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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

18/110359/A02

THE KING

v

NATHAN PHAIR

and

18/110359/A03

THE KING

v

PADRAIG TOHER

Mr B McCartney KC with Mr D Quinn (instructed by RP Crawford, Solicitors) for the Appellant Phair
Mr A Harvey KC with Mr C Harvey (instructed by PH Flanagan, Solicitors) for the Applicant Toher

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Before: Keegan LCJ and McFarland J

KEEGAN LCJ (***delivering the judgment of the court***)

Introduction

[1] This is an appeal brought by co-accused in relation to sentencing by His Honour Judge Rafferty KC ("the trial judge").

Toher's Appeal

[2] Toher renews an application for leave to appeal, leave having been refused by the single judge. He, on a plea of guilty, before the Crown Court received the following sentences:

(i) Manslaughter of Natasha Carruthers, contrary to Common Law - a determinate custodial sentence of 12 years - 50% in custody and 50% on licence.

(ii) Causing grievous bodily injury to Nathan Phair by dangerous driving, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of nine years, nine months – 50% in custody, 50% on licence and a disqualification for 10 years.

(iii) Causing grievous bodily injury to Sarah Gault by dangerous driving, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of nine years, nine months – 50% in custody, 50% on licence and a disqualification for 10 years.

(iv) Doing an act tending and intended to pervert the course of justice, contrary to Common Law – a determinate custodial sentence of three years – 50% in custody, 50% on licence.

(v) Conspiracy to possess a controlled drug of Class A (cocaine), contrary to section 5(1) of the Misuse of Drugs Act 1971, Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 5(2) of the Misuse of Drugs Act 1971 – a determinate custodial sentence of four years – 50% in custody and 50% on licence.

[3] All of these sentences were to run concurrently which meant that the applicant Toher was sentenced to a total period of 12 years' imprisonment and a driving disqualification of 10 years. In addition, various matters were left on the books, namely causing death by dangerous driving in relation to Natasha Carruthers, possession of a controlled drug of Class A (cocaine), attempted possession of a controlled drug of Class A (cocaine), criminal damage, possession of an offensive weapon, and failing to remain at the place of an accident.

Phair's Appeal

[4] Phair applies with leave of the single judge on one ground from his sentence which was imposed after a trial and a finding of guilty by a jury. In Phair's case the single judge granted leave to appeal because of the 13-year starting point identified by the trial judge and the argument that this was too close to the maximum permitted sentence for causing death by dangerous driving. In granting leave the single judge said:

> "I recognise that it is invidious to draw detailed comparisons from other reported cases but on balance it seems to me that having regard to cases such as *McCartney, Cooksley, Hasan* and *Richardson and others*, it is

> at least arguable that the starting point was too high in the particular circumstances of this case."

[5] Phair was sentenced as follows:

(i) Causing the death of Natasha Carruthers by dangerous driving, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of 11 years – 50% in custody, 50% on licence.

(ii) Causing grievous bodily injury to Sarah Gault by dangerous driving, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of 11 years – 50% in custody, 50% on licence.

(iii) Causing death of Natasha Carruthers by driving whilst unlicenced, contrary to Article 12B(a) of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of two years – 50% in custody, 50% on licence.

(iv) Causing grievous bodily injury to Sarah Gault by driving whilst unlicenced, contrary to Article 12B(a) of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of two years – 50% in custody, 50% on licence.

(v) Causing death of Natasha Carruthers by driving whilst uninsured, contrary to Article 12B(b) of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of two years – 50% in custody, 50% on licence.

(vi) Causing grievous bodily injury to Sarah Gault while driving uninsured, contrary to Article 12B(b) of the Road Traffic (Northern Ireland) Order 1995 – a determinate custodial sentence of two years – 50% in custody, 50% on licence.

