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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

NORMAN McKENZIE

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Before: Gillen LJ, Weir LJ and Stephens J

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GILLEN LJ (delivering the judgment of the court)

[1] This is a reference by the Director of Public Prosecutions under Section 36 of the Criminal Justice Act 1988 as amended. The respondent Norman McKenzie was convicted at Craigavon Crown Court on 17 January 2017 of the following offences:

- Manslaughter committed contrary to common law.
- Failing to ensure the safety and welfare at work of an employee contrary to Article 4(2)(a) of the Health and Safety at Work (Northern Ireland) Order 1978.
- Failing to carry out a suitable and safe assessment of the risks to the health and safety of an employee contrary to Regulation 3(1)(a) of the Management of Health and Safety at Work Regulations (Northern Ireland) 2000.
- Failing to take suitable and sufficient measures to prevent any person falling a distance liable to cause a personal injury contrary to Regulation 6(3) of the Work at Height Regulations (Northern Ireland) 2005.

[2] On 3 March 2017 the respondent was sentenced to 15 months imprisonment suspended for 3 years in respect of Count 1 and fined £1,000 on each of the three other offences making a total of £3,000.

Principles governing a referral

[3] The observations of Lord Lane CJ in Attorney General's Reference (No. 4 of 1989), adopted by Hutton LCJ in Attorney General's Reference (No. 1 of 1989) [1989] NI 245 sets out the correct approach to Section 36 references as follows:

> "The first thing to be observed was that it was implicit in the section that this court may only increase sentences which is concluded were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased - with all the anxiety that that naturally gave rise to - merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to reported cases and in particular to the guidance given by this court from time to time in the so-called guidance cases. However, it had always to be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice as a proposition is as soundly based in law as it is in literature."

Background to this referral

[4] The respondent to this reference Norman McKenzie was engaged by a co-accused Mr Reilly to work on an agricultural shed at Mr Reilly's premises in Portadown. Both of the accused had been involved in the building trade and had farming interests. Mr Reilly had put in the foundations of the shed. Mr McKenzie was engaged in constructing the steel framework after which Mr Reilly would complete the block work and render.

[5] At the material time Mr McKenzie employed three men all of whom were Bulgarian nationals. Amongst them was the deceased Mr Hristanos ("the deceased").

[6] On the morning of 20 January 2015 Mr McKenzie drove the three employees to the site arriving at approximately 11.00 am. The men were instructed by him to nail down metal sheeting on to the roof of the shed.

[7] To conduct the work the deceased and a co-worker were hoisted up to roof height by Mr McKenzie whilst standing within a box attached to the front of a telescopic handler driven by Mr McKenzie.

[8] The men commenced fitting metal sheeting to the roof initially whilst standing in the box attached to the telescopic handler.

[9] However, after the first two metal sheets were in place, in order to complete the task, the men had to exit the box and climb on to the roof structure itself in order to affix further sheeting.

[10] Mr McKenzie moved the handler away from the structure and used it to pick up three further metal sheets which he then drove back to the shed enabling the men to unload them on to the roof in preparation for fitting.

[11] A second load of sheeting was later transferred to the men on the roof.

[12] The telescopic handler was then driven away by Mr McKenzie with the two men remaining on the roof.

[13] The men were not provided with any safety equipment such as helmets, harnesses, safety nets, perimeter scaffolding, elevator platforms or any form of all round edge protection for the purpose of carrying out the task.

[14] The co-worker Mr Danos noted in a statement that he had never been offered the use of safety harnesses by the respondent in the time he had worked for him over a matter of weeks.

[15] In short it was the prosecution case that there were no safety measures put in place and no discussion about safety with the workers. In particular no practical safety measures were made available to the deceased on this occasion. No risk assessment had been carried out by Mr McKenzie or Mr Reilly as required under the health and safety legislation.

[16] At about 1.00 pm, approximately one hour after the men had started work on the shed, it began to rain. The rain caused the sheeting to become slippery. Word was sent to the respondent by the third Bulgarian employee in order to ask him if they could cease work on the roof because of the rain. It appears that request was ignored.

