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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM LAGANSIDE CROWN COURT

THE KING

v

FILIPPO SANGERMANO

Before: McCloskey LJ, McBride J and Fowler J

Appearances

Appellant: **Mr Declan Quinn, of counsel, instructed by RP Crawford Solicitors**
Respondent: **Mr David McNeill, of counsel, instructed by the Public Prosecution Service**

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

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Preface

This appeal raises the inter-related issues of the composition and content of so-called "basis of plea" documents, the information which a sentencing judge can permissibly take into account, *Newton* hearings, the right of every accused person to a fair sentencing process as part of their overarching right to a fair trial, the burden of proof on the prosecution in the sentencing process, the compilation of pre-sentence reports and the duties owed by counsel to the sentencing court.

Introduction

[1] By this appeal Filippo Sangermano ("*the Appellant*") challenges the sentence imposed upon him by Laganside Crown Court (venue Craigavon) on 15th February 2022 whereby for the offence of one count of causing actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861 he was sentenced as follows:

(i) An extended custodial sentence ("ECS") comprising immediate imprisonment of two and a half years supplemented by, upon release, a licence of two years duration containing the following conditions:

   (a) To present himself in accordance with the instructions given by his Probation Officer ("PO") at an intensive supervision unit to actively participate in a programme designed to address domestic abuse and to comply with the instructions given under the authority of the person in charge;

   (b) Not to develop any intimate relationship without first notifying his PO who will then take appropriate steps to ensure that verifiable disclosure has been made and will liaise with social services in respect of any appropriate child protection concerns;

   (c) To attend all appointments arranged with PBNI Psychology and medical professionals and to co-operate fully with any recommended care or treatment; and

   (d) To reside only at an address approved by his supervising officer.

(ii) A violent offences prevention order ("VOPO") of five years duration containing the following conditions:

(a) Prohibition against residing or staying overnight at any address without the prior approval of his Designated Risk Manager ("DRM");

(b) Prohibition against entering into any romantic or sexual relationship with any person without having made to that person full disclosure of his criminal record and such disclosure having been verified by his DRM;

(c) To engage and co-operate in all reasonable requests made by his DRM in relation to treatment programmes or courses designed to assist in reducing his risk and anger management; and

(d) To receive visits from and engage with his DRM.

The Course of the Prosecution

[2] The bill of indictment, mirroring the initial charges, specified the following offences:

(i) Wounding with intent, contrary to section 18 of the 1861 Act.

(ii) Possession of an offensive weapon, namely nail scissors, with intent to commit the indictable offence of wounding with intent;

(iii) Criminal damage to the injured party's mobile phone; and

(iv) Common assault upon the injured party by striking her with a crutch.

[3] The offending occurred on 29 October 2020, the appellant was arrested promptly and was first remanded in custody the following day. The prosecution was completed when the impugned sentencing decision was promulgated on 15 February 2022. Between these two dates there were certain events which must be considered in order to understand the main issues thrown up by this appeal:

(i) On 23 August 2021 the appellant was arraigned, pleading not guilty to all four counts.

(ii) On 23 November 2021 the defence legal representatives received disclosure of the notes of a meeting attended by police and the injured party in which she claimed that she had stabbed herself (these notes were not provided to the court and no particulars of this bare statement were supplied).

(iii) On 24 November 2021, following an adjournment the previous day, the injured party, in consultation with prosecuting counsel, a PPS official and the investigating police officer stated that she did not wish to give evidence, she was reconciled with the appellant and she wanted their relationship to continue.

(iv) On the same date, there were two events of major significance in the precincts of the courthouse. First, prosecuting and defence counsel settled a document designed to reflect the factual basis upon which the appellant would plead guilty. By this arrangement the appellant would plead guilty to the count of assault occasioning actual bodily harm to the injured party, with the remaining three counts to be "left on the books."

(v) Second, on the same date a copy of the basis of plea was provided to the trial judge.

(vi) On 29 December 2021 prosecuting counsel provided his written submission for the sentencing hearing and draft Violent Offences Prevention Order ("VOPO") to defence counsel.

(vii) At the beginning of January it was agreed with the judge that the replying written defence submission could await receipt of the pre-sentence report.

(viii) On 4 February 2022 the defence written submission for the forthcoming plea and sentence hearing was provided to prosecuting counsel.

(ix) The pre-sentence report was received by the parties on 5 February 2022.

(x) On 6 February 2022 prosecuting counsel provided defence counsel with an addendum to his written submission.

(xi) On 7 February 2022 the plea and sentence hearing took place.

(xii) On 11 February 2022, in response to a request from the judge, both the court and the defence received from the PPS certain medical records pertaining to the injured party, social services records concerning the same person and the OCP Order noted infra.

(xiii) On 15 February 2022 the sentencing decision of the judge was promulgated.

[4] The injured party, in her eleventh hour "withdrawal" statement, claimed that she, and not the appellant, had caused the wound to her leg. This was the impetus for the events on 24 November 2021 noted above.

Basis of Plea

[5] The text of the basis of plea ("BOP") document is the following:

> "The accused accepts he assaulted [the injured party] contrary to section 47 … The accused pleads guilty on an agreed factual basis with the prosecution, namely he was initially assaulted by [the injured party] and he consequently acted in a reckless manner. He did not intend to stab [the injured party] with the nail scissors in question and accepts that his actions went beyond self-defence."

It was signed by both counsel.

The Sentencing Information

[6] Before summarising the information available to the judge at the sentencing stage it is necessary to identify the sources thereof. These were the pre-sentence report; the appellant's criminal record in both this jurisdiction and that of England and Wales; the aforementioned social services records, medical records and OCP Order; a medical report forming part of the trial papers; the witness statement of the injured party; the transcript of a recording of the emergency telephone call made by the injured party at the time in question; the signed witness statement of the injured party which documented the violent relationship between the parties dating from around 2008 and described in some detail the alleged conduct of the appellant on the index date; the transcript, of some nine minutes duration, of the emergency telephone call made by the injured party at the material time; the witness statements of police officers detailing their observations and events following their arrival at the parties' place of residence, a report of the forensic examination of a garment belonging to the injured party; a transcribed version of the interviews of the appellant; photographs depicting a puncture wound of the injured party's left thigh and several other bruising/contusional injuries of her upper body; and other scenes of crime photographs.

[7] The following are the main elements of the information which the judge would have distilled from the aforementioned sources. The appellant is an Italian national, aged 55 years. At the time of the index offending he was the subject of a sentence of imprisonment of one month, suspended for one year, imposed on 11 December 2019. This related to the breaking of a window at a hostel. The appellant had previously resided in England for a period of some 25 years. During this period he was a prolific offender, committing 23 offences of theft (and kindred); 10 offences of fraud (and kindred); 10 offences against property; 7 offences against the person; 8 public order offences; 6 offences relating to police, courts and prisons; 6 miscellaneous offences; and one drug offence. The sentencing disposals which these offences generated comprised various terms of imprisonment, suspended

terms of imprisonment, community orders, conditional discharges and fines. The stand out offence is that of importing controlled drug which gave rise to a sentence of imprisonment of eight years imposed at Canterbury Crown Court on 20 December 2001.

[8] In order of gravity, this was followed by a sentence of four years imprisonment imposed on 6 April 2017 at Wood Green Crown Court for the offence of wounding/inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. The details of this offence are of some importance, as appears from the sentencing decision of the judge (*infra*). This represents the last of the multiple offences committed by the appellant in the jurisdiction of England and Wales.

