Neutral Citation No: [2024] NICC 6	*Ref:* **McB12348**
	ICOS No:
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **07/02/2024**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT NEWRY

_____

THE KING

v

GARY MAGEE

_____

Mr Berry KC with Mr O'Hare (instructed by Duffy Law Solicitors) for the Defendant
Mr McCollum KC with Ms O'Kane (instructed by the Public Prosecution Service) for the Crown

_____

McBRIDE J

Introduction

[1] Gary Magee, you were charged with the murder of Andrew James Thompson and with arson endangering life with intent or being reckless as to whether life would be endangered. When you were arraigned on 11 November 2022 you pleaded not guilty. Your trial was due to commence on 2 October 2023 and on that date, you were rearraigned and pleaded guilty to manslaughter and guilty to arson being reckless as to endangering life. These pleas were accepted by the prosecution on an agreed basis of plea.

[2] I am grateful to Mr McCollum KC, who appeared with Ms Fiona O'Kane of counsel, on behalf of the prosecution and Mr Greg Berry KC who appeared with Mr Kevin O'Hare of counsel on behalf of the defendant, for their helpful written and oral submissions which were of much assistance to the court.

Background

[3] Andrew James Thompson (deceased) known as Jimmy Thompson, lived alone in a privately rented terrace bungalow. He was in a relationship for 15 years with his partner and had a strong connection to her daughter and her children. He had five children, three of whom reside outside this jurisdiction, and he enjoyed a close relationship with his siblings.

[4] The circumstances surrounding his death and these offences were very fully described to the court by Ms O'Kane and I, therefore, intend only to summarise the most pertinent facts.

[5] On Friday 21 May 2021, the defendant and the deceased had been drinking together and smoking cannabis at the deceased's home which is a small two-bedroom terrace bungalow. At approximately 11:30pm a neighbour noticed smoke coming from a bedroom window of the deceased's home. He alerted another neighbour to contact the Northern Ireland Fire and Rescue Service whilst he went to the home to provide assistance but to no avail. When the Northern Ireland Fire and Rescue Service arrived, they located the deceased in the front bedroom. He was in a seated position on the floor and unconscious. He was taken outside and despite attempts at resuscitation he was pronounced dead at the scene at approximately 12:30pm.

[6] The defendant was located in the property at the back kitchen door. He was also found in a seated position on the floor with his back to the door which had a key on the inside. The defendant required medical treatment; he was initially conveyed to Daisy Hill Hospital but later transferred to ICU at RVH for treatment for smoke inhalation.

[7] Analysis of the scene identified that there were three seats of fire, namely the front bedroom, the back bedroom and living room. An accidental cause of fire was ruled out and it was considered that the most likely cause of the fire was by direct ignition of combustible materials.

[8] The defendant's personal possessions included a lighter located in his jean's pocket. A black top attributed to the defendant by DNA had a small burn to the right of the front sleeve and the defendant had an injury to his right middle finger correlating to the burn on the top.

[9] The main seat of the fire was in the back bedroom which caused damage to the bed, bedding and a bedside drawer. The second seat of fire was in the front bedroom where damage was minimal and localised to the pillow and some bedding. The third seat of fire was in the living room which was, again, localised to damage to a remote control attached to a cushion. There was no sign of fire travel between the rooms. There was, however, smoke damage and fire damage to the hall and the bathroom where a window cracked with heat damage. The remainder of the house was smoke damaged. It was estimated that the fire was in progress for approximately 30 minutes.

[10] Postmortem examination conducted by Dr Eagan, Pathologist, concluded that death had occurred due to smoke inhalation. The deceased suffered from coronary artery disease, ischemic heart disease, asthma and COPD. These conditions diminished his ability to withstand the toxic effects of carbon monoxide and,

therefore, contributed to his death but did not directly cause it. Blood samples taken from the deceased indicated the presence of cannabis and alcohol. At interview, the defendant denied committing any offences and said that he had no recollection of the fire. He initially denied being in the front bedroom but later accepted he was in the room and at interview accepted that there was no one else in the house throughout the evening and, therefore, either he or the deceased started the fire.

