

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

Delivered: 23/11/07

IN THE CROWN COURT SITTING IN NORTHERN IRELAND

THE QUEEN

-v-

GERARD McKENNA

TREACY J

[1] Gerard McKenna you have pleaded guilty to the manslaughter of Sean Patrick Mimmagh on 17 July 2005.

[2] The court was furnished with a three page document, which Mr Mateer QC informed the court was an agreed document, setting out in some detail the circumstances of the offence. This document was also opened in full and accordingly I propose only to summarise the material facts.

[3] On 17 July 2005 in the early hours of the morning some time around 2.15 am, Sean Patrick Mimmagh, aged 21, was knocked down and killed by a Vauxhall car driven by the accused at the car park of the Matrix nightclub at the Glengannon Hotel, near Dungannon.

[4] The defendant and his passenger and friend Paul McKenna had arrived by car at the hotel some 15 minutes or so before the fatal collision which would therefore have placed their time of arrival some time around 2.00 am. Both had been drinking in a number of licensed premises prior to their arrival. They were unsuccessful in gaining admittance to the Matrix nightclub which by that stage had closed.

[5] They then approached a small group of people who were standing in the car park in an area usually used by people waiting for taxis. Two of the proprietors of the Matrix club, Mr Graham and Mr Rowan, whilst leaving the car park saw a number of girls and young men. Close by were two other young men both wearing glasses one of whom had spoken to Mr Graham earlier. These two appear to have been the accused and his friend Paul McKenna. A short time later whilst returning by car on the public road along

the side of the car park Mr Graham and Mr Rowan observed a scuffle involving some of the people they had earlier seen on their way out. They drove round to the main driveway of the hotel/nightclub complex and stopped the car to intervene. From this vantage point Mr Rowan could see three persons involved in kicking a person on the ground - this was Paul McKenna being kicked. He shouted at the attackers and they stopped and the men involved walked away.

[6] Mr Rowan satisfied himself that Paul McKenna was all right. He then got back into his car intending to drive off. It was at this point that the accused's car was observed coming from the main car park at speed. It crossed the thin grass central reservation dividing the Matrix car park from the main driveway where he had been parked. He could see it stop beside Paul McKenna - who had been lying on the ground having been kicked.

[7] Mr Ferry, a taxi driver who had been booked to take Mr Mimmagh and his friends home, arrived roughly around the same time as Mr Rowan and Mr Graham's car pulled into the hotel driveway. His evidence indicates that after the fighting came to an end - that is after Mr Rowan's intervention - all of his passengers had got into the taxi except for Mr Mimmagh. He looked across to the car park and could see Paul McKenna looking for his glasses with some girls appearing to help him.

[8] He also describes the defendant's car appearing from the area where it had been parked in front of the main hotel. He describes the car "taking off" with wheels spinning and driving very hard around the car park. He heard the accused - the driver - shout to one of the girls to "fuck off" and heard the beginning of a sentence beginning with the words "I am going to get". The defendant had driven round to his friend Paul McKenna who then got into the vehicle.

[9] Another witness - one of the girls heard "I am going get one of these bastards" and still another heard "See them bastards, I'm going to get them" or "I'm going to get them bastards".

[10] The deceased Sean Mimmagh was the only one of the party of four due to leave in Mr Ferry's taxi who had not reached it by this stage. The taxi man could see the deceased begin to walk across from the Matrix in the general direction of his taxi. As Sean Mimmagh made his way across the car park the accused at the same time left the area from the rear of the Matrix travelling in a route towards Sean Mimmagh.

[11] Part of the incident was captured on the CCTV from the Matrix complex. An enhanced image produced by an expert video enhancer reproduces the start position of the car from where it is seen in one of the cameras, through the collision scene as indicated by the bloodstaining left at

the scene and on to the exit point where it left the car park. This confirms that the route taken was a deviation from the direct line of travel to the exit point – initially to the driver’s right and then to the left.

