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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **21/02/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

MICHAEL McGINLEY

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Mr Kevin Magill KC (instructed by Gillen & Co Solicitors) for the Appellant
Mr Michael Chambers KC (instructed by the Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Treacy LJ and Humphreys J

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NEW SENTENCING GUIDANCE ON HOW JUDGES SHOULD ADDRESS SENTENCE REDUCTION FOR CULPABLE DELAY

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TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] On 11 January 2024 Her Honour Judge McCormick KC ("the judge") imposed a determinate custodial sentence ("DCS") of 40 months, (20 months custody and 20 months licence) in respect of a single count of affray. A similar sentence was imposed in respect of co-accused Daniel Dundon. Both sought to appeal their sentences on virtually identical grounds. Huddleston J refused leave to both in a detailed written ruling. This appellant renews his application for leave to appeal before the full court. His co-accused did not renew his application.

Background facts

[2] On Thursday 13 September 2018 at 00:27 hours, police received a report of an incident at the Roe Park, Spa and Golf Resort, Limavady. On arrival police established that an altercation appeared to have begun in the male toilets and then

carried on in the bar area. A number of persons had left the area prior to police arrival.

[3] Daniel Dundon, the appellant's co-defendant, was still present. He had sustained a significant injury to the back of his neck and was receiving treatment from hotel staff. His brother, Sean Dundon, was also present. He and Daniel Dundon had been sprayed in the face with some kind of noxious substance and were having trouble with their eyes.

[4] Police attempted to establish what had happened from persons present and the injured parties, but they were all very reticent about engaging with the police and giving an account of what had happened.

[5] Police reviewed CCTV from the hotel. The CCTV shows Michael McGinley, who appears to have a significant injury to his eye, and Daniel Dundon fighting with each other. Both men are armed with knives. At one point McGinley slashes Daniel Dundon on the back of the neck causing a gaping injury to Dundon's neck. McGinley also sprayed a number of persons with some, unidentified, noxious substance.

[6] While the CCTV footage does not disclose how the incident started, it is clear that these two men are fighting with each other in that footage and each of them is equipped with a knife by the time the fight spills over and into the main bar area. Due to the lack of witness evidence, the prosecution case was essentially based on the CCTV footage which this court also viewed.

[7] From the footage the prosecution accept that they could not state with certainty how the incident started.

[8] However, it was evident from the CCTV that, prior to the events captured in the CCTV, the appellant had sustained a significant injury to his eye. The perpetrator of that attack has not been positively identified by the prosecution.

[9] The appellant was later arrested and interviewed. In his first interview, he gave an account of going to the toilet where two persons were having an argument. He named these individuals as Barney Doherty and a "Dundon lad" while indicating that a Simon Doherty was also present. He advised them to calm down and not spoil a good night. The appellant then claims he was attacked by the "Dundon lad", whose name he did not know, and slashed across the face. A second person also became involved, who he also said he did not know. He denied having been involved in an assault. His second interview was a no comment interview.

[10] Dundon was also arrested and interviewed on two occasions during which he gave no account.

History of proceedings

[11] At arraignment, on 30 March 2023, the appellant pleaded not guilty. However, it was indicated to the prosecution at arraignment that he would be willing to plead guilty to affray if the section 18 assault charge and the count of affray against his wife were "left on the books." Negotiations continued for some time and the appellant was ultimately re-arraigned and pleaded guilty to the single count of affray on 21 May 2023.

Original grounds of appeal

[12] The appellant submitted that the sentence passed was wrong in principle and manifestly excessive for the following reasons:

- The "starting point" was too high.
- Insufficient reduction was given for the plea.
- The judge erred in ruling that the appellant had "no mitigation in relation to the commission of the offence."
- The judge failed to give an appropriate reduction in sentence for the appellant's personal mitigation and the probation assessment that he was a "low likelihood of re-offending."
- The judge erred in failing to distinguish the appellant from his co-defendant.
- The judge failed to give adequate discount in recognition of the delay in this matter.
- The judge erred in finding that there were no expectational circumstances justifying the suspension of any sentence of custody.

Judge's sentencing remarks

[13] The judge noted the aggravating features identified by the prosecution:

- The use of weapons (knives).
- The location was a public place, namely a hotel where members of the public, including children, were present.
- While both defendants had criminal records, "Mr Dundon in particular has a relevant record. He has previous convictions for GBH and for wounding."

[14] The judge recorded that the parties' agreed position was that the court would be assisted by *R v Shebani* [2022] NICA 9; that the case passed the custody threshold; that 'highly culpable behaviour' had been demonstrated by each defendant; that each had come to harm and McGinley was the author of the harm to his co-accused Dundon; that it was not possible to say with certainty who slashed McGinley. The judge also noted the harm to the public when an event like this occurs in a public place where families and children are present.

McGinley's personal circumstances

[15] The judge then addressed McGinley's personal circumstances, his medical and mental health background.

McGinley's Criminal record

[16] His record is 'short,' and of 'some vintage,' having occurred in 2013, with nothing pending.

Pre-sentence report

[17] He was assessed as presenting a low likelihood of re-offending. The protective factors acknowledged as contributing to this assessment of low risk included stable accommodation and family support. Reliance was also placed on the fact that the offending occurred almost five years ago and there is no report of anything pending.

