Neutral Citation No. [2010] NICC 34 | *Ref:* **McCL7939**

Judgment: approved by the Court for handing down | *Delivered:* **23/09/10**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

THE QUEEN

–v-

PAULINE SHAW and COLIN FRANCIS SHAW

_____

I INTRODUCTION

McCLOSKEY J

[1] The first Defendant, Pauline Shaw, is charged with murdering Stephen Shaw ("*the deceased*"), her husband, on 8th March 2009. She initially maintained a plea of not guilty. Shortly before the commencement of her trial, she changed her plea to one of not guilty to murder but guilty of manslaughter on the ground of diminished responsibility. This plea was acceptable to the Crown and, having regard to the expert opinions available (*infra*), also seemed appropriate to the court. The second Defendant, Colin Francis Shaw, is the brother of the deceased. Both Defendants have pleaded guilty to the separate, though inter-related, count of perverting the course of justice, the particulars being –

> "*… that they indicated to both police officers and paramedics that* [the deceased] *had been stabbed the previous night by two male persons in the area of the Woodstock Road*".

Both Defendants later admitted to police that this was a mendacious account.

[2] The Defendants are aged forty-seven and forty-five years respectively. The outline of the prosecution case to the court, which was not contentious, was to the following effect. The deceased died at some unspecified time during the night of 9th/10th March 2009. The cause of death was a single stab wound to the left mid thoracic area, inflicted by a kitchen knife, which penetrated two layers of clothing. During her seventh interview, Mrs. Shaw admitted that she had

killed the deceased by stabbing. She claimed that she had not intended to kill him and had acted in a rage, having been subjected to considerable physical and verbal abuse by the deceased, both recent and historical. Prior to making this admission, Mrs. Shaw had canvassed the untruthful story that the deceased had returned home in a wounded condition the previous evening, having been the victim of an attack elsewhere. The second Defendant, Colin Shaw, had no involvement in the attack which precipitated the death. However, in tandem with Mrs. Shaw, he offered the same dishonest story about how the death had occurred, thereby concealing the true facts.

[3] According to the autopsy report:

> "*Death was due to a stab wound of the chest …* [which] *had passed between two ribs into the chest cavity, cutting the small blood vessels that run along the lower border of one of the ribs. This had resulted in heavy bleeding into the chest cavity, which caused death. The stab would have penetrated to a depth of 5.5 centimetres (about 2 inches) …*
>
> *It is likely that the rate of bleeding was relatively slow and it is possible that death may have been delayed for an hour or so …*
>
> *Had medical and surgical attention been promptly been sought it is likely that this injury could have been survived*".

The report also describes a second stabbing injury:

> "*There was a second stab wound on the left side of the chest. This extended for only a short distance into fat and muscle under the skin and on its own is unlikely to have been life threatening*".

The report contains the following further comment:

> "*If the weapon had a sharp tip it would have required no more than a mild to moderate degree of force to inflict the stab wounds*".

Based on toxicological analysis, Dr. Bentley also comments that the deceased may have been mildly intoxicated due to alcohol consumption.

[4] As appears from the foregoing, neither Defendant summoned any medical assistance for the deceased. This notwithstanding the indications in the evidence, in particular the blood stained upper body clothing and what would have been visible following its removal, that the main injury was of some

gravity. The Defendants claimed that they were unaware of the seriousness of the injuries and suggested that the deceased had discouraged them from calling an ambulance. According to the Autopsy Report, there was no evidence of any defensive action by the deceased.

II REPORTS

Pauline Shaw

[5] Dr. Kennedy, a consultant forensic psychiatrist, examined this Defendant on behalf of the prosecution. When thus interviewed, this Defendant recounted, *inter alia*, her relationship with the deceased, asserting:

> "*Mrs. Shaw said that the relationship with Stephen Shaw was characterised by violence and that they would 'argue and fight. He has blattered me many times. I would stand up for myself and hit him back.' **She said that she had used a knife on him before ...** she had 'got a tiny knife and went wee jabs in the head to make him let go of her'. She said the police were involved on that occasion but he dropped the charges*".

The significance of the emphasized excerpt will become apparent presently. Mrs. Shaw also recounted her extensive consumption of alcohol and prescribed antidepressant medication, spanning a period of many years.

Dr. Kennedy expresses the following opinion:

> "*At the time of the offence charged, I believe that Mrs. Shaw was suffering from an abnormality of mind brought about by her underlying long term personality disorder (inherent cause) and dysthymia (disease). It is apparent from her history that when under stress she becomes much more irritable, with less tolerance to frustration and reduced ability to control herself. Whether or not this abnormality of mind substantially impaired her mental responsibility is a matter for the jury. My own view is that it would have impaired her substantially. The alcohol taken by her on top of prescribed medication has been a longstanding pattern of behaviour. She is likely to have been further disinhibited by it, but alcohol is not the sole driver of the behaviour*".

[6] Focussing specifically on Mrs. Shaw's capacity to form a certain intention, Dr. Kennedy continues:

> "*From the records available it is apparent that Mrs. Shaw has had a long term problem with her anger control …*
>
> *She kept the knife at her side and stabbed Mr. Shaw in the back. The knife has since disappeared. Mrs. Shaw was not so drunk as to be out of touch with her environment and the situation. I believe she would have had capacity to form the specific intent at the time*".

In the span of two reports, Dr. Kennedy also analyses the risk of Mrs. Shaw reoffending. She comments that the offender did not fully disclose her history, has poor insight, does not assume full responsibility for her behaviour, fails to identify relevant risk factors, is unable to manage stress, has an entirely self-centred perspective, suffers from poorly controlled anger, does not engage well with services and has expressed no concern for her actions. According to Dr. Kennedy, these "*… are all areas which need to be addressed before she could be considered safe to live again in the community unsupervised*". In a second commentary, Dr. Kennedy opines that this offender is "***at moderate risk of repeat violence generally***", categorising as "*high*" the risk of reoffending in the context of conflict with a partner. She continues:

> "*The most likely scenario would be a repeat of the past i.e. stabbing a partner in the context of regular drinking, low mood, poor stress management and a domestic altercation. Potentially any harm caused could be life threatening …*
>
> *Nevertheless it is not possible at this time to estimate when her risk might have reduced sufficiently to be considered manageable in the community. Her mental health, personality and addiction problems are chronic; her intellectual functioning will always be limited.* ***In conclusion, risk assessment suggests that Mrs. Shaw shares characteristics that place her in a group at moderate risk of serious harm to others. The duration of the risk cannot be determined at point of sentencing***".

[Emphasis added].

[7] I have also considered two reports prepared on behalf of this Defendant by Dr. Bownes, consultant forensic psychiatrist. In the first, he describes her as "*… an individual of low intellectual ability with poor personal resources and chronic mental health problems*". He assessed her as suffering from significant personality disturbance and a chronic mood disorder (dysthymia). With specific reference to her offending, Dr. Bownes observes:

> "*… Ms Shaw's capacity to exercise self-control, judgment and foresight effectively and appropriately regarding and anticipating the consequences of her actions in the circumstances described is likely to have been significantly impaired by effects of a chronic mood disorder (dysthymia), underlying personality disorder and low intellectual ability*".