[9] The second main ingredient in the sentencing matrix was the PBNI pre-sentence report. This documents, firstly, a domestic abuse history relating to the injured party which, evidently, did not give rise to any prosecution/conviction of the appellant. Social services, drawing on information available from the parties' relationship of cohabitation in England, assessed the injured party to be vulnerable and in need of a capacity assessment. There were also concerns about the trafficking of the injured party. An interim injunction of brief duration – two weeks – banning contact between the parties was made on 30 April 2020. Pausing, this order was served on the defence as additional evidence. It was made in the Family Division of the Northern Ireland High Court (OCP) on the *ex parte* application of a health and social care trust. It was made. Some three months later the injured party declined to provide her place of residence as a "bail address" option for the appellant. It was further documented that on 8 October 2020 the appellant threw a walking stick at the injured party, missing his target. She declined to make a statement of complaint but requested that he be removed from her address. The index offence followed some three weeks later.

[10] All of the foregoing gave rise to a police assessment, extant at the time of the index offending, that the appellant was a high risk perpetrator with regard to domestic violence. Social services, while confirming that the injured party had capacity, considered her vulnerable by virtue of the parties' relationship. A record of the appellant's "poor" behaviour in prison, one aspect whereof was constituted by two disciplinary adjudications, was further documented.

[11] Next the report noted that when initially interviewed by the author the appellant "… presented as verbally aggressive and at times controlling of the interview process", necessitating a second interview on a later date. The author of the report opined:

> "… there is a high level of concern that [the Appellant] will be involved in further intimate partner violence if the current risks are not addressed ... [he]… is currently assessed as posing a high likelihood of reoffending within

> the next two years. Current risk factors include history of police call outs and violence, poor emotional regulation, lack of internal controls, limited insight, limited victim awareness and violent attitudes and poor coping skills."

The appellant was not considered to pose a risk of committing a further offence causing serious bodily harm. This was clearly a borderline assessment. The report states:

> "… he remains assessed as a high risk of further violent offending with concerns including poor emotional regulation, lack of internal controls, limited insight, limited victim awareness and violent attitudes."

[12] The report's conclusions were:

(i) There were significant concerns about the potential for further reoffending in a domestic context.

(ii) Specifically, there was a high level of concern that the appellant would engage in further "intimate partner" violence, entailing a high likelihood of reoffending within the next two years, vis-à-vis the injured party.

(iii) There were "considerable concerns" about the safety of the injured party in a post-release scenario lacking adequate safeguards.

(iv) The court should give consideration to making a VOPO as "a robust safeguard for the victim of this case in light of the risk of serious harm …"

(v) A disposal containing an element of probationary supervision would be appropriate. The specific conditions which were ultimately reflected in the ECS imposed were recommended. The author noted that the appellant had signified his consent to these conditions.

[13] The medical evidence was based on a history from the injured party that she had been punched to the face, grabbed by the left arm and stabbed with scissors in the left thigh. On examination there was bruising to the left side of her face, particularly around the left eye and a left subconjunctival haemorrhage. There was also a stab wound of the left lateral thigh which had been treated with one suture and steri-strips. Furthermore, there was photographic evidence of bruising of the left arm. In addition, there was police evidence of a woollen top which was badly torn and misshapen and exhibiting blood staining, blood stained jeans with a puncture in the upper left thigh area, a damaged television and blood stains on the floors throughout the property concerned. There was forensic evidence that the damage to the item of clothing was the result of the application of significant force.

[14] The other materials before the sentencing judge, derived from either the committal papers or additional evidence served subsequently, in particular, they included the medical records, the OCP Order and the social services records noted in para [3] above. The latter document, inter alia, the traumatic brain injury inflicted on the injured party by the appellant's assault in 2016; the severe epilepsy, anxiety and depression suffered by the injured party; episodes of self-harm; and her acute vulnerability. In addition, there is an assessment from Tower Hamlets (London) social services that the injured party is "at high risk of serious injury and murder" at the hands of the appellant.

The Sentencing Hearing

[15] Both prosecuting counsel and defence counsel provided the judge with written sentencing submissions. The prosecution submission included the following:

> "…. [The Appellant and the injured party] began a relationship in 2015 which quickly became violent ……
>
> The [injured party] appears to have cognitive difficulties caused by brain damage inflicted by the defendant and has been diagnosed with bipolar psychosis …….
>
> Both …….. have a long term history of Class A drug abuse …….
>
> An argument began at the flat on ……. 29 October 2020 ……
>
> The defendant lost his temper and started calling [the injured party] names like 'slag.' He picked up the TV and threw it on the ground, shouting at [her] and accusing her of sleeping around ….
>
> [The injured party] says that the defendant went over to the kitchen, picked up two butter knives from beside the sink and threw them at [her] ... she dodged them and they missed her. The defendant fell over and accused [her] of pushing him over. They continued to argue and in the course of the argument the defendant stabbed [her] in the left thigh with a pair of nail scissors …..
>
> [The injured party] called 999 in a highly emotional and upset state …. The man who stabbed her was the defendant … she believed he stabbed her with scissors … she can be heard shouting 'get off me' repeatedly as the

> defendant's voice can be heard in the background …. [The injured party] was interrupted by the defendant trying to grab the phone from her. He was grabbing her by the hair, arm and clothes and ripped her top. At one point he hit her around the left eye with his crutch. He threw her phone on the floor, damaging it. She then escaped out of the flat and down the stairs as the police entered ….
>
> The police recovered three significant pieces of real evidence … [the injured party's] jeans with an obvious puncture in the upper left thigh area, [her] ….. woollen top which was badly torn and misshapen around the neck and blood stained …. [and] a pair of small nail scissors in the front right pocket of [the defendant's] jeans ….
>
> [In interview the defendant claimed] …. She threw cutlery at him. He admitted inflicting the wounds on [her] but said that he had been defending himself because she had attacked him. He said he had fallen onto the floor and had struck out at her in self-defence, not realising he had the nail scissors in his hand ….
>
> He admitted damaging the TV in anger, but said it was his property and he could do that if he liked. He denied breaking her mobile phone, saying that he had grabbed it to stop her phoning the police but had not damaged it. Finally, he admitted that he hit her in the face with his crutch but claimed this too was in self-defence when she attacked him …..
>
> On 18 October 2020 [the injured party] made a withdrawal statement, stating that she now realised that she caused the wound to her own leg, not the defendant. She attended court for trial on foot of ……. a witness summons."

[16] The written submission then addressed the appellant's criminal record and includes the following passage:

> "On 6th April 2016 the defendant was sentenced at East London Magistrates' Court for an offence of battery against [the injured party] committed on 2nd April 2016. The facts of the offence were that the defendant punched [her] giving her a bloody nose and a bruised eye …

> He pleaded guilty to the offence and was sentenced to eight weeks in prison. On 6th April 2017 the defendant was sentenced at Woodgreen Crown Court in London for an offence of inflicting grievous bodily harm to [the injured party] on 15th October 2016. The facts of the offence are that in the course of an argument the defendant threw a drinking glass at her, over arm and across the bedroom of the flat where they lived. The glass hit her on the forehead, caused a cut which required stitches and fractured her skull. Immediately after causing the injury the defendant told [her] to say that she had had an epileptic fit ….
>
> The defendant pleaded guilty to the offence and was sentenced to 48 months in prison. On the same occasion he was also sentenced for a later offence of battery committed against [the injured party] on 14th November 2016. The facts of that offence are that during another argument the defendant head butted her, causing bruising around her eye ….
>
> He pleaded guilty to the offence and received a consecutive sentence of three months. ….
>
> Following his conviction in 2017 the defendant was made the subject of a restraining order not to contact [the injured party] for five years. It applies in England and Wales but not in Northern Ireland."

