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LONDONDERRY CROWN COURT

SITTING IN LAGANSIDE BELFAST

R

-v-

PIPER JOHN McCLEMENTS
AND
MATTHEW BRIAN GILLON

COLTON J

The Counts

[1] On the indictment the defendants were initially charged with the following counts:

- Count 1 – The defendants are jointly charged on Count 1 with murder contrary to common law. The particulars allege that Piper John McClements (formerly known as Daryl John Proctor) and Matthew Brian Gillon murdered Paul McCauley on 6 June 2015.

- Count 2 – Matthew Brian Gillon is charged with causing grievous bodily harm with intent contrary to Section 18 of the Offences Against the Person Act 1861, namely that on 16 July 2006 he unlawfully and maliciously caused grievous bodily harm to Mark Lynch with intent to do so.

- Count 3 – Matthew Brian Gillon is charged on the same date (16 July 2006) with attempting to cause grievous bodily harm to Gavin Mullin with intent.

[2] The defendant Piper John McClements pleaded not guilty at arraignment to the first count on 2 February 2018. On 19 September 2018 he applied to be re arraigned on application by his counsel at which stage he pleaded guilty.

[3] Matthew Brian Gillon pleaded not guilty to all three counts at arraignment on 2 February 2018. On 20 September 2018 he applied to be re-arraigned on Count 1 in respect of which he pleaded not guilty to murder but guilty to manslaughter. This manslaughter plea was accepted by the Crown.

[4] On the same date he pleaded guilty to unlawfully and maliciously inflicting grievous bodily harm on Mark Lynch, contrary to Section 20 on Count 2.

[5] On the same date the defendant pleaded guilty to a fourth count namely a Section 47 assault on Gavin Mullin. The third count was left "on the books" on the usual terms.

[6] I am obliged to the counsel instructed in this case for their able written and oral submissions and for the manner in which they dealt with this difficult case. Mr Ciaran Murphy QC led Mr David Russell for the prosecution. Mr Martin O'Rourke QC led Mr Donal Sayers for the defendant, Piper John McClements. Mr Turlough Montague QC led Mr Sean Doherty for the defendant, Matthew Brian Gillon.

Previous criminal proceedings

[7] The incident that gives rise to this indictment was the subject of previous criminal proceedings in 2008. At that time Daryl Proctor (now Piper John McClements) was, on Count 1, charged with attempted murder of Paul McCauley on 16 July 2006; on Count 2 with causing Mark Lynch grievous bodily harm with intent on the same date; on Count 3 with attempted grievous bodily harm on the same date in relation to Gavin Mullin, and on Count 4 with causing grievous bodily harm with intent to Paul McCauley. For convenience I shall refer to the defendant as Piper McClements throughout these sentencing remarks.

[8] On Friday 30 January 2009, Daryl Proctor was the subject of a sentencing hearing having pleaded guilty to Counts 2, 3 and 4. Count 1 was left on the books at that time on the usual terms.

[9] At the date of the sentencing hearing Paul McCauley had sustained devastating injuries and was in a permanently disabled state. The defendant accepted his guilt as a participant in a joint enterprise to carry out a violent attack on Mr McCauley and his companions.

[10] On 6 February 2009 the defendant was sentenced by Mr Justice Hart to a custody probation order comprising 12 years custody and one year's probation supervision. He was released from custody on 23 January 2015 and was under the supervision of the Probation Service for the following 12 months until the completion of the order on 30 January 2016.

[11] The current proceedings arise from the fact that Paul McCauley, who had been resident at Longfield Care Home, 2 Longfield Road, Eglinton, subsequently died on 6 June 2015. It was confirmed by Dr Lyness, the State Pathologist, who conducted a post mortem examination that the cause of death was pneumonia due to head injury.

Background circumstances

[12] On 15 July 2006 Gavin Mullin, a manufacturing technician (then aged 28) was with his friend Paul McCauley who was then age 29. They had known each other since they were 12 or 13 years of age.

[13] At about 3.00 pm in the afternoon they went to the home of Damien McCrossan at 105 Chapel Road, Derry. The young men had some work to do around the house and they removed various items from a cellar which they intended to use to make a bonfire in a field adjacent to the house later that night. The plan was to have a barbeque that evening as Damien McCrossan was going to work abroad the following week.

[14] Damien McCrossan had invited his friends to his home at around 7.00 pm. He had gone to the house by 6.30 pm and was preparing the barbeque. It was at the end of the lawn on the left-hand side of the house close to the garage which overlooks a large field of overgrown grass. Beyond that there is a further area of overgrown land which stretches from Irish Street to Sheppard's Glen below and to Gobnascale above and to the right.

[15] Paul McCauley was one of the first to arrive at about 7.15 pm that evening. By around 10.00 pm everyone who was coming to the barbeque had arrived. There were about 20 people present.

[16] At about 10.30 pm Damien McCrossan went into the field at the side of the house. At the bottom of the field there was some rubbish and other material which he had collected over a period of months. He planned to light that as part of the bonfire. He had taken the precaution of informing the Fire Brigade in advance to ensure that no problem would be caused. The bonfire was lit between 11.00 pm and midnight. The guests gathered in the area of the property to enjoy the evening. Between midnight and 1.30 am Damien McCrossan was pushing a wheelbarrow up to the garage to get wood. He heard noises at that time and looked at the direction of Gobnascale. He saw two groups of people, comprising about seven in total, at a railing that run along Irish Street. Nothing further occurred at that time.

[17] There is evidence that a Mr Ivan Campbell was the subject of an attack upon him at Nelson Drive in the city after which he was brought to Altnagelvin Hospital. He was known to the defendants and the assault on him appears to have been a factor in their subsequent behaviour.

[18] By the early hours of the morning most of those who had attended the barbeque had left to go home. The persons that remained were Damien McCrossan, Paul McCauley, Gavin Mullin and Mark Lynch. Mark Lynch suffers from muscular dystrophy which causes him mobility issues and makes it difficult for him to walk. By about 3.30 am Damien McCrossan went into the house to start cleaning up, leaving the others outside. At approximately 3.30 am to 3.45 am a sudden violent attack occurred upon those people remaining at the bonfire when they were attacked by a group of youths.

[19] Gavin Mullin thought there were at least six people, but possibly ten involved. He estimated them to be aged in their late teens to early twenties. He remembers falling to the ground and rolling down a hill. There was someone standing above him saying "get him" or "kick him" or words to that effect. He then saw the group running off in the same direction from which they had come. They were laughing as they left.

[20] Gavin Mullin could hear what he described as a snoring or snorting sound close by him. He looked to his friend Mark Lynch to see if he was all right. He saw blood on him and also noticed that Paul McCauley was staggering around. He asked Mark if he could leave him and Mark said not to. Paul McCauley was bleeding heavily from his nose. Gavin Mullin tried to bring both of them back to the house. When he was about half way there he asked Mark could he leave him there with Paul so he could go and get help. Paul McCauley was put into the recovery position and Gavin Mullin ran to the house and asked Damien McCrossan to get an ambulance and police. Damien McCrossan recollects that Gavin came through the kitchen door and there was blood visible on him. He rang 999. He then ran to Mark Lynch. Mark appeared to be all right and he went to Paul McCauley who was lying halfway between the fire and the garage on his side with Gavin Mullin holding him. He was gurgling and having trouble breathing. His face was covered in blood. He then ran back to tell the telephone operator about Paul's condition and he informed his father, who was asleep in bed at the time.