In a further commentary, Dr. Bownes states:

> "*… in my opinion, Ms Shaw was suffering from an 'abnormality of mind' at the time of the index incident arising from inherent personality disorder, effects of a chronic mood disorder (dysthymia) and low average intellectual ability and that would have substantially impaired Ms Shaw's capacity to exercise self-control, judgment and foresight effectively and appropriately regarding anticipating the consequences of her actions at the material time*".

It is evident that Dr. Bownes considered Dr. Kennedy's views and did not dissent from them, as the following passage confirms:

> "*As Dr. Kennedy has noted, the context of previous violent incidents is considered as particularly important in assessing future violent risk in women and based on the clinical findings and the information presently available to me,* ***I would consider the risk that Ms Shaw would repeat previous maladaptive patterns of behaviour in the domestic and relationship setting as currently significant and that escalation to further harmful behaviour could not be discounted***."

[My emphasis].

[8] The assessments and opinions contained in the reports of Dr. Kennedy and Dr. Bownes seem to me consistent with the intellectual assessment provided by Mr. McClelland, educational psychologist, who advises:

> "*Ms Pauline Shaw is a middle aged woman of a somewhat restricted level of cognitive ability … at the top of the category designated as 'extremely low' with an IQ at this level, in normal circumstances Ms Shaw should be able to differentiate between right and wrong. In situations where she may be the subject of emotional upset, chemical substances or simply an inability to understand precisely what may be proceeding, then Ms Shaw's rather low IQ*

> *could lead to a situation where a more intelligent individual may be able to understand what may be happening and to judge what may be the most sensible and acceptable course of action to take."*.

I have also considered the commendably detailed and balanced pre-sentence report prepared by Ms Vaughan, Probation Officer. This highlights, *inter alia*, this Defendant's poor insight and limited appreciation of her weaknesses and vulnerabilities. Ms Vaughan states:

> "*Ms Shaw's outlook and lack of thought regarding her eventual release is* [sic] *simplistic and unrealistic …*
>
> *These characteristics* [poor insight and limited capacity to reflect on past actions] *were evident during interview with myself and appeared to hinder her capacity for future risk management planning*".

Ms Vaughan continues:

> "*Overall throughout interview Ms Shaw presented as devoid of emotion or regret. Whilst she did state she was sorry for her actions she remained detached from the events and appeared more concerned about herself and her length of sentence. Pauline Shaw continually justified her behaviour. During all interviews the Defendant focussed on other people's behaviour and how they provoked responses from her.*"

Ms Vaughan addresses the discrete issue of risk of future serious harm in the following terms:

> "*Whilst the Defendant's risk of harm to the general public may not be significantly high Ms Shaw has been assessed as posing a risk of serious harm in the context of intimate relationships where alcohol is a factor …*
>
> *Her low frustration levels, limited insight, impulsivity, dependency in relationships and lack of consequential thinking, combined with her substance misuse, may increase the likelihood of harm in future relationships. This is compounded by the Defendant's limited intellectual functioning and her capacity for change…*
>
> *It is clear that the likelihood of Ms Shaw reverting to past coping mechanisms and destructive relationships is high …*".

There is a striking consonance in how all three professionals have evaluated the question of this Defendant's possible future reoffending. I have also considered a brief written communication from the prison, to the effect that this Defendant has complied with her sentence plan, is the beneficiary of the enhanced regime, has committed no offences against prison discipline and has failed no voluntary drug tests.

Colin Shaw

[9] Mr. McClelland's intellectual assessment of this offender is framed in the following terms:

> "*Mr. Colin Shaw is a middle aged man of a most reasonable and usable level of cognitive ability and, to a higher degree, of literacy …*
>
> *I would expect Mr. Shaw to have firm ability to differentiate right from wrong*".

He opines that this offender would benefit from probationary assistance. It would appear that Mr. Shaw's life has been punctuated by negative experiences and general instability. Some elaboration of these factors is found in the pre-sentence report. This contains an assessment that Mr. Shaw has inadequate insight into the seriousness of his offending and fails to acknowledge his personal responsibility. He is considered to pose a high likelihood of reoffending, though not presenting a risk of serious harm to others. The final sentence of the report is telling:

> "*Whilst it is evident that Mr. Shaw needs to address issues around his alcohol use, he has stated clearly that he is not willing to do this*".

III CHAPTER 3 OF THE CRIMINAL JUSTICE (NORTHERN IRELAND) ORDER 2008

[10] The provisions of Chapter 3 of the Criminal Justice (Northern Ireland) Order 2008 ("*the 2008 Order*") fall to be considered in relation to the offender Pauline Shaw only, by virtue of the offence of which she has been convicted. Chapter 3 contains a series of provisions arranged under the rubric "Dangerous Offenders" and is linked to Chapter 4, "Release on Licence". The terminology of "*specified offence*" and "*serious offence*" recurs throughout these provisions. These terms derive their meaning from Article 12, which provides:

> "***12.*** *– (1) An offence is a "specified offence" for the purposes of this Chapter if it is a specified violent offence or a specified sexual offence.*

(2) A specified offence is a "serious offence" for the purposes of this Chapter if it is an offence specified in Schedule 1.
(3) In this Chapter –
"life sentence" means –
(a) a sentence of imprisonment for life; or
(b) a sentence of detention under Article 45(1) of the Criminal Justice (Children)(Northern Ireland) Order 1998 (NI 9);
"specified violent offence" means an offence specified in Part 1 of Schedule 2;
"specified sexual offence" means an offence specified in Part 2 of that Schedule.
(4) References in this Chapter to conviction on indictment include references to a finding of guilt under Article 17 of the Criminal Justice (Children)(Northern Ireland) Order 1998 (NI 9)."

Article 13 is concerned with life sentences and a new method of custodial disposal, the so-called "indeterminate custodial sentence" (now generally known by the abbreviation "*IPP*"). Article 13 provides:

"13. *– (1) This Article applies where –*
(a) a person is convicted on indictment of a serious offence committed after the commencement of this Article; and
(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
(2) If –
(a) the offence is one in respect of which the offender would apart from this Article be liable to a life sentence, an
(b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence,
the court shall impose a life sentence.
(3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall –
(a) impose an indeterminate custodial sentence; and
(b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.
(4) An indeterminate custodial sentence is –

(a) where the offender is aged 21 or over, a sentence of imprisonment for an indeterminate period,
(b) where the offender is under the age of 21, a sentence of detention for an indeterminate period at such place and under such conditions as the Secretary of State may direct,
subject (in either case) to the provisions of this Part as to the release of prisoners and duration of licences.
(5) A person detained pursuant to the directions of the Secretary of State under paragraph (4)(b) shall while so detained be in legal custody.
(6) An offence the sentence for which is imposed under this Article is not to be regarded as an offence the sentence for which is fixed by law.
(7) Remission shall not be granted under prison rules to the offender in respect of a sentence imposed under this Article."