Continuing, the prosecution submission suggested the following aggravating factors: domestic violence, the use of a weapon, the injured party's vulnerability, the domestic setting of the assault and the appellant's criminal record

[17] The written sentencing submission of the defence counsel at the outset drew attention to the agreed basis of plea. It then adverted to the injured party's "withdrawal" statement dated 18 October 2020. The text continues:

> "It is respectfully submitted that the facts of the case, as ultimately established (ie the infliction of a small injury via nail scissors in a reckless/quasi self-defence context) are at the lower end of the scale of seriousness. Indeed, had those facts and that context been established at the outset this is a case which would likely have been dealt with summarily … The defendant was attacked by the complainant, he acted recklessly as opposed to

> intentionally, the injury was minor and the complainant initially made the case that the injury was self-inflicted."

In the passages which follow it is asserted that the appellant has debilitating and significant physical disabilities and suffers from depression and anxiety. This is followed by:

> "It is not disputed that on occasions the defendant has displayed aggressive behaviours."

[18] In a later, second written submission prosecuting counsel drew to the attention of the court certain medical records of the injured party which had been secured via a third party application. In a digest of these documents the attention of the sentencing court was drawn particularly to the traumatic brain injury and consequential brain damage suffered by the injured party in October 2016, an emergency passport seizure order made in November 2019 and the above-mentioned OCP Order of 30 April 2020. It was specifically submitted that there was a body of evidence indicating that the injured party either lacked or had previously lacked capacity. Her professed willingness to resume her relationship with the appellant was acknowledged.

[19] There are certain noteworthy aspects of the transcript of the sentencing hearing which followed. First, the judge had alerted both counsel in advance to the fact that she was actively considering the issue of dangerousness and had concerns about whether the injured party was truly capacious. In this context defence counsel stated the following:

> "When the defendant entered his guilty plea it was to a very much less serious set of facts and circumstances than were previously before the court ....
>
> And the context – in very brief summary – is that it is accepted that the complainant attacked the defendant, that his actions went beyond lawful self-defence and that the injury caused in this case, which was with nail scissors, a shallow wound requiring one suture … [was] caused in a reckless manner as opposed to a deliberate manner … and in fact he was lawfully using the nail scissors prior to the incident."

The main focus of the remainder of counsel's submission was the issue of dangerousness, the central contention being that the requisite evidential foundation for an assessment of this kind was lacking. Phrases such as "the facts ultimately accepted" and "the very particular facts and concessions in this case" featured. It was further submitted that the conditions for making a VOPO were not satisfied. In

this context the following passage in the first of prosecuting counsel's written submissions assumes particular significance:

> "The full facts of the case are set out in this opening to provide context, but where there is any conflict between the parties' accounts of the incident the court should sentence on the agreed basis of plea."

[20] Upon termination of defence counsel's presentation, the judge, very properly, invited prosecuting counsel to rejoin if so minded. Prosecuting counsel declined this invitation.

The Sentencing Decision

[21] At this juncture it is necessary to examine the heart of the impugned sentencing decision in greater depth. The necessity of this exercise will be apparent from the Preface to this judgment, the grounds of appeal and the decision of the single judge, all outlined above.

[22] In a commendably detailed reserved judgment the sentencing judge considered the issue of dangerousness at some length. The facts and factors which impelled the judge's conclusion that the statutory dangerousness test was satisfied are spelled out extensively. They are the following: the live suspended sentence current at the time of the offending; the reckless nature of the stabbing of the injured party with nail scissors; in the wake of the stabbing, the appellant's persistent verbal abuse of the injured party, his failure to tend to her needs and his focus on his own needs; the separate use of a crutch following the stabbing with scissors; his previous use of a crutch in committing the offence of battery in London in 2016; the infliction of brain injury on the same injured party on the latter occasion; the use of a crutch in the criminal damage offence giving rise to the suspended sentence; his unremitting intention to continue to cohabit with the injured party; the appellant's lack of self-control; his criminal record, in particular his convictions in respect of offences of violence perpetrated against the injured party, which included the infliction of the aforementioned brain injury and the perpetration of a further offence of battery within a week of release on licence from a sentence of imprisonment imposed for a battery committed upon her just eight weeks previously; his failure to comply with the aforementioned licence conditions; his failure to comply with civil court orders prohibiting his contact with the injured party; his conniving in the move of the injured party from England to Northern Ireland, thereby nullifying the impact of the protective orders and isolating the injured party from human support; his repeated claims that the index offence was committed in self-defence; his admission that he had previously offended against the injured party while under the influence of drugs; his lack of awareness of the seriousness of his offending; his flimsy claim to remorse; and the absence of any identifiable protective or stabilising factors in his life. [The underlining is explained in para [75] *infra*]

[23] To the former extensive list the judge added the following:

> "… the absence of self-management, self-control or internal controls as demonstrated by
>
> - Your conduct on various occasions in my court;
> - Your interaction with PBNI;
> - Your inability to recognise and self-manage the risks that you pose to the [injured party] and to the wider community …
> - Your [criminal record] which discloses regular disregard for court orders [and] it appears that you have never complied with or fully discharged a probation order."

Appeal to this Court

[24] The initial grounds of appeal were the following:

(i) The immediate custodial term of 30 months was manifestly excessive and/or wrong in principle.

(ii) The judge attributed to the appellant a level of culpability unsupported by the basis of plea.

(iii) The finding that the appellant was "dangerous" was erroneous in law.

(iv) The VOPO is unsustainable in law as it was not necessary or appropriate.

(v) The terms of both the ECS licence and the VOPO are disproportionate.

[25] The single judge, having first reflected on possible misunderstandings on the part of the appellant's legal representatives, condensed the grounds of appeal to (i), (iii) and (iv)/(v). The judge observed that the basis of plea document was "very incomplete." He reasoned that, in consequence, the sentencing judge was not precluded from considering the entirety of the material before the court, which we have outlined at paras [6]–[14] above. The single judge concluded that there was but one arguable ground of appeal, namely that relating to the sentencing judge's assessment of "dangerousness." See paras [20]–[21]:

> "[20] The only arguable point in respect of [the Judge's] assessment is whether or not the repetitive offending was likely to give rise to serious harm ... This issue was

> considered in Owens [2011] NICA 48 and in particular it was emphasised by the court that as the definition of serious harm was "death or serious personal injury, whether physical or psychological" (Article 3(1) of the 2008 Order), the reference to death coloured the definition and put the overall seriousness of the harm into context.
>
> [21] I consider that [the Judge] did approach this matter correctly and dealt with all relevant issues, however I consider that it is at least arguable that, although there is evidence to suggest repetitive offending and a significant risk of harm, that harm may not fall into the category of 'serious.' Leave is therefore granted on this point."

[26] Before this court the grounds of appeal were refined. The focus appellant's challenge was directed to the judge's assessment of dangerousness, the VOPO and the length of the immediate custodial term.

[27] It became apparent to this court when the appeal was first listed for hearing that the parties had not really directed their minds to the central issue before the court or the mechanism whereby this should be presented. The central issue, in a sentence, is whether the judge sentenced the appellant in a manner which is legally impermissible by taking into account inappropriate information. The court, having communicated this to the parties' counsel, next drew attention to the absence from the bundle of authorities of a series of material decisions, mainly of this court. Next, the court made a direction requiring the parties to compile a schedule setting out comprehensively and clearly the information which the judge was permissibly entitled to take into account in formulating the impugned sentence and the information which the judge could not permissibly consider, together with their competing contentions.

[27] This gave rise to a voluminous schedule (approximately half the length of this judgment) depicting not merely acute and extensive disagreements between the parties but also a total lack of agreement on a single issue. It is unnecessary to reproduce the schedule, having regard to paras [6]–[23] above.

Guidance From The Decided Cases

[29] We turn to consider some of the decided cases bearing on the central issue as we have formulated this in para [27] above. We preface this exercise with the observation that issues of this kind fall to be determined within the framework of basic dogma. The legal principles engaged are more than familiar. First, in criminal proceedings the burden of proof rests on the prosecution. Second, there is no burden on the accused, save in those narrow specific instances in which an evidential burden arises. Third, the accused is presumed innocent. Fourth, and

finally, the accused has a right to a fair trial which encompasses all aspects of the trial process, including sentencing.