[21] Mark Lynch is now aged 38 (26 at the time) and on the date of the assault lived in Letterkenny. He describes seeing a male standing with six or seven others around him and he heard Paul McCauley saying "you're looking fierce aggravated" or words to that effect. Mark Lynch realised what was going to happen and because of his disability he fell straight down. He "blacked out" at that point and remembers nothing until he regained consciousness. He saw Paul McCauley wandering around looking disorientated. He asked Gavin not to leave him and was ultimately brought into the house. He could taste blood in his mouth and he saw a footprint on his face and marks on his back. He subsequently realised that his jaw was broken. It appears that he had been rendered unconscious as a result of the trauma suffered by him.

[22] At 3.45 am John McClintock, senior paramedic was tasked with Nicola MacCorkell to 105 Chapel Road, arriving at 3.45 am. He found on arrival that

Paul McCauley's face was swollen on the right side and he had bruising to his head. He was unconscious. He had difficulty breathing due to a blocked airway caused by vomiting. His airway was cleared but he remained unconscious and could not speak. He was brought by ambulance to the Accident and Emergency Department of the Altnagelvin Hospital where he arrived at 4.15 am. En route he arrested twice and was given further treatment.

[23] Rodney Clements, paramedic was with another ambulance. He assisted in the treatment of Paul McCauley. He noted one of the others had boot marks to his back and face and could see these as bruising coming out in the pattern of sole – that was Mark Lynch.

[24] Mark Lynch and Gavin Mullin were also conveyed to Altnagelvin Hospital.

Medical evidence

Paul McCauley

[25] Dr Tallon examined Paul McCauley on his arrival in the resuscitation room at Altnagelvin Hospital. He was unconscious. Examination of his eyes showed pupil abnormalities consistent with a serious brain injury. He was incubated by the on-call anaesthetic team and minutes later his heart stopped beating and he was given chest compression, adrenalin and Atropine as a result of which his circulation was restored. He underwent a CT scan of his brain which showed a serious brain injury. He was transferred to the Intensive Care Unit where a CT of his brain demonstrated serious injuries.

[26] He was subsequently transferred to the Royal Victoria Hospital where he underwent neurosurgery in attempts to alleviate brain swelling. The following morning he was breathing on a ventilator and showed some response to pain. A CT scan of his brain demonstrated a large haemorrhage on the outer surface of the brain, a sub-dural haematoma and a right temporal non-depressed skull fracture, a fracture of his right petrous bone and gross cerebral oedema. On 19 July a bi-frontal de-compressive craniotomy was carried out.

[27] He was subsequently transferred back to Altnagelvin Hospital but only made a limited recovery from his injuries. This may have been due to a hypoxic episode which starved oxygen from his brain. He was not able to fix, follow commands and his motor movements showed only flexor responses in the upper limbs. He was left with severe brain damage which was irreversible.

[28] He was admitted to the Regional Acquired Brain Injury Unit under the care of Dr John McCann on 27 November 2006. He demonstrated what Dr McCann referred to as features consistent with a minimally conscious state secondary to severe traumatic brain injury. His eyes opened spontaneously but they did not fix or follow objects or persons. He had no spontaneous limb movements and had markedly

decreased muscle tone in all four limbs with a resultant joint flexon deformity and contracture. He had to receive all of his food and fluids by feeding tubes and had a catheter in place for urinary function. He had limited, if any, awareness of his surroundings according to Dr McCann and while in hospital he had shunt placed into his head to drain excess fluid from his brain which did not improve the level of responsiveness. He had surgery carried out to correct deformities of feet and ankles. In 2007 Mr McCauley was in a minimally responsive state with no significant improvement from admission in November 2006. He was totally dependent upon nursing staff and carers for all aspects of his care and could only be moved in a specialist wheelchair with great difficulty. He had no bowel or bladder function. He was vulnerable to infection, especially chest infection and skin breakdown. In 2007 Dr McCann thought it very unlikely that he would demonstrate any recovery. He had a minimally conscious state secondary to severe traumatic brain injury. He was fed through a feeding tube and remained in that state requiring full-time care. At the sentencing hearing in 2009 the court was told that there was no potential for recovery and that he would remain in a low level conscious, probably vegetative state and would require full-time care for the rest of his life. His life expectancy was estimated to have been reduced to between 10 and 15 years from the date of injury.

[29] As is clear from the victim impact statements I have received from Mr McCauley's family a heavy burden fell on them in respect of Mr McCauley's care, but a burden which was shouldered with outstanding devotion, commitment and fortitude.

[30] The medical evidence available to the court in 2009 was proven to be accurate.

[31] Paul McCauley ultimately died on 6 June 2015, life being pronounced extinct by Dr Burczy. A full post mortem was carried out by Dr Lyness, State Pathologist. In his report Dr Lyness indicates that Paul McCauley remained with an uninterrupted reduced level of consciousness from the date of his admission to Altnagelvin Hospital on 16 July 2006 until his death in 2015. The injuries that were found by him included the contusions, subdural haematomas, skull and sinus fractures, raccoon sign and scalp bruising, all indicative of traumatic head injury. He indicates in his report that the pathology that he outlined was a direct result of a head injury and that the initial injuries may cause further brain damage and that damage is, therefore, a consequence of the primary brain injury and may be described as secondary injuries. He describes how Mr McCauley suffered seizures and recurring infections to which he was predisposed by the initial brain injury. These can also cause secondary brain damage.

[32] Within the post mortem report Dr Herron, a neuropathologist, outlines that Mr McCauley suffered a severe head injury on 16 July 2006 that was ultimately the cause of his death from pneumonia in 2015.

[33] Dr Lyness indicates that the post mortem examination revealed pneumonia which is a severe acute inflammatory condition of the lungs caused by bacterial

infection. His opinion was that it was the general debilitating effects of this pneumonia as well as its effect on his ability to breathe which precipitated his death. He states that it is well recognised that this is a complication associated with immobility and reduced consciousness secondary to a head injury. He concludes that:

> *"Indeed, in this instance there seems little doubt that the head injury he had sustained nine years prior to his death was the initiating event in a protracted fatal sequence."*

Dr Lyness indicates that:

> *"In consideration of the clinically diagnosed fractures of the bones on the left side of the face and there having been bruising and swelling to the right eye, it would seem reasonable to suggest that he sustained some form of blunt force trauma to these regions, possibly punches. Indeed, it remains possible that such a blow caused him to fall backwards resulting in the subdural haemorrhage."*

[34] In the original criminal proceedings Professor Crane, State Pathologist, also reported on the case. He outlined in his report that the injuries would appear to be confined to the head. He states that:

> *"Considerable force would have been required for his injuries and could not have been due to a simple unaccelerated fall to the ground or by punching … the injuries would be consistent with him having been kicked on the right side of the head with a shod foot, or by his head being stamped upon."*

Mark Lynch

[35] Mark Lynch was examined by Mr Boyd, consultant oral and maxillofacial surgeon at Altnagelvin Hospital. Examination and x-rays confirmed a fractured mandible. Two x four-hole plates were placed across the fracture on the anterior mandible and one single four-hole plate was placed across the fracture of the right angle of the mandible. Incisors were repaired using sutures. He was discharged from hospital on 17 July and was reviewed at Letterkenny General Hospital on 11 October. He was re-admitted to have the plates removed from his jaw after which he made a satisfactory recovery.

Gavin Mullin

[36] Gavin Mullin received minor injuries.

Forensic evidence

[37] Photographs taken in the aftermath of the incident demonstrated sole imprints on the back and face of Mark Lynch.