[18] It was noted that affray is a 'serious offence' under the Criminal Justice (Northern Ireland) Order 2008. In the absence of a pattern of violent offending, the Pre-Sentence Report ("PSR") concluded that Mr McGinley does not present a significant risk of causing serious harm to others. The prosecution took no issue with that assessment. The judge agreed with those assessments and found that he did not fall to be sentenced as a dangerous offender.

Affray

[19] Affray is a common law offence punishable by a maximum of life imprisonment. It is an offence against public order. It consists of participating in a fight with one or more persons in a public place when the conduct was such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. The crime is not merely fighting in public but includes the impact on members of the public in a position to observe the fighting.

[20] The judge referred to paras 12, 15, 18 and 26 of *Shebani.* The court in *Shebani* at para [18] re-iterated the previous statements of the Court of Appeal, that "it is impossible to devise guidelines for sentencing in affray." This was because of the

infinite variety of circumstances and participation which meant it was impossible to devise guidelines. However, the Court of Appeal also said:

> "The general approach that should be adopted is first to consider the nature of the affray itself and in particular, how it is perceived by innocent members of the public. Relevant factors would be the number of participants, the duration of the affray, the ferocity of the fighting, whether weapons were used, the injuries sustained, the number and proximity of the public and the impact on the public."

[21] The judge watched the CCTV footage and observed that the incident lasted several minutes, a number of people were involved and two knives were used. McGinley and Dundon each had a knife. McGinley also had possession of and used a noxious spray. The source of these weapons has never been explained nor why they were present at an event where people had assembled to celebrate a wedding.

[22] As the judge stated:

> "Significant injuries were sustained by both of these defendants. McGinley is clearly seen to slash Dundon's neck. This occurred in a busy hotel with many wedding guests visible on the screen and no doubt other patrons too. Children were present. They can be seen on the screen. It was an event which occurred without regard to the fact that they had assembled to celebrate someone else's big day. Staff are seen scrambling to withdraw glasses, to close down shutters and to secure the area, in other words, to try to minimise the harm that could be done with the items which are commonly available in and around a bar area."

[23] The judge recited in her judgment the matrix of 'mitigating features' in terms of the personal circumstances of each of the defendants. The judge indicated that she took into account their vulnerabilities, responsibilities and their personal circumstances.

[24] Dealing with McGinley the judge said as follows:

> "The first of the two defendants on the indictment is Michael McGinley, now aged 44. He was 39 years old at the time of this incident. In the papers available to me, he has reported a happy childhood, a grandfather, a father of six, the youngest of whom is approaching their majority but is still underage. He is separated from his wife but

remains on good terms with her and is reported to live with his sister.

I am told that he left school with no qualifications, that he did work until he was 31 in 2010 when, as he explained to the probation service, his youngest son was diagnosed with cancer and treatment commenced which would last for years. Thankfully, I understand that boy has now fully recovered.

This is a case, however, where Mr McGinley is said to have suffered PTSD symptoms following the tragic death of two young nephews who he tried but was not able to save from fire in 2007.

The incident at the Roe Park in 2018 is reported to have weighed heavily on this defendant. He is left with significant scarring to which I will return. He has also had to contend with the death of one of his siblings by suicide in 2019 and the burden of that experience further exacerbated pre-existing mental health challenges.

His sister reported to Dr Devine, consultant psychologist, that the family feared to leave the defendant on his own and I remind myself, of course, of the downturn in his mental health which led to his hospitalisation before Christmas [2023].

The court has been greatly assisted by the receipt of a report dated the 15th of September from Dr Aiden Devine whose examination of Mr McGinley on the 7th of September last year was facilitated by the defendant's sister with whom he lives.

Dr Devine stated in his report at paragraph 6.4 that the illness and treatment which was endured by the youngest child of that family should be considered a major perpetuating factor in relation to the father's depressive symptoms and generalised anxiety. Apparently, the prolonged nature of those worries about the son further perpetuated existing matters and there's reference to an avoidance coping strategy and protesting concerns about his family who were keen to ensure that he would seek help whereas he chose to withdraw socially.

> Dr Devine also focusses in paragraph 6.5, on the events of the evening with which I am concerned which again he identifies as a perpetuating factor in respect of Mr McGinley's current mental health and specific reference is made to the fact that serious facial injuries were sustained during the altercations on this night resulting in prominent scarring about which this man is self-conscious, particularly when in the community.
>
> Dr Devine also identifies another perpetuating feature of the depression endured by this man. One of those factors is the ongoing matters before this court and the other is the fact of losing his sibling to suicide in December of 2019. Dr Devine says he believes that bereavement rekindled this man's feelings of guilt in addition to his grief reaction, and finally, in regard to the potential impact of a custodial sentence, Dr Devine has advised the court that there is a well-established link between prison and mood disorders that he, the psychologist, would anticipate an increase in Mr McGinley's depressive symptoms, especially as incarceration would cause further disconnection from this man's support systems and he observed it was clear during his meeting or examination of the defendant that this defendant receives support from his family and in particular, from his sister."

She continues:

> "*Nothing mitigating occurs in my assessment in regard to the affray itself* but I have noted and recited all the factors which I consider to be relevant to them including the fact that Mr Dundon has *the more significant record and was under licence at the relevant time*." [our emphasis]

[25] The judge then identified a starting point of five years for both McGinley and Dundon. The judge reduced the five years (60 months) by a quarter for the guilty pleas which were entered on the afternoon after the jury had been empanelled. That took the sentence down to 45 months. Given the considerable time that had passed since the incident in September 2018 until the arraignment in March 2023, even allowing for Covid delays, she considered this was a long period and reduced the 45 months to 40 months to take account of the passage of time.