[30] It is necessary to elaborate a little on these foundational principles. In every criminal trial the burden on the prosecution is to establish beyond reasonable doubt the guilt of the accused person of the offence/s charged. This is no freewheeling palm tree, however. Rather, the burden is to establish that the accused is guilty of the offence/s specified in the indictment in a specific factual manner. Thus, every opening prosecution statement to a jury will identify the facts which the prosecution will seek to prove, beyond reasonable doubt, in order to establish the guilt of the accused. Where, following a contested trial, the jury returns a verdict of guilty, it is presumed, absent any clearer indication to the contrary, that the jury has convicted on the basis of the prosecution case ie that the jury has been satisfied beyond reasonable doubt that the prosecution has established the facts which it set out to prove at the beginning of trial – subject of course to any variations or modifications which may have arisen following the commencement of the trial and subject also to the judge's final directions to the jury. If convicted, the ensuing sentencing of the accused person will be based upon the foregoing foundation.

[31] In contrast, in cases where the guilt of an accused person is established by the mechanism of a plea of guilty the parties and the court must confront certain challenges and realities. It is in this context that the basis of the guilty plea assumes obvious importance. The evolution of the criminal trial process during recent years has entailed the introduction of much sophistication and complexity. The BOP represents one of these sophistications. It is a valuable addition to the fairness, transparency and coherence of sentencing exercises. In those cases where it is employed certain unavoidable rigours arise. We shall address these more fully infra.

[32] The discrete cohort of principles relating to so-called "*Newton*" hearings must also be considered. In *R v Newton* [1982] 77 Cr App R13 the English Court of Appeal addressed directly the correct approach in cases where there is a dispute between prosecution and defence in the context of a plea of guilty. The court held that the trial judge should consider three possible courses: first, the reception of a plea of not guilty following which the jury will determine a disputed issue or issues; second, as per the first option, with the judge making the necessary determinations; or, third, receiving no evidence and considering the submissions of counsel. Where the latter case is adopted and a substantive conflict between parties remains, the version of the accused must be accepted "so far as possible."

[33] The decision in *Newton* was considered by this court in *R v McCullough* [1999] NI 39. There, following a contested trial, the jury found the appellant not guilty of murder but guilty of manslaughter. The evidence adduced, particularly forensic evidence, had implicated another person ("F") to some extent. F was not prosecuted. The trial judge sentenced the appellant on the basis that he was the person wholly or mainly responsible for inflicting the fatal injuries on the deceased. In holding that

there was ample evidence to justify the judge's approach, this court observed, at 42, that:

> "…. It would not have been appropriate to hold a **Newton** hearing …. since the evidence had all already been heard. [The judge] had to determine for himself on the evidence given the degree of the appellant's participation in the attack on the deceased."

Notably, this court did not descent from the argument that the judge had to be satisfied "beyond reasonable doubt" about this matter.

[34] In *Attorney General's Reference No 6 of 2004 (Doyle)* [2004] NICA 33 this court cited *Newton* without qualification at para [7], adding at para [8] that it would be "plainly" inappropriate for this court to conduct a *Newton* hearing. It followed that the appellate court was required to accept one particular facet of the defendant's account namely that the deceased had admitted him to her house and he had not broken in: see paras [6]–[8].

[35] Next, in *R v Magee* [2007] NICA 21 in a context where the defendant had pleaded guilty to manslaughter one of the issues raised on appeal concerned the nature of his conduct and his state of mind. Self-evidently, it was accepted that the defendant did not intend to kill or cause grievous bodily harm. The appellant contended that at first instance the prosecution had accepted that he had acted in self-defence but had exceeded the limits of reasonable force. The prosecution position, subtly different, was that the possibility of the jury acquitting on the basis of self-defence or accepting that there had been an element of provocation had formed the basis of the sentencing. The appellate court simply made up its own mind, based on its assessment of the committal statements, satisfying itself that the appellant was unmistakably the instigator of the relevant confrontation and, further, that while the deceased had "squared up" to the appellant he has done so in response to the appellant's initial attack response to the initial attack and the reaction of the appellant had been wholly disproportionate: see para [9].

[36] We draw attention in the briefest of terms to *R v CK (A minor)* [2009] NICA 17, it being another instance of the adoption by this court of *R v Newton* without reservation: see para [29].

[37] Chronologically, *R v Newton* was next considered by this court in *R v Thompson and another* [2014] NICA 74. There, one of the main grounds upon which one of the appeals against sentence was successful was that, in the context of guilty pleas, the sentencing judge should not have founded on inter alia a forensic connection suggesting that the conduct of one of the defendants had been of greater culpability than the other without having first alerted the parties, providing the opportunity for submissions. It is of some note that in thus concluding this court

cited with approval the decision of the English Court of Appeal in *R v Lucien* [2009] EWCA Crim 2004 and in particular the following passage at para [11]:

> "It is very apparent that the judge had taken a great deal of care over his sentencing remarks which were full and clearly reasoned but in this case, for some reason, the defence were unaware until the sentencing was actually in progress that the judge did not accept that the appellant's criminal involvement only began once the complainant was in the car. **If a judge does not accept an important and relevant part of the basis of the plea he or she should make that clear so the defence can decide how they wish to proceed**."
> [Our emphasis.]

The defendant's right to a fair trial, the last of the four principles identified in para [29] above, resonates strongly in this passage.

[38] The more recent decision of this court in *R v Morrow* [2019] NICA 71 is another illustration of the adoption of *R v Newton* without demur. What emerges from this decision is the importance of both the parties and the judge approaching *Newton* issues in a focused way. This court, in the exercise of its appellate jurisdiction, had to grapple with a rather unsatisfactory first instance hearing framework one feature whereof was the provision by the parties to the judge of a draft basis of plea document which contained areas of disagreement. This court was prompted to make two observations. First, it was "difficult to ascertain" the precise task the judge was asked to perform by the parties or, indeed, whether the parties were even agreed about this; see para [13]. Second, it was not clear from the judge's ruling whether the exercise performed by him was of the *Newton* variety: see para [16]. At para [27] the court identified as the fundamental question that of whether the appellant had been deprived of his right to a fair hearing. This court concluded, at para [32]:

> "The fundamental error of law which this court has identified is that the appellant was deprived of his right to a procedurally fair hearing in the sentencing process which unfolded following his pleas of guilty."

[39] This court was moved to provide the following general guidance, at para [35]:

> "(a) Without in any way levelling any criticism at Counsel in this case, the inability to agree the basis of a plea has had unfortunate consequences. The court would exhort the prosecution and the defence in this and other cases of the need to use their best efforts to agree the factual basis of plea in

order to avoid costly and time-consuming hearings in busy Crown Courts.

(b) The court would wish to emphasise how rarely a "Newton" ruling/outcome should purport to make definitive findings/conclusions regarding contested material issues without affording the defendant a full opportunity to be heard and call witnesses. This is especially so in a context where the central issue in dispute is mainly one of fact. Elementary fair hearing rights must be scrupulously respected.

(c) There is a need for clearly understood parameters at the outset of every such hearing, whether of the *Newton* variety or otherwise.

(d) Every defendant's right to a fair trial extends to the sentencing process. This inalienable right is not restricted to the determination of guilt/innocence."

The final noteworthy feature of *Morrow* is the absence of any judicial dissent from the appellant's proposition that the standard in play with regard to disputed factual issues in the sentencing context was that of beyond reasonable doubt: see the terms in which the appellant's argument was formulated at para [10].

[40] The right of every accused person to a fair trial shines brightly in *R v Belfast Magistrate, ex parte McNally* [1992] NI 217 at 225e and 227j especially. This decision is especially noteworthy for its confirmation of the burden (on the prosecution) and the standard (beyond reasonable doubt) of proof in a sentencing context and the emphasis on the defendant's right to a fair trial.