[38] A grey hooded top was also recovered from Lynch. It was bloodstained and had shoe marks.

[39] A blue baseball cap was recovered at the scene.

[40] Shoes were recovered from the defendant McClements namely 2 x Ador trainers which he admitted he was wearing on the night of incident. McClements was arrested on 27 July 2006 and swabs were taken from him for forensic analysis at that time.

[41] The blue baseball cap was examined at the forensic science laboratory in Northern Ireland. The major profile obtained from the headband of the baseball cap matched that obtained from the sample attributed to Mr McClements. The prosecution's contention was that the cap was habitually worn by Proctor and was worn on the night and found at the scene.

[42] Forensic science also carried out examinations in relation to the training shoes that had been removed from Mr McClements. A right training shoe was examined. Areas under the heel cup, the stripes on the inner quarter and the front of the eyelet panel all had areas of bloodstaining. They were sampled for DNA. The bloodstain from under the heel cup gave a partial profile which matched the profile attributed to Paul McCauley. The bloodstaining from the eyelet panel gave no profile. The bloodstaining from the inner quarter gave a mixed DNA profile from more than one person. A major profile was established and originated from an unknown male. The partial incomplete minor profile matched Paul McCauley.

[43] DNA from under the heel cup was sub-exhibited and it was sent to the Cellmark laboratory in England for further analysis. High sensitivity DNA (STR) profiling tests were carried out which provided extremely strong scientific support for the proposition that the DNA tested from the heel cup originated from Paul McCauley rather than from another person unrelated to him.

[44] For the purposes of this hearing Forensic Science NI recently reviewed the findings from the previous examinations. They looked at whether the DNA from the heel of the right trainer comprised:

(a) The DNA of the deceased and one known person, or

(b) Two unknown persons.

They calculated the result to be in excess of one billion times more likely that the former proposition is true rather than the latter.

Prison calls

[45] The prosecution also referred to contents of various telephone recordings made by the defendant while in prison. The transcripts are between 2009 and 2010.

[46] Mr Murphy does not place any particular emphasis on the contents in terms of the prosecution case, relying as he does on the same basis for the conviction as the plea in 2009. Nonetheless, the contents of the conversations do not reflect particularly well on the defendant. The comments range from ones of denial, self-pity, admissions, bravado, complaints about the fact that he is taking the "rap" for all the others who were involved and suggestions that he should be paid money by them for doing so.

[47] What is entirely absent from his comments on this whole affair is a lack of remorse or empathy for the victim or his family.

Sentence in respect of Piper McClements

[48] On 19 September 2018 McClements entered a plea of guilty to the murder of Paul McCauley and accordingly a mandatory life sentence was imposed.

[49] It is now the responsibility of the court in accordance with Article 5 of the Life Sentences (Northern Ireland) Order 2001 to determine the length of the minimum term that the defendant will be required to serve in prison before he will first become eligible to have his case referred to the Parole Commissioners for consideration by them as to whether, and if so, when he is to be released on licence. I make it clear however that, if and when, he is released on licence he will, for the remainder of his life, be liable to be recalled to prison if at any time he does not comply with the terms of that licence.

[50] Article 5(2) of the Life Sentences (Northern Ireland) Order 2001 provides that the minimum term:

> *"… shall be such part 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."*

[51] The legal principles that the court should apply in fixing a minimum term are well settled.

[52] In **R v McCandless & Ors** [2004] NICA 1 the Court of Appeal held that the Practice Statement issued by Lord Woolf CJ and reported at [2002] 3 All ER 412

should be applied by sentencers in this jurisdiction who are required to fix tariffs under the 2001 Order. The relevant parts of the Practice Statement for the purposes of this case are as follows:

> *"The normal starting point of 12 years …*
>
> *10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in paragraph 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.*
>
> *11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because:*
>
> *(a) the case came close to the borderline between murder and manslaughter; or*
>
> *(b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or*
>
> *(c) the offender was provoked (in a non-technical sense) such as by prolonged and eventually unsupportable stress; or*
>
> *(d) the case involved an overreaction in self-defence; or*
>
> *(e) the offence was a mercy killing.*
>
> *These factors could justify a reduction to 8/9 years (equivalent to 16/18 years).*
>
> *The higher starting point of 15/16 years*
>
> *12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as;*
>
> *(a) the killing was 'professional' or a contract killing;*
>
> *(b) the killing was politically motivated;*

(c) *the killing was done for gain (in the course of a burglary, robbery etc);*

(d) *the killing was intended to defeat the ends of justice (as in the killing of a witness or a potential witness);*

(e) *the victim was providing a public service;*

(f) *the victim was a child or was otherwise vulnerable;*

(g) *the killing was racially aggravated;*

(h) *the victim was deliberately targeted because of his or her religion or sexual orientation;*

(i) *there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing;*

(j) *that extensive and/or multiple injuries were inflicted on the victim before death;*

(k) *the offender committed multiple murders.*

Variation of the starting points

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards to take account of aggravating or mitigating factors which relate to either the offence or the offender in the particular case.

14. Aggravating features relating to the offence can include;

(a) *the fact that the killing was planned;*

(b) *the use of a firearm;*

(c) *arming with a weapon in advance;*

(d) *concealment of the body, destruction of the crime scene and/or dismemberment of the body;*

> (e) *particularly in domestic violence cases, the fact that the murder was the combination of cruel and violent behaviour by the offender over a period of time.*
>
> *15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.*
>
> *16. Mitigating factors relating to the offence will include –*
>
> (a) *an intention to cause grievous bodily harm, rather than to kill; or*
>
> (b) *spontaneity and lack of premeditation.*
>
> *17. Mitigating factors relating to the offender may include –*
>
> (a) *the offender's age;*
>
> (b) *clear evidence of remorse or contrition;*
>
> (c) *a timely plea of guilty."*

Victim Impact Reports

[53] Before I consider the application of these principles I want to highlight and acknowledge the victim impact statements I have received in this case. I received statements from Mark Lynch and Gavin Mullan, who were not only affected by their own trauma but also by the knowledge of the consequences for their friend, Paul McCauley. I also have received statements from the immediate family of Paul McCauley, from his daughter Maeve, Maeve's mother Julia, Paul's father James, his sisters Joanne and Emma and his brother David. These statements are detailed and provide an eloquent testimony to Paul and to the devastating impact his injuries and subsequent death have had on the entire family. The family of course includes his beloved mother, Cathy, who has passed away as a result of cancer a little over a year after Paul.

[54] These statements have been supplemented by photographs of Paul both before and after the attack.

[55] These statements bring home to me the enormous and devastating impact Paul's injuries and eventual death have caused to his family.

[56] It is also clear that the sectarian nature of the assault has engendered justifiable condemnation in the community which has been reflected in widespread

sympathy and support for the McCauley family. The impact of Paul's death will resonate with his family and friends for the rest of their lives. I recognise that the loss of Paul's life cannot be measured by the length of a prison sentence. There is no term of imprisonment that I can impose that will cure the anguish and loss suffered which is so movingly expressed in the impact statements I have read.

Application of the Principles

[57] In applying the Practice Statement I bear in mind that it is not to be interpreted as a straitjacket designed to create a rigid, compartmentalised structure into which each case must be shoehorned. As the Court of Appeal said in **McCandless**:

> *"… the sentencing framework is, as Weatherup J described it in paragraph 11 of his sentencing remarks in **R v McKeown** [2003] NICC 5, a multi-tier system. Not only is the Practice Statement intended to be only guidance, but the starting points are, as the term indicates, points at which the sentencer may start on his journey towards the goal of deciding upon a right and appropriate sentence for the instant case."*

[58] The Court of Appeal has made it clear that selecting a starting point is not a mechanistic or formulaic exercise. The guidelines are there to assist the court to proceed to, what in the circumstances of the case, it considers is a just and proportionate sentence having regard to the guidelines.