(vii) Supplying a controlled drug of Class A (cocaine), contrary to section 4(3)(a) of the Misuse of Drugs Act 1971 x 3 – a determinate custodial sentence of four years – 50% in custody and 50% on licence.

[6] In addition, a charge of dangerous driving, contrary to Article 10 of the Road Traffic (Northern Ireland) Order 1995 was left on the books. This meant that the appellant received a total sentence of 11 years, 50% in custody, 50% on licence on the basis of concurrent sentences. The appellant also received a disqualification from driving of 15 years.

Factual Background

[7] This is set out in a previous decision of this court of 14 November 2022 reported at [2022] NICA 66, which was an appeal against conviction brought by Nathan Phair. In short, the above offences arise as a result of a fatal car chase which

occurred following a failed drugs transaction between the appellant, Phair, and the applicant, Toher. Toher had paid Phair for cocaine which Phair did not provide. This resulted in an altercation during which Toher approached Phair with an iron bar and attacked his car and thereafter, a high-speed car chase between the two men. Phair was driving one of the cars and was injured. Toher was driving another car and accepts unlawful act manslaughter by virtue of his nudging Phair's car off the road. Phair had passengers in his car, namely his girlfriend, Natasha Carruthers, who was killed and another young woman, Sarah Gault, who was also in the car and who was seriously injured.

[8] The pursuit between the Corsa which Phair was driving and the BMW which Toher was driving was high speed over some 12 miles and through the village of Derrylin. CCTV in the village captured the cars and the evidence established that the cars had achieved a speed of some 100 miles per hour. There was considerable forensic evidence about this pursuit during the trial which included the issue of contact between the cars. It is common case that there was contact between the front of the BMW and the rear of the Corsa on at least three separate occasions. The expert evidence concluded that the contact had occurred between the front nearside of the BMW and the rear offside of the Corsa with the Corsa moving left to right across the BMW.

[9] Toher pleaded guilty to the manslaughter of Ms Carruthers, on the basis that he had deliberately made contact with the Corsa, and he used the car as a weapon over the course of the pursuit. Upon the court clarifying with Mr Harvey KC the basis of plea we were told that it was unlawful act manslaughter rather than gross negligence manslaughter as we were led to believe in Phair's conviction appeal. There is no written basis of plea.

[10] In any event the prosecution made the case that the appellant, Phair, was also guilty of the offences that he was ultimately convicted of. Specifically, the prosecution whilst recognising that Phair had been approached by Toher in the first instance and was justified in driving away from him, made the case that there was a high degree of danger associated with his driving thereafter. In addition, the prosecution highlighted the fact that no one in the Corsa called the police, despite four phones later being found in the car. No one sought help from anyone along the route or sought refuge in a public area or went to the nearest police station in Enniskillen.

[11] After the accident, Toher left the scene in his car and returned to the Republic of Ireland. He later had his car repaired at a body repair shop. In respect of this he pleaded guilty to an offence of perverting the course of justice. However, Toher then subsequently surrendered himself at Enniskillen Police Station on 16 October 2017 and brought the repaired BMW car to the jurisdiction of Northern Ireland. He was interviewed on 16 and 17 October 2017, providing a prepared statement in which he said he had met Phair on a couple of occasions for Phair to supply him with drugs and this had been facilitated through an Andrew Waters. He said he had initially

bought €100 of drugs and on the next occasion wanted some more drugs meeting at a football field in Newtownbutler and giving Phair £440. He then said that he did not get the drugs and he went looking for Phair, he said he took the wheel brace with him because he was not sure how Phair would react. He later said this was an iron bar that someone had handed him. He said he only used it to strike the car when Phair went to drive off. He accepted giving chase and going quickly, commenting that as his was the more powerful car he did not have much trouble keeping up with Phair. He accepted that he had collided with Phair's rear offside.