[41] The decision of this court in *R v Caswell* [2011] NICA 71 addresses specifically the context of a guilty plea where there are differences between prosecution and defence about factual issues. In such cases it is incumbent upon the sentencing judge to determine, firstly, the materiality of the factual matters in dispute. This behoves the judge to consider the submissions of both parties. If this gives rise to a ruling that a certain issue is (or issues are) material the judge must then proceed to the further stage of inviting the parties further representations or evidence to facilitate resolution of the dispute in accordance with *R v Newton*.

[42] The decision in *R v Newton* was extensively considered by the English Court of Appeal in *R v Cairns* [2013] EWCA Crim 467. The first passages of note in the judgment of Leveson LJ are the following, at paras [2]–[4]:

"It is a cardinal principle of our criminal justice system that, for those cases decided in the Crown Court, a jury decides on the guilt or otherwise of those charged with crime. That critical decision concerns only whether the ingredients of the criminal offence or offences (as set out in the indictment) are proved. The jury is not concerned with what might be described as the aggravating or mitigating circumstances which will be important in the event of a conviction, namely the decision that falls to the judge as to the sentence to be imposed. Only in very rare circumstances should the jury be asked questions supplementary to the verdict (one example being whether manslaughter has been proved as an involuntary act, by reason of diminished responsibility or because of loss of control).

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.

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."**
[our emphasis]

The judgment continues, at paras [5] – [7]:

"The proper approach of the prosecution to bases of plea was considered in *R v Tolera* [1999] 1 Cr App R 29 and is now set out in the Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise (issued with effect from 1 December 2009). In so far as it deals with the position of the defendant and the court, it can be summarised in this way:

i) A basis of plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests; in cases involving multiple defendants, the bases of plea for each defendant must be factually consistent with each other (see para C1).

ii) The written basis of plea must be scrutinised by the prosecution with great care. If a defendant seeks to mitigate on the basis of assertions of fact outside the prosecutor's knowledge (for example as to his state of mind), the judge should be invited not to accept this version unless given on oath and tested in cross examination as set out in IV.45.14 of the Consolidated Criminal Practice Directions (CCPD): see para C3. If evidence is not given in this way, then the judge might draw such inferences as he thought fit from that fact.

iii) The prosecution advocate must ensure that the defence advocate is aware of the basis on which the plea is accepted and the way in which the case will be opened (para C5). Where a basis of plea is agreed, having been reduced into writing and signed by advocates for both sides, it should be submitted to the judge prior to the opening. It should not contain matters that are in dispute: see *R v Underwood* [2005] 1 Cr App R 13 replicated in CCPD IV.45.11(c) and (d). If it is not agreed, the basis of plea should be set out in writing identifying what is in issue; if the court decides that the dispute is material to sentence, it may direct further representations or evidence in accordance with the principles set out in *R v Newton* (1982) 77 Cr App R 13.

iv) Both sides must ensure that the judge is aware of any discrepancy between the basis of plea and the prosecution case that could potentially have a significant effect on sentence so that consideration can be given to holding a *Newton* hearing. Even where the basis of plea is agreed between the prosecution and the defence, the judge is not bound by such agreement: see paras C8 and C10, CPR IV.45.12 and *Underwood (ibid).* But if the judge is minded not to accept the basis of plea in a case where that may affect sentence, he should say so."

As will become apparent, we consider that there was a gulf between this guidance and what occurred in the present case.

[43] The decision in *R v Cairns* was considered uncritically, though briefly, by this court in *R v McGrade* [2014] NICA 8, at para [10] and in *R v Morrow (supra)* at para [6].

[44] It is clearly desirable for both the profession and sentencing judges to be aware of this court's stance in relation to *R v Cairns*. Succinctly, we adopt it fully. To this we would add that *R v Cairns* is not necessarily exhaustive of the principles to be applied, as a perusal of this judgment should make clear. Furthermore, *R v Cairns* does not purport to prescribe exhaustively the procedural requirements to be observed in cases of this kind. Some of these have been addressed in previous decisions of this court, as noted above. We shall supplement these to a modest extent in the next section of this judgment.

Some Further Guidance

[45] In every litigation context – criminal, civil *et al* – the litigant has a fundamental, inalienable right to a fair hearing. The content of this right is intensely context sensitive. The broader context with which this judgment is concerned is that of the information which may permissibly be considered by a sentencing court where the accused pleads guilty and the court receives a "basis of plea" document, without demur. The narrow context with which we are concerned is that of the instant case. We shall address the former first.

[46] The fundamental and inalienable right of every litigant to a fair trial raises questions of practice and procedure. This illuminates why, by well established principle, the right in play is of the procedural variety. It is frequently expressed in the familiar words procedural fairness. In this common law jurisdiction fairness normally denotes procedural fairness. This formulation is the modern incarnation of the hallowed common law principles audi alteram partem and memo judex in causa sua.

[47] In some litigation contexts one encounters the phraseology of procedural impropriety or procedural irregularity. These are terms of art which can be found in reported cases and academic texts. This kind of phraseology is best reserved to cases in which some kind of procedural aberration other than procedural unfairness is under scrutiny. Procedural aberrations of this genre include, inexhaustively, non-compliance with time limits imposed by subordinate legislation, failures to comply with specific aspects of rules of court, practice directions or case management orders and a failure to perform a statutory duty to consult. In the context of the liberty of the citizen, a procedural aberration may take place where there is a failure by the relevant public authority to serve certain documents – timeously or at all – on a detained person.

[48] Procedural unfairness is remote from substantive unfairness. These two concepts are neither bedfellows nor cousins. Substantive unfairness belongs to the realm of subjective, personal and idiosyncratic opinion. Procedural unfairness, in contrast, does not. In this context it is appropriate to add that in every case – belonging to whatever judicial jurisdiction – where an issue of procedural unfairness arises the court is the ultimate arbiter. It forms its own view, unconstrained by either the *Wednesbury* principle or the doctrine of proportionality having conducted a detached, dispassionate audit. This applies equally to courts of appellate and review jurisdiction.

Dangerousness: The Legal Rules

[49] "Dangerous" offenders form a discrete cohort governed by a tailor made statutory regime contained in Article 12ff of the Criminal Justice (NI) Order 2008 (the "2008 Order"). This regime is constructed around the concepts of specified violent offence, specified sexual offence and specified terrorism offence. Each of these discrete classes is the subject of statutory definition. In the present case, the relevant class is that of "specified violent offence." This means an offence specified in Part 1 of Schedule 2. Assault occasioning actual bodily harm contrary to section 47 of the 1861 Act belongs to the list of "specified violent offences."

[50] By virtue of the aforementioned classification the provisions of Article 14 of the 2008 Order had to be considered by the court in sentencing the appellant. Article 14 provides insofar as material:

> "14.—(1) This Article applies where—
>
> (a) a person is
>
> (i) convicted on indictment of a specified offence
>
> …
> and

(b) the court is of the opinion—

(i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences…

…

(2) The court shall impose on the offender an extended custodial sentence.

…

(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of

(a) the appropriate custodial term; and

(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences …"

"Serious harm" means, per Article 3(1), "death or serious personal injury, whether physical or psychological."

[51] In any case where it falls to the court to apply the test enshrined in Article 14(ii)(b)(i), the requirements of Article 15(2) apply. These stipulate that the court –

"(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 any pattern of behaviour of which the offence forms part; and

(c) May take into account any information about the offender which is before it."

In every case where the court concludes that the test is satisfied the offender is categorised a "dangerous" offender. The effect of this assessment is to trigger Article 14(3) and Article 18.