[11] The agreed basis of plea was set out in the following terms:

(i) The defendant considered the deceased to be a friend. He would have called to his neighbouring house on occasion and the two would sometimes have shared drinks.

(ii) On the date in question, the defendant called to the property of Mr Thompson and was invited in for a drink. Both men consumed a significant quantity of alcohol.

(iii) There is no evidence of any falling out between the pair, nor indeed, any evidence of animus from the defendant towards the deceased. There was no motive for the defendant to intentionally seek to harm Mr Thompson.

(iv) Only the defendant and deceased were in the property on the night in question. The defendant has no recollection of starting the fires but accepts that he did, in fact, light the fires.

(v) There is no rational explanation for the starting of the fires, but it is accepted that the Crown possess material which points to a history of fire starting and such material may inform the background to this offending behaviour and assessment of future risks.

(vi) It is accepted that the fire started by the defendant led to the death of Mr Thompson.

(vii) The defendant himself nearly died in the fire. He was retrieved from inside the property and suffered serious injuries that necessitated a prolonged stay in hospital.

(viii) It is accepted by lighting the fires, the defendant behaved in a reckless fashion and that this was an unlawful act which resulted in the death of the deceased.

[12] The material which the Crown possessed which pointed to a history of fire starting consisted of police reports relating to seven arsons, all of which were associated with the defendant but for which he has never been prosecuted. The first report related to arson with intent to endanger life at North Street flats in Newry on 25 June 2002. He was co-reported with two other persons. No prosecution was

directed and no particulars of the event or the decision rationale are contained within the papers.

[13] The second report relates to criminal damage at 21 Talbot Street, Newry on 24 February 2006. No prosecution was directed as there was insufficient evidence to show he was the person who had damaged the property.

[14] The third report relates to an arson on 16 July 2009. Two cars were on fire at 9 Parkside, Warrenpoint plus a linked serial of two rubbish bins being placed beside a house and set on fire. There was no evidence of identification in respect of the car and there was insufficient identification evidence in respect of the bins and in addition the witness withdrew his cooperation. The fourth report alleges that the defendant set his flat on fire at Cowan Street, Newry. He was stopped by police having been drinking with associates nearby and was observed to be carrying a bag full of photographs of his deceased brother. He had been requested to leave the flat the previous day following complaints to NIHE and was reported to have said "if I have to leave, I will make sure all four flats go up." The defendant was reputed to be involved in a number of disputes with neighbours. Two seats of fire were observed but no accelerant had been used and soft furnishings had been ignited. Extensive damage was caused. A witness came forward two years later to say that the defendant and another individual had admitted to getting away with arson. This having been said whilst they were intoxicated and under the influence of drugs. No prosecution was directed on the grounds that there was insufficient evidence to connect the defendant to the starting of the fire.

[15] The fifth report of arson related to arson at 10 St Marys Street, Newry and a caller had reported someone climbing out of the window of this property to escape a fire. Police received information that the defendant was involved in this arson attempt. No accelerant was used at the scene, and it was noted that there was deliberate lighting of flammable material. The defendant stated to police that he was at this property sleeping with his girlfriend when the initial fire at the premises was alerted and after it went out on the ground floor, he stated that they went back in to sleep, and the fire somehow ignited again. No prosecution was directed due to absence of evidence to connect him to the fire.

[16] The sixth report relates to June 2020 when a fire took hold in a wheelie bin at the Simon Community in Newry. The defendant was present alongside other residents. It appears that no file was forwarded to PPS due to insufficiency of evidence. The final report relates to a fire set close to a hedge and a van at the San Jose apartments on Dublin Road, Newry. No prosecution was directed in respect of the arson element due to lack of identification evidence.