A second new method of custodial disposal, labelled the "*extended custodial sentence*", is regulated by Article 14, which provides:

"***14.*** *– (1) This Article applies where –*
(a) a person is convicted on indictment of a specified offence committed after the commencement of this Article; and
(b) the court is of the opinion –
(i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.
(2) The court shall impose on the offender an extended custodial sentence.
(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of
(a) the appropriate custodial term; and
(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.
(4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which –
(a) is the term that would (apart from this Article) be imposed in compliance with Article 7 (length of custodial sentences); or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months.
(5) Where the offender is under the age of 21, an extended custodial sentence is a sentence of detention at such place and under such conditions as the Secretary of State may direct for a term which is equal to the aggregate of –
(a) the appropriate custodial term; and
(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.
(6) In paragraph (5)(a) "the appropriate custodial term" means such term (not exceeding the maximum term) as the court considers appropriate, not being a term of less than 12 months.
(7) A person detained pursuant to the directions of the Secretary of State under paragraph (5) shall while so detained be in legal custody.
(8) The extension period under paragraph (3)(b) or (5)(b) shall not exceed –
(a) five years in the case of a specified violent offence; and
(b) eight years in the case of a specified sexual offence.
(9) The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term.
(10) In this Article "maximum term" means the maximum term of imprisonment that is, apart from Article 13, permitted for the offence where the offender is aged 21 or over.
(11) A court which imposes an extended custodial sentence shall not make an order under section 18 of the Treatment of Offenders Act (Northern Ireland) 1968 (c. 29)(suspended sentences) in relation to that sentence.
(12) Remission shall not be granted under prison rules to the offender in respect of a sentence imposed under this Article."

Finally, under the heading "The Assessment of Dangerousness", Article 15 provides:

***"15.** – (1) This Article applies where –*
(a) a person has been convicted on indictment of a specified offence; an
(b) it falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences.

(2) The court in making the assessment referred to in paragraph (1)(b) –
(a) shall take into account all such information as is available to it about the nature and circumstances of the offence;
(b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and
(c) may take into account any information about the offender which is before it."

[11] It is clear that Chapter 3 establishes a hierarchy of sentencing mechanisms, all available to the court in respect of "*dangerous*" offenders. The hierarchy is constituted by, in descending order of precedence, the life sentence, the IPP and the extended custodial sentence. Where the court forms the requisite opinion, it *must* invoke the appropriate sentencing mechanism accordingly: see Article 13(2), Article 13(3) and Article 14(2). The injunctive "*shall*" in all of these provisions presumptively imports a mandatory requirement and deprives the court of any discretion. Where the court does *not* form the opinion specified in Article 13(2)(b) required for the imposition of a life sentence, it must give consideration to each of the other two sentencing devices. Article 13(3) behoves the sentencing court to consider the regime for extended custodial sentences, which is contained in Article 14. There are distinctions between the two regimes. In summary, they differ as regards the future management and supervision of the sentenced prisoner. In this key respect, the Article 13 mechanism is more intrusive and Draconian than its Article 14 counterpart, placing even greater emphasis on the future protection of the public

[12] The position adopted by the Crown regarding the Defendant Pauline Shaw was that while a discretionary life sentence is not warranted, the court should impose an IPP, with a notional starting point of 11/12 years [as this concept is explained later in this judgment]. As the 2008 Order itself and the reported English decisions [infra] make clear, one of the effects of the new legislation is that the discretionary life sentence is now reserved to a small category of exceptional cases. This reflects the punitive and intrusive nature of the IPP, which has much in common with the discretionary life sentence. Concurring with the prosecution stance, I conclude that the latter disposal is not warranted in the present case, as I am not of the opinion specified in Article 13(2) of the 2008 Order.

[13] Bearing in mind the distinction highlighted in paragraph [11] above, I have made the assessment required by Article 13(3), taking into account – as required by Article 15(2) – all of the information available to the court, which is derived largely from the committal papers and the experts' assessments summarised in paragraphs [5] – [8] above. Having done so, I conclude that the Article 14 regime of extended sentences would not be adequate for the purpose of protecting the public from serious future harm perpetrated by this Defendant

in the commission of further specified offences. I consider that the greater level of protection which the public will enjoy by the imposition of the Article 13 regime is clearly warranted in the particular circumstances of this case. I base this view on the various experts' measurement of such risk, the court's reluctance in the present context to engage in the kind of forecasting which is required by Article 14 (but to a lesser extent by Article 13) and the current imponderables relating to this offender's ability to address the factors conducive to reoffending. With regard to the future, I consider that the "*specified offences*" in play include unlawful killing and several of the offences against the person listed in paragraph 6 of Schedule 2, Part 1. Accordingly, an IPP is appropriate.

[14] Having thus concluded, the next question to be addressed is how to give effect to this determination. The provisions arranged in Chapter 3 of the 2008 Order are new to Northern Ireland. They have no antecedents in this jurisdiction and, so far as I am aware, have not yet been considered or construed in any reported case. They came into operation on 15th May 2008 (per SR 2008 No. 217) and, by the express terms of Article 13(1)(a) and Article 14(1)(a), the new penal devices of an IPP and an extended custodial sentence apply to limited categories of convictions subsequent to the aforementioned commencement date. These new provisions apply to the offender Pauline Shaw, as manslaughter ranks as a "*serious*" offence and her conviction postdates the commencement date.

[15] Comparable, though not identical, statutory provisions have existed in England and Wales since 2003, introduced initially by Sections 224-229 of the Criminal Justice Act 2003. Section 225, as originally enacted, provided:

> "*Life sentence or imprisonment for public protection for serious offences*
>
> *(1)This section applies where –*
>
> *(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and*
>
> *(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.*
>
> *(2) If –*
>
> *(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and*

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,

the court must impose a sentence of imprisonment for life.

(3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection.

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences.

(5) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law."

The original Section 225 was amended subsequently and it now provides (effective from 14th July 2008):

*"**225 Life sentence or imprisonment for public protection for serious offences***

(1) This section applies where –

(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and

(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(2) If –

(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life.

(3 In a case not falling within subsection (2), the court may impose a sentence of imprisonment for public protection if the condition in subsection (3A) or the condition in subsection (3B) is met.

(3A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.

(3B) The condition in this subsection is that the notional minimum term is at least two years.

(3C) The notional minimum term is the part of the sentence that the court would specify under section 82A(2) of the Sentencing Act (determination of tariff) if it imposed a sentence of imprisonment for public protection but was required to disregard the matter mentioned in section 82A(3)(b) of that Act (crediting periods of remand).]

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences.

(5) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law."

[16] Consideration of the two English statutory models which have existed successively since 2003, coupled with some reflection on relevant decisions of the English Court of Appeal, seems to me appropriate, with a view to ascertaining whether they provide reliable guidance to the construction and application of the Northern Ireland statutory provisions. In embarking upon this exercise, I would highlight two judicial pronouncements in particular. First, in ***The Queen –v- Lang and Others*** [2005] EWCA. Crim 2864, the Vice President, in considering whether Parliament had intended to adopt the Court of Appeal's criteria for the imposition of a statutory life sentence promulgated in ***The Queen –v- Chapman*** [2000] 1 Cr. App. R(S) 77, referred to the well established canon of statutory interpretation that "*… Parliament is presumed to know the law …*": see

paragraph [8]. More recently, and to like effect, in ***The Queen –v- C and Others*** [2008] EWCA. Crim 2790, the Lord Chief Justice stated, in paragraph [13]:

> "*The amending legislation in the 2008 Act was enacted in the context of existing jurisprudence. If any change of practice had been intended, some indication to that effect would have been included in the amending statute. There is none.*"

I consider that the two pre-existing English statutory models and the Court of Appeal decisions which they have generated form part of the legislative context of Chapter 3 of the 2008 Order and should be evaluated accordingly, albeit with an element of caution.