[17] At one point the deceased lost his footing causing him to slip but on this occasion he was caught by the co-worker who prevented him falling further. The men carried on working whilst the rain fell more heavily and more persistently. This in turn caused the surface to become more treacherous.

[18] The deceased was heard to say "Will this guy ever come to take us down off the roof. I am wet all over".

[19] The co-worker recalled seeing the deceased sitting on the roof with his backside in contact with the sheeting as he began to slip down the roof feet first. The co-worked attempted to impede his progress but was unable to prevent the deceased from sliding off the roof. In the process the co-worker was himself pulled from the roof.

[20] The deceased fell to the ground, a distance of almost 5 metres suffering fatal head injuries upon impact. The co-worker suffered relatively minor injuries.

[21] It was obvious that at the point of impact the deceased was critically injured. Mr McKenzie attended to him and from the record of the call to emergency services he was clearly shocked and immediately concerned for his welfare.

Interviews of the respondent

[22] Norman McKenzie (NM) was subsequently interviewed by representatives of the Health and Safety Executive of Northern Ireland ("HSENI"). The following points emerged in the course of the interview.

- NM accepted his involvement in the construction of the farm shed admitting that he had engaged in such work for approximately 10 to 12 years.

- He had never used netting or scaffolding before nor had he provided any training to his workers on health and safety or working at heights.

- He suggested that all of the work on the roof was to be completed whilst the men were standing in the box attached to the telescopic handler notwithstanding the finding by the learned trial judge that completing the task from the box on the telehandler would not have been physically possible.

- NM claimed that in the past when working at heights he would use safety harnesses but however on this occasion he had not brought the safety harnesses to the site.

- He claimed that in any event the deceased was reluctant to wear one and so he did not force him to do so. It is pertinent to observe at this stage that investigations carried out by HSENI indicated that the harnesses owned by Mr McKenzie were not in any event suitable for the task being carried out by the deceased at the time of his death.

- NM asserted that the deceased was his own man and that he liked to work in his own way.

- He denied that it had been raining at the time of the incident or that anyone had come to speak to him about the weather.

- It was noted that Mr McKenzie was extremely emotional throughout the interviews and he did provide whatever assistance was sought by HSENI during the course of their investigation.

[23] In the context of Mr McKenzie's attempt to place some of the blame on to the deceased, it is pertinent to note that as late as 3 January 2017, 13 days before the trial commenced, the defence statement included the following:

> "At no stage did he (*the respondent*) require ... the deceased or anyone else either to step on to the roof and/or to remain on the roof. Further weather conditions were reasonable when the deceased was on the roof. The deceased was quite at liberty to come down off the roof at any time if he felt weather conditions had deteriorated to such an extent as to render the said roof dangerous. The deceased was an experienced workman who was very much his own man. The defendant believed that the deceased would not have remained on the roof if conditions rendered his so doing dangerous. In relation to Counts 2, 3, 4…… the defendant says that he had provided a safe working system for work at height, namely, the work platform attached to the JCB loadall machine."

The victim impact report

[24] The prosecution did not advance victim impact reports. However the court was informed by prosecution counsel in opening that the daughter of the deceased had instructed counsel to inform the court that she did not wish for the defendant to be separated from his family.

Principles governing this case

[25] The Director of Public Prosecutions Mr McGrory QC, who appeared with Mr Magee, opened a wide array of well-trodden authorities on a number of disparate matters arising out of this appeal. We have been guided in this appeal by the following principles.

Sentencing in gross negligence manslaughter cases

[26] Sentences for gross negligence manslaughter vary widely reflecting the wide variety of situations in which the offence can be committed.

[27] We endorse the approach adopted by the Court of Appeal in England in Barass [2012] 1 Cr App R (S) 450 and A-G's Ref (No. 60 of 2009) (Appleby) [2010] 2 Cr App R (S) 311 that greater importance should now be focused on the consequences of the offence.