Victim Impact Statements

[17] When considering the appropriate sentence for these offences, I have taken into account the various impact statements which I have received. These were

provided by a number of the deceased's siblings, his partner and his stepdaughter. They all express eloquently and movingly the devastating impact the cruel and needless death of the deceased has had upon their individual lives and their lives collectively as an extended family. They each speak about the unanswered questions surrounding his death, the heartache and grief and anguish they endure on a daily basis; the adverse impact it has had on their physical and emotional well-being with some requiring medication and counselling, and all report his loss when they attend family events such as weddings, birthdays and Christmas. These statements have impressed upon me that this senseless and cruel act has brought much anguish and pain to the entire family circle. Whilst no term of imprisonment I can impose can equate to or restore human life and cannot alleviate the profound grief, pain and anguish that the deceased's family now have to live with, I nonetheless intend to take the impact of his tragic death upon his family members, into account in determining the appropriate sentence.

Manslaughter

[18] The defendant pleaded guilty to manslaughter and to Arson being reckless as to endanger life. Both these charges arise out of the same set of circumstances and the act of arson is a necessary ingredient of both offences. Accordingly, I intend to deal with manslaughter as the headline offence. Both counsel agreed that this was the correct approach to take to avoid double-counting and to comply with the principle of totality.

Dangerousness

[19] The offence of manslaughter comes within the provisions of the Criminal Justice (Northern Ireland) Order 2008 ("2008 Order"). It is a "specified offence" and a "serious offence" and accordingly under Article 13 the court has to decide whether "there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences." In accordance with Article 15:

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

[20] Guidance on its application has been set out in *R v EB* which largely follows a decision in *R v Lang* [2005] EWCA Crim 2864.

[21] In *R v Kelly* [2015] NICA 29 at para [41] Gillen LJ distilled from a long line of case law, the following principles which are to be applied when making an assessment of dangerousness:

> "(1) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and can be taken to mean "noteworthy, of considerable amount or importance."
>
> (2) Factors to be taken into account in assessing the risk include the nature and circumstances of the current offence, the offender's history of offending including not just the kind of offence, but its circumstances and the sentence passed, whether the offending demonstrated any pattern and the offender's thinking and attitude towards offending.
>
> (3) Sentencers must guard against assuming there was a significant risk of serious harm merely because the foreseen specified offence was serious. If the foreseen specified offence was not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant."

[22] In *R v EB* Morgan LCJ gave further guidance as to the relevance of pre-sentence reports and at paras [10] and [11] stated as follows:

> "[10] …There is considerable emphasis on the role of the pre-sentence report, and we will have a little to say about that later in this judgment.
>
> [11] The importance of the pre-sentence report was also recognised in *R v Pluck* [2007] 1 Cr App R(S) 43. In *Pluck*, the appellant had been sentenced to imprisonment for public protection with a specified period of four years. The probation officer had assessed the appellant as not posing an immediate or likely risk of harm to others. The judge disagreed and found the appellant did pose a significant risk of serious harm. The Court of Appeal held:

> '…in evaluating the risk of further offences, the reports before the court will probably constitute a key source of information, although the assessments set out therein are clearly not binding. However, if a court is minded to proceed on a different basis than the conclusions set out in the reports, counsel should be warned in advance.'"

[23] I had the benefit of the pre-sentence report which was available at the time the court heard the defendant's plea in mitigation. At that hearing the prosecution did not challenge the PBNI assessment that the defendant was not dangerous. It was only on the eve of the day of sentencing that the prosecution alerted the parties to the fact that they wished to adjourn the case to allow them to obtain a report on dangerousness from an expert.

[24] The court acceded to the application for an adjournment and Professor Davidson has now prepared a report dated 30 November 2023. At a hearing on Tuesday 16 January 2024, I advised counsel for the prosecution and the defendant that the report from Professor Davidson did not change the view I had formed in respect of the dangerousness. In these circumstances both parties indicated that they did not wish to obtain further expert evidence or make further submissions on dangerousness.