[12] The evidence indicates that the deceased jumped to his right on the approach of the defendant but a collision occurred such that he was knocked to the ground, resulting in the front driver’s wheel passing over the deceased’s head causing injuries from which he died very rapidly.

[13] The accused continued to drive on and left the scene.

[14] The defendant’s car was reported seen crashed into the gable wall of a barn about three miles away. Martin McKenna the defendant’s cousin who lives locally contacted police after the later press release had gone out to say he had towed the defendant’s car from the crash site to a shed. He also said that the defendant had been dropped off in Dungannon intending to go to Athlone for motor bike racing the following day.

[15] The accused returned to Northern Ireland after he learned that the deceased had in fact died and came voluntarily to the police. On being charged he stated “I didn’t mean to kill anybody”.

[16] During his interviews the accused claimed he had drunk the equivalent of 4 or 4½ pints over the course of the evening at a number of licensed premises, but that he was at the relevant time nevertheless fit to drive. When the row developed and his friend was being attacked on the ground he maintained that he was scared and he decided to get the car to get his friend Paul and he drove off. He maintained that he didn’t realise he had hit or driven over anyone. I must say I find that aspect of his account highly improbable. He stated that he was in a panic. He was asked about the details just before he drove off and he said that he was aware that the girls were trying to help Paul and that at that time the boys who had attacked him were no longer beside Paul. He told police he had driven along the main road in the direction of Ballygally but turned off towards Eglish then Greystone and then crashed the car. He then got a lift from a passing motorist to his cousin’s house and his cousin pulled the car out of the ditch for him and towed it to his garage. He then told police that rather than go home he decided to go to see motor bike racing so he got dropped off in Dungannon.

[17] He was able to give quite a detailed account of his movements and of the incident leading to the scuffle although thereafter his powers of recollection mystifyingly fade. He remembered driving over the kerb to get into the Matrix car park – the car was banging going over it – he picked up Paul and drove he thought in first gear in a high rev. He said that when he took off he was spinning as hard as he could later telling police that he had 3 or 4 years experience of stock car racing. He told the police that he didn’t

know he had hit anyone until the next day when he got a phone call from a friend around 12 or 1 pm.

[18] He initially denied saying he was going to get anyone but a little later in the interview said that he wasn't sure about that, he didn't know whether he did say that or not. It is however now accepted that he did express such hostility.

[19] After the Crown had opened the case I enquired as to whether there was a personal family statement from the deceased's family. It appears that they were unaware that they had an opportunity to contribute in this fashion. When informed they indicated that they wished to avail of the opportunity to make a personal statement. It was agreed that this should be shown to the defence in advance and then (in the absence of any valid objection) to the court. I enquired of the defence as to whether in those circumstances they wished to make their plea then or to defer it until after the personal statement had been received and was informed by Mr Gallagher QC on behalf of the defendant that they preferred to defer the plea until the statement was available. Everyone agreed that this was an appropriate course to adopt.

[20] When I was informed that the family wanted to make a personal statement it was agreed that it might also be helpful for the family to be provided with the many references that had been furnished on the accused's behalf as well as the pre-sentence report. This course commended itself because whilst it would not lessen the grief of the family they would at least have seen some of the material that the court would take into account in sentencing the accused and might therefore have a fuller appreciation of the accused and of the sentence.

[21] I also considered that, in the absence of some medical or other cogent reason against it that the personal statement prepared by the family should be shown to the accused. This I understand has been done.

[22] The personal statement was in the following terms:

"It's hard to write on paper what Sean meant to each of us, he was loved so much by all the family. He was a mummy's boy, her only son and our only brother, He would have went out with friends but was a homebird at heart. He was quiet, modest and easy going and would never get in a panic. Me and Sean were wild close we were always together. I loved him so much. We were like best friends, We always went out together. I didn't go out with him that night but was waiting for him to come home to hear all the craic of his night out but he never made it back. The

last time we seen Sean he was in great form and was wearing the new clothes he had bought earlier that day. That was only the second time Sean had been to the Glengannon. Sean died on mummy's birthday. He always went into mummy's bedroom when he came in at night it didn't matter what time it was to get a cigarette out of her bag, mum used to give off and tell him to buy his own but she always gave them to him, and now that he's gone it's one of the things she misses the most. He used to say to mum "any money ma" and she would have slipped him money and tried to hide it from Catherine and me, mum spoiled Sean because he was the only boy in the house and Catherine and I would have nagged her about him being spoiled but looking back now we both spoiled him too. We will never get over loosing Sean, during the day it is easier to get on with things but nighttimes are hardest. That's when we think of things the most, mum is on sleeping tablets as she cant sleep at night. She's also on antidepressants since it happened. I would often dream about Sean and wake up and expect him to be there then it just hits you all over again that he's not coming home. It's coming up to Christmas and we dread it, Christmas is a time for family and our family is empty without Sean. Sean was so young, only 21 he had his whole life in front of him, so full of life. Sean will never have the chance to experience life, having a girlfriend, getting married and having children. His life was cut so short so needlessly and pointlessly by someone else's doing. Sean worked with his dad as a stonemason after he left school, he went on to train as a plasterer., he was doing this up until he died. He played hurling when he was at school. He played for his county team Tyrone, he was planning on going back to hurling but never got the chance. He used to love fishing as well, he would head out for the day on his own and fish all day. Our lives will never be the same without Sean, it's hard to accept what's happened, we still expect to see him coming through the door. It's hard to move on, we've been waiting two and a half years for justice to be done for Sean. Sean suffered a horrible death. We hope and pray that he's at peace now and that justice will be done.

Written by Natalie Mimmagh age 21 on behalf of
Teresa Mimmagh (Sean's mummy) and Catherine
Mimmagh (Sean's sister)"

Basis of plea

[23] An agreed document setting out the basis of the defendant's plea to manslaughter was handed into court and it was in the following terms:

"OMAGH CROWN COURT

R v GERARD PATRICK MCKENNA

BASIS OF PLEA TO MANSLAUGHTER

1. The Defendant pleads guilty to manslaughter on the basis of committing an unlawful act causing the deceased's death (unlawful act manslaughter, otherwise known as dangerous act manslaughter).
2. The Defendant did not intend to kill the deceased nor did he intend to cause the deceased grievous bodily harm.
3. The mens rea necessary for the commission of unlawful act manslaughter is recklessness on the part of the Defendant in subjecting the deceased to the risk of harm or putting him in fear of harm.

VENNA (1970) QB421
SPRATT (1991) 1 WLR 1073
CHURCH (1960) 1 QB 59
DPP v NEWBURY (1977) AC 500
GRAY v BARR(1971)2QB 554"

[24] In the agreed summary of the facts the prosecution outline stated that it seemed clear from the available evidence that the accused was driving towards the deceased - whether to do him some harm short of grievously bodily harm or merely to put him in fear of harm was not capable of being determined precisely.

[25] The accused was originally charged with murder and was arraigned on the 20 April 2007 and pleaded not guilty. On 4 October 2007 the defence had the case listed before me for the purposes of re-arraignment upon which

date the defendant entered a plea of guilty to manslaughter which was accepted by the prosecution.

[26] The defendant is a 34 year old single man with no relevant record. He has a virtually unbroken record of good employment since he left school. According to the pre-sentence report he left school when he was aged 16 on a Friday and started work the following Monday with the Tyrone Crystal Company where he remained for the next 15 years when he was made redundant. He has never been unemployed for any significant length of time. He is currently employed as a steel erector with the locally based Eurofab Engineering Structures Company. He has worked there as a steel erector for the last 3½ years. He is undoubtedly a hardworking and conscientious employee. Counsel pointed out that he leads a fairly withdrawn social existence and is in reality quite isolated. This appears to be borne out by the expert reports in the case and I note that the consultant clinical psychologist Professor Davidson stated that he had got the impression that the defendant was “a rather unworldly person who was not particularly communicative and sociable [and] that he was generally calm, quiet and introverted”.