[28] We have found particularly useful the approach adopted by Weir J in R v Brown [2014] NICC 6. Brown's case dealt with two counts of manslaughter and 19 counts under the Health and Safety at Work (NI) Order 1978 arising out of a dangerously faulty gas installation which led to two teenage boys dying in their beds and a third being seriously ill. In this case the court found assistance in the guidance contained in the English Sentencing Council's "Corporate Manslaughter and Health and Safety Offences Causing Death" Guidelines although this related to organisations rather than individuals (see also R v Holton [2010] EWCA Crim. 934 at paragraph [20]).

[29] In Brown's case the court set out a number of guidelines in identifying relevant factors affecting seriousness of the offence as follows:

- How foreseeable was serious injury?
- How far short of the applicable standard did the defendant fall?
- How common is this kind of breach in the defendant's organisation?
- How far up the organisation did the breaches go?
- Was there more than one death?

[30] The starting point for a sentence in the court in that case was one of six years imprisonment subsequently reduced to four years by virtue of a number of mitigating circumstances.

[31] In this context we note the observations of the Court of Appeal Criminal Division in England recently in Regina v Mohammed Babamiri and Another [2015] EWCA Crim 2152. In that case the defendant was convicted on a count of gross negligence manslaughter and on two counts contrary to the Health and Safety at Work Act 1974 in circumstances where a heavy guillotine tipped over and trapped the deceased in clear contravention of any proper standard of safety.

[32] Quashing a suspended sentence passed at first instance and imposing a sentence of 12 months imprisonment, the Lord Chief Justice of England and Wales said at paragraph [37]:

> "… However we think that in this case we can take the course of imposing an immediate custodial sentence of 12 months imprisonment. That will have the effect of ensuring that it is brought home to the offender and others that actions of this kind will almost invariably require immediate custodial sentences. The sentence that we substitute is at the

> bottom end of the scale. … In such cases judges must appreciate the decision of Parliament that custodial sentences in gross negligence manslaughter cases are almost inevitable, but that the length of the sentence must depend on the particular factors in each case."

Suspended sentences

[33] When the custodial threshold is passed under Article 5(2) of the Criminal Justice (NI) Order 2008, as the learned trial judge properly determined in the instant case, the question then arises as to whether or not such a sentence should be suspended.

[34] In this jurisdiction there is no statutory requirement to find exceptional circumstances before suspending a sentence of imprisonment. This contrasts with the situation in England and Wales.

[35] On the other hand, we are conscious of the comments of Morgan LCJ in R v McKeown, Lynn and Ferris (Director of Public Prosecutions Reference (Nos. 13, 14 and 15 of 2013) [2013] NICA 63 at paragraph [11]:

> "Where a deterrent sentence is required previous good character and circumstances of individual personal mitigation are of comparatively little weight. Secondly, although in this jurisdiction there is no statutory requirement to find exceptional circumstances before suspending a sentence of imprisonment, where a deterrent sentence is imposed it should only be suspended in highly exceptional circumstances as a matter of good sentencing policy."

[36] Whilst we recognise that McKeown's case was delivered in the context of crimes of riotous assembly, nonetheless the general proposition about deterrent sentences is of wider application.

Pleas for clemency

[37] As the learned trial judge pointed out, the clemency sought by the deceased's daughter does her great credit. Nevertheless it has been emphasised on a number of occasions that the courts cannot depart from what otherwise would be a proper sentence because of the sympathetic views of the victims or their families. In Attorney General's Northern Ireland Reference (No. 3 of 2000) (Rogan) [2001] NI 366 Carswell LCJ cited with approval the principle enunciated by Judge J in R v Nunn [1996] 2 Cr. App. R (S) 136 at 140 as follows:

> "... the opinions of the victim, or the surviving members of the family, about *the appropriate level of sentence* (emphasis added) do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than otherwise would be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways leading to improper and unfair disparity ..."