[25] In the pre-sentence report the defendant is assessed as high likelihood of reoffending. The factors pertaining to that assessment are – history of criminal convictions, multiple offence types, lack of credible account for index offences, acknowledgement of no idea of why he committed the offences, previous proximity to pyromaniac incidents, persistent substance misuse, unstructured lifestyle, and limited consequential thinking. Whilst the defendant is assessed as high likelihood of reoffending the pre-sentence report concludes that he does not meet the PBNI threshold to be assessed as posing a significant risk of serious harm to others at present.

[26] In contrast Professor Davidson in his report dated 30 November 2023, after considering the PBNI report, the PE papers, previous PSRs and previous non-conviction arson particulars concludes:

> "On balance in this case, taking all the above into account, with the caveat, I would assess the defendant as posing a significant risk of serious harm to others. This takes into account the putative fire setting history, the psychometric templates and clinical judgement."

[27] Professor Davidson's conclusion is subject to a number of caveats. First, he did not have access to GP records and therefore the report was a "desktop report" as

he did not have the benefit of a face-to-face clinical interview to assist in the psychometrics used to assess risk and dangerousness. Secondly, part of his assessment consisted of a review of the defendant's historical association with fire setting, and he accepts that this is based solely on media and police reports and that there never was a conviction.

[28] At the hearing on 16 January 2024, I outlined to counsel that I did not consider the defendant met the threshold of being dangerous. In carrying out this risk assessment I have taken into account all the information available to the court and in particular I have had regard to the factual circumstances surrounding the index offending including the agreed basis of plea; the defendant's criminal record; the pre-sentence report; Professor Davidson's report and the non-conviction arson particulars.

[29] In respect of the circumstances I note that there was no animus between the parties. Secondly, I have carefully considered the defendant's extensive criminal record. I consider that his extensive criminal record, which is largely magistrate's Court level is consistent with a person leading a chaotic lifestyle and I note that he has no previous convictions for arson. Thirdly, whilst there are reports of historical association of the defendant with fires, this association is based solely on evidence which was far from being sufficient to support a decision to prosecute. Accordingly, I do not consider that these reports can be given any weight in terms of forming a view about a pattern let alone an escalation in the defendant's behaviour in respect of fire starting. I further note from his discussions with the author of the pre-sentence report that he has expressed remorse and I note that there are some positive indicators in terms of his pre-sentence incarceration. He is now passing the drugs test and is on an enhanced regime. He also appears to be undertaking other courses and these are positive indicators showing a capacity to change. Whilst I have taken Professor Davidson report into account, given the lack of additional information available to him and the caveats in his report, I consider that his report does not assist the court in making an assessment of dangerousness.

[30] Based on all the information, I am satisfied that the defendant does not satisfy the provisions of Article 15(1)(b) and therefore I do not find him to be dangerous.

Manslaughter

[31] As Kerr LCJ observed in *R v Magee* [2007] NICA 21, "offences of manslaughter typically cover a wide factual spectrum" and given their fact sensitive nature the courts in Northern Ireland have not set out rigid sentencing guidelines.

[32] Nonetheless, Sir Anthony Hart in his authoritative paper prepared for the Judicial Studies Board of Northern Ireland dated 13 September 2013 analysed a large number of first instance and Court of Appeal decisions and compiled a compendium in which he identified seven broad sub-categories of manslaughter. Counsel for the prosecution sought to rely on category (i) which relates to cases involving

substantial violence to the victim. In contrast counsel for the defendant submitted that category (iv) "unlawful act" manslaughter was the relevant category.

[33] Whilst Sir Anthony Hart's paper is some 10 years old, it continues to be of assistance in sentencing in this area. Having regard to the cases, however, set out in his compendium, I consider that this case does not fit neatly into any of the seven sub-categories identified. I further find that none of the cases referenced by him either in category (i) or category (vi) are of assistance in providing guidance as they involved very factually different circumstances to the present case.

