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(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

LEE SMYTH and CAOLAN LAVERTY

Before: Morgan LCJ, McCloskey LJ and Horner J

Mr McCartney QC and Mr McCreanor appeared for Smyth
Mr Kearney QC and Mr Quinn appeared for Laverty
Mr Connor QC and Mr McNeill appeared for the PPS

MORGAN LCJ (delivering the judgment of the court)

[1] Each of these cases concern sentences for manslaughter imposed by Colton J at Belfast Crown Court on 16 January 2020. In each case the original charge was murder to which a not guilty plea was entered at arraignment on 11 January 2019 and on 15 November 2019 in each case a plea to manslaughter in respect of the death of Christopher Meli was entered on re-arraignment. We are grateful to all counsel for their helpful oral and written submissions.

Factual Background

[2] This summary of the factual background is taken from that set out by Colton J in his sentencing remarks:

- (i) On 11 December 2015, Christopher Meli was spending the evening drinking with his friends Ryan Morris, Steven Woods and Ryan's sister Sarah [Group 1] at Sarah's house in Twinbrook. Shortly after midnight, they went out to buy more drink at an off-licence in Laurel Glen. An altercation took place at an area called Doc's Path, however, there is no clear account of who was involved in this altercation or its cause. At least two members of Group 2, Nicole Curran and the defendant Daniel McGrath, were involved in this dispute.

- (ii) The next incident took place at an Indian takeaway in Laurel Glen. The owner saw three males kicking a fourth male on the floor at the front of his shop. Two females came to help the male. It is the prosecution case that the male on the floor was Daniel McGrath. What happened next was in revenge for the attack and gave rise to the offences.
- (iii) A group of between 15-20 males and females gathered in the Stewartstown Road area [Group 2]. This group, which included all eight defendants, ran towards Meli, Woods and the Morris siblings as they returned from the off-licence. What precisely took place is not clear. Sarah Morris alleges that Lee Smyth led Group 2 and was the first to arrive and the last to leave the area. Meli was knocked to the ground and surrounded by a crowd who repeatedly kicked him. Sarah Morris says she saw Smyth kick Meli at least four times after he fell to the ground.
- (iv) Ryan Morris and Woods also described being assaulted at this stage. Group 2 eventually left Meli lying on the ground. A number of Group 2 members chased Morris and Woods and further assaults were inflicted on them near St Luke's Church.
- (v) Morris says he was attacked when Group 2 first caught him on Doc's Path. He recognised Smyth, Lewis and Stilges in the attacking group. Someone kicked him from behind, near Pine Tree Manor, and he fell dislocating his knee. Lewis then kicked him in the face, causing a black eye and split lip. The attack continued when he reached St Luke's Church before he managed to escape.
- (vi) Woods alleged that he was knocked to the ground, winded and kicked whilst on the ground. The evidence indicates that McGrath believed that Woods was responsible for the assault on him earlier. Some members of Group 2 believed that Woods had a knife and that he injured Stilges.
- (vii) After Meli was left lying on the ground and was receiving help from members of the public, Lavery kicked him once to the right side of his chest/stomach. Meli was still alive and making gargling sounds. When paramedics arrived at the scene 8-10 minutes later, after a 999 call had been made at 00.52, they examined Meli and noted no signs of life. At 04.30, a forensic medical examiner attended and formally announced life extinct.
- (viii) Dr Peter Ingram carried out a post-mortem. He found that the cause of death was upper airways obstruction and inhalation of blood caused by facial

injuries as a result of blows to the head, probably a number of kicks causing bleeding in his nose and mouth.

- (ix) On behalf of Smyth, Professor Jack Crane produced a report in which he agreed with Dr Ingram's findings. However, he added that the blow that caused Meli's death was likely to be a punch to the nasal bones causing fracture and bleeding and that the blow need not have been of more than moderate force. This opinion was accepted by the prosecution.
- (x) Ryan Morris was examined at the Royal Victoria Hospital the following morning. He had left-sided bruising and decreased sensation over his intraorbital nerve distribution. He had pain on the left side of his femur and the back of his head. His right knee was swollen with pain at the medial joint line and over his medial collateral ligament.
- (xi) Woods was never medically examined. He says he suffered cuts and bruises to his upper left arm and scrapes all over. He had lumps on his head and a bloodied nose. He suffered from headaches after the attack.