[38] There is an exception, which is not material to the present case, where the imposition of a condign sentence on the offender may be actively detrimental to the interests of the victim.

Starting points and discounts

[39] We conclude our tour d'horizon of the principles applicable in this case with two well known principles:

- In the interests of transparency in Crown Court sentences judges should indicate the starting point before allowing a discount for a plea so that the parties in the Court of Appeal, if necessary, can examine the structure of the sentence. (R v Lin [2013] NICA 28 at paragraph [27]).

- In order to benefit from the full measure of discount for a plea of guilty, the plea must have been entered at the earliest opportunity (Attorney General's Reference (No. 1 of 2006) (McDonald and Maternaghan) [2006] NICA 4) at paragraph [19].

Conclusion

[40] We commence our conclusion with the prefatory observation that these offences carried a fatal consequence which must be reflected in the sentence. It was but good fortune that the second workman, who also slipped from the roof, did not meet a similar fate.

[41] Cases such as these where men are required to work from dangerous heights with an obvious potential for serious or fatal consequences if they are not protected, require deterrent sentences for three reasons.

[42] First, to ensure that it is brought home to offenders that gross negligence of this kind, where the lives of workmen are at risk, will usually require custodial sentences.

[43] Mr McCrory QC, who appeared on behalf of the respondent with Mr Lunny emphasised a point initially raised by this court namely that whilst incorporated bodies who are prosecuted for such offences are often subjected to very heavy fines, the individuals concerned tend to escape prosecution. There is no rational reason why this should be so and we trust that in the future prosecutions leading to condign punishment will be visited on the individuals in the company responsible where it is appropriate to do so.

[44] Secondly, deterrence is necessary to prevent others behaving in this way and to bring to the attention of the construction industry generally the consequences of failure to ensure the safety of workmen. We note with grave concern that the learned trial judge referred to Mr McCrory having "indicated and indeed the defendant has stated that this type of practice is widespread in this industry". We trust that today's sentence will herald a radical alteration in this state of affairs if that is the case.

[45] Thirdly, men such as the deceased and other casual labourers are particularly vulnerable and exposed in dangerous workplaces such as this. It is the role of this court to protect the public in general and such men in particular where their lives are at risk in working at heights. We are only too aware that in a period when jobs are at a premium it is never easy for workers to protest at frailties in the system of work. The onus rests on employers to be responsible for their safety.

[46] The need for deterrence was recognised by the learned trial judge when he said:

> "This is first case of its type that is a manslaughter prosecution for a falling accident. It draws attention to the industry of the potentially serious consequences of the use of this haphazard and dangerous methodology of carrying out this type of work. These are inadequate working practices which should be brought to the attention of the industry generally, and I hope that this case will in fact emphasise that point."

[47] Applying the criteria to which we have adverted in the Brown case, we have made the following determinations.

[48] First, self-evidently the risk of death or serious injury was foreseeable for men working from a height of 5 metres without protection. This was particularly the case in the inclement weather conditions that prevailed on this day.

[49] Secondly, there was a total absence of safety assessment or precautions in this instance. Mr McKenzie fell wantonly short of the standard to be expected from employers of workmen.

[50] Thirdly, we do not consider that this was a one-off occurrence. Mr Dimov, the fellow worker, made a statement, which the judge accepted, to the effect that during the four weeks that he was engaged in making roofing structures, he had not received:

- health and safety instructions,
- any explanations regarding the essence of the job,
- safety working clothes, helmet, shoes, safety harness or belts and
- any scaffold around the building.

[51] This was not the first occasion that they had been working on the roof. Moreover the complete lack of insight exhibited by Mr McKenzie in the course of his interviews with the authorities and thereafter as to the gross negligence of his system bore witness to the fact that such breaches were likely to have been common in his employment.

[52] Fourthly, whilst this was a small business, Mr McKenzie was in day to day control of it. He was completely responsible for the safety of this man.

[53] Fifthly, as indicated above, there was a fatal consequence.

