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IN THE COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GLENN PAUL HARWOOD

Before: Higgins LJ and Coghlin J

HIGGINS LJ

[1] This is an appeal against sentence with leave of the Single Judge. The appellant was charged with the murder of James Joseph William Lavery on 22 April 2005. At Belfast Crown Court on 6 September 2006, the first day of his trial, a jury was sworn but the case was not opened. On the second day the appellant pleaded guilty to the manslaughter of James Joseph William Lavery which plea was accepted by the prosecution. The trial judge Mr Justice Hart adjourned the case for pre-sentence reports. On 27 November 2006 the appellant was sentenced to thirteen years imprisonment. He appeals against that sentence with leave on three of the five grounds of appeal then put forward.

[2] The appellant, James Joseph William Lavery (hereafter referred to as the deceased) and a man name Wellington had been drinking heavily and continuously at the home of Wellington, in Templemore Avenue, Belfast, for some three days prior to the incident giving rise to the death of the deceased. The deceased was then aged 34 years and the appellant was 27 years of age. He is now 29 years of age.

[3] On 22 April 2005 around 6.00 pm Wellington went to a neighbour's house and asked her to go over and take a look at James Lavery because he thought he was dead. The neighbour went to the house and found James Lavery lying face down on his hands in the middle of the living room floor with blood underneath him. She rang for an ambulance. The police were also detailed to attend and on arrival a police officer questioned Wellington about what had happened. He was obviously intoxicated and told the police officer he had been drinking with the deceased and the appellant the previous night,

that a fight had broken out and that he had gone to sleep. When he awoke he found the victim lying on the floor and the appellant was no longer present.

[4] A post mortem examination revealed that the cause of death was stab wounds to the chest. One of the stab wounds had lacerated the left lung and penetrated the heart, causing rapid and heavy bleeding. This wound was from the front towards the back, slightly left to right and downwards into the left side of the chest. This stab wound on its own would have been fatal in a very short period of time. A second stab wound had passed below the left collar bone and through a sizeable vein. This wound would have resulted in fairly brisk bleeding and was also likely to have been fatal. The third stab wound was described as a superficial injury through the skin and fat to the breast bone and was unlikely to have been life threatening on its own. There was also a superficial stab wound on the right side of the neck which was not life threatening. Also found was a very small superficial cut just below the right ear hole and seven very small and superficial incised and penetrating wounds on or around the left ear as well as five scratches on the left cheek. All of the stab wounds were consistent with having been inflicted with a knife which was found at the scene. This single bladed knife which was bloodstained was found behind the television set at the front wall of the house. No other knife or weapon was found. Only a moderate degree of force would have been required to inflict the injuries. The superficial cut and wounds around the left ear could have been caused by the knife but it was possible that some of them might have been caused by a collapse on to broken crockery that was lying on the floor. There were bruises to the right side of both lips which could have been caused by a blow or collapse. There were bruises to two muscles on the left side of the neck which strongly suggested that the deceased had been grasped by the neck. There were no injuries suggesting that the deceased had attempted to defend himself against the knife attack. He was heavily intoxicated at the time of death with a blood alcohol level of 353 mgs per ml. of blood, which is around four and a half times the legal limit for driving.

[5] Forensic examination established that footprints made in blood at the scene were made by footwear belonging to the appellant and that a number of impressions on the back of the deceased's Ranger's football top, which he was wearing, were also made by the same footwear. Both the deceased's blood and that of the appellant were found on the knife used to injure the victim and the deceased's blood was found on the appellant's watch and boots. The appellant had been observed entering the house around 3.10 pm and leaving again after 5 minutes; it seemed that he had returned to the house to collect his jacket. Another neighbour observed that there was blood on the inside of the appellant's right arm from his elbow to his thumb. He appeared to be very drunk. This neighbour had seen the appellant in the house the previous day when he had been drinking with the householder and the victim.

[6] On leaving the deceased's house the appellant went to his mother's house where he showed her his hands which were covered in blood. He had a cut to one of his hands. He told his mother, " I think I've killed somebody". He went upstairs where he washed and changed and then put his stained clothing into the washing machine. Later the appellant returned to the scene of the crime, which by then was cordoned of by the police. He spoke to a police officer asking what had happened and when asked to identify himself he gave a false name.

[7] Later that evening the appellant showed a friend a cut to his left hand which ran across the palm and said that the deceased had done it with a knife when 'he had gone for him'. He met another acquaintance later that night who told him that she had heard he had killed Jimmy Lavery. He replied "he stabbed me" and held out his left hand showing a cut on the palm a couple of inches long. In the early hours of Saturday morning the appellant arrived at the home of the girlfriend of his brother. He told her, "I have stabbed someone five times".