Reduction for Guilty Plea

[26] Counsel for the appellant makes the point that although he did not plead guilty at the earliest opportunity he had, from arraignment, through his counsel,

made attempts to resolve the indictment by way of a plea to affray. Therefore, it is asserted that the judge failed to take into account and apply appropriate weight to his early indication of willingness to plead to the count ultimately accepted by the prosecution.

[27] It is common case that that defence counsel engaged in early discussions with the prosecution. However, this did not involve an unequivocal offer to plead guilty. McGinley initially wanted to plead guilty on the basis that he was not armed with a knife and on the basis that the wounding with intent charge would be left on the books. He also wanted the charges against his wife to be discontinued. It is correct that the prosecution could not accept the conditional offer to plead until his co-accused indicated he would plead guilty. This ultimately occurred and the appellant belatedly accepted that he had been armed with a knife.

[28] We consider that the 25% reduction for the plea was generous and certainly well within the bounds of the judge's sentencing discretion.

Disparity

[29] The first and obvious point of distinction between the appellant and his co-accused Dundon is their criminal records. The appellant has a very minor record and nothing for violence. Dundon on the other hand has a lengthy and highly relevant record for violence.

[30] The appellant's very limited record is comprised of two appearances in the magistrates' court both in 2013 for which he received a community service order of 120 hours subsequently revoked and replaced with a £600 financial penalty. When he appeared for those offences he was 32 with a completely clear record. The appellant therefore had a very minor record and none for violent offences when he was being sentenced for affray. It is also noteworthy he was on bail for the index offence for *five* years and there was nothing pending against him.

[31] In sharp contrast Dundon had an extensive criminal record totalling 22 entries spanning a period of almost 12 years from his first court appearance in August 2010 until June 2022. His record discloses that on 4 March 2013 he was sentenced at Laganside Crown Court for possession of a weapon in a public place and grievous bodily harm ("GBH"). For the GBH he was sentenced to imprisonment for four years suspended for four years. He repeatedly breached that suspended sentence committing further offences in January 2014, May 2017, and notably in June 2014. I say notably because in May 2015 he was sentenced at Laganside Magistrates' Court for possession of a class A drug, possession of class B drugs with intent to supply and possession of class C drugs with intent to supply. These offences were committed in breach of his suspended sentences imposed earlier by the Crown Court for GBH and possession of an offensive weapon. No steps appear to have been taken to activate the suspended sentences. For the drugs offences he was given probation and community service. The index offence occurred on 13 September

2018. Not very long before this he was sentenced at Antrim Crown Court on 8 September 2016 for the offence of wounding (01/02/2015). That offence occurred just a matter of days before he appeared for the drugs offences mentioned above. For the wounding charge he received a determinate custodial sentence of two years (one year custody and one year licence). Although that wounding took place within the period of the four-year suspended sentence imposed for the previous GBH it was not activated presumably because by the time of his sentence in September 2016 the four-year period had expired. Very importantly Dundon was on licence for that offence of wounding when he committed the index offence of affray in September 2018. Whilst on bail for the September 2018 charges [possession of an offensive weapon (a Stanley knife) and affray] he committed further offences of disorderly behaviour, criminal damage and resisting police on the 11 March 2022. On 9 June 2022 he was given a suspended sentence prison for those offences.

[32] It is clear that Dundon was a dangerous recidivist with a clear propensity to use violence. The appellant had a minor record and nothing for violence.

[33] The judge was aware of Dundon's more significant record and the fact that he was under licence at the relevant time. However, this striking difference is not reflected in the sentencing outcome. We consider that Dundon's record constituted a serious aggravating factor and the difference in their records ought to have been reflected in their final sentences.

Mitigation in relation to commission of offence

[34] In his first after caution interview with the police Mr McGinley gave the following account:

> "… me my wife, my two daughters and Mary Harty goes to the wedding, in the jeep, land at the wedding every thing lovely at the wedding, everything was perfect at the wedding around 12am and 12:10 me and my wife were outside smoking a fag, we walked back in. We walked back in to the hotel in the hall way I said I was going to use the toilet. I go into the toilet and there was an argument going on between a Barney Doherty and a Dundon lad in the toilets, Barney's brother Simon was there as well. I had a pee fixed myself up. Turned around and say boys it's a lovely night don't be making a big thing out of it. After that a Dundon Lad hit me a belt with the knife across the face. After that I was trying to get out of the toilet when another fella small fella around 5 foot 5, 5 foot 6 grabs my leg and knocks me to the ground. I get back up and I could not see where I was going the blood was running into my eye and I tried to get out and this girl grabs me and puts a cloth to my face. When I turned

> around this Dundon fella kept approaching me with a knife followed me out of the toilets. He kept approaching me and all I remember is my wife standing beside me, she was trying to save me from him as I could not see, the blood was rushing into my face. After that my wife and 2 daughters got me to the jeep and got me out of it."

[35] Dundon gave no account to the police of how the event started or otherwise.

[36] In the prosecution opening under the heading "facts" it is stated that on arrival the police established that there had been an altercation which "initially started in the male toilets" and then carried on in the bar area. It is noted that the prosecution case is "essentially based" on the CCTV footage which shows Mr McGinley with a "significant injury to his eye, and Daniel Dundon fighting with each other and are armed with knives by the time the fight spills into the main bar area."

