate ground of appeal in this case so we will deal with it, including this aspect of remorse within the section below.

Treatment of the guilty plea

[60] The third ground of appeal is that the reduction for the guilty plea "should have exceeded the 1/3 discount applied."

[61] The basis for this claim is that the appellant made his plea when the main witnesses had withdrawn from participation in this prosecution and the appellant knew that this withdrawal could pose difficulties for the Crown in securing a conviction.

[62] In support of their claim for a reduction higher than the usual one-third maximum they quote Morgan LCJ's comment in the case of *McKeown & Han Lin* [2013] NICA 28 where he says:

> "In this jurisdiction the full discount for a plea is generally in or about one third where an offender faces up to his responsibilities at the first opportunity. In appropriate cases it can be higher."

[63] Relying on the last sentence of this dictum the defence submit that there can be no more appropriate case than one where the prosecution are faced with a realistic possibility of having no admissible evidence to present to a jury, an appellant knows this, and pleads guilty regardless.

[64] Pleas of guilty serve many purposes. From the appellant's point of view, they provide a tangible way to express genuine remorse for wrongdoing. If this was part of the appellant's purpose in pleading in this case, then we commend it highly. It is a hopeful sign for this appellant and for the journey he must make towards taking responsibility for his own actions.

[65] Guilty pleas also have more mundane benefits for appellants. In this case, the plea reduced the legal jeopardy he faced. This reduction of risk was a tangible

benefit that accrued to him as soon as he entered the plea. Another tangible benefit was that he placed himself in a good position to request generous reduction in return for his generous act of admitting responsibility when he knew all about the Crown's difficulties.

[66] In the sentencing hearing the defence asked for 'the maximum available discount' which most judges would understand to be a full one third off the starting point. No argument for more than the usual maximum appears to have been made at the hearing. The judge granted him a full a one third reduction.

[67] We consider this reduction to be generous on the facts of this case. The judge made no legal error in her assessment.

The domestic aggravator

[68] The statutory domestic abuse aggravator was introduced by section 15 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 which came into effect on 21 February 2022. Section 15 provides that it 'may be specified as an allegation alongside a charge of an offence against a person ("A") that the offence is aggravated by reason of involving domestic abuse.'

[69] All the charges to which the appellant pleaded guilty did have the statutory aggravator attached to them. He made his plea knowing this to be so and therefore admitting that the statutory aggravator applies. The judge confirms in her judgment that the conditions for applying section 15 are fulfilled and the defence agrees in its skeleton argument that they are. The only dispute about this aggravator therefore relates to the way the judge applied it in this case.

[70] When sentencing for an offence to which the statutory domestic aggravator applies section 15(4) requires the court to:

> "(a) state on conviction that the offence is aggravated by reason of involving domestic abuse;
>
> (b) record the conviction in a way that shows that the offence is so aggravated;
>
> (c) in determining the appropriate sentence, treat the fact that the offence is so aggravated as a factor that increases the seriousness of the offence; and
>
> (d) in imposing sentence, explain how the fact that the offence is so aggravated affects the sentence imposed.

[71] In the present case the judge said the following when applying the statutory aggravator:

> "The lead offence for the purposes of sentence is count 1, the non-fatal strangulation. Having considered all the factors in this case, had the appellant been convicted after a contest and taking all the aggravating and mitigating factors into consideration I would have assessed a starting point as 36 months. I consider this offence aggravated by domestic abuse within the meaning of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 and therefore increase the sentence by 12 months …This increases the starting point in this case to 48 months."

[72] The judge's method of applying the statutory aggravator therefore was as follows:

(i) Step 1: identify the lead offence - (NFS).

(ii) Step 2: Calculate the starting point having regard to all applicable aggravating and mitigating features EXCEPT the statutory aggravator and the plea. She arrived at 36 months for the NFS to include all the aggravators and mitigators that she had listed.

(iii) Step 3: Calculate an uplift for the statutory domestic abuse aggravator - (she gave 12 months for this) and add it to starting point. This gave a total of 48 months for the NFS (36 + 12 = 48).

(iv) Step 4: Apply the plea reduction to the total produced by step 3. One third off 48 (48-16=32). This gave an effective sentence of 32 months for the NFS.