[17] The essential philosophy of the IPP sentencing device is expounded in ***The Queen –v- Johnson and Others*** [2007] 1 CAR(S) 112, where the Lord Chief Justice stated that it –

> "*… is concerned with **future** risks and public protection. Although punitive in its effect, with far reaching consequences for the offender on whom it is imposed, strictly speaking, it does not represent punishment for past offending … when the information before the court is evaluated, for the purposes of this sentence, the decision is directed not to the past, but to the future, and the future protection of the public*".

In ***The Queen –v- C and Others*** [*supra*], the Lord Chief Justice emphasized that these principles remain unaffected by the statutory amendments in England: see paragraph [7]. Both the underlying philosophy and the calculation methodology feature in another recent English Court of Appeal decision, ***The Queen –v- Wilkinson and Others*** [2009] EWCA. Crim 1925:

> "*[16] … It is well understood that an IPP has a great deal in common with a life sentence. Its justification is the protection of the public. It is indeterminate. Release depends on the judgment of the Parole Board as to the risk which the prisoner presents.* ***The court must fix a minimum term before which release cannot be considered, calculated by reference to the hypothetical determinate term which would have been called for if the indeterminate sentence were not being passed.*** *All those features it shares with a discretionary life sentence …*
>
> *Both sentences therefore address future dangerousness and public protection from the predictive danger posed by the offender.*"

[My emphasis].

[18] In ***Lang***, the English Court of Appeal, in considering the equivalent English statutory provisions, provided the following guidance:

> *"**[10]** The procedure for fixing a minimum term in relation to these new sentences should be as before the 2003 Act in relation to discretionary and automatic life sentences. The court, taking into account the seriousness of the offence or the combination of the offence and one or more offences associated with it, must identify the notional determinate sentence which would have been imposed if a life sentence or imprisonment for public protection had not be required. This should not exceed the maximum permitted for the offence. Half that term should normally then be taken and from this should be deducted time spent in custody or on remand (see s 82A of the 2000 Act as set out in amended form in Archbold,* Criminal Pleading, Evidence and Practice *(57th edn, 2005) p 682–683 (para 5-310) and s 240 of the 2003 Act). There will continue to be exceptional cases where more than half may be an appropriate (see* R v Szczerba *[2002] EWCA Crim 440 at [31]–[34], [2002] 2 Cr App R (S) 387 at [31]–[34]). As previously, when the offender has served the period specified he may require the Secretary of State to refer his case to the Parole Board who may direct his release if 'satisfied that it is no longer necessary for the protection of the public' that he should be confined. If released, he will remain on licence indefinitely, save, as we have indicated, when the sentence was imprisonment for public protection and the Secretary of State makes an order, after ten years, that the licence should cease to have effect. In calculating the minimum term, an appropriate reduction should be allowed for a plea of guilty (see Sentencing Guidelines Council* Reduction in Sentence for a Guilty Plea*:* Guideline *(December 2004) p 5 (para 5.1)), and care should be taken not to incorporate in the notional determinate sentence an element for risk which is already covered by the indeterminate sentence.".*

For present purposes, the most important aspect of this passage is the methodology which it prescribes for determining the *minimum term:* the sentencing court must first identify the determinate sentence which, notionally, it would *otherwise* have imposed and then, as a general rule, reduce this by one half. This approach has been adopted in a series of subsequent English decisions: see, for example, ***The Queen –v- Kehoe*** [2009] 1 Cr. App. R(S) 9 and

[2008] EWCA. Crim 819. In a commentary on this decision, Dr. Thomas observes:

> "*If the offence is not sufficiently serious to justify a sentence of life imprisonment, then the court may fall back on the discretionary power to impost a sentence of imprisonment … for public protection.* ***The practical consequences of the sentences are for almost all purposes the same as those of a sentence of imprisonment for life***".

[Volume 9, Criminal Law Review 2008, p. 728, at 730 – emphasis added].

[19] In paragraph [17] of ***Lang***, the learned Vice President suggests that a series of factors should be taken into account in the assessment of significant risk. These include, as one would expect, the nature and circumstances of the index offence and any previous offending; sentences imposed on previous occasions, social and economic factors pertaining to the offender; and the perception and awareness of the offender. The judgment emphasizes that a significant risk of serious harm to members of the public is not, automatically, in play merely because the foreseen specified offence is serious. Furthermore, where the foreseen specified offence is not serious, a significant risk of serious harm will arise in relatively few cases. In paragraph [19] of the judgment, the statutory words "*members of the public*" are considered, prompting the following assessment:

> "***[19]*** *The risk to be assessed is to 'members of the public'. This seems to be an all-embracing term. It is wider than 'others', which would exclude the offender himself. We see no reason to construe it so as to exclude any particular group, for example prison officers or staff at mental hospitals, all of whom, like the offender, are members of the public. In some cases, particular members of the public may be more at risk than members of the public generally, for example when an offender has a history of violence to cohabitees or of sexually abusing children of cohabitees, or, as in one of the cases before us (Feihn), where the offender has a particular problem in relation to a particular woman.".*

Finally, with reference to cases involving multiple offences, the Vice President advocates the following approach:

> "***[20]*** *When offenders are to be sentenced for several offences only some of which are specified, the court which imposes an indeterminate sentence under ss 225 or 226 or an extended*

> *sentence under ss 227 or 228, for the principal offences should generally impose a shorter concurrent sentence for the other offences. In the case of a specified offence where there is a risk of serious harm, the sentence for such other offence must be an extended sentence where the principal offence is a serious offence (s 227(2)). It will not usually be appropriate to impose consecutive extended sentences, whether the principal offence is serious or merely specified (compare* R v Nelson *[2002] 1 Cr App R (S) 565 at [23])".*

The approach advocated in this last passage seems consonant with the well established principles and practice governing the imposition of concurrent and consecutive sentences in Northern Ireland.

[20] There are obvious differences between Section 225 of the 2003 Act, as amended and Article 13 of the 2008 Order. In particular:

(a) Where the qualifying conditions are satisfied, the English sentencing court has a discretion whether to impose an IPP, whereas this is mandatory in Northern Ireland.

(b) The terminology of "*the notional minimum term*" does not feature in the Northern Ireland legislation.

(c) Article 13(3), which prescribes the methodology for determining an IPP, contains no provision equivalent to Section 225(3C).

(d) Moreover, Section 225(3C) imports a statutory provision, Section 82A(2) of the Powers of Criminal Courts (Sentencing) Act 2000, which does not extend to Northern Ireland.

There is yet another point of distinction between the two jurisdictions. The latter statutory provision is concerned with the determination of tariff in a discretionary life sentence. Subsection (3) regulates how the court is to determine the tariff, stipulating that three factors shall be taken into account. The second and third of these factors have no direct equivalent in the Northern Irish counterpart, Article 5 of the Life Sentences (Northern Ireland) Order 2001 ("*the 2001 Order*"), while the first of the three factors is expressed as "*the seriousness of the offence, or of the combination of the offence and one or more offences associated with it*". This approximates closely to, but does not equate precisely with, Article 5(2) of the 2001 Order, which provides, in terms, that the tariff is the period which –

> "*… the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it*".

In short, this comparative analysis accentuates the differences between the present English statutory model for IPPs and its Northern Ireland counterpart. The original English statutory model, on which much of the case law is based, is a closer comparator.