[8] On Saturday 23rd April 2005 the appellant was arrested at the home of his brother's girlfriend. He was extremely intoxicated at the time of arrest. After a suitable period of time he was interviewed by the police. At the first interview his solicitor stated –

> "My client would wish me to state at the outset of the interview that he suffers from depression, is currently receiving treatment from his GP and furthermore is attending with a psychiatrist, Dr Bell, who is based at Woodstock Link. He's investigating the possibility that my client suffers from temporal lobe epilepsy and is subject to blackouts which is confirmed by a letter in his property and he regrets that he may not be able to help as extensively as he would like with your enquiries".

[9] The interview then proceeded but the appellant made no comment to the questions asked. Further interviews followed during most of which the appellant made no comment to the questions asked. However in the last interview he said -

> "I've a memory of … I don't know whether I was sitting up or sitting down … of this man you're talking about coming to me with a knife and me going for the knife with my hand and that's, that's my recollection. I don't remember stabbing no one or doing anything. All I remember is grabbing for the knife."

When asked why he had not mentioned this earlier in the interviews he said he had remembered when he first came in to the police station but he had been told by his solicitor to say 'no comment'. The learned trial judge observed in his sentencing remarks that this did not sit easily with the appellant's earlier statement in an interview when he said –

> "I suffer from temporal or could be suffering from temporal lobe epilepsy and I haven't a baldy about anything in relation to what you are talking about that's all I have to say."

[10] In his defence statement, dated 30 November 2005, the appellant made the case that he was acting in self defence and that the deceased had come at him with a knife and while he recalled grabbing the knife he could not recall what happened thereafter.

[11] Mr T Mooney QC, who with Mr Murphy QC appeared on behalf of the prosecution, informed the learned trial judge that a wound had been found on the palm of the appellant's hand. Dr Carson, the former Deputy State Pathologist who was engaged on behalf of the defence, was of the opinion that this could have been a defensive wound. Dr Bentley, the Assistant State Pathologist who had carried out the post-mortem examination of the deceased, could not exclude the possibility that this was a defensive wound. In light of the opinions expressed by the pathologists, prosecuting counsel took the view that the prosecution could not exclude the possibility that, at one stage, the appellant had been defending himself from a knife attack. Consequently prosecuting counsel indicated that a plea of guilty to manslaughter would be accepted. The basis on which that plea was offered by the defence and accepted by the prosecution was set out by the learned trial judge in the course of his sentencing remarks in these terms -

> "The prosecution therefore indicated that they were prepared to accept a plea to manslaughter on the basis that the evidence raised the possibility, which they would have had to persuade the jury beyond reasonable doubt had not been the case, that the defendant had been defending himself at one stage. Nevertheless, as Mr Mooney observed, the plea to manslaughter accepted that the defendant's actions went beyond reasonable self defence. And (sic) that he stabbed the deceased several times shows that he grossly over-acted. For the defendant Mr Terence McDonald QC said that whilst his client may have been making a drunken attempt to defend himself he accepted that the defendant went too far".

The learned trial judge then went on to say that he had to sentence the appellant in light of what had been said by the prosecution.

[12] The grounds of appeal were –

1. The sentence imposed for the offence of manslaughter in the circumstances was manifestly excessive and wrong in principle.
2. The learned trial judge gave no apparent credit to the accused for the fact that he pleaded guilty at the first appropriate time.
3. Notwithstanding the accused's previous record the learned trial judge was wrong in law in not making a portion of the sentence imposed a period of probation together with conditions designed to address the accused's problems.
4. The sentence imposed by the Judge had no regard to the fact that the accused may have been defending himself from attack.
5. The learned trial judge was provided with bundles of authorities dealing specifically with manslaughter caused by the use of a knife. These authorities surveyed both the English and Northern Ireland jurisdiction approached. Notwithstanding these authorities the learned trial judge imposed a sentence which in the circumstances was not based on proper precedent.

The Single Judge granted leave on grounds 1, 2 and 4.

[13] Mr T McDonald QC, who with Mr Irvine appeared on behalf of the appellant, concentrated on the first four grounds of appeal. In relation to the first he submitted that the sentence imposed was, in light of the basis for the plea as accepted by the prosecution, manifestly excessive for that type of manslaughter. He referred to a number of cases which, it was submitted, tended to indicate that the length of sentence imposed in the instant case was more in keeping with a different type of manslaughter from one in which the accused was acting, at some stage, in self defence. In relation to the second ground of appeal it was submitted that the appellant pleaded guilty to manslaughter at the first appropriate time after the prosecution had authority to accept that plea. This followed detailed discussions between senior prosecuting counsel and senior defence counsel over time and it was submitted that the learned trial judge failed to give any or sufficient credit to the appellant for his plea at the first available opportunity. Furthermore it was submitted that the learned trial judge failed to give any weight to the possibility that the deceased may well have been the initial aggressor and that the appellant may have been defending himself from attack by the deceased. The possibility that the appellant may have been defending himself was one that was accepted and acknowledged by the prosecution. It was submitted that this was a case in which the appellant, initially, was defending himself from attack by the deceased, but that in doing so he over reacted when drunk