[27] It is obvious from the many testimonials which were handed into court supplemented by the oral testimony of Mr Sean Burns that the defendant was widely respected by those who knew him and regarded as helpful to other people.

[28] It was submitted on his behalf that the defendant has shown great remorse and that the death of the deceased has affected him greatly. Those submissions appear to be in large measure borne out by the contents of Professor Davidson’s report and the pre-sentence report.

[29] It was submitted that the defendant is not aggressive by nature. This is also borne out by the fact that he is a 34 year old man with no relevant convictions. It is also a feature that emerges consistently from the reports and testimonials that have been furnished. It may also be reflected in the fact that when his friend was being attacked on the ground he did not physically intervene. That behaviour also lends credibility to his claim during interview that he was in panic and fear at the relevant time. The pre-sentence report indicates the view of the experienced probation officer that the defendant does not present any measurable risk of harm to the general public and that the likelihood of further re-offending has been assessed as low. The pre sentence report also points out that the defendant is struggling to come to terms with his involvement in this death and expresses the view that there is no doubt that alcohol, a sense of fear and panic were significant factors in the defendant’s actions on 17 July 2005.

[30] Nonetheless there are a number of aggravating features in this case. There is the fact that he used his car as a weapon to frighten and that he drove

in a manner which he should have anticipated was liable to cause injury and fright and in fact collided with Sean Mimmagh as a result of which a young life has been needlessly lost. I also considered an aggravating feature that there was alcohol involved and that the accused demonstrated and acted with hostility.

[31] Whilst of course I take into account all the mitigating factors which I have already set out I also take into account in his favour his plea of guilty. Nonetheless I do not accept that he is entitled to full discount in respect of his plea because it was very late in coming. In this respect I refer to the observations of Kerr LCJ in Attorney General's Reference (No. 1 of 2006) McDonald and Others [2006 NICA 4 at paragraph 19].

[32] The court was referred to a number of English Court of Appeal decisions involving manslaughter arising out of the use of a motor vehicle. The sentence that was regarded as appropriate in each of the three cases referred to was one of six years (see R v Gault (1995) 16 Cr. App. R. (S) 1013; R v Ripley [1997] 1 Cr. App. R. (S) 19 and Attorney General's Reference (No. 64 of 1999) (David Little) [2002] 1 Cr. App. R. (S) 94 (at 409). The defence also referred me to a number of authorities including the sentencing remarks of McCollum LJ in the case of R v McKeown. I consider that the case of McKeown was wholly exceptional because it was concerned amongst other things with a mother who had considerable family responsibilities. Moreover it does not appear that the line of English authorities to which this court was referred were brought to the attention of the court in that case.

[33] Nothing that this court says or does can bring back young Sean Mimmagh but the series of English Court of Appeal decisions does provide the court with a sentencing framework. The sentence I intend to impose is consistent with those imposed in other cases in which people have been unlawfully killed in circumstances involving the use of a motor vehicle. The sentence in this case must reflect the fact that the Prosecution accepted that the defendant did not intend to kill the deceased nor did he intend to cause the deceased grievous bodily harm. I trust that those who report the outcome of this case will draw particular attention to the comments I have just made. In cases involving unlawful killing arising from the use of a vehicle the English Court of Appeal has ruled in 3 separate cases that 6 years imprisonment is an appropriate sentence.

[34] The probation officer has suggested that the court consider the imposition of a period of probation supervision in the form of a custody probation order. He has also confirmed that the defendant has been assessed as suitable and that whilst undergoing post custody supervision the areas identified in the report would be addressed. The defendant has also indicated a willingness to engage in such an order and the strict enforcement procedure for such an order has been fully explained to the defendant.

[35] Having regard to the background of this case and on the understanding that the defendant consents to such an order being made I am prepared to accept the recommendation of the Probation Officer and to impose a period of probation supervision in the form of a custody probation order. The overall sentence of imprisonment which I would have imposed in this case would have been one of six years. If the defendant consents to custody probation I will impose four years custody followed by two years probation.