[21] Next, I consider it appropriate to reflect on whether the methodology for determining the minimum term (or "tariff") for the purposes of a life sentence (whether discretionary or mandatory) in Northern Ireland illuminates the IPP methodology contained in Article 13(3) of the 2008 Order. It is well established that in the exercise of fixing a tariff, the question of future risk to and protection of the public (to be contrasted with the factors of retribution and deterrence) is disregarded. This flows from the express provisions and structure of the 2001 Order and was highlighted by the Lord Chief Justice in ***The Queen –v- McCandless and Others*** [2004] NI 269 and [2004] NICA 1, where one of the Appellants (Scott) was the recipient of a discretionary life sentence, with a prescribed minimum term of eight years, while the other four received mandatory life sentences. The differences between these two species of life sentence was highlighted by the Lord Chief Justice, in dealing with the case of ***Scott,*** in the following introductory observations:

> "*[41]* ***This appeal involves quite different issues from those in murder cases which attract a mandatory life sentence*** *and to which Lord Woolf's Practice Statement is applicable. We included it in the present batch of appeals in order to have an example of a discretionary life sentence and to give assistance to sentencers in their approach to such cases.*"

[Emphasis added].

In paragraph [50], the Lord Chief Justice referred to the criteria governing the imposition of a discretionary sentence of life imprisonment formulated in ***The Queen –v- McDonald*** [1989] NI 54, the two essential requirements being a crime of sufficient seriousness and good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be confidently measured at the time of sentencing. The Lord Chief Justice continued:

> **"***[51] The minimum term fixed by the judge of eight years equates to a determinate sentence of 16 years. We note that he did not invite counsel for the appellant to address him on the length appropriate to the case, and it would have been preferable for him to do so. A sentence of 16 years in a case of grievous bodily harm represents a very high point on the scale of sentences on a plea of guilty in that type of offence. It would normally only be justified if the court were imposing a term, pursuant to Article 20(2)(b) of the Criminal Justice (Northern Ireland) Order 1996, which is longer than that which is commensurate with the seriousness of the offence,*

> *in order to protect the public from serious harm from the offender. Where a life sentence is imposed, however, the protection of the public is achieved by the executive discretion over the time of his release after the minimum term has elapsed, since the offender will not be released if he still presents sufficient risk to the public. It is therefore unnecessary to extend the minimum term to a length which would afford that same protection. We accordingly are of opinion that the minimum term of eight years fixed in this case is longer than is required to reflect the elements of retribution and deterrence. We consider that a term of six years, which equates to a determinate sentence of twelve years, would suffice for this purpose. After that period has elapsed, it will fall to the Life Sentence Review Commissioners to assess the risk to the public presented by the appellant and determine whether he can safely be released.*"

As this passage highlights, in Northern Ireland the "tariff" element in any life sentence represents "real time" in imprisonment terms: there is no remission. More importantly, it must be measured on the basis of retribution and deterrence only, without reference to the question of future risk to and protection of the public.

[22] There is no suggestion in ***McCandless*** that the tariff in discretionary life sentence cases should be determined in accordance with the exercise prescribed by the English Court of Appeal in ***The Queen –v- Marklew and Lambert***[1999] 1 Cr. App. R(S) 6. As appears from the judgment of the court in that case, the evolution of the determination of a discretionary life sentence tariff in England has been governed by a combination of statutory provisions, Practice Directions of the Lord Chief Justice and related decided cases, none of which is replicated in Northern Ireland, with the exception of Section 34 of the Criminal Justice Act 1991 (which, while confined to the duty to release "discretionary" life prisoners, is substantially mirrored in Article 6 of the 2001 Order). The divergence in the approaches of the two jurisdictions is illustrated by the prescription contained in the judgment of the Lord Chief Justice in ***The Queen –v- O'Connor*** [1994] 15 Cr. App. R(S) 473 (at p. 476) relating to the imposition of a discretionary life sentence, which has no direct counterpart in Northern Ireland:

> "*The exercise that the judge must perform, therefore, is to decide, first of all, what would be the determinate sentence that he would have passed in the case if the need to protect the public and the potential danger of the offender, had not required him to impose a life sentence. Having decided what the determinate sentence should be, he then has to take into account Section 33(2) and Section 35(1) and decide on such proportion of that determinate sentence as falls between a half and two thirds of it*".

Sections 33(2) and 35(1) of the 1991 Act provide for the discretionary grant of parole upon completion of half the tariff and obligatory parole upon completion of two thirds. In a tariff fixing exercise in Northern Ireland, there is no comparable obligation on the sentencing court to consider these factors. It would appear that within these statutory provisions one finds at least part of the rationale for the one half/two thirds of the determinate sentence prescription contained in ***O'Connor***. The rationale, as I shall presently conclude, seems to me to derive mainly from the intrinsic nature of the IPP and paragraph [51] of ***McCandless*** (*supra*).

[23] In ***Marklew and Lambert***, Thomas J, following an exhaustive review of the statutory history in England and Wales, observes (at p. 15) that one of the effects of Section 34 of the 1991 Act was that as regards indeterminate sentences imposed after 1st October 1997, the prisoner's former automatic entitlement to have remand custody credited for the purpose of computing the time for referral to the Parole Board was substituted by judicial sentencing discretion. The court suggested that, as a general rule, this discretion should be exercised by giving full credit. [This is mirrored in Northern Ireland: see ***McCandless,*** paragraph [52]]. The most important aspect of this judgment is the methodology it prescribes for the determination of the tariff element of a discretionary life sentence:

> "*In the case of adult offenders, we consider that again the general approach should be to begin consideration of the specified part under Section 34 by taking half the determinate period that would have been passed;* ***that determinate period will reflect the element of punishment, retribution and deterrence in the sentence.***"

[At p. 12 – emphasis added].

In this passage the emphasis is on orthodox sentencing dogma, rather than Sections 33(2) and 35(1) of the 1991 Act. The philosophy which it embodies differs in no way from that expounded in ***McCandless,*** paragraph [51]. Simultaneously, the court recognised that, exceptionally, the specified period could be as high as two thirds of the determinate sentence which, notionally, would have been passed. The decision in ***McCandless*** neither espouses nor excludes this latter possibility.

[24] The decision in ***Marklew and Lambert*** has been consistently followed in a series of subsequent cases. One of these is ***The Queen –v- SzCzerba*** [2002] 2 Cr. App. R(S) 86, which reinforced with some emphasis the general rule of fifty percent reduction, underlining that any greater reduction should occur only exceptionally: see paragraphs [32]-[34]. More recently, the English Court of Appeal reiterated this approach in ***The Queen –v- Wheaton*** [2005] 1 Cr. App. R(S) 82 and in particular paragraph [26]:

> "*We accept the argument of counsel that, in the fixing of a notional determinate term, the element of the sentence reflecting the need to protect the public from danger posed by the Defendant should not be taken into account where a discretionary life sentence is being passed. However, judges should not overlook the need to reflect an element of deterrence, which may properly feature in fixing a notional determinate term*".

This passage reinforces the conclusion that in the determination of the minimum term in discretionary life sentences, there is clear consonance doctrinally in the approaches adopted in the two jurisdictions.