and his actions went beyond reasonable self defence. Furthermore it was submitted that the learned trial judge failed to take into account the fact that there was no obvious ill-feeling or history of such between the deceased and the applicant as well as the fact that the applicant did not bring the knife to the deceased's house. The trial judge recognised that the appellant needed to address his alcohol and drug addiction and that a period of probation supervision on release would offer a means of achieving this objective. However the learned trial judge did not consider the appellant would comply with any conditions imposed as part of probation supervision and therefore concluded that a custody probation order was not warranted. It was said that any such probation conditions would only apply on the release of the appellant after a lengthy period of imprisonment. In those circumstances it was submitted that there was no reasonable basis on which to conclude now, that, following his release from prison, which would not take place for many years, the appellant would fail to comply with any probation conditions. This ignored the potential rehabilitative effect that such a period of imprisonment would have upon him. Thus it was submitted that, notwithstanding the applicant's previous convictions, the trial judge should have imposed a period of custody followed by a period of probation in order to address the applicant's alcohol and drug addiction. In his sentencing remarks the learned trial judge referred to a number of cases in this jurisdiction. Counsel on behalf of the applicant in this court contrasted the sentences imposed in those cases with the longer sentence of thirteen years passed in this case. I will refer to these cases later in this judgment.

[14] On behalf of the Crown Mr Murphy QC submitted that the sentence imposed was neither manifestly excessive nor wrong in principle. It was clear the learned trial judge took into account the plea of guilty to manslaughter. It was submitted that although the prosecution did not have authority to accept the plea to manslaughter at an earlier time, there was nothing to preclude the applicant from admitting manslaughter which he had not done either in interview, or on arraignment or in his defence statement. He was sentenced for manslaughter on the basis that he had grossly overreacted. It was submitted that it is not apparent how further credit could have been afforded to the applicant particularly as the acceptance of the applicant's over-reaction by the prosecution, had been determinative of the decision to accept the plea to manslaughter, so benefiting the applicant. In addition the learned trial judge's decision not to impose a custody/probation order was justified in light of the applicant's criminal record, his failure to comply with court orders and a previous breach of probation immediately following his release from custody.

[15] The applicant was born on 15 August 1977. His criminal record commenced in 1994 when he was seventeen years of age. Between 1994 and 1997 he was convicted of numerous offences of shoplifting as well as two separate offences of possession of drugs. He was also convicted of assaults on

police and common assaults on adults. At Craigavon Crown Court on 13 October 1997 he was sentenced to detention in a Young Offenders Centre for three years for grievous bodily harm with intent and assault occasioning actual bodily harm, both offences having occurred on 30 June 1995. He was convicted of assault occasioning actual bodily harm in 1999. In 2001 he was sentenced to a period of custody followed by 12 months probation for three offences of robbery. In 2002 he was sentenced to four years imprisonment for robbery. This offence occurred five days after his release from custody having served the custodial element of the custody probation order imposed in 2001.

[16] In the defence statement served on the applicant's behalf reference was made to the possibility that the applicant might be suffering from temporal lobe epilepsy and subject to blackouts. On 4 May 2006 he was examined by a Consultant Neurologist who concluded that there was enough clinical information to sustain a diagnosis of temporal lobe epilepsy and to commence the applicant on anti-epileptic drug therapy. The Consultant Neurologist concluded that epilepsy was not relevant to the commission of any offence in connection with the death of Mr Lavery. The learned Trial Judge referred to this report and the drug therapy in his sentencing remarks when he stated –

> "However this was only to deal with what Dr Craig referred to as "the episodes of ascending sickness with associated fear and a feeling of emptiness etc, which had been associated with periods of unresponsiveness according to his father". In the following passage Dr Craig then dealt with another aspect of the defendant's behaviour which has been described as "periods of rage". And I quote: "With regards the other episodes which have been described as periods of rage, in my opinion these are not at all typical for epileptic attacks in that they appear to be situation specific, prolonged and involved, directed aggression, both verbal and physical, which would be extremely rare in epileptic seizures. In my opinion these attacks are likely to be a reflection of Mr Harwood's personality and exacerbated by excessive alcohol intake and illicit drugs. They also occur in the context of previous psychiatric type symptoms, although the nature of these would best be characterised and quantified by a psychiatrist, such as Dr Bell, whom Mr Harwood has seen in the past."

It is apparent from that passage that the episode was not due to an epileptic event occurring outside the defendants' control. It is significant that Dr Craig refers to the defendant's personality and what he describes as his "excessive alcohol intake and illicit drugs".