[12] It is specifically accepted by the prosecution that Toher apologised for driving away from the scene after the collision saying that he panicked and regretted his part in the incident. He said that he had felt suicidal and so he was having treatment from the psychiatric unit at Cavan Hospital. Thereafter, he made no comment but at the end of the second interview on 16 October 2017 he began to answer questions in relation to the specifics of the driving and accepted deliberately nudging the Corsa a few times during the pursuit.

[13] Phair was interviewed on 25 October 2017 whilst still in hospital. He said that Toher had attacked his car at Letterbreen, smashing the windscreen and driver's window, that he had panicked and taken off. He claims he was going to the nearest police station he could think of at Lisnaskea, he said that during the chase he was bumped by Toher's car. He, when asked about Toher and his relationship him, made no comment. Phair was interviewed, again, six months later on 4 April 2018 when he mostly answered 'no comment' to questions put to him specifically in relation to the drug deals. At trial, Phair accepted he had supplied Toher with drugs (notwithstanding his not guilty pleas which he maintained throughout the trial necessitating jury verdicts); in respect of his driving, he accepted that he had driven far below the standard of a careful and competent driver, but maintained he had acted under duress of circumstances. This defence was rejected by the jury.

Personal circumstances of Toher and Phair

[14] Both Phair and Toher have previous convictions. Toher is now aged 32 years. He has convictions in the Republic of Ireland, for four offences of possession of drugs, in 2012 and 2014. He has been convicted on 11 October 2011 of dangerous driving, driving with excess alcohol, failing to remain, and driving without insurance. During these appeal hearings, we have seen a report in relation to what is described as a hit and run road traffic collision on 12 September 2010 involving Toher which seems to relate to the conviction in 2011.

[15] Phair is now aged 27. He has 25 previous convictions beginning with offences of handling stolen goods, driving without a licence and driving without insurance, committed on 23 January 2013 when he was aged 17. He then committed further offences in relation to the taking of vehicles between 2012 and 2014. He has a conviction on 29 October 2018 for driving when unfit through drink or drugs,

possession of a Class B controlled drug, using a motor vehicle without insurance, dangerous driving, theft of vehicle and no driving licence.

[16] On 5 September 2016 Phair was convicted of offences of domestic burglary, arson being reckless as to whether life would be in danger, common assault and criminal damage, committed on 3 January 2013 for which he received a total sentence of two years suspended for three years. He breached this suspended sentence by committing an offence of disorderly behaviour on 19 August 2017, although no action was taken in respect of it. However, on 23 October 2018, he was convicted again of domestic burglary committed on 27 August 2017 and sentenced to three years and six months' imprisonment. One year of his suspended sentence was activated consecutively. These burglaries were of vulnerable and elderly persons who were present in their homes at the time. During this appeal hearing, we heard some of the facts and, in particular, in relation to the second burglary that it involved a 96-year-old woman who was blind and hearing impaired.

[17] Finally, on 29 October 2018, Phair was convicted of the theft of a vehicle, dangerous driving, driving whilst unfit, driving without a licence and driving without insurance. This offence occurred on 23 November 2017, four weeks after he had left hospital a result of the index offences where he had been treated for his injuries. This offending was relied on as bad character evidence and this court previously ruled that it was properly admitted at trial.

[18] The circumstances of this offence were that Phair stole a Nissan jeep from the driveway of a house on Boa Island on lower Lough Erne. He drove dangerously, on the wrong side of the road and swerving across the road. Again, he did so without licence or insurance. He was interacting with another vehicle, and both were pursued for 10 miles by the owner of the jeep before the Nissan collided with the other vehicle. Phair was apprehended by the owner and another and said to them "Leave me alone. I am off my head on pills." Multiple drugs were found to be present in his blood. He alleged that he had received a beating at the hands of the owner of the car. He was sentenced to a total of four months' imprisonment and disqualified from driving for two years.