[25] The law in England and Wales relating to IPPs is summarised in Archbold 2010, paragraph 5-305, in the following terms:

> *"Fixing the Minimum Term*
> ***5-305***
> *For all practical purposes, sentences of imprisonment and detention for public protection are the same as sentences of imprisonment or detention for life; the only differences are, first, that in the case of imprisonment or detention for public protection, the Parole Board may on application 10 years after release, direct the Secretary of State to order that a licence shall cease to have effect; and secondly, in the case of such sentences, no order can be made under section 82A(4) of the PCC(S)A 2000 (post, § 5-310) that the early release provisions are not to apply at all. The procedure for fixing a minimum term in relation to all such sentences should be as before the Act in relation to discretionary and automatic life sentences. This must now be read subject to the amendments made to section 82A by the CJIA 2008, which modify the process of fixing the minimum term in two cases (one of which has no application to sentences of imprisonment or detention for public protection), and provide for allowance to be made for time spent on bail subject to certain conditions.*
> *As to the requirement in subsection (3B) of section 225 that the notional minimum term should be at least two years, it was said in Att.-Gen.'s Reference (No. 55 of 2008) (R. v. C.), ante, that where an offender falls to be dealt with for two or more offences, this condition may be established despite the absence of an individual offence for which a two-year minimum sentence would be appropriate, and that the totality of the offending should be reflected in the assessment of the notional determinate term; and in R. v. Roberts [2009] 2 Cr.App.R.(S.) 100, CA, that judges should ensure that longer than appropriate terms are not*

fixed in order to avoid the restrictions of the new regime in a non-Schedule 15A case."

This summary appears to me correct, having regard to my consideration of the English statutory provisions and reported cases above.

[26] The comparative exercise which I have carried out above yields the conclusion that there are significant differences between the current English and Northern Irish statutory regimes governing IPPs. It also highlights the reality that, in a number of material respects, the massive statutory intervention in the field of sentencing which has been a feature of parliamentary activity in England and Wales during recent years has not invariably been extended to Northern Ireland or replicated in local legislation. The 2008 Order was made on 7th May 2008 and, therefore, postdates the related English statute (the 2003 Act) by some five years. By 2008, the decisions in ***Marklew and Lambert, SzCzerba, Wheaton*** and ***Lang*** were well ingrained in English sentencing jurisprudence and were based on the first of the two statutory models, which is reasonably comparable to it's local counterpart. The three basic components of the successive English statutory models have been the legislative provisions themselves, the superimposed judicial interpretation thereof and the Lord Chief Justice's Practice Directions relating to discretionary life sentences. It is to be presumed (absence any indication to the contrary) that the legislature was cognizant of these in enacting the 2008 Order. Equally, the legislature is presumed to have been cognizant of the decision in ***McCandless***, which confirms the correctness of having regard to the "full" *determinate* term when measuring the *minimum* term in the case of a discretionary life sentence *and* employs the mechanism of applying a fifty percent reduction.

[27] I take into account that Article 13 purports to be an elaborate, self-contained model, supplemented only by the other provisions of the 2008 Order which it incorporates, expressly or by implication. Article 13(3)(b) obliges the court to specify the so-called "*minimum period*", or, in its full text, "*the minimum period for the purposes of Article 18*". It defines the "minimum period" as –

> "*… such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it*".

This definition is not supplanted, displaced or modified by any other provision of the legislation. It is contained in a statutory scheme which makes a fundamental distinction between determinate sentences (on the one hand) and indeterminate sentences (on the other). It is abundantly clear from Chapters 2-4 that an IPP belongs to the latter category. It follows that logically, and by definition, the statutory provisions relating to *determinate sentences* unless imported into Article 13 expressly or by implication, have no application.

[28] What, therefore, is the correct method of measuring the "*minimum period*" under Article 13(3)(b)? Following careful reflection, I conclude that the answer lies in the formulation of the statutory criterion, which is concerned with *retribution and deterrence.* In my view, this behoves the sentencing court, in fixing the minimum period, to disregard the factor of future risk to and protection of the public. This consideration is excluded from Article 13(3)(b); it has already been reckoned by the court, in concluding that an indeterminate custodial sentence is required; and it will be fully addressed in the future by the Parole Commissioners, in the discharge of their functions under Article 18.

[29] Next, I remind myself of the presumptions to which I have adverted above – in paragraph [14] - and the decision in ***McCandless***. I also take into account the well established principle that where the liberty of the citizen is in play, the relevant statutory provisions –

> "*… must be construed at all times in his favour so far as the language of the statute permits this to be done*".

[***Ward –v- Police Service of Northern Ireland*** [2008] NI 138, paragraph [4], per Lord Bingham]. See also ***Bennion On Statutory Interpretation*** [5th edition], pp 836-839. Furthermore, the proposition that the legislature cannot have intended that an IPP should be more intrusive or restrictive than a sentence of discretionary life imprisonment seems to me incontestable. I also accept the rationale offered by Pill LJ in ***The Queen –v- West*** [2001] 1 Cr. App. R(S) 30 that an IPP prisoner should not be in a worse position than a determinate sentence prisoner with regard to early release. In this respect, by virtue of Article 8 of the 2008 Order, determinate sentence prisoners are entitled to release on licence under Article 17 upon the expiry of the so-called "*custody period*" which – per Article 8(3) – shall not exceed one half of the term imposed. Under Article 13(3), the court, in opting for an IPP, forms an opinion about future risk to and protection of the public *at a particular point in time, on the basis of the information then available*. In the light of updated information, prison reports and expert assessments, the Parole Commissioners, in the future discharge of their functions under Article 18, could form a different opinion. The manifest good sense of the Chapter 3 arrangements seems indisputable and is reinforced still further by the acknowledgement that the Parole Commissioners, by their constitution, possess an expertise to which the sentencing court cannot lay claim. All of this enhances the conclusion which I have reached on sentence computation methodology.

[30] While acknowledging the differences between the statutory regimes in the two jurisdictions, I can discern no reason in logic or principle, as regards the crucial question of sentence computation, for treating IPP subjects differently in separate regions of the United Kingdom. I conclude, for the reasons elaborated above, that Article 13(3)(b) of the 2008 Order is properly construed as incorporating the ***McCandless*** decision and the equivalent English methodology for measurement of the "*minimum period*". It follows that this

should normally be one half of the notional determinate term, but could conceivably be more in exceptional cases. The competing view gives rise to an austere, incongruous and unequal result which, in my estimation, the legislature cannot have intended.

IV SENTENCING FOR MANSLAUGHTER

[31] I begin with the decision in ***Attorney General's Reference No. 2 of 1992 (Christie)*** [1993] 3 NIJB 30, where the jury returned a verdict of guilty of manslaughter on the ground of diminished responsibility. Hutton LCJ observed (at pp. 33-34) that this verdict –

> "*… faces the trial judge with one of the most difficult tasks in sentencing which a judge has to face, because he has to strike a balance between recognising on the one hand that the accused had committed an unlawful killing and recognising on the other hand that the accused had carried out the killing because he or she was suffering from an abnormality of mind induced by disease which subsequently impaired his or her responsibility for the killing*".

The judgment of MacDermott LJ contains two noteworthy propositions. The first is that the offence of manslaughter "*… confronts judges with the most difficult sentencing problems*". The second is that in cases of diminished responsibility, the judge has "*… a particularly difficult task*" [at p. 70]. In a later passage, the learned Lord Justice reiterates that manslaughter cases present "*quite peculiarly individual sentencing problems*" [at p. 76]. A further noteworthy feature of all three judgments in the Court of Appeal is the importance of endeavouring to assess the extent of the offender's residual responsibility.