The learned trial judge then referred to a report prepared by a Consultant Psychiatrist and stated –

> "Of particular relevance is the long history of drug and alcohol abuse which he [the psychiatrist] was given by the defendant. Harwood described how he started smoking cannabis at 13 and drinking heavily around 18, he has continued to smoke cannabis and has taken a wide range of drugs including cocaine, ecstasy, GHB and amphetamines."

The judge then referred to the pre-sentence report and to the passage under the heading "Risks of harm to the public and likelihood of re-offending" which he then quoted. This stated –

> "Over the past ten years the defendant has developed a pattern of dishonest and violent behaviour. This has been fuelled by abuse of alcohol and drugs. He has on many occasions used threatening and violent behaviour towards others. His involvement in this offence of manslaughter has demonstrated the high risk of harm he can pose to others when he is intoxicated.
>
> As with many previous offences the defendant, due to a high level of intoxication , claims he has minimal recollection of events leading up to the commission of the offence.
>
> It is my assessment that if Mr Harwood, upon his eventual release from custody, reverts to a lifestyle of drug and alcohol abuse, he will continue to pose a high risk of harm to others and his likelihood of re-offending will also be high. The identifiable risk factors are (1) his established pattern of aggression and violence towards others; (2) his abuse of alcohol and drugs; (3) reckless behaviour and lack of control; (4) lack of victim awareness; (5) lack of motivation to address any of the above factors".

[17] The learned trial judge commented that the applicant has an extremely bad record. He noted in particular the convictions for violence to which I have referred as well as the various robberies. He also referred to the nine convictions for failure to surrender to bail as well as the breaches of non-molestation orders and the offences committed when the appellant was either

on parole or day release from prison. He commented also on the failure of the appellant to comply with obligations imposed on him by court orders.

The grounds of appeal.

[18] **Whether sufficient credit was given for the guilty plea to manslaughter?**

It was submitted that insufficient credit was given for the guilty plea to manslaughter in the particular circumstances of this case. Mr McDonald QC contended that the appellant had a potential defence based on self defence. The basis for this was the suggestion that the deceased attacked the appellant with a knife and caused the wound to the palm of the appellant's right hand and in stabbing the deceased the appellant acted in self defence. Discussions between counsel about this case commenced before the Long Vacation and continued on the opening day of the trial. It seems clear these discussions centred on a plea to manslaughter and it was indicated that, if acceptable, such a plea would be entered. Clearly the injury to the appellant was a matter which prosecuting counsel required to investigate. Eventually he determined that the presence of this wound raised the possibility that at one stage the appellant was defending himself. In light of this he reasoned that it formed the basis for a possible plea to manslaughter where the appellant's actions went beyond reasonable self-defence or as Mr McDonald put it, an over-reaction on the part of the appellant in defending himself. Once the prosecution decided that a plea of guilty to manslaughter on this basis would be accepted this was communicated to defence counsel whereupon the appellant pleaded guilty to manslaughter. The plea was entered on the second morning and the learned trial judge was obliged to consider what credit, if any, the appellant should receive for his plea of guilty at that stage. In his sentencing remarks the judge dealt with this issue in the following manner –

> "But Mr Mooney informed me that there had been discussions for some time between counsel about a possible plea to manslaughter and I take this into account when deciding how much credit to give to the defendant for his plea of guilty, although it has to be said that it is always open to a defendant to enter a plea of manslaughter when arraigned on a charge of murder, particularly where, as here, the ultimate plea abandoned a defence of self-defence."

It was submitted that the comment by the trial judge that it was always open to a defendant to enter a plea of guilty to manslaughter when arraigned on a charge of murder, indicated that the trial judge considered that, in the circumstances of this case, the appellant could have entered a plea to

manslaughter at an earlier stage. Mr McDonald submitted that a plea to manslaughter, in circumstances where the defence statement indicated a defence of self-defence, could not be entered until such time as the prosecution indicated that it would be accepted. It was submitted the learned Trial Judge, in stating that it was always open to a defendant charged with murder to enter a plea of manslaughter, failed to recognise that the plea to manslaughter was made, in effect, at the earliest opportunity. Thus it was submitted that the applicant was not afforded credit for a plea of guilty to manslaughter at the earliest opportunity.

[19] It is not entirely clear what the learned trial judge meant by the last part of the passage quoted above. Self-defence, unlike provocation, is a complete defence to a charge of murder. Until prosecuting counsel indicated that a plea to manslaughter on the basis of over-reaction would be acceptable, the appellant was entitled to maintain his plea of not guilty to murder. While it is correct to say that it is always open to a defendant to enter a plea to manslaughter on a charge of murder at an earlier stage, for this appellant to do so, before prosecuting counsel had indicated that such a plea would be accepted, would have denied him the opportunity of maintaining the defence of self-defence, which had been foreshadowed in his defence statement, should the prosecution decline to accept his plea. In appropriate circumstances allowance should be made for cases in which deferral of a plea of guilty is objectively justified. Thus there is some merit in counsel's submission that this appellant pleaded guilty at the first available opportunity, that is, when he knew his plea to manslaughter would be accepted on the murder charge. To have done so earlier would have thrown away his defence of self-defence.