Smyth

[3] Smyth pleaded guilty to manslaughter, 2 counts of Assault Occasioning Actual Bodily Harm ("AOABH") and one count of affray. The basis of his pleas was agreed as follows:

- (i) Smyth pleaded guilty to manslaughter on the basis that he joined in the attack on the deceased and delivered punches and kicks as part of the group, however, none of the blows was with more than moderate force and he did not intend to cause really serious harm. He later returned to punch the deceased several times on the ground, as described by witnesses.
- (ii) Smyth joined in assaults on Ryan Morris and Steven Woods. He pleaded guilty to AOABH against Morris and Woods.
- (iii) Smyth pleaded guilty to affray on the basis that this covers the events surrounding the assaults on Morris and Woods.

[4] Smyth was aged 18 years and 8 months at the time of the attack. He had one previous conviction for disorderly behaviour and was subsequently convicted of a customs offence as a result of the importation of what turned out to be a firearm which he had purchased at an open market in Bulgaria. The pre-sentence report indicated that he had a history of consuming alcohol prior to the incident but it appears that while he was in prison he developed an addiction to non-prescribed

medication. He was released on bail at various times but was returned to prison as a result of his failure to comply with bail conditions and the commission of further offences of possession of a class A drug and theft.

[5] He reported a decline in his mental health since the offences and had been prescribed medication for depression. He remained under threat in the Poleglass area as a result of the offences. His peer group and substance misuse were the main contributory factors in his offending behaviour. He lacked consequential thinking skills or victim awareness at the time of the offences. He was assessed as presenting a medium likelihood of committing further offences and was not considered to pose a significant risk of serious harm to others.

[6] Colton J noted the following aggravating factors:

- (a) his leading role in the attack;
- (b) gratuitous violence by kicking and punching a defenceless man on the ground;
- (c) the influence of alcohol;
- (d) the level of violence which went well beyond that which might have been prompted by the initial dispute;
- (e) indifference to the seriousness of the likely injuries sustained by the deceased;
- (f) the number of blows inflicted by the applicant and the group to the deceased;
- (g) the initial false allegation that the victim had a knife; and
- (h) subsequent assaults on Morris and Woods.

[7] In mitigation the judge noted:

- (a) the negative effect of the incident on his mental health;
- (b) his consequent misuse of non-prescribed medication;
- (c) his remorse and insight into the impact of his conduct on the Meli family and his own family;
- (d) the judge accepted that the letter he had written to the Meli family was evidence of his true remorse;
- (e) his relative youth; and

(f) the impact of delay in the proceedings coming to a conclusion.

[8] Balancing the aggravating and mitigating factors Colton J concluded that the appropriate sentence before discount for the plea was 11 years. He noted this was a late plea although it was welcomed by the prosecution. He imposed a determinate custodial sentence of 9 years with concurrent sentences on the other counts.

Laverty

[9] Laverty pleaded guilty to manslaughter and one count of AOABH on Woods. The basis of his plea was agreed as follows:

- (i) Laverty was part of Group 2 which went to Doc's Lane seeking Group 1 in the aftermath of the earlier altercation at the Indian takeaway.
- (ii) Laverty was present at Doc's Lane as part of Group 2 during which the violence unexpectedly escalated and the deceased was fatally assaulted.
- (iii) Laverty did not personally assault the deceased in any way during the incident. However, his presence encouraged others within Group 2 to act as they did when they assaulted the deceased. Laverty's plea (*actus reus*) is on the basis of secondary participation in a joint enterprise, based on presence alone.
- (iv) Laverty's plea (*mens rea*) was on the basis that he conditionally intended to encourage/assist the infliction of some harm, falling short of serious bodily harm, by someone in Group 2 on members of Group 1, if necessary.
- (v) Laverty accepts that he kicked the deceased once to his chest/stomach but asserts that this did not cause/contribute to the deceased's death.

[10] Laverty was 16 years and 8 months old at the time of the incident. He had no previous convictions at the time but was subsequently sentenced for a criminal damage offence committed before this incident. His mother and younger brother continued to live in Twinbrook. He resided on bail at a different address.

[11] The pre-sentence report noted that at the time of sentencing he was in a relationship with his partner with whom had a two year old son. He was working on a part-time basis in Lisburn for a company selling gardening equipment and acted as a carer for his grandmother. His lifestyle and attitude had changed since the time of the offence. He expressed remorse for his actions and stated that he no longer used either alcohol or drugs and intended to continue on that path. He was assessed as posing a low likelihood of committing further offences and not posing a significant risk of harm to others.