[59] What then is the appropriate starting point? In determining the starting point the court must have regard to the fact that the defendant was a young offender at the time he committed the offence. He was aged 15 years and almost 11 months at the time he committed the offence. He was in law a child. Although he is now an adult the sentencing guidelines and principles applicable are essentially unchanged from those in 2009. In **R v ML** (Sentencing) [2013] NICA 27 the Court of Appeal considered the proper approach to the sentencing of an adult in respect of conduct when a child. In that case the court was dealing with historic sexual offences. The court took the view that when assessing the issue of culpability, which was a primary consideration in sentencing, it would be appropriate to consider what sentence would be imposed today on a child who was slightly older than the offender was at the time that he committed the offences.

[60] That approach chimes entirely with the Practice Direction in **McCandless** which governs the minimum term in murder cases both in 2009 and today.

[61] Thus, in paragraph 24 the Practice Direction states:

> *"24. <u>In the case of young offenders, the judge should always start from the normal starting point appropriate for an adult (12 years)</u> (my underlining). The judge should then reduce the starting point to take into account the maturity and age of the offender. Some children are more, and others less, mature for their age and the reduction that is appropriate in order to achieve the correct starting point will very much depend on the stage of the development of the individual offender. A mechanistic approach is never appropriate. The sort of reduction from the 12 year starting point which can be used as a rough check, is about one year for each year that the offender's age is below 18. So for a child of 10, the judge should be considering a starting point in the region of 5 years.*
>
> *25. Having arrived at the starting point the judge should then take account of the aggravating and mitigating factors in the particular case, which will take the prescribed minimum term above or below the starting point. The sliding scale proposed is intended to recognise the greater degree of understanding and capacity for normal reasoning which develops in adolescence over time as well as the fact that young offenders are likely to have the greatest capacity for change. It cannot take account of the individual offender's responsibility for, and understanding of the crime."*

[62] In **R v Finnegan DPP's Reference No:8 of 2013** [2014] NICA 20 at [24] the Court of Appeal in this jurisdiction confirmed that:

> *"… the approach to the sentencing of those who were children at the time of the commission of the offence is different from the approach for adults."*

At paragraph [25] the court in that case noted that:

> *"… domestic and international provisions in relation to the sentencing of children are designed to ensure that where detention of young people is necessary it should be for the shortest appropriate time and the focus should be on rehabilitation away from recidivist offenders."*

[63] The court further noted the assistance that can be found in the general factors taken into account in the compilation of the Sentencing Guidelines Council definitive guidelines.

[64] The most recent iteration of the guidelines was published on 1 June 2017. In relation to the sentencing of children and young people the overarching principles identified in the definitive guideline confirm that while the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focussed on the child or young person as opposed to offence focussed (para 1.2). It is expressly recognised that:

> *"Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and development age is of at least equal importance to their chronological age (if not greater)."*

[65] These themes are echoed in the section headed "Determining the Sentence" in which the definitive guideline indicates that:

> *"In assessing culpability the court will wish to consider the extent to which the offence was planned, the role of the child or young person (if the offence was committed as part of a group), the level of force that was used in the commission of the offence and the awareness that the child or young person had of their actions and its possible consequences. There is an expectation that in general a child or young person will be dealt with less severely than an adult offender. In part, this is because children and young people are unlikely to have the same experience and capacity as an adult to understand the effect of their actions on other people or to appreciate the pain and distress caused and because a child or young person may be less able to resist temptation, especially when peer pressure is exerted. Children and young people are inherently more vulnerable than adults due to their age and the court will need to consider any mental health problems and/or learning disabilities they may have, as well as their emotional and development age. Any*

> *external factors that may have affected the child or young person's behaviour should be taken into account."*

[66] The circumstances of this case can be distinguished from the case of **Wootton and Another** [2014] NICA 69 in which the court was dealing with a defendant who had committed a terrorist murder when just two months short of his 18th birthday. It can also be distinguished from cases such as **R v CK** [2009] NICA 17 and **R v Coyle** [2010] NICA 48. In both these cases the court was sentencing young offenders where the welfare of the child was the primary consideration for the court in terms of disposal.

[67] The basis of the expectation that in general a child or young person will be dealt with less severely than an adult offender is supported by the individual features in this case.

Report from Dr Weir

[68] The court received a report from Dr Weir, Consultant Clinical Psychologist, which offers an insight into the defendant that was not available to the Probation Service or to the sentencing court in January 2009. She assessed the defendant on two occasions, on 13 October 2018 and 29 October 2018. He presented as someone with mental health problems. Dr Weir had access to medical notes and records and histories not available to the Probation Service. The defendant has had no contact with his biological father since age 2/3 years. After his biological father left his mother started a relationship with a man who became his stepfather who remained in his life from the age of 2 or 3 up to age of 12. Dr Weir records that he was subject to brutal and psychologically damaging punishment by his stepfather during this period of time. During this time he lived in different countries because his stepfather was in the army including Germany, Cyprus and the UK as demanded by his stepfather's army job. He came to live in Derry shortly before his stepfather parted from his mother. Prior to coming to Derry he had been referred to psychiatric services aged 10.

[69] After his stepfather left it appears the defendant turned to a very small "clique" of older peers with whom he associated in an area where criminal activity was rife. The defendant reported to Dr Weir that he wanted to "fit in and be accepted by them". In 2004, aged 13, he was referred by a social worker to a consultant psychiatrist in the Child and Family Team in Derry. The social worker was concerned about his depression and history of fire setting and behaviour disorder. Furthermore, the social worker was concerned that his mother had significant difficulties managing her son. Criminal activity was rife in the area and in January 2006 Piper McClements suffered a head injury after he was hit with a brick that came over their garden wall some weeks before the index offence. This history contrasts somewhat with the defendant's comments to the Probation Service in both 2008 and in 2018 where he suggests an "uneventful childhood" which was

not marred by any significant or traumatic incident. He had described positive relationships with his mother, stepfather and siblings. The matters set out in Dr Weir's report resonate with the factors set out in the definitive guideline which underpin the recommended approach to sentencing of children and young offenders.

Pre-sentence Report

[70] The pre-sentence report prepared by the Probation Service assesses the defendant's likelihood of re-offending as medium. The report expresses concern that the defendant associated with individuals who it seems, like the defendant, possess strong sectarian views and rigid beliefs, particularly at the time of the offence and also negative peer influences.

[71] Although not relevant to this sentencing exercise the defendant was not assessed as someone who presented as a significant risk of serious harm.

[72] In terms of the future the Probation Service acknowledges that he was fully compliant with his 12 month period of probation supervision subsequent to his release from custody in 2015 during which time he completed PBNI's Accepting Differences programme and engaged with PBNI psychology. He has not come to any adverse police attention for violence from his release from custody in 2015 until his remand in 2018. He has had two convictions for road traffic offences. The report indicates that the defendant has reflected on his former lifestyle and has come to understand how his young life was manipulated by older and negatively influential peers from his community during his formative years, factors which he states would no longer be relative to him. He now has had a steady girlfriend for the past 12 months who is in the early stages of pregnancy. Following his eventual release from custody he would be keen to move away from Northern Ireland to live in England to live in the area from where his girlfriend originates with a view to making a fresh start in life. It has not been possible for him to do so because of bail conditions in relation to this matter.