[20] Article 33 of the Criminal Justice (Northern Ireland) Order 1996

provides: -

> "**33.**—(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given."

Thus the stage at which the appellant indicated his intention to plead guilty and the circumstances in which the indication was given are both relevant and critical matters. Here the indication was given before the trial

commenced, whereupon, it was a matter for prosecuting counsel to decide what course he should adopt, in light of the report from the former deputy State Pathologist and prosecuting counsel's consultation with the present Assistant State Pathologist. It seems this took some time. It is suggested that the learned trial judge's remarks, quoted above, are capable of the implication that the reduction in sentence for the plea of guilty to manslaughter would be less than the reduction warranted by such a plea entered at an earlier time than the morning of the second day.

[21] It is clear that the judge took into account for the purposes of deciding the amount of credit to afford to the appellant as a result of his plea, that there had been discussions between counsel for some time about a possible plea to manslaughter. He did not say that he was reducing the amount of discount because the plea was not entered at an earlier stage. Nonetheless the last part of the passage quoted preceded by the word 'although', does suggest the possibility that the timing of the plea would affect the amount of discount. The learned trial judge has extensive experience in sentencing defendants. If he was affording full discount for the plea of guilty to manslaughter the last part of the passage was superfluous. However, whether the credit afforded to the appellant was the appropriate amount depends on what the range of sentence is for this type of offence. That issue will be considered later in this judgment.

[22] **Should the judge have imposed a custody probation order?**

In the course of his sentencing remarks the judge recognised that the appellant needed to address his alcohol and drug addiction and that a period of probation supervision would offer a means of achieving this objective. He then stated "On the other hand, I have to consider whether Harwood would comply with any probation conditions". He concluded that the appellant's record of breaches of probation, re-offending whilst on licence, failing to answer to bail and breaches of non-molestation orders satisfied him that he would not honour any probation conditions. The probation officer did not recommend a custody probation order. She stated that the appellant recognised that he would need the assistance of the Community Addiction Services and the Probation Board and that he would require to address his abuse of alcohol and drugs. But without making any recommendation, the Probation officer properly left the decision about a probation element to the sentence, to the judge. She stated that if the court deemed a custody probation sentence order appropriate then she would request two conditions be attached to the probation element of the order, namely that he reside in probation-approved accommodation and engage in treatment for substance abuse. In the circumstances the Trial Judge was satisfied that the appellant would not abide by any conditions and therefore did not consider a custody/probation order was justified.

[23] Custody probation orders were introduced by Article 24 of the Criminal Justice (NI) Order 1996. It provides -

> "**24. —**(1) Where, in the case of a person convicted of an offence punishable with a custodial sentence other than one fixed by law, a court has formed the opinion under Articles 19 and 20 that a custodial sentence of 12 months or more would be justified for the offence, the court shall consider whether it would be appropriate to make a custody probation order, that is to say, an order requiring him both—
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> (a) to serve a custodial sentence; and
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> (b) on his release from custody, to be under the supervision of a probation officer for a period specified in the order, being not less than 12 months nor more than 3 years.
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> (2) Under a custody probation order the custodial sentence shall be for such term as the court would under Article 20 pass on the offender less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer on his release from custody in protecting the public from harm from him or for preventing the commission by him of further offences."
>
> (3) A court shall not make a custody probation order in respect of any offender unless the offender consents and, where an offender does not so consent, the court shall not pass a custodial sentence of a greater length than the term the court would otherwise pass under Article 20.
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> (4) Where in any case a court does not consider a custody probation order to be appropriate, the court shall state in open court that it is of that opinion and why it is of that opinion.
>
> (5) A court which makes a custody probation order shall state the term of the custodial sentence it would have passed under Article 20 if the offender had not consented to the order."