[32] The sentiments expressed by the Northern Ireland Court of Appeal in ***Christie*** are mirrored in the observation by the English Court of Appeal in ***The Queen –v- Boyer*** [1981] Cr. App. R(S) 35 that the offence of manslaughter attracts a wider range of sentences than any other offence, varying from life imprisonment to a conditional discharge. This is consistent with a later observation of the Court of Appeal in ***The Queen –v- Butler*** [1999] 2 Cr. App. R(S) 339, cautioning against resort to comparisons with other manslaughter sentences, having regard to (a) the intrinsic difficulties posed in every manslaughter case and (b) their acutely fact sensitive nature. Judges and practitioners alike are more than familiar with the many cautionary exhortations of this kind announced by our Court of Appeal. To like effect, in the earlier decision in ***The Queen –v- Chiv Au Yeang*** [1989] 11 Cr. App. R(S) 504, Lord Lane CJ stated (at p. 505):

> "*We do not altogether find it helpful to refer to other cases in this area because the range of circumstances, both mental*

circumstances and physical circumstances, giving rise to the offence are so widely distributed."

[33] Echoes of all of these sentiments can be detected in the decision of the Northern Ireland Court of Appeal in ***The Queen –v- Magee*** [2007] NICA 21, a guidelines judgment, where the Lord Chief Justice stated:

> *"**[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.".*

[34] In ***The Queen –v- Wood*** [2009] EWCA. Crim. 651, the English Court of Appeal promulgated some guidance on sentencing in manslaughter cases where the defence of diminished responsibility is based on an abnormality of mind due to an alcohol dependency syndrome. While the analogy is admittedly not exact or perfect, it seems to me that this is reasonably proximate to the present case. The court rejected an argument that in assessing the seriousness of an offence of manslaughter on the ground of diminished responsibility it should focus exclusively on the offender's culpability, holding that the sentencing judge must also consider the harm consequent upon the offender's actions: see paragraph [14]. The court concurred with the suggestion in ***The Queen –v- Kehoe*** [2008] CLR 728 that in cases where an offender satisfies the criteria of dangerousness, a life sentence "*… should be reserved for those cases where the culpability of the offender is particularly high or the offence itself is particularly grave*" (per Lord Phillips CJ). This prompted the Lord Chief Justice to observe, in paragraph [18]:

> "*The conclusion which follows from this observation is that the mere fact that the case is one of manslaughter on the grounds of diminished responsibility does not preclude a sentence of imprisonment for life. In reality this sentence will be rare in such cases, usually reserved for particularly grave cases, where the Defendant's responsibility for his actions, although diminished, remains high*".

This passage serves to remind the sentencing court of its obligation to endeavour to evaluate the extent of the offender's diminished responsibility, given the potentially broad spectrum which may exist in this respect. This is reflected in a later passage in the judgment of the court:

> "*[19] … We accept, of course, that the Appellant's culpability was diminished, but it was very far from extinguished and his level of responsibility for his actions merits examination in the light of his immediate activities both before the attack began and after it was concluded and his insight into the need to do what could be done to cover up the fact of the killing and his involvement in it …* ***A very substantial element of mental responsibility remained.***"

[My emphasis].

[35] In another recent decision, ***Attorney General's Reference No. 83 of 2009 (Moore)*** [2010] 2 Cr. App. R(S) 26, a case of manslaughter on the ground of diminished responsibility, it was accepted by the prosecution that the offender's mental responsibility for his conduct – a ferocious, sustained attack upon a defenceless man – was substantially reduced. The sentencing judge considered that the absence of premeditation or an intention to kill was a mitigating factor. The Lord Chief Justice cautioned:

> "[27] *Although we do not criticise that finding, care should be taken to avoid the risk of a double level of mitigation. Where the culpability for the killing has been reduced from murder on the grounds of diminished responsibility because the offender's mental responsibility for his actions has been reduced, there is a danger of double counting the absence of premeditation or any intention to kill*".

The court observed that even if the Defendant in that case had not intended to kill, he had been reckless about the consequences of his violent attack. The court further recalled its statement in ***Wood***, paragraph [21], that in diminished responsibility manslaughter cases the culpability of the Defendant "*… may sometimes be reduced almost to extinction, while in others it may remain very high …*". The conclusion was that the determinate sentence, making due allowance for the offender's plea of guilty, should be twelve years. This was duly reduced by half to determine the minimum term for the purposes of the English equivalent of an Article 13 IPP.

V CONSIDERATION AND CONCLUSIONS

Colin Shaw

[36] This Defendant is to be sentenced for the offence of conduct tending to pervert the course of justice. This is a common law offence, triable on indictment only. The general thrust of the reported cases is that a custodial sentence is normally appropriate. See, for example, ***The Queen –v- Khan*** [2001] 2 Cr. App. R(S) 553. In ***The Queen –v- Tunney*** [2007] 1 Cr. App. R(S) 565, the Court of Appeal suggested that the seriousness of the substantive offence, the duration of the offending conduct and the effect thereof on the administration of justice should be considered. This seems to me unexceptional. To like effect is the suggestion in the more recent decision in ***The Queen –v- Snow*** [2008] 2 Cr. App. R(S) 497 that the three main factors to be reckoned are the length of the deception, the nature thereof and how successful it proved to be. In ***Snow,*** the two offences arose out of false information provided by the offender to the police in vehicle checkpoint contexts. In this way, on the first occasion the offender escaped detection and the wrong person was convicted, while on the second occasion the offender admitted his deception following arrest. The court observed:

> "*We are in no doubt that these were serious offences. Perverting the course of justice is invariably a grave matter because it strikes at the root of the criminal justice system. As was noted by this court in* ***The Queen –v- Mitchell*** *[2003] 1 Cr. App. R(S) 97, important factors going to the seriousness of the particular offence are the length of time*

during which the deception continued; the nature of the deception; and the success of the deception".

The outcome was the imposition of consecutive sentences of imprisonment of nine months and three months respectively.

[37] The main factor highlighted on behalf of this Defendant by Mr. Mallon (of counsel) was that, following arrest, he retracted the false story and told the truth to police within a matter of some hours, before his interviews had begun. It was acknowledged that each Defendant blamed the other for concocting the story. While this offender pleaded not guilty when arraigned, it was suggested that this was justifiable on account of a possible defence of duress of circumstances. Taking into account all the information available, including his criminal record, I have some difficulty in accepting this claim. His plea of guilty was delayed until rearraignment at a later stage. In ***Attorney General's Reference No. 1 of 2006 (McDonald and Others)*** [2006] NICA 4, the Court of Appeal ruled that in order to avail of the full measure of credit for a plea of guilty, a Defendant must have admitted his guilt at the earliest opportunity. I consider that as this did not occur in the present case, this Defendant's plea of guilty, while attracting reasonable weight, qualifies for something less than the full notional discount, in circumstances where he really had no viable defence.

[38] While this Defendant has a criminal record consisting of nineteen previous convictions, it was not suggested on behalf of the Crown that this ranks as an aggravating factor. Having regard to the nature of his previous offending and the vintage of most of it, I concur with this approach. The most serious aspect of this Defendant's offending is, in my view, the fact that the deception was perpetrated in the context of an unlawful killing. The court must also take into account this offender's earlier failure to summon medical assistance for the deceased. I am of the opinion that if this charge had been contested unsuccessfully, a sentence of around eighteen months imprisonment would have been warranted. Giving appropriate credit for the offender's guilty plea and attributing due weight to the brief duration of the deception, a factor of obvious significance in the present context, I consider that the appropriate sentence is twelve months imprisonment.