[37] The prosecution statement of facts states that from the footage it is not possible to say "with certainty" how the incident started. The prosecution stated however that they had "no difficulty" agreeing that McGinley had suffered an eye injury "off camera." The toilet was off camera.

[38] In *AG's Ref (1 of 2006) McDonald, McDonald and Maternaghan* [2006] NICA 4 the Court of Appeal stated:

> "***Sentencing for affray***
>
> [22] There are no local guideline cases on affray and the modern English authorities are of limited value as the statutory offence there is different and the maximum penalty is three years imprisonment whereas in this jurisdiction the maximum possible penalty is imprisonment for life. A guideline case predating the legislative change in Great Britain is Keys and others (1986) 8 CAR (S) 444 where the appellants were involved in a large scale disorder at the Broadwater Farm Estate, in which 200 police and fire crew were injured, vehicles were used as barricades and set on fire, and a variety of missiles, including petrol bombs, were thrown. One officer was killed. The appellants were sentenced to 5 and 7 years' imprisonment. In that case it was stated that for premeditated, organised affray ringleaders could expect to be sentenced to 7 years and upwards although it was acknowledged that since there is a very wide spectrum of types of affray, it was not easy to give firm sentencing guidelines. Lord Lane CJ stated:

> 'The facts constituting affray and the possible degrees of participation are so variable and cover such a wide area of behaviour that it is very difficult to formulate any helpful sentencing framework.'

[23] In this jurisdiction there is no reported decision that could be described as a guideline case for the offence of affray. In *R v Fullen and Archibald* (2003 – unreported) this court was invited to consider the effect of the amendment of the law in England and Wales brought about by the enactment of the Public Order Act 1986 which abolished the common law offences of riot, rout, unlawful assembly and affray. The 1986 Act introduced a statutory definition of affray and imposed a maximum term of imprisonment of 3 years upon conviction on indictment. The Act has not been extended to Northern Ireland and in this jurisdiction affray remains an offence at common law punishable by life imprisonment. McLaughlin J, delivering the judgment of the court, rejected the argument that sentences here should be based on the 1986 Act, saying:

> '… we do not consider that courts here should regard themselves as limited by the provisions of the 1986 Act. *For the present* there remain sufficient differences between the public order problems in Northern Ireland and Great Britain to reserve to these courts a greater degree of flexibility in sentencing than is available under the 1986 Act.' [our emphasis]

[24] The decision not to extend the 1986 Act to Northern Ireland must be regarded as deliberate. As a matter of principle, therefore, it would not be correct to adjust sentences for affray in this jurisdiction to reflect the change in the law that was brought about by that Act. We consider that the range of possible sentences for this offence in Northern Ireland extends well beyond the three year maximum that applies in England and Wales.

[25] Because of the infinitely varying circumstances in which affray may occur and the wide diversity of possible participation of those engaged in it, comprehensive rules as to the level of sentencing are impossible to devise.

> Certain general principles can be recognised, however. Active, central participation will normally attract more condign punishment than peripheral or passive support for the affray. The use of weapons will generally merit the imposition of greater penalties. The extent to which members of the public have been put in fear will also be a factor that will influence the level of sentence and a distinction should be drawn between an affray that has ignited spontaneously and one which has been planned – see *R v Anderson and others* (1985) 7 Cr App R (S) 210. Heavier sentences should in general be passed where, as in this case, the affray consists of a number of incidents rather than a single self-contained episode.'

[39] In *R v Anderson & Ors*, Robert Goff LJ stated:

> "When one is dealing with a case of affray, plainly a distinction has to be drawn between those cases where the affray is premeditated and those cases where it is spontaneous."

This passage was cited with approval in *R v Fullen and Archibald* (2003 unreported) by the Court of Appeal [Carswell LCJ and McLaughlin J] at para [36].

Settling on facts before sentencing

[40] *R v Cairns & Ors* [2013] 2 Cr App R (S) 73 looked at the issue of the sentencing judge settling on facts before sentencing, including looking at the case of *Underwood.* Of particular relevance are paras [3], [4] and [6]:

> "[3] After a trial, therefore, once the offence has been proved, in order to do justice, the judge has to determine the gravity of the offending and is both entitled and required to reach his or her own assessment of the facts, deciding what evidence to accept and what to reject. The conclusions must be clear and unambiguous not least so that both the offender and the wider public will know the facts which have formed the basis for the sentencing exercise. They also inform this court should the offender seek to appeal the sentence as wrong in principle or manifestly excessive, or the Attorney General seek to refer it as unduly lenient.
>
> [4] The position is no different when an offender pleads guilty. The admission comprised within the guilty plea is to the offence and not necessarily to all the facts or

> inferences for which the prosecution contend. Once again, however, the responsibility for determining the facts which inform the assessment of the sentence is that of the judge. In the normal course, when the contrary is not suggested, that assessment will be based on the prosecution facts as disclosed by the statements. If, however, the offender seeks to challenge that account, the onus is on him to do so and to identify the areas of dispute in writing, first with the prosecution and then with the court.
> …
>
> [6] Without seeking to be exhaustive of the issues that might arise (or citing all the relevant authorities), there is no obligation to hold a Newton hearing (a) if the difference between the two versions of fact is immaterial to sentence (in which event the defendant's version must be adopted: *R v Hall* (1984) 6 Cr App R (S) 321; (b) where the defence version can be described as 'manifestly false' or 'wholly implausible': *R v Hawkins* (1985) Cr App R (S) 351; or ***(c) where the matters put forward by the defendant do not contradict the prosecution case but constitute extraneous mitigation where the court is not bound to accept the truth of the matters put forward whether or not they are challenged by the prosecution: R v Broderick (1994) 15 Cr App R (S) 476.***" [our emphasis added]

[41] By way of mitigation McGinley advanced the case during police interview and his plea in mitigation that he had been attacked prior to his involvement. This was not accepted by the judge because the prosecution could not prove that. What he said and relied upon by way of mitigation did not however contradict the prosecution case but constituted extraneous mitigation. The passage above indicates that the judge is entitled to accept or reject defence assertions provided they are grounded on some factual basis.