The offence

[73] In terms of his involvement in the offence I propose to sentence the defendant on the same basis as Mr Justice Hart in 2009 as described in the Court of Appeal judgment in the following terms:

> *"[6] … he initially denied all involvement in the offences but ultimately pleaded guilty on the basis that he had been a participant in the joint enterprise to carry out this violent attack. The prosecution accepted that it was unable to prove beyond a reasonable doubt that the applicant himself kicked or stamped on Mr McCauley's head. The applicant accepted that he had struck Mr Lynch but claimed in the pre-sentence*

> *report that he had not been responsible for breaking his jaw as he had not hit him "very hard". Again, the prosecution accepted that it could not prove that the fracture to Mr McCauley's jaw had been directly caused by a blow struck by the applicant."*

[74] I must therefore sentence the defendant upon the basis that he did not himself kick or stamp upon Paul McCauley's head but he was a party in a joint enterprise possessed of the intention to assist or encourage others to act with the intention to cause grievous bodily harm. That assistance or encouragement included, at the very least, striking Mr Lynch.

Starting Point

[75] Applying the general principles applicable to sentencing for offences committed by young persons together with the individual circumstances of this defendant I have no doubt that the starting point of 12 years should be reduced in this case.

[76] In accordance with the Practice Direction I start from the normal starting point appropriate for an adult of 12 years and reduce it to one of 10 years in this case to take into account the maturity and age of the defendant at the time he committed this offence.

Aggravating Features

[77] Having settled on that starting point I now consider the aggravating features in this case. The victim was deliberately targeted because of his religion. He was in a vulnerable position having regard to the fact that he was subject to a brutal unprovoked attack from a large number of males. The victim was a man of a peaceful, friendly disposition and was in no position to defend himself. The injuries were inflicted by kicking or stamping upon his head. There were other victims. The injuries caused to Mr McCauley were catastrophic. They have resulted in enormous pain and suffering for him and his family both in terms of having to care for him during his remaining years and having to cope with his pointless and tragic loss of life.

[78] I consider that there was a degree of premeditation in this assault. It is correct that the defendant and the group of which he was a part did not specifically target the defendant and only came across him and his friends by coincidence. It is clear nonetheless that they were "spoiling for a fight" and they had left a predominantly Protestant area of the city to travel to a predominantly Catholic area motivated by a desire to administer retribution, as they saw it, for the removal of a flag or the perceived sectarian assault of an acquaintance.

[79] These features are not of the type set out in paragraph 14 of the Practice Direction but in the case of an adult would certainly result in a higher starting point.

[80] I consider that the aggravating features would justify a variation of the 10 year starting point upwards to one of 14 years.

Mitigating Features

[81] In terms of mitigation concerning the offence, the court accepts that by his participation in the offence the defendant did not intend to assist, encourage or kill Mr McCauley nor did he have knowledge that any of the others involved in this assault intended to kill. I also take into account that he was a participant in a joint enterprise rather than himself inflicting the injuries on Paul McCauley.

[82] Mr O'Rourke urges me to take into account the defendant's purported remorse for his actions.

[83] At the commencement of the hearings I was handed in a written letter from the defendant in which he expresses his deepest sympathy and condolences to the McCauley family. He says he is fully aware of the heartache and suffering he has caused to all concerned and that this is a burden he will live with on a daily basis. He goes on to say:

> *"I was 15 at the time of offence, this is by no (sic) means of excuse in any capacity, however standing before the courts today I am a 28 year old man. My views, friendships and values have changed. I am now a better person who lives a law abiding life. I wish to minimise any factors that could be deemed an attempt to mitigate my actions, out of respect for the McCauley family. I will accept the sentence the courts deem appropriate and fair. I hope and pray the sentence I receive helps the McCauley family, if at all possible."*

[84] The court earnestly hopes that this remorse is genuine and that the contents of the letter are sincere. They do not chime with his conduct at the time or what he is recorded as having said in the telephone conversations recorded covertly. Neither the pre-sentence report, or that of Dr Weir, convey any true remorse. What would undoubtedly be of the most assistance to the McCauley family would be the revelation of the identity of all the other persons who were involved in this offence.

[85] Overall I do not consider that this is a case in which there should be any significant discount for remorse.

[86] I have already taken into account the age and immaturity of the defendant at the time he committed this offence by varying the starting point.

[87] Taking these mitigating factors into account I would vary the appropriate tariff downwards from 14 years to 13 years. Subject to any discount for a plea this is the minimum tariff I would have imposed subject to the consideration of the effect of the previous conviction and sentence for the Section 18 offence.

The previous conviction and sentence

[88] A difficult issue that arises in this case is what is the impact, if any, of the fact that the defendant has previously been convicted and sentenced for causing grievous bodily harm to the deceased with intent in respect of the same incident giving rise to this prosecution? He has also served the custodial element and probationary period of the sentence imposed by the court for that offence.

[89] Mr Murphy argues that the court should reduce the minimum term to be served by the defendant by the six years he has already spent in custody but no more. Mr O'Rourke argues that the tariff imposed should be such as to avoid the defendant serving any further period in custody because of the particular circumstances of this case.

[90] This matter has not been considered before in this jurisdiction as far as the court is aware. In this unique situation the court has given careful consideration to the implications of the previous conviction and sentence.

[91] The "*year and a day rule*" in homicide was abolished by the Law Reform (Year and a Day Rule) Act 1996. Section 2(2) of the Act provides:

> *"(2) This section applies to proceedings against a person for a fatal offence if—*
>
> *(a) The injury alleged to have caused the death was sustained more than three years before the death occurred, or*
>
> *(b) The person has previously been convicted of an offence committed in circumstances alleged to be connected with the death."*

[92] In such circumstances the consent of the Director of Public Prosecutions is required for prosecution.

[93] In this case clearly both sub-sections are engaged.

[94] The 1996 Act emerged after a report of the Law Commission laid before Parliament in February 1995.

[95] The report recommended the abolition of the rule but recognised at paragraph 5.2 that:

> *"Problems might also arise where the defendant has already been prosecuted for a non-fatal offence such as assault or attempted murder before the death occurs. If convicted, he may already have served or be serving a substantial sentence. It is clearly desirable there should be safeguards for defendants against unduly late or unnecessary second prosecutions. These safeguards take the form of both a screening process to prevent unfair prosecutions being brought in the first place, and a system by which the defendant can apply to have an unjust prosecution stopped if it is in fact brought".*

[96] It was for this reason that the consent of the Director of Public of Prosecutions is required before a prosecution in these circumstances.

[97] It is not suggested by the defendant that the prosecution in this case is either unfair or unjust. However, Mr O'Rourke does highlight the rationale for the concerns. In dealing with cases where there has been a previous conviction at paragraph 5.31 the Law Commission indicates:

> *"5.31 The rationale of this recommendation is that in some cases the sentence imposed for a non-fatal offence will be an adequate punishment for a homicide offence arising out of the same incident, allowing for the lapse of time, the element of double jeopardy, and the fact that the sentencer would have taken into account the consideration that the victim was brought close to death by the offence."*

[98] The Law Commission goes on to say at paragraph 5.33:

> *"The question then is, how severe must a sentence for a non-fatal offence be for it to be genuinely doubtful whether, after the appropriate discounts for delay and double jeopardy, conviction of a homicide offence would be likely to justify a substantially greater sentence than that already imposed? We have come to the conclusion that two years is the appropriate figure."*

[99] This recommendation was not reflected in Section 2(2)(b), the legislation requires the consent of the Director in all cases in which there has been a conviction in circumstances alleged to have been connected with the death.