In any case in which the court has formed the opinion that a custodial sentence of twelve months or more is justified, the court must consider whether it would be appropriate to make a custody probation order. The effect of a custody probation order is to place the offender under the supervision of a probation officer for a specified period, following his release from custody. The period that may be specified is not less than twelve months or more than three years. The decision whether to impose a custody probation order depends on whether the sentencing judge considers it to be appropriate. If he does not consider it to be appropriate then he should pass a custodial sentence commensurate with the seriousness of the offence or where the offence is an offence of violence, such longer term as is necessary to protect the public from serious harm from the offender – see Article 20 (2) (a) and (b). If a court considers a custody probation order to be appropriate then the custodial sentence shall be for such term as the court would, under Article 20, pass less such period as the court thinks appropriate to take account of the effect of the offender's supervision by the probation officer in protecting the public from harm from him or for preventing the commission by him of further offences. There is no requirement that the reduction in the custodial sentence is the same length as the period of supervision. The primary purpose in imposing a custody probation order, which reduces the length of the custodial sentence, is the protection of the public from harm and the prevention of further offences by the offender. The first question for the court must be whether the public need protection from the offender or whether the offender is likely to re-offend or both. The custodial sentence that the offence justifies should not be reduced (by the imposition of a custody probation order) unless the supervision of a probation officer is likely to bring about protection of the public or the prevention of further offences by the offender. A number of the appellant's previous convictions were alcohol and/or drug related. The judge recognised that supervision might address that problem. However the objectives of probation supervision are not likely to be achieved unless there is co-operation with the probation officer and compliance with any conditions that might be imposed. If co-operation and compliance are in doubt then the making of a custody probation order would not be justified or appropriate. The decision whether it is appropriate or not has to be made at the time of sentencing on the information then available to the trial judge. He is best placed to make that decision and his conclusion whether it is appropriate or not is an exercise of his discretion which should not be set aside lightly. It is clear the learned trial judge considered whether the appellant would co-operate and comply with any conditions that might be imposed. It is correct that the sentencing judge does not know at the time of sentencing whether the appellant would be co-operative and compliant a number of years into the future. That is so in every case and past behaviour is usually the only indicator and invariably a reliable one. The appellant has shown himself to be unable to co-operate or comply in the past. In being satisfied that the appellant would not honour any probation conditions it cannot be said that the learned trial judge was acting without firm grounds

for that view. He cannot be criticised for arriving at that conclusion and there are no grounds for interfering with the exercise of his discretion not to impose a custody probation order.

[24] **No or Insufficient weight given to the fact the appellant may have been defending himself.**

It was submitted that the learned Trial Judge failed to give any or sufficient weight to the acceptance by the prosecution that the appellant may well have been initially defending himself from attack by the deceased. Mr McDonald QC relied on the evidence that a fight had broken out between the appellant and the deceased, the cause of which was unknown. There was no evidence of animosity between them nor did the appellant go to the house with the intention of fighting with the deceased. Furthermore there was no evidence that the appellant brought the knife to the house rather it was a household knife belonging to the house in which the deceased was found. It was submitted that while the trial judge did outline the basis upon which the prosecution accepted the appellant's plea of guilty to manslaughter, he did not otherwise take account of the fact that the appellant may well have been initially defending himself against attack by the deceased. In setting out the prosecution approach to the case the trial judge did refer to the prosecution taking the view that they could not exclude the possibility that at one stage the appellant may have been defending himself from a knife attack. He then said – "it is also relevant to recall at this stage the initial statement by Wellington to Constable Kidd that there had been a fight". Later he referred to Mr McDonald's submission that his client may have been making a drunken attempt to defend himself. After referring to the prosecution view the trial judge went on to say " in view of what has been said by the prosecution I have to sentence the defendant on that basis". Whilst the trial judge made no further reference to the possibility of the appellant being under attack initially, it is clear that he had in mind from his earlier remarks the possibility which the prosecution said they would have to persuade the jury beyond reasonable doubt was not the case, namely that he had been defending himself at one stage. In those circumstances the submission that the learned Trial Judge failed to have regard to this factor in his sentencing is not borne out. Reliance was also placed on the Trial Judge's comment that the only mitigating feature was the defendant's plea of guilty" whereas the suggestion that he was defending himself, which was accepted by the prosecution, was a mitigating feature. That issue will be considered later in this judgment.

[25] **That the sentence was manifestly excessive and wrong in principle being inconsistent with precedent.**

The substance of this submission was that the sentence was outside the range for manslaughter of the type admitted by the appellant and that the sentence

imposed was not consistent with the cases referred to by the learned Trial Judge. The Trial Judge referred to R v McCullough 1999 NI R. 39; R v Campbell 2003 NICC 10; R v Magee (Deeny J unreported) and R v Donnell 2006 NICA 8.

[26] In R v McCullough the appellant was found not guilty of murder and guilty of manslaughter on the basis that he was so drunk that he was unable to form the necessary specific intent necessary for murder. He was regarded as the prime mover when he and another man battered the deceased with a gas cylinder. He was sentenced to 13 years imprisonment which on appeal was reduced to 10 years on the basis that the sentence imposed was above the range which might properly be imposed in that type of case. Reference was made to several cases in England and Wales in which lower sentences were imposed. In giving the judgment of the court Carswell LCJ said at page 44 –

> "We must approach this case on the basis that the appellant must be punished for the nature and quality of his acts, the only element lacking being his ultimate intention to kill the deceased or inflict grievous bodily harm. We therefore consider that the judge was fully justified in regarding him as a violent and dangerous man from whom the public requires protection. Having said that, however, we do consider that the sentence of 13 years was above the range which might properly be imposed in such cases, even after a contest."