[42] This point is reinforced in *Underwood* [2004] EWCA Crim 2256 where the court stated:

> "The third, and most difficult, situation arises when the Crown may lack the evidence positively to dispute the defendant's account. In many cases an issue raised by the defence is outside the knowledge of the prosecution. The prosecution's position may well be that they had no evidence to contradict the defence assertions. That does not mean that the truth of the matters outside their knowledge should be agreed. In these circumstances,

> particularly if the facts relied upon by the defendant arise from his personal knowledge and depend on his own account of the facts, the Crown should not normally agree the defendant's account *unless it is supported by other material.* There is, therefore, an important distinction between assertion about the facts which, in truth, the prosecution is ignorant. Neither the prosecution nor the judge is *bound* to agree facts *merely* because…the prosecution cannot 'gainsay' the defendant's account." [our emphasis]

Underwood was recently considered and applied in *R v Creaney* [2023] NICA 75 at [50]-[51].

[43] Similarly, Archbold [2025] at 5A-340, when looking at instances where *Newton* hearings are not required, indicates:

> "5A-340 The cases (including, in a recent restatement in *Cairns* [2013] EWCA Crim 467; [2013] 2 Cr. App. R. (S.) 73) establish three situations where although there is a dispute as to the facts of the case, the court is not obliged to hear evidence under the principles laid down in Newton. The first is where the difference in the two versions of the facts is immaterial to the sentence (see *Hall* (1984) 6 Cr. App. R. (S.) 321, CA; *Bent* (1986) 8 Cr. App. R. (S.) 19, CA). If the sentencer does not hear evidence, he should specifically proceed on the defendant's version: Hall, above; see also Sweeting (1987) 9 Cr. App. R. (S.) 372, CA.
>
> The second exception is where the defence version can be described as "manifestly false" or "wholly implausible" (see *Hawkins* (1985) 7 Cr. App. R. (S.) 351, CA; *Bilinski* (1988) 9 Cr. App. R. (S.) 360, CA; *Walton* (1987) 9 Cr. App. R. (S.) 107, CA; and *Mudd* (1988) 10 Cr. App. R. (S.) 22, CA). See also *Palmer* (1994) 15 Cr. App. R. (S.) 123, *CA and Broderick* (1994) 15 Cr. App. R. (S.) 476, CA (couriers claiming to believe that they were carrying cannabis as opposed to a Class A drug). A judge may form such a view of the defence basis of plea where, for example, he had presided over a trial of co-defendants; but he should only do so after hearing full submissions and giving a reasoned decision so that the basis on which subsequent mitigation would take place was entirely clear to all concerned: *Taylor* [2006] EWCA Crim 3132; [2007] 2 Cr. App. R. (S.) 24.

The third exception is the case where the matters put forward by the defendant do not amount to a contradiction of the prosecution case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. These matters are likely to be outside the knowledge of the prosecution: see *Broderick*, above. Where the facts put forward by the defence do not contradict the prosecution evidence, the cases justify the following propositions:

(a) The defendant may seek to establish his mitigation through counsel or by calling evidence. The decision whether to call evidence is his responsibility, and there is no entitlement to an indication from the court that the mitigation is not accepted (*Gross v O'Toole* (1982) 4 Cr. App. R. (S.) 283, DC); but such an indication is desirable (*Tolera* [1999] 1 Cr. App. R. 29, CA).

(b) The prosecution are not bound to challenge the matter put forward by the defendant, by cross-examination or otherwise (*Kerr* (1980) 2 Cr. App. R. (S.) 54, CA), but may do so (Ghandi (1986) 8 Cr. App. R. (S.) 391, CA; *Tolera*, above).

(c) Where the prosecution not only dispute the defence assertions but identify the evidence on which they would rely to challenge them, the defendant is effectively bound to adduce evidence in support of his assertions if there is to be any prospect of them being accepted by the court: see *Noonan* [2010] EWCA Crim 2917; [2010] 2 Cr. App. R. (S.) 35.

(d) The court is not bound to accept the truth of the matters put forward by the defendant, whether or not they are challenged by the prosecution (*Kerr*, above): see *Broderick*, above.

(e) ***In relation to extraneous matters of mitigation raised by the defendant, a civil burden of proof rests on the defendant,*** although in the general run of cases the court would accept the accuracy of counsel's statement: *Guppy* (1995) 16 Cr. App. R. (S.) 25, CA."