[52] Article 14(3) provides:

> "(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of –
>
> (a) The appropriate custodial term; and
>
> (b) A further period ('the extension period') for which the offender is to be subject to a licence and which is to be of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences or serious terrorism offences."

By Article 14(4), the "*appropriate custodial term*" –

> "(a) Is the term that would (apart from this article and Article 15(a)) be imposed in compliance with Article 7 or ….
>
> (b) Where the term that would be so imposed is a term of less than 12 months, is a term of 12 months."

By Article 14(8) and (9),so far as material:

> "The extension period under paragraph (3)(b) or (5)(b) shall not exceed—
>
> (a) five years in the case of a specified violent offence …
>
> The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term."

There are two further consequences of an assessment of dangerousness. First, per Article 14(11), the court is prohibited from imposing a suspended sentence. Second, by Article 14(12), remission of sentence under prison rules is not available.

[53] Next, the effect of Article 18 must be considered. This is, in summary: where an offender the subject of an ECS has served one half of the appropriate custodial term and the Parole Commissioners have directed his release the Department of Justice ("DOJ") must release him. The Commissioners are empowered to make a

release direction only where "… they are satisfied that it is no longer necessary for the protection of the public from serious harm that [the offender] should be confined", per Article 18(4)(b). Article 18(8) is a form of backstop provision:

> "Where P is serving an extended custodial sentence, the Department of Justice shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28."

[54] The dangerous offenders regime of the 2008 Order has been considered by the Court of Appeal in a number of cases. From these certain themes emerge. First, the sentencing court is strongly exhorted to focus intensively on the statutory test rather than any other test which may have been applied by the Probation Service in its pre-sentence report: *DPP's Reference (No 6 of 2019) (Price)* [2020] NICA 8 and *R v Allen* [2020] NICA 25.

[55] Second, the future risk which lies at the heart of the statutory regime must be significant. Thus, a mere possibility, a remote prospect, of future harm will not suffice. This court has further emphasised in, for example, *R v Kelly* [2015] NICA 29 that the sentencing court should take account of every item of information bearing on the predictive evaluative judgment to be formed. Inexhaustively, factors to be taken into account include the nature and circumstances of the index offence, the history and circumstances of previous offending, any ascertainable pattern of offending, the offender's attitude, any indications of a capacity to change and any positive indications emerging from the offender's pre-sentencing incarceration.

[56] In *R v Brownlee* [2015] NICA 58 this court held that the impact of the apprehended future conduct must be serious harm; the conduct must be likely to occur; and while imminence is a relevant consideration it is not a pre-condition of an assessment of dangerousness. The use of violence in a domestic setting will always be considered a significant aggravating factor. Where there is a risk of multiple superficial injuries this will not normally satisfy the definition of serious personal injury. However, where serious injury has not been inflicted in the past it does not follow that there is no significant risk of such harm in the future. In this context it has been observed frequently that the absence of more serious injury on previous occasions may be attributable to good fortune. See for example *R v Tate* [2012] NICC 29.

[57] In *R v EB* [2010] NICA 40 there is a heavy emphasis on the pre-sentence report and procedural fairness. This court stated at paras [10]–[11]:

> "It is common case that the learned trial judge did not give any warning of her intention to depart from the assessment in the pre-sentence report. In *R v Lang* [2005] EWCA Crim 2864 the English Court of Appeal considered

how the assessment of significant risk of serious harm should be made in respect of identical provisions in the Criminal Justice Act 2003 in particular at para

"•(i) The risk identified must be significant. This was a higher threshold than mere possibility of occurrence and could be taken to mean "noteworthy, of considerable amount or importance" .

•(ii) In assessing the risk of further offences being committed, the sentencer should take into account 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, details of which the prosecution must have available, and, whether the offending demonstrated any pattern; social and economic factors in relation to the offender including accommodation, employability, education, associates, relationships and drug or alcohol abuse; and the offender's thinking, attitude towards offending and supervision and emotional state. Information in relation to these matters would most readily, though not exclusively come from antecedents and presentence probation and medical reports. The sentencer would be guided, but not bound by, the assessment of risk in such reports. A sentencer who contemplated differing from the assessment in such a report should give both counsel the opportunity of addressing the point.

•(iii) If the foreseen specified offence was serious, there would clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm. For example, robbery was a serious offence. But it could be committed in a wide variety of ways, many of which did not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there was a significant risk of serious harm merely because the foreseen specified offence was serious. A pre-sentence report should usually be obtained before any sentence was passed which was based on significant risk of serious harm. In a small

number of cases, where the circumstances of the current offence or the history of the offender suggested mental abnormality on his part, a medical report might be necessary before risk can properly be assessed.

• (iv) 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. Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, did not give rise to significant risk of serious harm."

We consider that this passage constitutes helpful guidance to judges making assessments of dangerousness. 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.'"

Next, the court drew particular attention to the statutory language, at para [15]:

> "The assessment of whether there is a significant risk of serious harm depends upon three dimensions. The first is that the impact of the act must be *serious harm*. The second is that the act must be *likely* to occur. The third dimension involves assessing the *imminence* of the event causing serious harm…
>
> The assessment of imminence is dynamic and this issue is reassessed every 16 weeks in respect of an offender such as the applicant. When, therefore, the pre-sentence report indicated that the applicant had not been assessed as presenting a significant risk to the public of serious harm that assessment reflected the judgment made at the time of the report. It did not preclude the possibility of a different judgment being arrived at during a later assessment."

Finally, though not perhaps expressly articulated, it is not difficult to deduce from this judgment the clear message that sentencing judges should signify in advance their intention, which should normally be provisional only, of dissenting from material aspects of pre-sentence reports. Furthermore (as occurred in the present case) it is self-evidently desirable that a sentencing judge's view that an assessment of dangerousness is a live possibility should be timeously communicated to the parties' representatives.

The Pre–Sentence Report Issues

[58] The pre-sentence report ("PSR") is rehearsed in some detail in paras [9]–[12] above. The statutory underpinning of this type of report is Article 21 of the Criminal Justice (NI) Order 1996. In short, in prosecutions on indictment the court is obliged to commission such a report unless considered unnecessary, in which case it shall state its reasons in open court.

[59] As appears from the chronology in para [3] above, coupled with the transcripts which this court has considered, the judge directed a PSR on the occasion of the BOP, the reconfigured indictment and the re-arraignment (21 November 2021). In view of the case the appellant was making, this court considered it necessary to probe certain questions relating to the PSR, in particular the information provided to the author following the plea of guilty. This yielded the following additional information:

(i) For a period of almost three weeks nothing occurred.

(ii) On 13 December 2021 the appellant's solicitor transmitted the BOP document and photographs of the nail scissors to PBNI.

(iii) On 14 December 2021 the PBNI officer concerned acknowledged receipt and confirmed that she would be interviewing the appellant one week later.

One of the specific issues which it became necessary for the court to understand was the date upon which prosecuting and defence counsel received the PSR. Notwithstanding that the chronology underwent three iterations during a protracted period of case management before this court, it failed to provide this information as regards defence counsel. The date on which prosecuting counsel received the PSR was 5 February 2022, ie two days before the date allocated for the plea and sentencing hearing.

[60] That, in a nutshell, is the "story" of the PSR. On the occasion of the final listing of the appeal the court made abundantly clear that it required a full account of this discrete chapter in the prosecution, to address in particular what materials were provided to the PBNI, when and by whom. Directions were made accordingly. None of this information was provided.

[61] As a result it has been left to the court to work this out for itself to the best of its ability. Some of the materials provided to the report's author are expressly identified in the text. Others can be deduced with reasonable confidence. However, the court has been left to carry out a necessarily imperfect exercise due to the parties' failure to provide the requisite assistance and co-operation. This is a regrettable state of affairs.