[27] In R v Campbell the defendant pleaded not guilty to murder but guilty to manslaughter on the grounds of diminished responsibility. He assaulted the deceased with his fists and feet following a sustained period of drinking by both of them in each others company. He was sentenced to a custody probation order of 10 years imprisonment and three years probation supervision.

[28] In R v Donnell the appellant was charged with murder of one man and attempted murder of another man. The injured parties were known alcoholics who drank together and the appellant was concerned that the deceased was becoming involved in a relationship with his mother. He claimed little recollection of the incident due to his own alcoholism and drinking. He pleaded not guilty but several days into the trial he changed his plea to guilty of manslaughter and guilty of causing grievous bodily harm with intent. It emerged in the evidence that the weapon used by the appellant could not have caused some of the wounds sustained by the deceased and the injured party, thus raising the probability that another person was present with another weapon. The emergence of this evidence caused the prosecution to reconsider the charges and ultimately accept the pleas tendered. He was

sentenced to a custody probation order of 14 years imprisonment and two years probation supervision on both charges concurrently. On appeal this was reduced to 10 years imprisonment and two years probation supervision. It was argued that the original sentence for manslaughter was the equivalent of 16 years imprisonment and was outside the range of sentence appropriate for this type of manslaughter. The Court of Appeal after referring to R v McCullough and the comments of Carswell LCJ considered the sentence was outside the range and reduced it accordingly.

[29] In R v Magee the defendant was sentenced to a custody probation order of 9 years imprisonment and three years probation supervision in December 2006. He was charged with murder but pleaded guilty to manslaughter, that plea being accepted by the prosecution on the basis that the possibility of an element of provocation and self-defence could not be excluded. In circumstances of jealousy over a young woman the defendant and the deceased 'squared up' to each other and eventually each was armed with a knife. There was some evidence that at the time the one fatal blow was struck to the deceased's armpit, the deceased had dropped his weapon and said he wanted no trouble. Other witnesses put it differently. The defendant appealed against the length of the sentence, it being argued that the sentence was outside the range for this type of manslaughter. The Court of Appeal rejected that submission. This decision was given after the appellant in the instant appeal was sentenced. The Trial Judge's reference to this case is to the decision at first instance. I will return to the decision of the Court of Appeal later in this judgment.

[30] Mr McDonald QC referred also to the decision in R v Rice 2007 NICC 7 in which the defendant was sentenced to 6 years imprisonment for manslaughter by use of a knife. The circumstances of that case are very different from those in the present appeal. Fighting broke out between two rival groups in the course of which the deceased sustained a knife wound. The defendant was charged with murder. After several days of evidence he pleaded guilty to manslaughter by reason of an unlawful and dangerous act namely taking part in an affray armed with a knife. The circumstances surrounding the infliction of the fatal wound were disputed and unclear. While an aggravating feature was the defendant's aggressive behaviour he had in effect a completely clear record. I do not consider this case provides any assistance in the present appeal.

[31] Manslaughter is a common law offence the maximum punishment for which is life imprisonment. The maximum indeterminate sentence is usually, but not exclusively, reserved for a serious offence where the offender poses a high risk of harm to the public. The offence of manslaughter covers such a wide spectrum of circumstances, that the range of sentencing lies between non-custodial community orders and long terms of imprisonment. Comparison between sentences for manslaughter is usually unhelpful due to

the wide variation in the circumstances of the offence and the culpability of the offender. As Carswell LCJ observed in R v McCullough, supra, the offender is to be punished for the nature and quality of his acts. The thrust of the submission on behalf of the appellant was that the sentence of thirteen years imprisonment was outside the range for this type of manslaughter. Thus the Court must look closely at the type of manslaughter involved and the circumstances proved or accepted.

[32] It is submitted that a fight occurred between the appellant and the deceased. The circumstances of it are not revealed. The pre-sentence report contains the appellant's account of what he remembered had occurred. This records -

> "Mr Harwood informs me that prior to the offence taking place he had been drinking heavily and persistently for a number of days and he states he has minimal recollection of the events up to the offence or subsequently.
> He states that he does remember being in the home of Mr Wellington having drunk a bottle of vodka and taken cocaine. He states that his victim threatened him with a knife and that he tried to protect himself by taking hold of the knife which was resulted in wounds (sic) to his hand. He states that he has no recollection of causing the harm to his victim but accepts he was responsible for causing the death of Mr Lavery."