[44] Blackstone [2025], to similar effect at D20.85, states:

> "… The requirement to prove mitigation should not be confused with the resolution of a factual dispute as to the circumstances of the offence in a *Newton* hearing (see D20.8 *et seq*.). The cases appear to draw a distinction between 'true *Newton*' situations, where the dispute is about the immediate circumstances of the offence, and what have been described as 'reverse *Newton*' situations. In the latter, the dispute is about extraneous matters about which the prosecution witnesses are unlikely to have any knowledge. Since these matters would not have formed part of the prosecution case, or be within the prosecution's knowledge, and may well be within the peculiar knowledge of the offender, the rule is that the onus of satisfying the judge rests on the defence."

[45] Applying the above it is clear that McGinley falls into that third category of cases where no *Newton* hearing was required, and that the issue of whether he was attacked or not before his involvement could properly have been regarded as extraneous mitigation, in terms of the offence. In terms of this mitigation the burden of proof resting on the defendant is on the balance of probabilities and that "in the general run of cases the court would accept the accuracy of [his] statement." This was not the approach adopted by the trial judge who appears to have dismissed the mitigatory impact of his account because the prosecution could not establish it with certainty. With respect to the trial judge she approached the matter through the wrong lens. On the authorities she ought to have considered whether the matters put forward by the defendant contradicted the prosecution case (which they did not) and whether the matters constituted "extraneous mitigation." She should further have borne in mind that in relation to matters of extraneous mitigation that a civil burden of proof rests on the defendant (see proposition (e) from Archbold set out at paragraph [43]). In assessing whether the defendant had established the "extraneous mitigation" on the balance of probabilities she should have had regard to whether there was other material that supported his account.

[46] The appellant has pleaded a specific ground of appeal that the judge erred in not considering that there was mitigation pertaining to the offence. On his account what triggered his involvement in the events shown on CCTV was that he had been the victim of a prior attack in the toilets. The Crown do not accept his account on the basis that they cannot prove to the criminal standard that he was so attacked. However, as per *Cairns* and the other authorities cited, it does not follow that the court must therefore reject the appellant's position. His account did not contradict the prosecution case but constituted extraneous mitigation which should have been assessed in the manner summarised at paragraph [45] above.

[47] Although the prosecution cannot state with certainty how the incident started there is "other material", as per *Underwood,* which tends to support the appellant's account that he was slashed with a knife in the toilet in which Dundon was present.

[48] Dundon has a serious record for violence including possession of an offensive weapon in a public place, GBH and wounding; he was on licence for the wounding at the time of the index offence; had a problem with drugs and drink; he was heavily intoxicated at the time and gave no account at all including of what happened in the toilet. The author of Dundon's PSR noted that his inability to restrain himself whilst under the influence of alcohol was an issue for Dundon.

[49] Another striking feature commented on by the sentencing judge was violent behaviour in March 2022 (whilst on bail) which in her words "chime with the present offending." This offending involved three further offences of disorderly behaviour, criminal damage and resisting police for which Belfast Magistrates' Court imposed a custodial sentence of two months but suspended it for three years. The judge noted:

> "… it is clear that that offending occurred reportedly outside his mother's house, reportedly after his uncle's father when reportedly, the defendant had drink taken. The relevance of that observation is that *it chimes with the present offending where people were gathered for a formal occasion, a milestone event in the lives of two families and this defendant failed to conduct himself appropriately when under the influence of alcohol and then he involved himself by going into the toilets to see what was going on."*

[50] By contrast the appellant, who like all arrested persons was advised of his right to remain silent, chose to give an account and named those who were present. He gives an account at his first interview which forms part of the papers and which is supported by the CCTV to the extent that following his exit from the toilet he can be seen in an injured state with what we now know was a serious eye injury. Dundon, on the other hand, who claims that the appellant was the aggressor, refuses to give any account.

[51] In the CCTV Dundon can be seen advancing towards the appellant brandishing a knife. This is accepted by Dundon in his skeleton argument for his appeal which, when refused leave, he abandoned.

[52] The judge noted that the differences between the account given by Dundon to PBNI in preparing his PSR, and the version of events provided to Professor Willoughby, the Consultant Ophthalmic Surgeon retained by Dundon's legal team:

> "I compare that with the history set out in the pre-sentence report where at page 3, it is reported that Mr Dundon told the probation officer that having consumed a significant amount of alcohol, from where he was sitting, he could see people frequently going in and out of the toilets and he explained he went in to see what was going on. He told the probation officer that a bit of an argument started. He asserted he was punched by someone not known to him, that he ended up on the bathroom floor, that he saw a knife on the floor and he remembered being sprayed in the face with a liquid.
>
> Mr Dundon said that he left the bathroom to try to get his eyes washed out. He got out through the door and was sprayed again in the face by the same person who had punched him. Then he was stabbed in the back and across the neck and he reported that at that point, he felt shocked, fearful for his life and felt if he didn't stand up and do something, he'd be dead.
>
> He reported that he had been in fight or flight mode and had not realised how badly he was injured at the time and stated that his priority at the time was to avoid further injury.
>
> Professor Willoughby also received an account and provided a report to the court. In this instance, Professor Willoughby reports in a report from July of last year that this man was involved in an assault on the 12th of September and sustained stab wounds to the neck and thorax and a chemical injury to both eyes. The patient reports that the left eye was held open and chemicals or drain cleaner was poured into that eye. That eye was said to have suffered from poor vision from childhood."

[53] The appellant's account of being attacked with a knife in the toilet is consistent with the CCTV evidence in that he had already suffered a serious eye injury prior to the altercation captured by the CCTV footage. Dundon admits being in the toilet and admits there was an altercation, that he struck someone and that he saw a knife on the floor of the toilet. In the CCTV Dundon can be seen advancing towards the appellant brandishing a knife but claimed that he did so "in self-defence." He accepted in his skeleton argument seeking leave to appeal that he could have escaped, hence the plea.