[62] Based particularly on the experience of one member of the judicial panel, the court's understanding of the normal practice relating to the PSR issues canvassed above is the following. Probation officers are not regularly in attendance at the Crown Court. Following a plea of guilty or conviction the judge directs that a PSR be prepared by PBNI. A period of between four to six weeks is given for this report to be compiled. In cases with a BOP document entailing a material shift in the contours of the prosecution case the judge will usually remind both prosecution and defence counsel of the importance of drawing this to the attention of PBNI as soon as possible. The PPS provides PBNI with the indictment, information regarding counts to which the defendant has pleaded guilty, the trial depositions and the defendant's criminal record. The PPS should also provide a structured outline of the prosecution case and any BOP document. The PPS will also provide, where appropriate, any victim impact material, entries from domestic violence registers, any medical materials, any social services records and any assessment from a Multi Agency Risk Assessment Conference.

[63] Defence representatives also have a responsibility to provide PBNI with any material which they consider appropriate. This will include *inter alia* any BOP document, any medical/psychiatric or other mitigating reports and materials/particulars concerning any rehabilitation work undertaken by their client. The materials and other information provided by prosecution and defence, together

with the defendant's interview by PBNI, inform the content and utility of the PSR. The responsibility is jointly shared by prosecution and defence.

[64] Belatedly, following promulgation of this judgment in draft the following information was provided by prosecuting counsel:

> "With respect to para [62], I made enquiries with the PPS Crown Room which deals with Laganside cases, the PPS at Craigavon Courthouse and a court clerk at Laganside. The common position between all of them was that the PE papers and the bill of indictment are provided to the PBNI by the Crown Court staff rather than the PPS. The practical reason, I am told, is that the Crown Court has a record of which PBNI office or officer is responsible for each case and the PPS do not.
>
> Where they have not previously been provided to the Court, victim impact statements should be provided by the PPS to the PBNI either directly or through the Court.
>
> The position with regard to third party material, prosecution disclosure material and bases of plea is not as clear. I specifically asked about bases of plea. In Laganside neither the PPS nor the Crown Court believed it was their responsibility to provide them to PBNI. I do not regularly prosecute in Craigavon, but I have made enquiries and understand that because of this uncertainty, PPS counsel Nicola Auret met with HH Judge McCormick KC in the last court term (between the sentence and hearing of the appeal in this matter) and agreed that the Crown Court would assume this responsibility…"

The BOP Issues

[65] The BOP document permeates every aspect of this appeal. On behalf of the appellant it was submitted, in trenchant terms, that the BOP document adequately conveyed to the sentencing judge the factual basis upon which the appellant was pleading guilty to the section 47 offence. We consider this submission manifestly unsustainable. Our reasons for doing so are based in the following analysis of the text:

> (i) "The accused accepts he assaulted [the injured party] …."
>
> This contains no factual description of the assault. It is an utterly meaningless statement factually.

(ii) The addition of the words "… contrary to section 47 …" simply serves to magnify the deficiency highlighted immediately above.

(iii) "The accused pleads guilty on an agreed factual basis with the prosecution, namely he was initially assaulted by [the injured party] …." Our analysis in (i) above applies fully.

(iv) "…. and he consequently acted in a reckless manner …" The same analysis applies.

(v) "He did not intend to stab [the injured party] with the nail scissors …." This is the only part of the BOP which sets out factual material, namely (a) the act of stabbing and (b) the use of nail scissors to do so. However, this can only be described as a manifestly incomplete portrayal of the factual matrix.

(vi) "… and accepts that his actions went beyond self-defence." There is nothing of a factual nature in these words: the analysis in (i) above applies fully.

[65] Every BOP is produced by the lawyers representing the prosecution and the accused person. It is a joint exercise. This assessment applies irrespective of whether either all or most of the drafting has been undertaken by one of the parties only. Responsibility for the content is shared equally.

[66] The exercise of compiling and agreeing a BOP document requires of each party an intense focus on facts. The multiple disputes which this appeal has exposed will be avoided in future cases if this exhortation is observed. Legal representatives will hopefully find it helpful to reflect on *actus reus*, which is concerned exclusively with factual matters. This would have avoided the multiple shortcomings in the BOP document presented to the sentencing judge in this case. The mischiefs of vagueness, opacity, ambiguity, material omission and lack of specificity would not have arisen. An appreciation that statements that an accused person "… acted in a reckless manner" and "… went beyond self-defence" are not statements of fact is of fundamental importance. There is no objection to this kind of statement being incorporated in a properly constructed BOP. However, where they are not preceded by the necessary factual foundation they simply become meaningless – as meaningless as the expressions "was initially assaulted by" and "did not intend to stab."

[67] It may also be useful to bear in mind that in any adversarial process – criminal, civil or other – there are no facts at the outset. Rather, there are factual allegations only. As this judgment has attempted to make clear, facts do not enter the arena unless and until (a) a verdict is given or (b) specific factual findings are made and/or (c) specific facts are agreed between the parties. Given all of the foregoing, this court cannot emphasise sufficiently the importance of care, focus and self-discipline in the compilation of the written word: specifically, every BOP and every written submission of prosecution and defence presented to the court in the wake thereof. This is not a counsel of perfection and this court readily recognises the strains and pressures on all concerned in every sentencing exercise. On the other hand, however, there is every opportunity for both parties to alert the court to anything of an ambiguous or contentious nature at the most vital stage of all, namely before, or at latest on the day of, the plea and sentence hearing. Even then, the end has not been reached and the facility of alerting the judge to something significant following such hearings in advance of the promulgation of the sentencing decision is available. There is no "do nothing" option, with whatever perceived forensic benefits this might entail, for either prosecution or defence.

[68] The transformation in the prosecution of the appellant gave rise to a dichotomy. On one side of the notional line lay information upon which the appellant could legitimately be sentenced. On the other side lay information which the sentencing court could not permissibly consider. This is the effect of the guiding principles set out above.

[69] The judge, though not bound to accept the BOP document, clearly did so. Based on the transcripts, there was no interrogation of its contents in open court. No further consideration was given to it until some 11 weeks later when the plea and sentencing hearing was held.

[70] The main question raised by this appeal is: what materials, if any, were impermissibly considered by the sentencing judge? While this court's route to the answer has been unavoidably lengthy, the answer is straightforward. The judge was entitled to consider everything that had been generated, as summarised in paras [6]-[14] above, with one exception namely anything relating to alleged criminal conduct on the part of the appellant lying outwith the boundaries of the BOP document. Fundamentally, this means the following. The judge could not permissibly consider any information relating to the alleged conduct of the appellant within the compass of the three counts on the indictment which were no longer being pursued. The argument that the constraints on the judge were substantially greater is confounded by a combination of *Cairns*, paras [3]–[4] (para [42] *supra*) which express principles of longstanding in this jurisdiction, Article 15 (2)(a) and (b) of the 2008 Order (para [50] above), and Article 21(4) of the Criminal Justice (NI) Order 1996.

[71] All of the material events bearing on the generation of the BOP document and the rearraignment of the appellant occurred in the precincts of the court building on

the date when the appellant's trial was scheduled to commence. Thereupon the direction of the criminal process altered significantly, being shaped by the BOP document. This became the dominant element of the prosecution matrix. This dominance should have been reflected in everything which unfolded thereafter. Sadly, this did not occur.

[72] What, then, went wrong?

(i) First, it is apparent that the probation officer was not properly informed. Fundamentally, the transformation and dichotomy noted above should have been conveyed to the officer in unambiguous terms, accompanied with all appropriate detail. This was the joint responsibility of prosecution and defence.