[12] Shortly before he was sentenced he was examined by an educational psychologist, Kate O'Hanlon. She found him pleasant, cooperative and willing to focus on the assessment. He expressed a wish to return to further education to study either mechanical or electrical engineering. He had been employed for 18 months in a local business and enjoyed the responsibilities and challenges of the role. He was operating within the low average range on the IQ spectrum but his processing speed was good as was his eye to hand coordination which augured well for a prospective career in engineering. He had poor confidence and quite low self-esteem and presented as a young man with growing maturity and a sense of responsibility for his family.

[13] Colton J noted the following aggravating features:

- (a) indifference to the seriousness of the likely injuries sustained by the victim;
- (b) the number of blows;
- (c) the influence of alcohol;
- (d) the initial false allegation that the victim had a knife; and
- (e) kicking the victim on the ground after the attack demonstrating his indifference to the victim's plight.

[14] In mitigation the judge noted:

- (a) his secondary participation in a joint enterprise of manslaughter;
- (b) his immaturity and youth at the time of the offence and its impact on his culpability;
- (c) his employment and his character references;
- (d) the educational psychologist's report;
- (e) his genuine remorse; and
- (f) the impact of delay.

[15] Balancing the aggravating and mitigating factors the judge considered that the appropriate sentence before discount for the plea was 6 years. The plea was late but welcome and the judge imposed a determinate sentence of 5 years and a concurrent sentence on the other count.

Manslaughter Sentencing Guidance

[16] The guideline authority on sentencing and manslaughter cases in this jurisdiction is *R v Magee* [2007] NICA 21. The court noted that offences of manslaughter typically cover a very wide factual spectrum and it was not easy in those circumstances to prescribe a sentencing range that would be meaningful. It considered, however, that certain common characteristics of many offences of violence committed by young men on other young men were readily detectable and these called for a consistent sentencing approach.

[17] The problem that needed to be addressed was set out by the court at [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’.”

[18] The guideline required to address that problem was set out at [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.”

The court clearly intended to increase the range of sentencing for an offence of this nature and consequently decisions prior to the promulgation of Magee are likely to be of very limited assistance.

[19] The court then identified some of the aggravating factors which can arise in these cases:

- (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.

[20] This subject was reviewed extensively in a paper presented to the Judicial Studies Board for Northern Ireland on 13 September 2013 by Sir Anthony Hart dealing with sentencing in cases of manslaughter, attempted murder and wounding with intent. The paper was prepared by an extremely experienced and capable Crown Court Judge and its approach has generally been followed in this jurisdiction and has the approval of this court. Dealing with cases involving substantial violence to the victim the judge said:

“Whilst sentences range from 6 years on a plea to 14 years in a contest, pleas in cases at the upper end of the spectrum attract sentences of 10 to 12 years, with sentences of 12 years being common. Sentences of 6 to 8 years tend to be reserved for cases where there are strong mitigating personal factors, or the defendant was not a principal offender.”

Youth

[21] Article 4 of the Criminal Justice (Children) (Northern Ireland) Order 1998 provides that in any proceedings for an offence the court shall have regard to

- (a) the welfare of any child brought before it; and
- (b) the general principle that any delay in dealing with the child is likely to prejudice his welfare.

This provision reflects Article 3.1 of the United Nations Convention on the Rights of the Child which states that in all actions concerning children the best interests of the child shall be a primary consideration and paragraph 5 of the Beijing Rules which states that the imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. This approach in relation to children was approved in *R v CK a minor* [2009] NICA 17 when dealing with a case involving a 12-year-old accused of serious sexual offences.

[22] Neither accused was a child at the time of sentencing but Lavery was 16 years and eight months old at the time of the commission of the offence and Smyth was some months over 18 years old. The statutory provisions on children are intended to reflect among other things that immaturity may be a substantial factor in relation to culpability, that stigmatisation of children should be avoided and that rehabilitation should be a primary objective in the sentencing of young people.