[54] Sixthly, there was not by any means a prompt acceptance of responsibility. The papers are peppered with attempts on the part of Mr McKenzie to exculpate himself from full responsibility for what happened. His interviews, his defence statement and indeed even his interviews with Dr Best his psychiatrist all reflected failure to accept prompt and early responsibility for this matter. On the contrary, there were patent unjustified attempts to blame the deceased himself for failure to take precautions for his own safety.

[55] Doubtless, from any starting point, a discount would have been given for the plea of guilty. However it has to be recognised that this plea of guilty had been entered after the jury had been sworn and was therefore presented at a very late stage. This would have considerably diluted the amount of discount to be given in such an instance.

[56] The learned trial judge did not indicate a starting point for sentencing and did not indicate the measure of discount to be given on the custodial aspect albeit he did take into account a number of mitigating matters. Invoking the principles we have outlined in paragraphs 25 et seq above, we consider that the starting point for an offence of manslaughter of this nature should have been four years imprisonment and that the other lesser offences should have had a starting point of 12 months imprisonment.

[57] There were of course a number of points in mitigation to be presented on behalf of the respondent all of which were cogently presented by Mr McCrory and properly taken into account by the learned trial judge. These included:

- There was some measure of extreme remorse shown in relation to the death of this unfortunate man. He had been known to Mr McKenzie for several years and it is clear that his death did cause distress to him and other members of the immediate entourage. The 999 call which the court listened to did illustrate extreme distress in the immediate aftermath of the incident. The report of Dr Best, the psychiatrist reflected the psychological effect to which the judge adverted. On the other hand it has to be remembered that protestations of remorse were somewhat diluted by the attempts to shift blame on to the deceased which continued throughout the process leading up to trial. Moreover judges must be wary of double counting the discount for remorse and a plea of guilty.

- NM had a clear record.

- There were a large number of testimonials as to his good character.

- The plea for clemency from the daughter of the deceased albeit this has to be seen in the context of the principles we have set out in the Cych case.

- The fact that the matter had been hanging over his head for two years.

[58] On the other hand in looking at the aspects of mitigation, it has to be recognised that such features are often identified typically with men such as the respondent who have failed to comply with health and safety obligations. They are often decent men and women trying to run a business but who sometimes take dangerous shortcuts in order to speed up their process and reduce the cost. They do not normally come before the courts. These are points in mitigation personal to the respondent made in the context of a serious case of criminal negligence where a deterrent sentence is necessary which in itself reduces their impact. A generous reduction by way of mitigation would have reduced the figure to three years imprisonment.

[59] Doubtless, as indicated above, a discount for the plea of guilty would have been given in addition but in light of the lateness of the plea this would not have been more than a fifteen percent reduction. This would have further reduced the sentence to thirty months.

[60] We have come to the conclusion that the sentences in this case were unduly lenient in each instance falling outside the range of sentences which the judge, applying his mind to all the relevant factors should reasonably have considered appropriate. A condign punishment would therefore have been two years and six months imprisonment.

[61] In light of the fatal consequences in this instance and the need for deterrence we see no basis for suspending this sentence. To have introduced the concept of suspension was unduly lenient and we consider therefore the period of custody must take effect immediately.

[62] We have to turn to the question of double jeopardy. Currently in Northern Ireland, although not in England and Wales, there is a recognition that in a case such as this of a man who left the court initially believing he was not going into custody, having been given a suspended sentence, it will undoubtedly come as a considerable blow to him to find that he must now serve a sentence. We have taken that factor into account and have determined that a sentence of twenty four months on the charge of manslaughter should be the appropriate sentence of imprisonment to reflect this. Twelve months shall be served in custody and twelve months shall be on licence.

[63] We further consider that the fines imposed on the three remaining counts were also unduly lenient and that these offences merit also a period of imprisonment. Hence we impose concurrent sentences of six months imprisonment on each of these counts to run concurrently with the twenty four months imposed on the count of manslaughter. In those circumstances we remove the fines imposed. Mr McKenzie should therefore surrender to the authorities immediately.