[34] Counsel for the Crown referred me the English Sentencing Guidelines on unlawful act manslaughter. Whilst accepting these were not binding on this court, the Crown submitted that this court should have regard to them. She submitted that the harm in this case was of the utmost seriousness as it involved loss of life. In terms of culpability she submitted that the unlawful act carried a high risk of death which was, or ought to have been, obvious to the defendant and given the role that he played being the sole offender the case fell within category B and under the guidelines the appropriate range was 8-16 years. She further referred the court to a number of English authorities, most notably the case of *R v Connolly* [2018] 1 Cr App R. In this case the starting point for manslaughter by arson was set at 14 years. The facts in *R v Connolly* resonate with the facts in this case. In *Connolly*, the defendant started a fire in a block of flats when under the influence of drugs. It led to the death of an elderly man with whom the defendant had lived. The deceased had been in poor health and as a result of his health and age he was unable assert himself and was fatally trapped in his home. The defendant denied responsibility at interview. She had 45 previous convictions, largely coincidental with her drug abuse. Whilst none of the offending was of a nature comparable, the court deemed it was a relevant factor that she was a persistent offender who had not complied with court orders up to the time of the commission of the index offence.

[35] The other English authorities referred to by the Crown were not of much assistance given their very fact specific nature.

[36] In contrast, defence counsel Mr Berry, in well-reasoned submissions submitted that the Northern Ireland Court of Appeal had confirmed on a number of occasions that the England & Wales sentencing Guidelines are confined to that jurisdiction and are of limited application in this jurisdiction generally only being referred to so as to identify aggravating and mitigating factors. Whilst he accepted the courts in this jurisdiction sometimes give effect to the English guidelines, the courts in Northern Ireland have taken a very different approach in respect of manslaughter and murder cases. Accordingly, he submitted the court should rely on the principles set out by Sir Anthony Hart in his paper and, in particular, the guideline cases set out under category (vi) relating to unlawful act manslaughter. In particular, he relied on the case of *Coyle* [2010] NICA 48 where the court imposed a starting point of six years where there was a vulnerable victim who was subjected to direct violence by the defendant which probably caused his death. There had been a

robbery which was part of the motivation and a weapon had been used to cause the wounds and fear.

[37] In line with the Northern Ireland Court of Appeal authorities it is my view that the English sentencing guidelines are of use in respect of identifying aggravating and mitigating factors. Whilst I note the courts in this jurisdiction have given effect to the guidance set out in England & Wales in respect of sentencing in some areas, most notably our courts have not followed the England & Wales guidelines for murder and manslaughter cases. Accordingly, I do not consider that the England & Wales authorities which have been referenced are of any assistance to me as guideline authorities.

[38] As has already been outlined, manslaughter covers a very wide variety of cases and, accordingly, previous cases are of limited assistance given the very fact specific nature of each case. In determining the appropriate starting point it is necessary to consider the harm caused and culpability having regard to not only the nature of the unlawful act and its gravity, but all the aggravating and mitigating factors present.

[39] It was agreed by all that the harm in this case was of the utmost seriousness as it caused death.

[40] The unlawful act was also of a very serious nature. The defendant started three separate fires. Whilst it is accepted that the defendant and the deceased were friends and there was no animus between them and, therefore, no intention to cause harm, nonetheless, the defendant acted in a highly reckless manner. He must have known, or ought to have known, that by starting three fires there was a very high risk of death or grievous bodily harm. This was especially so in a context where the fires were lit in a small terrace house, not only causing a risk to the deceased but also to others in the terrace. Further, the defendant knew that the deceased was vulnerable. They had been friends, and he knew the deceased had medical conditions which impaired his ability to cope with smoke inhalation and his ability to escape from the property. The defendant was the sole offender and therefore, played a leading role in the offence.