[23] These factors have to be balanced, of course, against the requirements of retribution and deterrence. Consequently, the nature of the offending will be an important factor in determining where the balance lies. The sentencing guidance gives a clear steer as to how that balance is to be struck. At [23] of Magee the court refers to “wanton violence among young males”. That is a clear indicator that the sentencing range takes into account those of teenage years. The guidance in [26] suggests that deviation from the range may arise because of the potentially limitless variety of factual situations where manslaughter is committed but we accept that very careful consideration would have to be given to cases where wanton violence was committed by very young teenagers. The decision of this court in *R v Coyle* [2010] NICA 48 is an example of such an approach.

[24] We are satisfied that this was a case of substantial violence to the victim consisting of punches and kicks while he lay on the ground which resulted in injuries to his face and to his body. The attack had clear elements of cowardice and defencelessness and was entirely consistent with the trial judge’s assessment of a revenge mission. It therefore qualifies as a case of substantial violence to the victim as described by Sir Anthony Hart. Mr Kearney submitted that although in his paper Sir Anthony had appended a number of manslaughter cases none of them were examples of the application of his contention for 6 to 8 years for secondary offenders

or those with substantial mitigation on a plea. We accept that submission but we are satisfied that the range put forward by Sir Anthony in those cases is appropriate.

Delay

[25] This court has recently considered the question of the reasonable time guarantee in Article 6 ECHR in *R v Dunlop* [2019] NICA 72 and *DPP's Reference No 5 of 2019 (Jack)* [2020] NICA 1. At [29] of *Dunlop* the court said that the threshold for proving a breach of the reasonable time requirement is an elevated one not easily traversed. In determining whether a breach of the reasonable time requirement has been established the court will consider "in particular but inexhaustively the complexity of the case, the conduct of the defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap. Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration".

[26] We had available to us a chronology of investigation and prosecution prepared by the PPS at our request. We invited submissions on whether the delay in this case breached the reasonable time guarantee. Clearly an explanation was required since the period between the commencement of the investigation and sentencing was just over four years. This was, however, a case in which the history of the events was confused as a result of the number of people involved and the differing recollections and perspectives of potential witnesses describing a series of events.

[27] The trial papers comprised some 4000 pages and there were 160 witnesses. In addition to that many others were interviewed. In respect of the timeline the only criticisms related to a period between June 2016 and April 2017 when the PPS made further requests for evidence to the police and a further period of 2 months between March and May 2018 when authority was sought for enhanced fees for the defence teams from the Legal Services Agency which properly reflected the complexity of the case.

[28] The complexity of the case was not in dispute and in our view the periods in respect of which complaint was made neither individually nor cumulatively amounted to a breach of the reasonable time guarantee provided by Article 6. We accept, however, that it is proper to take into account that each of those convicted was subject to bail conditions and were left in a state of doubt for a substantial period as to the consequences for them as a result of their conduct.

Conclusion

[29] Smyth played a leading role in the attack upon the deceased. He delivered multiple blows by punching and kicking him. He returned to punch him further when he was on the ground. His only substantial mitigating factor was his remorse.

Given his age he must have realised the seriousness of what he was doing so that his personal circumstances will not be strong mitigating factors following *AG Ref No 6 of 2004 (Doyle)* [2004] NICA 40. He spent a great deal of time in custody on remand as a result of which he has a limited period to serve. Delay is not a significant factor in his case.

[30] We are satisfied that the sentence of 11 years identified by the learned trial judge before applying discount for the plea was consistent with the authorities and entirely appropriate. The plea was late. In his defence statement in January 2019 the applicant made the case that he acted in self-defence and it was only 10 months later that he acknowledged his guilt. A discount of two years leading to a determinate custodial sentence of nine years comprising four years and six months in custody and the same on licence cannot be criticised. His application for leave to appeal is granted but his appeal is dismissed.

[31] Lavery was a secondary party. He was under 18. The trial judge accepted that his participation to an extent was as a result of peer pressure and immaturity which caused him to run with the group which attacked the deceased. In light of his youth the delay in coming to trial ranked somewhat higher in his case. The most obvious aggravating factor in his case was the kicking of the deceased as he lay on the ground after the attack showing total indifference to the victim's plight. In his favour was his genuine remorse.

[32] Had he been of full age the appropriate sentence on a contest would have been about nine years before discount for a plea. In adopting a starting point of 6 years the learned trial judge made allowance for his youth, the delay, his remorse and to some extent his personal circumstances. He also maintained a denial of his responsibility in his defence statement in January 2019 and cannot complain about the 1 year reduction for the plea. His appeal is dismissed.