[100] In seeking to set a baseline for a sentence beyond which the Director's consent would be required the Commission said at 5.35:

> *"We were interested to identify the type of cases where the court would have known at the time of the first conviction that the defendant's act had had catastrophic consequences, that would have reflected these consequences in the sentence, so that sentence for any subsequent homicide offence would probably not be substantially greater."*

[101] In **R v Clift and R v Harrison** [2012] EWCA Crim 2750 the Court of Appeal in England and Wales considered separate cases in which each defendant was convicted of causing grievous bodily harm with intent, contrary to Section 18 of the Offences Against the Person Act 1861. The victim in each case subsequently died and each defendant faced trial on a charge of murder.

[102] The issue before the Court of Appeal was whether or not the trial judges were correct to permit the Crown to adduce evidence of the defendants' previous convictions in relation to the Section 18 offences.

[103] The Court of Appeal refused leave on the issue and held that evidence of the previous convictions was admissible.

[104] In **Clift** it appears that the defendant was sentenced to ten years imprisonment in relation to the Section 18 offence in respect of which he served five years imprisonment. When he was convicted two years after his release for the murder he was sentenced to life imprisonment with a minimum specified term of six years.

[105] The court does not analyse the extent to which the minimum tariff was reduced by the trial judge save to say that:

> *"The defendant was convicted of murder and sentenced to imprisonment for life, with a minimum term based on six years, taking full account of the sentence he had already completed following his conviction on the earlier occasion."*

Mr Murphy argues that the inference is that the tariff was reduced solely by the amount he had served following his conviction on the earlier occasion (five years). It is simply not possible to assess what approach the trial judge took from the Court of Appeal report.

[106] In **Harrison** the defendant was sentenced to imprisonment for public protection with a specified minimum term of six years on 11 July 2008 arising from the Section 18 conviction. On 6 March 2012 whilst still serving that period he was convicted of murder. The trial judge imposed a minimum tariff of sixteen years but held that it should be effective with effect from 1 January 2008 which was the date of

his initial arrest. In that case clearly the only reduction applied was in respect of the period of time already served in relation to the Section 18 offence.

[107] I was also referred to the case of **R v Coleman** [2005] EWHC 1184 (QB).

[108] In February 1997 the applicant, **Coleman**, caused the death of his baby son aged 4½ months. On 19 February 1998 he was convicted of an assault occasioning grievous bodily harm and had been sentenced to a term of six years imprisonment.

[109] The baby survived until 1 June 1998 when he died as a result of severe breathing difficulties resulting from his injuries. He was then retried under the Law Reform (Year and a Day Rule) Act 1996 and on 17 July 1997 he pleaded guilty to a charge of murder and a life sentence was imposed.

[110] On 12 May 2000 the Secretary of State notified him in writing that the minimum period which he should serve before his release on licence was eight years.

[111] The application before the court was under Schedule 22 of the Criminal Justice Act 2003 for an order that the early release provisions under the Criminal Justice Act 2003 should apply to him after a shorter period.

[112] In the applicant's case the minimum term recommended by the trial judge was eight years and that recommended by the Lord Chief Justice Lord Bingham was eight or nine years.

[113] The sentence of six years for assault was described as "a very merciful one". Both the trial judge and the Lord Chief Justice appeared to consider it unduly lenient. When recommending a period of eight to nine years Lord Justice Bingham LCJ said:

> "*Had the first trial of this defendant been the murder trial in July 1999, the defendant pleading guilty on re-arraignment, I think that a proper term for the purposes of retribution and deterrence would have been 10-12 years*."

He recognised the term should be reduced because the applicant previously stood trial and had been sentenced for the same criminal acts.

[114] In considering the application under Schedule 22 of the 2003 Act Mr Justice Andrew Smith also came to the conclusion that the minimum term for the murder offence would be one of twelve years.

[115] He went on to say at paragraph [12] of his judgment:

> "*I also consider the minimum term should be further*

> *discounted because the applicant had stood trial and had been sentenced to six years imprisonment for the same criminal acts before he was charged with murder. I also accept that the applicant has apparently made real progress while in custody. Nevertheless, I do not, subject to one possible qualification, consider the minimum term should be reduced below the period of eight years notified to him by the Secretary of State."*

[116] Thus, it appears that both Lord Justice Bingham and Mr Justice Andrew Smith were prepared to countenance a reduction from ten to twelve years to one of eight years because of the previous conviction and the sentence imposed.

[117] This was clearly separate from the period of time already served by him in respect of the Section 18 sentence as is clear from the remainder of the judgment of Mr Justice Andrew Smith when he did reduce the eight year period by a period of sixteen months and twenty six days reflecting the time he had spent in custody arising from the Section 18 conviction. (Although there was some confusion about whether this was time on remand for the murder offence.)

[118] I shall return to the mechanism by which this result was achieved. The importance of this decision was the willingness of Lord Justice Bingham LCJ and Mr Justice Andrew Smith to reduce the minimum tariff because of the previous conviction and sentence, in addition to allowance for the time served as a result of the earlier conviction.

[119] As in all matters of sentencing the approach will be fact sensitive.

[120] I consider, that as a matter of principle, the court should consider whether a tariff should be discounted in circumstances where a defendant has already been convicted and sentenced in respect of an offence committed in circumstances alleged to have been connected with the death which has resulted in a tariff hearing.

[121] The important factors for that consideration in this case are as follows:

(a) Plainly the degree of culpability of the defendant remains the same today as it was when sentenced by Hart J in 2009.

(b) The sentence of Hart J was described as "severe" by the Court of Appeal.

(c) There has been a substantial gap of close to 10 years between the sentencing of the defendant on 3 January 2009 and today's date.

(d) In effect he has served the custodial element of the sentence imposed in 2009 together with the completion of the probation order imposed.

(e) Since his release from custody he has not engaged in any relevant offending.

(f) Since being charged with these offences he has been on restrictive bail conditions which prohibited him from leaving the jurisdiction as intended to attempt a new life in England.

(g) When he was originally sentenced in 2009 the court was aware that the victim's life expectancy was placed between 10 and 15 years from injury, something which contributed to the sentence imposed. The court was fully aware of the almost inevitable consequences of the injuries sustained by the victim and these were taken into account in the sentence.

[122] Mr O'Rourke argues that these factors indicate that the "severe sentence" imposed on the defendant in 2009 has satisfied the requirements of retribution and deterrence for the purposes of the offence of murder. In the exceptional circumstances of this case he argues that the court should impose a minimum term which will not require the defendant to serve any further time in custody.

[123] Having considered the matter I have come to the conclusion that the defendant should receive discount by reason of his previous conviction and sentence because of the matters I have set out above. I do not agree that any reduction should be confined to the period of the time spent in custody in relation to the Section 18 sentence. However I do not agree with Mr O'Rourke's submission that any discount should be such as to avoid the requirement for the defendant to serve further time in custody.