[41] I consider that there are a number of aggravating features in this case. The defendant has 115 previous convictions. Notably however the record is dominated by road traffic violations, drug supply and use, criminal damage, and common assaults and he has no convictions for arson. I also accept, as the defendant's counsel submitted, the offending was mostly in the Petty Sessions and was in keeping with someone who has a drug/alcohol addiction. Nonetheless, as appears from his record the defendant is a persistent offender, and his recidivism spans a 30 year period. He has not complied with court orders and, in particular, at the time of offending was on bail and subject to probation. He is someone who has repeatedly breached court orders including conditional discharges, suspended sentence and

probation orders. Accordingly, I consider his criminal record is an aggravating feature.

[42] The defendant has no convictions for arson, but I note the history associated with him of starting fires. This evidence however was insufficient to support any prosecutions and accordingly the defendant has never been prosecuted or convicted in respect of these incidents. Although the agreed basis of plea referred to this material the concession was only in respect of the risk posed by previous conduct and, therefore, I do not intend to treat the history of his association with fires as an aggravating feature.

[43] The other aggravating feature identified by the Crown was the fact the offence was committed whilst the defendant was under the influence of drugs and alcohol. In addition, I note that the offending occurred in the deceased's home which is a place where he should have felt safe.

[44] In terms of personal mitigation I have read and carefully considered the report of Dr East, Consultant Psychiatrist dated 20 November 2023. The defendant reported to Dr East an increase in levels of anxiety and hypervigilance. Dr East opines that he now meets the criteria for post-traumatic stress disorder as a consequence of the life threatening events that make up the index events. He is presently prescribed antidepressant medication and Dr East expects his symptoms to resolve over the next two years.

[45] I have also carefully read and considered the pre-sentence report which sets out details of the defendant's personal circumstances. The defendant was born on 26 April 1979 and is 44 years of age. He has had a troubled background and chaotic lifestyle and was a victim of sexual abuse when a schoolboy. He has not been in employment for 20 years. He has a history of alcohol dependent syndrome and was treated by the Community Addictions Team in 2014. He also has a dependency on Benzodiazepines and has a history of extensive drug use including cannabis, cocaine and opioids. The pre-sentence report also notes that the defendant is doing reasonably well in prison and has participated in a number of courses to address his substance misuse and to improve his literacy. He is now on enhanced regime.

[46] The defendant has expressed remorse in respect of his offending and accepted full responsibility for it stating that the offence is daily and constantly on his mind. He acknowledged "it will never leave me." I accept that these statements reflect an expression of remorse by the defendant for his offending.

[47] Although Mr Berry asked me to consider the fact that the defendant sustained serious injuries in the fire as a mitigating factor, I do not do so, as I consider he was the author of his own misfortune in this regard.

[48] Having regard to all the circumstances of the offending and the aggravating and mitigating factors I consider that the appropriate starting point is nine years.

Reduction for Guilty plea

[49] The defendant pleaded guilty to manslaughter and reckless arson on the cusp of this trial. I note, however, that discussions had been ongoing between the prosecution and defence from an early stage, but the Crown were not in a position to accept the plea until the trial date. In these circumstances, I will give substantial reduction for the plea, but I will not give a full reduction as there was no admission at interview and there was a reasonably strong prosecution case. I, therefore, intend to reduce the starting point of nine years to one of seven years, being three and a half years in custody and three and a half years on licence.

Arson Endangering Life

[50] The guideline case for arson endangering life in this jurisdiction is *McBride* [2007] NICA 57, which suggests that the range is 5-6years. The Court of Appeal stressed that there are so many variations in the way the crime can be committed guidelines are of limited assistance only. Having regard to all the aggravating and mitigating factors already referred to and in particular the fact death occurred in this case I consider the appropriate starting point to be one of 6 years which I will reduce to 4 years and 6 months to reflect the reduction for the guilty plea.

[51] Having regard to the principle of totality I intend to impose this sentence concurrently.

[52] Your total sentence is therefore one of seven years which means you will serve three and a half years in prison followed by a period of three and a half years on licence in the community.