[54] This is not, therefore, a case of the prosecution merely not being able to "gainsay" the appellant's account. It is a case in which there is objectively verifiable other material capable of supporting, but not proving, the appellant's account.

[55] The judge did not consider or evaluate this other material specifically in the context of whether it was capable of supporting the appellant's account that he was slashed with a knife in the toilet prior to the altercation outside the toilet.

[56] Nor did the judge approach the matter through the correct lens as set out at paragraph [45]. Had she done so it would have been difficult to disregard his mitigatory claim as to what triggered the events giving rise to the affray.

Personal mitigation

[57] The appellant relies on his personal circumstances as set out in the pre-sentence report and from Mr Devine, Consultant Clinical Psychologist. The court was also provided with a copy letter and attached notes from the appellant's GP.

[58] After plea, but before sentence, the appellant attempted to take his own life and was admitted to St Luke's Hospital. Details of the said attempt and subsequent treatment were detailed in a letter from Dr Colin Gorman, Consultant Psychiatrist, dated 11 December 2023.

[59] The appellant is a 44-year-old father of six and a grandfather. He has a very limited criminal record and no previous convictions for violence. Notwithstanding his limited education and illiteracy, the appellant has a significant history of consistent work from age 15 until 2010. It was apparent from the PSR and psychological report, that the appellant's mental health and lifestyle took a significant turn in 2007, when his nephews died in a fire, from which he had tried to save them. Then in 2010 his son was diagnosed with cancer. Dr Devine opines that:

> "I believe that Mr McGinley developed post-traumatic stress symptoms following the fire which included generalised anxiety, intrusive distressing thoughts and feelings of guilt. In addition to those issues, he suffered from secondary depressive symptoms including low mood and suicidal ideation, he also withdrew socially, and others observed personality changes."

[60] The appellant's mental health further deteriorated with the death of his brother from suicide in 2019 and the stresses of the present proceedings hanging over his head for such a long period of time, as most clearly manifest in his attempt on his life in December 2023, in the week he was due for sentence.

[61] The foregoing factors caused probation to conclude that the appellant presents as "a low likelihood of reoffending within a two-year period." It was further noted that there had been no further violent offending, or indeed offending of any nature, in the five plus years from the commission of these offences to date of sentence.

Delay

[62] The appellant's offending occurred on 11 September 2018. He was arrested on 13 September 2018. He was interviewed on 5 November 2018. A summons to answer the complaint issued on 8 July 2022, with a first court appearance on 24 August 2022, almost four years after the commission of the offence. The appellant was sentenced over six years after the date of offence.

[63] There has clearly been significant delay in this matter. The case was hanging over the appellant's head for an inordinate period and the court must take this into account when sentencing him: *A-Gs Reference (No.2 of 2001)* [2003] UKHL 68.

[64] The Court of Appeal in Northern Ireland has addressed the issue of delay in the case of *R v Dunlop* [2019] NICA 72 and *R v Ferris* [2020] NICA 60. The judge properly recognised that there had been culpable delay in this case. The appellant submits that the delay in this case was inordinate and the remedy for the breach ought to have been greater than the five months' reduction applied by the judge.

[65] The appropriate remedy identified by the trial judge in the present case, was what Lord Bingham described as "a reduction in the **penalty** imposed on a convicted defendant." (our emphasis) The rationale for this approach is said to be that a person charged should not remain too long in a state of uncertainty about their fate.

[66] In *R v Jack* [2020] NICA 1 at [44] the court stated that:

> "the evaluative exercise … should take into account not only the impact of the delay on the offender but also the requirement that offenders are realistically punished for their offences. Those competing private and public interests must be balanced and the balance must result in a proportionate response …"

and went on to say:

> "… that it is not appropriate for this court to set out prescriptive guidance except to observe that in cases involving hardened recidivists <u>who must be impervious to concern</u>, in the case of vile and heinous crimes or in the case of dangerous criminals who pose a significant risk to members of the public of serious harm the appropriate

> response would be a public acknowledgement without any reduction in the penalty…
>
> In *Dunlop* at [34] this court referred to a practice of sentencing judges in this jurisdiction which involved making allowance for Article 6 ECHR delay by adjusting custodial sentences downwards. We emphasise that whilst previously there may have been such a practice that in future before there is any reduction the *guidance* in this case *must* be followed." [our emphasis]

[67] We agree that it is not appropriate for this court to set out prescriptive guidance. The qualification in the passage above about 'hardened recidivists' has no application to this appellant who had a minor record and none for violence. Accordingly, it is strictly unnecessary to go further. Nonetheless, we observe that the analysis, if correct and one by which we are bound, is alarming. It envisages a scenario where the court, when confronted with a breach of the article 6 reasonable time guarantee, will respond differently depending on whether the defendant falls within one of the undeserving classes of offender identified by the court in the passage just quoted or within the deserving class. Such a two-tier system discriminating between these two classes is difficult, if not impossible, to justify.

[68] Although the defendants in both classes have been subjected to a breach of their article 6 ECHR right to a fair trial within a reasonable time, those in the undeserving class are to be treated in a materially different manner by reason of the class/category in which they are placed.