[124] As the Law Commission said in the report to which I have referred at 5.32:

> "*In many cases the sentence imposed for the non-fatal offence will **not** be adequate punishment for the homicide offence because the incidence of death (even if caused by a freak medical condition, such as 'an eggshell skull') normally leads to an increase in sentence. As a general approach, in cases where the victim has died, the court assesses the sentence which would have been appropriate if the death had not occurred and then add on something to reflect the fact that a person was killed.*"

[125] The fact remains that the defendant has now been convicted of murder. This has the consequence of the imposition of a life sentence which means he will remain under licence for the rest of his life. However, in my view a second inevitable consequence is that a more severe punishment will be imposed than was appropriate for a Section 18 offence and this should include an additional period in custody,

having applied the appropriate principles as set out in the practice direction and in **McCandless**.

[126] I therefore propose to reduce the minimum tariff by reason of the previous conviction and sentence from 13 years to 11 years.

Discount for Plea

[127] In terms of the defendant's plea this has to be considered in light of the Court of Appeal guidance in **R v Turner**.

[128] The plea in this case was very much at the last minute and occurred on the day the trial was about to commence.

[129] Between arraignment and trial the defendant had changed counsel and had served a defence statement suggesting that he had been put under inappropriate pressure to plead to the Section 18 offence.

[130] Nonetheless, the defendant is entitled to discount for a plea. By doing so he has accepted responsibility for his actions and has reinforced this in the letter he has submitted to the court. The plea may well be belated evidence of genuine remorse and may be of some comfort to the family of the deceased. It has also resulted in an important and significant saving of time. Overall, I consider that as a result of the defendant's plea the tariff should be reduced from 11 years to 9 years which approximates to a discount of one sixth.

Time already served in custody

[131] The defendant is entitled to be given credit for the six year period he spent in custody as a result of the Section 18 conviction.

[132] The mechanism by which that should be given effect is not entirely straightforward. Mr Justice Andrew Smith grappled with this issue in the **Coleman** case. He had regard to the effect of Section 67 of the Criminal Justice Act 1967 (equivalent to our Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968).

[133] Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 provides that:

> *"The length of any sentence of imprisonment … imposed on or ordered in relation to an offender by a court shall be treated as reduced by any relevant period.*

Relevant period is defined by Section 26(2A) as follows:

> *"(a) …*
>
> *(b) Any period during which he was in custody –*
>
> > *(i) By reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or …"*

[134] The issue therefore is whether or not the period during which the defendant was in custody was as a result of an order of the court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose.

[135] In my view it can reasonably be argued that in this case there is the necessary direct connection between the Section 18 offence in respect of which he had been sentenced and this offence in respect of which he is now to be sentenced.

[136] If I am wrong about this I consider that it is open for the court to reduce the notional minimum term I would otherwise impose to reflect the time spent by the defendant in custody in connection with the Section 18 offence. This principle is not disputed by the prosecution.

[137] This ultimately was the approach adopted by Mr Justice Andrew Smith in **Coleman** when he said at paragraph [14] of his judgment:

> *"I am satisfied that this period should be brought into account to reduce the minimum period to be served after sentence both because of the way that this period has been treated in the past and because in any event it is appropriate and just to do so."*

Conclusion

[138] The notional minimum term I would impose on Piper John McClements under Article 5 of the Life Sentence (Northern Ireland) Order 2001 is one of 9 years. This is arrived at by reason of a minimum tariff of 13 years reduced to 11 years by reason of the defendant's previous conviction and sentence and further reduced to 9 years by reason of his plea of guilty.

[139] The notional tariff should be reduced by the amount of time the defendant served in custody as a result of the Section 18 charge. I understand that this amounts to 2190 days, a total of six years. This will have the effect of reducing the tariff to one of three years.

[140] The defendant will also be entitled to credit for the time served since his return to custody on this count on 19 September 2018, the date upon which the life sentence was imposed.

Matthew Brian Gillon

[141] The evidence against the defendant Gillon was obtained via covert recordings arising from the deployment of an audio device on a Mercedes Benz car VRN; KU65SXL between 4 December 2015 and 8 January 2016. In the course of the recordings obtained from this device a person subsequently identified as the defendant places himself at the scene before, during and after the attack.

[142] He was arrested on 20 December 2015 at the port of Belfast when the silver Mercedes vehicle in question of which he was the sole occupant disembarked from the ferry. He was arrested for the murder of Paul McCauley and the attempted murders of Gavin Mullin and Mark Lynch. After caution he made no reply.

[143] On 21 December 2015 he was interviewed by the PSNI in the presence of his solicitor and he made no comment during the relevant interviews.

[144] He had previously been interviewed on 27 July 2006 and 13 July 2007 but made no admissions.

[145] On 7 April 2016 he was charged with the murder of Paul McCauley and other offences to which he made no reply.

[146] On 2 February 2018 he was arraigned and pleaded not guilty to each of the three counts on the indictment. See paragraph [1] above.

[147] On 20 September 2018, on application by his counsel, he was re-arraigned. He pleaded guilty to manslaughter on Count 1, guilty to unlawfully and maliciously inflicting grievous bodily harm on Mark Lynch contrary to Section 20 on Count 2 and guilty to a Section 47 assault on Gavin Mullin on Count 3.

[148] The pleas to the lesser counts were accepted by the prosecution. The prosecution accept the defendant has pleaded guilty to unlawful act manslaughter. The basis of his pleas is that he participated in unlawful assaults on the injured parties. The prosecution accept that he did not intend to inflict or assist in the infliction of grievous bodily harm with intent. The prosecution indicated that no issue is taken with the defendant's account of his involvement as set out in the pre-sentence report in the following way:

> "*The defendant advised that the offence occurred around the time of the 'marching season' and tensions between certain Protestant and Catholic areas were high at this*

time. He reports he found himself in Irish Street with a group of like-minded peers. Not reporting how he got there, but stating that he would have frequented Irish Street during this particular season. After hearing reports that 'something happened' in relation to a form of sectarian attack against those in Irish Street earlier that evening, Mr Gillon reports that there was a consensus among the group for a form of retaliation. Not knowing what the particular plan was, the defendant reports that he followed the group towards the area of Chapel Road. He accepted that during interview, on making their way towards a Catholic area they could have been met with a form of confrontation that may have resulted in the psychical altercation, however he denies any premedication for the attack.

During interview, Mr Gillon recalled following the group towards a field area. He reports that it was very dark and denied any sight of the bonfire that the victims had. The defendant recalled hearing a lot of raised voices and quickly finding himself in the middle of an altercation. He accepts that during this time he came into physical contact three times, stating that he had punched at people three times, not knowing who and what were the consequences of his actions. He recalls at one point though he did think that the situation was 'getting out of hand' and he, as well as others from the group, fled the scene."

Pre-sentence report

[149] The report sets out the defendant's personal circumstances which were elaborated upon by Mr Montague in his submissions. He is currently aged 31. At the time of the incident on 16 July 2006 he was aged 19 years and 3 months. He has a long term partner of 12 years and prior to his arrest was in regular employment as a project manager in a demolition company which involved him working in various places throughout the United Kingdom and, at times, further afield.

[150] He originates from Kent in England where he lived until he was four years old before moving to Edinburgh due to his father's employment. He remained in Edinburgh until he was ten years old when he relocated with his family to Derry. He is the second oldest child in a family of six and reports that his parents were "good Christians" who lived pro-social lives and continue to do so. He was subject to sectarian attacks because he lived in a Catholic area which resulted in the family's move to the Fountain estate where he lived at the time the offences were committed. He claims that he was the victim of a number of sectarian attacks during his teenage years and that his dislike for the individuals involved resulted in on-going sectarian encounters. These encounters were fairly regular and involved association with peers in the Fountain estate. The probation report accepts that Mr Gillon has made

efforts through the support of his partner to disassociate himself with those who were present on the evening in question and has removed himself from the Fountain area relocating to an address in the Waterside area. He has also found employment and has lived a stable lifestyle in the last twelve years. It was the assessment of the report that Mr Gillon presented as a low likelihood of re-offending over the next two years. I have received a very positive reference from the defendant's employer. It is noted that having commenced work in March 2008 he was eventually promoted in November 2013 to the position of site manager where he has been responsible for the running of several multi-million pounds projects.