[73] The defence asserts that the trial judge made an error by adopting a 'sequential and mechanistic' approach rather than a holistic approach. The gravamen of their concern is that this approach risks double counting because it will be difficult in practice for judges to discount the domestic context when offences occur in such contexts. This asserted difficulty it is argued may cause judges to apply the same aggravator twice - the second time being when they come to applying the statutory aggravator as section 15 requires.

[74] We are not persuaded by this argument. The present case is one where just such a risk existed and the trial judge was fully capable of discounting the domestic context from her calculation of her initial starting point. She explicitly listed the aggravators she would take into account when setting the starting point and the domestic context was not one of them.

[75] We consider that a sequential approach is in fact the best way for judges to remember to treat the statutory domestic aggravator separately from all other aggravating factors. The only way we would differ from the approach of the sentencing judge relates to the order in which the steps are applied.

[76] The sentencing judge selected the lead offence, calculated the starting point by reference to all aggravators and mitigators except the domestic context and the plea, then added an uplift for the statutory domestic abuse aggravator, then finally applied the plea reduction to the total.

[77] In our view the proper method is to complete steps 1 and 2 as above and then apply the plea reduction. Finally, the statutory domestic abuse aggravator should be calculated and applied to the reduced sentence. Applying the statutory aggravator should be the last step in the sentencing process.

[78] In relation to the present appellant the final sentence he received for the NFS was 32 months. Using our recommended method, the final sentence should have been 36 months, calculated as follows:

Step 1: NFS identified as the lead offence.

Step 2: Starting point calculated having regard to all applicable aggravating and mitigating features EXCEPT the statutory aggravator and the plea. This gives a starting point of 36 months - as above.

Step 3: Apply the plea reduction to the starting point as per the standard approach in *R v Stewart*. One third off 36 months - 12 months off. The sentence reduced for plea is therefore 24 months.

Step 4: Calculate an uplift for the statutory domestic abuse aggravator and apply it to the outcome of step three. The penalty for the domestic context calculated by the judge was 12 months and we consider this figure appropriate on the facts of the case. Adding the 12 month penalty for statutory aggravator to the reduced sentence noted at step 3 gives a total of 36 months for the lead offence.

[79] In light of the new approach this appellant has benefited from an unwarranted reduction of some four months in his overall sentence. However, given all the circumstances of this case and especially the fact that sentence was passed in the absence of relevant guidance, we would consider it unfair to change the sentence imposed. Accordingly, we make no changes to the sentences issued in this case.

Sentencing guidelines

[80] The single judge identified a gap in guidance in relation to the new offence of NFS. Our comments above confirm that a starting point of 36 months is appropriate for NFS cases where the harm is assessed as 'medium.' Where harm is assessed to be 'high', the starting point will likely exceed 36 months as is necessary and justified by the level of harm actually inflicted in the case. We do not set a precise figure for this because the research evidence shows that the harms caused by NFS are multiple and highly variable. Our judges are fully aware that they must arrive at sentences which properly reflect the facts of the individual case in hand.

[81] Guidance was also said to be necessary in relation to 'the appropriate methodology to be adopted when applying the domestic abuse aggravator.' Our comments above reflect the new methodology sentencing judges should use. This methodology reflects the fact that this aggravator is a creature of statute introduced by the Assembly as part of a multi-pronged attack on the 'scourge of domestic violence in Northern Ireland.' It is intended to be used to specifically identify, penalise and deter violent behaviour in a domestic context where its effects and consequences may be materially different from violence and abuse in other contexts. We consider that these objectives are best achieved by imposing one clearly identified period of time within the sentence and labelling it as the 'extra' time the offender must serve because he was abusive in a domestic setting triggering the statutory aggravator.

[82] It is important to note that the deterrent penalty imposed for that specific purpose should not then be diluted by any credit given in relation to a plea. The punishment for committing domestic abuse should be whatever is judged necessary on the facts of the individual case, but once it is calculated it should remain intact and not be diluted by plea reductions.

[83] This approach will also make it easier for judges to comply with their new recording obligations under section 15(4) of the 2021 Act, especially the obligation in section 15(4)(d).