Pauline Shaw

[39] Relying on the defence statement, it was argued on behalf of this Defendant by Mr. Boyd (of counsel) that she had always been disposed to plead guilty to manslaughter and that this opportunity did not materialise until a late stage, with the result that she should receive full credit for the plea of guilty. This was not contested by Mr Murphy QC on behalf of the Crown, correctly in my view, and I shall proceed on this basis. Although this Defendant has no previous convictions, I consider this factor neutralised by information contained in the various reports about her past conduct and, on one occasion,

an attack on a partner using a knife. Thus I decline to treat this Defendant's lack of criminal record as a mitigating feature. Having regard to the various reports available, I consider that this Defendant has no genuine remorse for her actions, bearing in mind the important distinction highlighted in ***The Queen –v- Quinn*** [2006] NICA 27, paragraph [26]. While, realistically, there may have been an element of provocation in the background to the killing, this must be balanced against the court's evaluation of this offender's state of mind (*infra*). I conclude that this Defendant's plea of guilty is the only true mitigating factor, attracting credit of approximately one third.

[40] In measuring the appropriate term and evaluating possible aggravating factors, it is incumbent on the court to make a reasonable assessment of this Defendant's residual responsibility. Bearing in mind the nature of the weapon employed and the two separate wounds inflicted, coupled with the act of arming herself and the specific context in which the attack was perpetrated, it seems to me that the extent of this Defendant's residual responsibility was not insubstantial. While I accept that this Defendant's culpability was diminished, this is reflected in her plea of guilty to a less serious offence (manslaughter) and must not be reckoned twice. While the attack on the deceased did not partake of the kind of unbridled frenzy which features in some of the reported cases in this field, this does not in my view mitigate the culpability of the offender. While it sounds on the seriousness of her offending (and will undoubtedly be considered by the Parole Commissioners in due course) it does not render her conduct any less culpable. Equally, while I note the contents of the information from Hydebank Prison, this does not seem to me to mitigate the seriousness of this Defendant's offending.

[41] I consider that there was an element of planning and premeditation in her actions which, in my view, were neither involuntary nor truly spontaneous. This ranks as an aggravating factor. I find that this Defendant's offending is further aggravated by the act of arming herself with a dangerous knife. Some degree of aggravation also arises from the infliction of two separate stab wounds and her failure to summon medical assistance in circumstances where the existence of a relatively severe injury should have been apparent. This failure, in my view, was motivated in part by considerations of indifference towards and retribution of the deceased. I further consider that the substantial impact which the death has had on certain family members, as evidenced in their poignant and balanced statements to the court, aggravates the offending to so me extent. I recognise that there is some overlap in the various aggravating factors identified above.

[42] I have not found it helpful to compare the facts and features of the offending in the present case with the facts and outcomes of the several other cases brought to my attention. The instant case illustrates the strength of the proposition that such an exercise is unwise and unsound in principle (see ***McLlwee*** [1998] NI 232, p 238). Having regard to the analysis above, I consider

that the appropriate determinate sentence for this Defendant following a contested trial, taking into account the aggravating factors which I have identified, would have been twelve years imprisonment. This is the first stage in the exercise of measuring the "*minimum period*". The second step involves the adjustment required by my earlier assessment that this Defendant should receive full credit for her plea of guilty. Approached in this way, the notional full determinate sentence for this Defendant would have been one of eight years imprisonment. Thirdly and finally, this falls to be reduced, having regard to the conclusion expressed in paragraph [27] above. Giving effect to this approach, I find no reason for diverging from the general rule that the reduction should be of the order of fifty percent. I conclude, accordingly, in the language of Article 13(3)(b) that the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the index offence, in combination with the subsidiary offence, is four years imprisonment. Thus I sentence this Defendant to an indeterminate custodial sentence under Article 13 of the 2008 Order, with a minimum period of four years imprisonment.

[43] As this is not a determinate custodial sentence of twelve months or more, the court's power to recommend licence conditions to the Secretary of State, enshrined in Article 23, does not arise. Similarly the power contained in Article 24(2)(b), as any future release on licence of this Defendant will not be effected under Article 17 or Article 19. At a later stage, the licence conditions recommended in the Probation Officer's report, which appear to the court to be both reasonable and sensible, will doubtless be carefully considered, in the circumstances then prevailing.

[44] This Defendant is also to be sentenced for the separate offence of perverting the course of public justice. I consider that this freestanding offence was inextricably bound up with the principal offence. Furthermore, I agree with the general approach recommended in ***Lang***, paragraph [20], which is harmonious with the language of Article 13(3)(b) of the 2008 Order and cautions against the risk of double counting. Thus a concurrent sentence is appropriate. I find no basis for distinguishing between the two Defendants and, accordingly, impose a concurrent sentence of one year's imprisonment in respect of the second count, to operate concurrently.

[45] It follows that this Defendant will be imprisoned for **a minimum period** of four years. At the appropriate future stage, the Parole Commissioners **shall not** transmit a release direction to the Secretary of State unless and until they are satisfied that "*… it is no longer necessary for the protection of the public from serious harm that* [this Defendant] *should be confined*", per Article 18(4)(b). Thus, ultimately, this Defendant could remain in prison for many years. By virtue of Article 22(2), any such licence in the case of this Defendant will extend for the remainder of her life, subject to the possibility of revocation or an

extinguishment order by the Secretary of State, per Article 22. Any release on licence will be subject to recall to prison at any time. Furthermore, the automatic release on licence of any prisoner serving an extended custodial sentence upon expiry of the period determined by the court as "*the appropriate custodial term*", pursuant to Article 18(8), will not apply to this Defendant in consequence. I conclude that these enhanced measures of protection for the public are necessary in this case.

[46] In an era of increasingly voluminous and complex criminal justice legislation**,** public misconceptions about the rationale and effect of sentences imposed by criminal courts are, sadly, commonplace. I trust that fair, responsible and accurate reporting of this judgment will play a significant role in preventing any misunderstandings or distortions. It is appropriate to observe, finally, that the sentencing laws which this judgment implements were made by Parliament. It is the solemn duty of every court to faithfully interpret and fairly and reasonably apply all Parliamentary legislation. This is a fundamental facet of the constitutional doctrine of the separation of powers.

Postscript

[47] This may be the first case in Northern Ireland in which the court has had to consider *in extenso* Chapter 3 of the 2008 Order and its related provisions. In the discharge of its duty to construe Article 13 faithfully and accurately, the court has been obliged to conduct an exhaustive and highly time consuming exercise in the compilation of this judgment. I record the court's gratitude for the co-operation and assistance of Mr. Murphy QC and Mr. Boyd in this task. Furthermore, the sentencing of the first-named Defendant has been delayed in consequence and there has been an unwarranted investment of court time. All of this is self-evidently regrettable. In an era of all-encompassing and minutely prescriptive criminal justice legislation, the failure of the legislature to spell out fully and clearly, in simple language, the methodology to be applied in determining the "*minimum period*" under Article 13(3)(b) of the 2008 Order is both surprising and unfortunate.