(ii) The written submissions of prosecuting counsel prepared for the sentencing hearing failed to reflect the transformation and dichotomy noted. It is not in dispute that these were prepared with a view to a contested trial. In their original incarnation they would have formed the basis of prosecuting counsel's opening to the jury. Upon the advent of the transformation in this criminal process, this document was no longer appropriate. It belonged to a matrix which had altered significantly. A corresponding transformation in this document or its substitution by something entirely new was obviously required. This did not occur. As a result, as appears from our rehearsal of this document (in its final incarnation) in paras [15]–[16] above, considered in conjunction with the judge's sentencing decision, the judge was provided with certain information which did not permissibly belong to the sentencing exercise.

(iii) A firm, reasoned objection to the judge receiving the prosecution written submission in these terms should have been made. This did not occur.

(iv) Both parties being fully aware of the materials which were before the judge, defence counsel, in both written and oral submissions, should have highlighted everything which, on the appellant's case, could not permissibly be considered by the court. This did not occur.

(v) Reminders to the judge of the BOP document were not sufficient, not least on account of its multiple frailties.

[73] On the date when the transformation of this prosecution occurred, and thereafter, prosecuting and defence counsel were possessed of insights and understandings which the judge could not possibly match. It became the duty of counsel to ensure that this was fully addressed. Upon the hearing of this appeal both counsel had resort frequently to the language of "my understanding." This speaks volumes. It is abundantly clear to this court that there is an enduring and

profound conflict between prosecution and defence about the basis of plea. The responsibility for this is shared equally. It has no justification.

[74] In the foregoing circumstances the fact of certain wrong turns in the sentencing of the appellant, is unsurprising. The sentencing matrix before the court was beset by confusion, opacity and inconsistency. This was pre-eminently avoidable. The judge did not receive appropriate assistance from prosecuting and defence counsel.

[75] Giving effect to para [70] above, we consider that insofar as the following matters were reckoned in formulating the impugned sentence the judge should have disregarded in particular the information relating to the injuries to the injured party other than that to her left thigh; the conduct of the appellant alleged to have inflicted such injuries; the allegations of the appellant attacking the injured party following the commission of the index offence; and the alleged conduct of the appellant bearing on the (discontinued) criminal damage count. The effect of this is that in the opinion of this court the judge permissibly took into account (a) most of what we have summarised in para [22] above and (b) everything rehearsed in para [23]. None of this was excluded by the BOP document.

The Issues for this Court

[76] Taking into all of the foregoing, the determination of this appeal requires the court to address three issues, namely the sentencing judge's assessment that the appellant is a dangerous offender, the length of the custodial period imposed and the sustainability of the VOPO.

(i) The Dangerousness Assessment

[77] The legal rules and principles to be applied are rehearsed extensively at paras [49]–[57] above. As stated in *R v EB* (*supra*) at para [15], in every case where a court undertakes an assessment of dangerousness, applying the statutory test of a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences requires alertness to three considerations, namely the impact of the act must be serious harm; the act must be likely to occur; and the imminence of the apprehended event.

[78] It is instructive to consider this court's summary of the impugned sentencing decision at paras [22]–[23] above. We consider that there was an abundance of information which the judge could permissibly take into account in devising all aspects of the sentencing package under challenge. The main items of information belonging to the impermissible side of the notional scales are few in number.

[79] This court, exercising an appellate jurisdiction, must balance two particular factors in the present case. On the one hand, appropriate deference must be accorded to the sentencing judge's assessment that a person is a dangerous offender.

On the other hand, this assessment was based in part upon the consideration of information which should have been disregarded. Balancing these two considerations, this court is of the clear view that if the judge had disregarded the impermissible information the assessment of dangerousness would still have been made. There was ample material pointing clearly in this direction. This aspect of the appeal, therefore, fails.

(ii) The VOPO

[80] We turn next to the VOPO. Its terms are rehearsed in para [1] above. The correct approach to the making of a VOPO is set out in the decision of this court in *R v Hanrahan* [2021] NIJB 344, at paras [32]–[52]. The legal test was adumbrated by the court in the following terms, at para [32]:

> "… The legal test is prescribed by section 55 of the 2015 Act. The test is exactly the same for a sentencing VOPO and a free standing VOPO. The question for the court in both cases is whether it considers a VOPO necessary for the purpose of protecting the public from the risk of serious harm caused by the convicted offender (in the case of the sentencing VOPO) or the respondent (in the case of the free standing VOPO): per section 55(1) of the 2015 Act. Specifically, "**the risk of serious violent harm"** means the risk of serious violent harm caused by a person is a reference to protecting the public, or any particular members of the public, from a current risk of serious physical or psychological harm caused by that person committing one or more specified offences (per s 55(2)). Cognisance of the list of "specified offences" is also essential: section 55(2) and Part 1 of Schedule 2 to the 2008 Order (reproduced in the Appendix to this judgment). The test is both exhaustive and exclusively statutory. It has no judicially devised elements."

At paras [36]–[46] guidance on satisfying the legal test is provided. This court made clear in particular that there is no burden of proof in play, the judicial exercise is one of forming a predictive evaluative judgment, the requisite risk must be current, it must be a risk relating to the future, the factor of intervening imprisonment must be balanced and, finally, a sufficient evidential foundation is required in every case.

[81] It is common case that on the date of the appellant's sentencing the effect of the imposition of an immediate custodial period of 2½ years was that he was "time served." Thus, but for the ECS he would have been released immediately. The effect of the ECS was that the date of his release from sentenced imprisonment could not be predicted. Clearly there can be no suggestion that the judge was not alert to this. Fundamentally, this court is unable to identify any error of law in the judge's

selection of this discrete sentencing mechanism. To this we would add that, in common with the ECS selection, appropriate deference on the part of an appellate court should be applied. Most importantly, perhaps, the terms of the VOPO are compatible with both the sentence of imprisonment imposed and the ECS. While the suggestion that the injured party wishes to resume a cohabiting relationship with the appellant was canvassed, the judge was entitled to treat this with circumspection and the terms of the VOPO are compatible with this eventuality.

[82] It follows that the challenge to the VOPO is without merit.

(iii) The Custodial Term

[83] We turn finally to the custodial term of 2½ years. The effect of taking into account information relating to the three counts in the indictment which were ultimately not pursued was that the gravity of the appellant's offending was magnified. If the information in question had been disregarded a lesser sentence of imprisonment would have been appropriate. Before this court it was submitted that the transformation of the prosecution case brought it within the domain of a summary prosecution in sentencing terms, which would have entailed a maximum sentence of 12 months imprisonment. The court considers this suggestion fanciful. The appropriate disposal in our view is to substitute a sentence of 21 months imprisonment for the 30 months imposed by the judge. The appellant remains in prison as the Parole Commissioners have made no direction for his release.

[84] Summarising, both the ECS and VOPO mechanisms are a reflection of an unassailable evaluation by the judge of the need to afford maximum protection from the appellant to an extremely vulnerable young lady

Best Practice

[85] The phrase "busy Crown Court Judges" appears in the judgments of this court with some frequency. It is especially apposite here. The multiple demands on the judge concerned are abundantly clear from the appeal papers, in particular those transcripts in which the issues of scheduling and timetabling were addressed. The burdens of the judge's heavy workload emerge as one of the most striking features of the proceedings at first instance in this case. It is in this context that the professional duty of prosecuting and defence counsel to provide sentencing judges with the maximum assistance in every case arises.

[86] Consideration could usefully be given to separate protocols, or practice directions, relating to (a) BOP documents and (b) the briefing of Probation Officers for the purpose of compiling PSRs. The English Practice Direction (2015) may provide a useful point of reference.

Outcome

[87] We summarise the outcome of this appeal as follows:

(i) The challenge to the judge's assessment that the appellant is a dangerous offender is dismissed, with the result that the judge's selection of the ECS mechanism is affirmed.

(ii) The challenge to the VOPO is dismissed.

(iii) A sentence of 21 months' imprisonment is imposed in substitution of the custodial period of 30 months imposed by the judge. The appeal succeeds to this limited extent.