The deceased had numerous injuries whereas the appellant had none, other than the cut to the palm of his hand. This was caused by the knife when it was in the possession of the deceased. Somehow the knife came into the possession of the appellant and thereafter the deceased was unarmed. When unarmed he was stabbed three times in the chest, one of which entered the heart. In addition he was stabbed in the right side of the neck and the right ear as well as around the left ear. It is extremely unlikely he was grasped by the neck after the stab wounds were inflicted and the footprints made in blood on the deceased's back would have occurred after the stabbing. It was submitted that this was an over-reaction by the appellant to the actions of the deceased. The Trial Judge described the appellant's actions as going well beyond reasonable self defence and the fact that he stabbed the deceased several times showed that he grossly over-reacted. This was not a case in which, once the deceased was unarmed, the appellant could be said to be in immediate peril from the deceased, a person who had consumed so much alcohol that his blood reading was 353 mgs. In a situation of immediate peril a person being attacked cannot weigh to a nicety the exact measure of his defensive action, but that was not this case. The appellant left the house with the deceased lying on the floor, where he was found much later by the owner

of the house. No assistance was sought for him. Much later the appellant returned to the scene as if he was a bystander and gave a false name to the police. Thus can be seen the type of manslaughter case for which this appellant, with his criminal record and background, was to be sentenced.

[33] The prevalence of offences of violence often involving weapons, more often a knife, in circumstances in which both the offender and the injured party are both inebriated, is now well known. In R v Magee 2007 NICA 21 the Lord Chief Justice provided guidance on how offences of this nature should be approached. In the course of the judgment in that case he 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.
>
> **[23]** It is the experience of this court that offences of wanton violence among young males (while by no means a new problem in our society) are becoming even more prevalent in recent years. Unfortunately, the use of a weapon – often a knife, sometimes a bottle or baseball bat – is all too frequently a feature of these cases. Shocking instances of gratuitous violence by kicking defenceless victims while they are on the ground are also common in the criminal courts. These offences are typically committed when the perpetrator is under the influence of drink or drugs or both. The level of violence meted out goes well beyond that which might have been prompted by the initial dispute. Those who inflict the violence display a chilling indifference to the severity of the injury that their victims will suffer. Typically, great regret is expressed when the offender has to confront the consequences of his behaviour but, as this court observed in *R v Ryan Quinn* [2006] NICA 27 'it is frequently difficult to distinguish authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions'.

[24] The courts must react to these circumstances by the imposition of sentences that sufficiently mark society's utter rejection of such offences and send a clear signal to those who might engage in this type of violence that the consequence of conviction of these crimes will be condign punishment. We put it thus in *Ryan Quinn*: -

> '… it is now, sadly, common experience that serious assaults involving young men leading to grave injury and, far too often, death occur after offenders and victims have been drinking heavily. The courts must respond to this experience by the imposition of penalties not only for the purpose of deterrence but also to mark our society's abhorrence and rejection of the phenomenon. Those sentences must also reflect the devastation wrought by the death of a young man …'

[25] The case of *Ryan Quinn* involved the manslaughter of a young man by the delivery of a single blow by a closed fist. This court concluded that the starting point in Northern Ireland for that type of offence was two years' imprisonment and that this should rise, where there were significant aggravating factors, to six years. That was a very different case from the present. In that case there could be no doubt that the applicant did not intend serious injury to his victim although the court was of the view that he should have been aware that this might occur. In the present case the applicant deliberately stabbed his victim with a long knife. He must have known that this would inflict a significant injury. The attack took place because the deceased man took objection to the earlier entirely unprovoked attack on him by the applicant.

[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] It is clear that at least four of those aggravating circumstances are present in the instant case. It does not seem to me that the appellant was under provocation or in peril once he was in possession of the knife and therefore the fifth aggravating circumstance (number ii above) was probably present as well. The learned Trial Judge described this case rightly as "at the upper range of gravity". The Lord Chief Justice has stated that sentence for manslaughter of this type on a contest should lie in the range between eight and fifteen years. Those are the most general of guidelines and contemplate cases falling outside the range on either side, depending on the circumstances. This case involved such deliberate and substantial violence inflicted with a knife that on a contest it rightly falls outside the upper end of the range by some, but not a considerable measure. The only mitigating feature is the appellant's plea of guilty to manslaughter. At the time he acquired the knife he was facing an unarmed man. The fact that at an earlier stage he was defending himself from attack is not a mitigating feature when he stabbed the deceased three times in the chest, when the deceased was unarmed. We take the view that this was a very serious case of manslaughter, quite unlike the various cases referred to and one to which the comments of the Lord Chief

Justice clearly apply. The proper sentence on a contest was above 15 years by at least two years. In the circumstances of this case, taking into account the credit due for the guilty plea, it cannot be said that the sentence of thirteen years is manifestly excessive or wrong in principle nor does it give insufficient allowance for the plea of guilty or the fact that the appellant was at one stage defending himself before he acquired the knife from the deceased. We consider the sentence entirely proper for an offence of this seriousness and the appeal against sentence is dismissed.