[151] He is described as very professional in his attitude to customers as well as his peers. He is described as hardworking and an extremely capable, well respected member of staff.

[152] The PBNI assess that the defendant does not currently meet the threshold to be assessed as a significant risk of serious harm under the Criminal Justice (Northern Ireland) Order 2008. I accept the assessment of the PBNI.

[153] The probation report does indicate that the defendant did show an element of remorse for his actions but as the report points out any empathy with the victim's family is somewhat overshadowed by the fact that he had not come forward to police until nine years after the attack even though he had been questioned by police in 2006, 2009 and finally in 2015 following the death of Mr McCauley. Though not commented on by the Probation Service I would add that there is nothing in the transcript of the tape recordings to which I have been referred which suggest any significant remorse on behalf of the defendant.

The appropriate sentence

[154] It is somewhat of a cliché to point out that offences of manslaughter cover a wide factual spectrum. In the course of the hearing counsel with their customary diligence referred me to reported cases involving manslaughter to assist in pointing the court to the appropriate sentence. The cases to which I have been referred are very much fact specific but I have taken them into account in coming to the appropriate sentence in this case. The two key precedent materials for the purposes of sentencing in manslaughter cases in this jurisdiction are the paper presented to the Judicial Studies Board for Northern Ireland by Sir Anthony Hart on 13 September 2013 which deals with sentencing in cases of manslaughter and the guideline case of **R v Magee** [2007] NICA 21.

[155] Whilst acknowledging the authority of **Magee** Sir Anthony Hart in his paper puts forward a number of sub-categories of offence which can be identified that are readily encountered in practice. The relevant sub-category for this case is sub-category (i) in respect of which Sir Anthony says:

> "<u>*Cases involving substantial violence to the victim*</u>*. Whilst sentences range from six years on a plea to fourteen years on a contest, pleas in cases at the upper end of the spectrum attracts sentences of ten to twelve years with sentences of twelve years being common. Sentences of six to eight years tend to be reserved for cases where there are strong mitigating personal factors, or the defendant was not a principal offender."*

[156] The case of **Magee** is repeatedly referred to in all the reported decisions on sentencing in manslaughter cases and remains the leading authority on this issue and it is worth setting out the key paragraphs of the judgment in full. The relevant guidelines are set out in paragraphs [22] to [27]:

> *"[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."*

Applying this guideline authority the normal range of sentence for the unlawful act of manslaughter involving the use of substantial violence is between 8 to 15 years, with a possibility of a sentence up to 17 years or thereabouts.

[157] In terms of aggravating features these are the same as apply to McClements see paragraphs [77] and [78] above. This was an unprovoked sectarian attack involving an element of pre-meditation. Considerable violence was used. The defendant evinced an indifference to the seriousness of the likely injury to the deceased and the other two men who were injured. The prosecution accept that the defendant did not intend to inflict or assist in the infliction of grievous bodily harm with intent. In this regard he is less culpable than the others involved in this assault. It is for this reason that the defendant is to be sentenced on the basis of manslaughter and not murder in respect of Mr McCauley. However, as Hart J said in sentencing McClements in 2009:

> *"Those who take part in such cowardly and dangerous attacks must expect to be severely punished as a result, even if they did not themselves inflict the injuries. The mob or pack mentality that takes over in such situations is all too often fuelled and sustained by the support given to the actual attackers by supporters who stand by or join in."*

[158] As to personal mitigation, the defendant did not have a criminal record at the time of the offence. His subsequent employment record suggests that he has left the lifestyle he describes in 2006 behind him.

[159] He has expressed some remorse to the Probation Service, something which was emphasised on his behalf by Mr Montague in his submission. For the reasons

set out earlier I am not entirely convinced of the extent of this remorse but the expressions are to be welcomed.

[160] I consider that the aggravating features to which I have referred place this case in the upper part of the range identified in **Magee**. Had this matter been contested and the defendant convicted of manslaughter I would have imposed a sentence of 13 years' imprisonment. I consider that this is a case that falls in the spectrum identified by Mr Justice Hart of between 10 to 12 years on a plea of guilty.

[161] In relation to the defendant's plea I accept that he is entitled to a discount. This was by no means an early plea having been entered when the trial was due to commence. However I am told by Mr Murphy, and I accept, that the offer to plead guilty to manslaughter would not have been accepted at any earlier stage and was made at a time when it would first have been acceptable to the prosecution.

[162] It is a long and firmly established practice in sentencing law in this jurisdiction that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate.

[163] In determining what the lesser sentence should be the court should look at all the circumstances in which the plea was entered. As I have indicated because of the late stage in the proceedings in which the defendant has pleaded guilty he is not entitled to maximum credit for his plea. However the plea of guilty is welcome in this case. By accepting the plea to the lesser offences the prosecution recognise that it would have been difficult to sustain the original counts on the indictment. The pleas of guilty in this case bring certainty and finality to the matter. The pleas are an acknowledgment of guilt by the defendant and hopefully will provide some sense of justice and relief for the relatives and friends of the victim. The plea has led to a significant saving of time and public expense which is in the public interest. It has convenienced witnesses who would otherwise have to attend court.

[164] I consider that the defendant does not meet the criteria for a dangerous offender under the 2008 Order and that the case can be disposed of by way of a determinate custodial sentence.

[165] I determine that the appropriate custodial sentence on a contest for Count 1 would be one of 13 years.

[166] I propose to reduce this sentence to a custodial term of 10 years which represents a discount marginally short of 25% which I consider to be the commensurate sentence in this case.

[167] Under the provisions of Article 8(2) of the 2008 Order I am obliged to specify a period referred to as the custodial period at the end of which the offender is to be released under Article 17. Under Article 8(3), the custodial period shall not exceed

one half of the term of the sentence. I therefore specify the custodial period of the sentence to be five years with the licence period being one of five years.

[168] Counts two and four are subject to the sentencing regime under the Criminal Justice (Northern Ireland) Order 1996. I am satisfied that the offences in Counts two and four are sufficiently serious so that only a custodial sentence can be imposed.

[169] In relation to the second count it should be borne in mind that Mr Lynch suffered very significant injuries and he has understandably been greatly affected by the death of Mr McCauley as is clear from his victim impact statement.

[170] In relation to the second count I consider that the commensurate sentence taking into account the defendant's plea of guilty is one of 3 years imprisonment.

[171] Since the sentence is greater than 12 months I am obliged to consider whether or not a custody probation order would be appropriate under Article 24 of the 1996 Order. In this regard, I have considered the pre-sentence report. The defendant appears before the court with no pattern of violent offending. He has compiled with bail conditions imposed since 2015. There is no evidence of destabilising factors such as substance misuse or mental health issues within his lifestyle. He reports a stable relationship of 12 years and a stable employment history and support within his family. He is now aged 31 years and is assessed as presenting a low likelihood of re-offending. In the circumstances I do not consider that a probation order is appropriate.

[172] In respect of the fourth count I impose a sentence of one year's imprisonment.

[173] All sentences are to be concurrent.