[69] However, the guarantees of article 6 require that "*everyone* is entitled to a fair and public hearing within a reasonable time." On the analysis in *R v Jack* there is a category of prisoners who by reason of their classification will be excluded from receiving any reduction in sentence for the article 6 ECHR breach. It is arguable that this amounts to their being excluded from an effective remedy.

[70] *R v Jack* refers to public confidence. Public confidence is, however, unlikely to be eroded by a trial judge affording an appropriate remedy to vindicate the breach of the article 6 Convention right by way of a reduction in the penalty to be imposed. What the appropriate remedy is in an individual criminal case will be a matter for the sentencing judge taking into account all the factors that are relevant to that exercise.

[71] On the other hand, public confidence could be eroded by a wholesale exclusion of or a materially different treatment of those who are deemed to fall within a de facto undeserving class.

[72] Further, if the sentencing courts are required or encouraged to treat article 6 delay differently in accordance with the dictum in *Jack* this may have adverse

practical and policy implications. It may, for example, impact on how other criminal justice stakeholders view and respond to systemic delays in those cases deemed undeserving.

[73] Significant delays can and do occur in serious cases. Hopefully, the criminal cases in which article 6 ECHR delay is established are not numerous. The category of cases identified in *R v Jack* as effectively not justifying a reduction in penalty includes some of the most serious offences and offenders. If the courts are not seen to take the delay in those cases as seriously as it does in other cases criminal justice stakeholders may be emboldened to take a similar approach. We therefore take this opportunity to clarify the position regarding delay against the obiter comments in *R v Jack*. As a matter of principle our approach should now be applied.

Whether the reduction should come before or after the reduction for the plea

[74] The prosecution rely in particular on para [45] of *R v Jack*:

> "This court stated that the proper approach in relation to aggravating and mitigating factors is to identify the impact of all those factors to determine the starting point before applying the reduction for any plea. The question is whether the same approach should be taken in relation to any reduction in penalty for breach of [the article 6 requirement]. We consider that it should."

[75] Accordingly, it was stated at the end of para [45] that an article 6 breach "should be considered in fixing the starting point before applying the reduction for the plea."

[76] The appropriate remedy identified by the trial judge in the present case was a reduction in the penalty. The rationale for this approach is that a person charged should not remain too long in a state of uncertainty about their fate.

[77] We consider that as a matter of principle this exercise should be conducted after the starting point has been identified in the manner set out in *R v Stewart* [2017] NICA 1. The reason for this is that the reduction is to remedy the delay occasioned by state authorities resulting in a breach of article 6. The remedy in this case is the reduction in the penalty. To reduce the penalty and to afford transparency one needs to know what is being reduced and by how much. It should be treated in a similar manner to the plea. The sentencer needs to know what sentence he would have imposed apart from the delay. From that figure he should make his reduction, if warranted. This is a vitally important part of the exercise to make clear to everyone the extent to which the delay has resulted in a reduction in the sentence of imprisonment which would otherwise have been imposed. If it is simply rolled up as mitigation there is no obligation on the sentencer to allocate a specific discount to the identified mitigating factors and so the parties, the victim and the Court of

Appeal will not know precisely how delay has impacted the actual penalty. The actual remedy for the article 6 breach must be apparent on the face of the record, otherwise it will be impossible to discern. If the period is not identified it will be difficult, if not impossible, to determine whether the remedy was sufficient or excessive, and the true impact of serious delay may therefore be disguised. We have concluded that any reduction which is merited as a remedy for delay should be applied after any reduction for a plea of guilty. On this basis, a defendant who pleads guilty will receive the same reduction for delay as one who pleads not guilty and is convicted after a trial.

Exceptional circumstances

[78] It is submitted that the appellant was a stranger to violent offending and, had it not been for what his counsel describes as the "unprovoked attack on his person and the further approach from Dundon with a knife" this incident would not have occurred. His actions were entirely out of character for him. He has no history of violence and has not offended in any way in the intervening five plus years since the index incident.

[79] The appellant is a 44-year-old father of six who has significant mental health issues and substantial care obligations. The impact of the attack upon his person, the impact on his fragile mental health and the stress associated with these matters hanging over his head for over five years were significant and acted as a salutary lesson, which together with his good record, is why he was assessed as low likelihood of further offending.

[80] Notwithstanding the serious nature of the offending, it is submitted that, when one takes into account how he became involved in his offending, the injuries he sustained, the impact these events on his mental health and the delay, the court ought to have considered that there were exceptional circumstances justifying the suspension of any sentence.

[81] The judge plainly did not accept that exceptional circumstances existed in this case justifying the suspension of the sentence. That was a more than reasonable response for the judge to have taken to the facts of this case bearing in mind the serious nature of the offending. We reject this ground.

Conclusion

[82] For the reasons stated at paras [34]–[56] above, we find that McGinley's case differs considerably from Dundon's and that the sentence should be adjusted to take into account his much more limited criminal record. Furthermore, the mitigation identified in relation to the commission of the offence ought to have been taken into consideration in arriving at the appropriate starting point for this appellant. As a result, the sentence imposed on the appellant was manifestly excessive. We have concluded that the starting point ought to have been four rather than five years to

take these factors into account. A reduction of 25% for the plea of guilty should then be applied. At that point a further reduction of six months, for culpable delay, should be applied and we round this down to a custodial sentence of 30 months.

[83] We therefore grant leave, allow the appeal and substitute a DCS of 30 months, split equally between custody and licence.