Victim impact

[19] In relation to this case, victim impact statements were obtained from Joan McKeown, the mother of Natasha Carruthers, and Vivien McCutcheon, her aunt. We have seen these victim impact statements which are impressive and speak to the very real loss of Ms Carruthers. We note the effect of the court case on the family and publicity as to the incident. It goes without saying, that this was an incident which caused a considerable amount of heartache to several families.

The points raised on appeal

[20] Mr Harvey, on behalf of Toher, made three core points on appeal, which we summarise as follows:

(i) That the judge's end point before reduction for the plea of guilty of 16 years was manifestly excessive.

(ii) That the judge was wrong in principle to impose a sentence of four years in relation to the one drug offence of Toher and a sentence of three years in relation to the perversion of the course of justice.

(iii) That the judge did not provide sufficient reduction for the plea of guilty which was at an early stage. Mr Harvey took no issue with the 10-year disqualification in Toher's case.

[21] Mr McCartney, on behalf of Phair, raised several points on appeal as follows:

(i) That the judge's starting point of 13 years before application of mitigation was manifestly excessive.

(ii) That the court did not provide enough mitigation for the fact that the driving of Phair, was in the circumstances where he claimed duress, and, also, his remorse and his dealing with drugs.

(iii) That the drug offences were over sentenced.

(iv) That the disqualification of 15 years in his case, was manifestly excessive.

The decision of the trial judge

[22] The trial judge described the driving as wantonly reckless and completely outrageous. There can be no argument about that. He commented that both Phair and Toher had "displayed a deliberate, outrageous and wantonly callous disregard for the safety of the public and those occupants of either car." There is no issue with the fact that the judge considered the relevant legal cases in this area. In respect of Toher he identified the following aggravating factors:

(i) Greatly excessive speed.

(ii) A prolonged, persistent and deliberate course of very bad driving.

(iii) Aggressive driving.

(iv) Serious injury to two others.

(v) His previous convictions, which included dangerous driving and failing to remain at the scene of an accident, as well as convictions for drug offences.

[23] In terms of mitigation for Toher, the judge said that the plea of guilty was not at earliest stage but well in advance of trial and he referred to some remorse. He, therefore, applied a starting point before reduction for the plea of 16 years and reduced it by 25%. He did consider whether the sentence for perversion of the course of justice should be consecutive to that for manslaughter but decided to make all of the sentences concurrent including that sentence and the sentence for conspiracy to possess cocaine.

[24] In relation to Phair, the following aggravating factors were considered by the judge to be applicable:

(i) The level of drugs in his blood.

(ii) Greatly excessive speed.

(iii) A prolonged, persistent and deliberate course of very bad driving.

(iv) Serious injury to another.

(v) His previous convictions.

(vi) That the offence was committed while he was on bail.

[25] As to mitigation in Phair's case the judge accepted that there was some sense of grief or loss at the death of Natasha Carruthers but noted that immediately after the collision when in hospital his principal concern was for his own situation. He referred to the injuries that Phair had sustained but did not consider that these would require significant reduction in sentence. He identified a point of 13 years for the offence of dangerous driving causing death which was the headline offence. He said he would reduce this to 11 years because of Phair's youth and the fact that his driving was initially reactive to the actions of Toher. He made all of the sentences concurrent, and he imposed a period of disqualification of 15 years, acknowledging the dual purpose of disqualification to reflect culpability and the need for public safety.

Consideration

[26] Rightly, there is no issue taken with the nature of the aggravating factors described by the judge in either case.

[27] Mr McCartney was at pains to point out the differences between the two offenders and Toher's antecedents. We note his previous convictions and are satisfied that the trial judge took these into account in sentencing. However, when

comparisons are made between the co-accused there is a valid disparity in sentencing because Toher pleaded guilty and Phair did not. The sentence that would have been imposed on Toher had he not pleaded guilty, is 16 years and Phair's sentence 11 years. Therefore, the disparity point gains no traction in this case.

[28] An issue that is of relevance is the culpability of each of the offenders. In this regard, there is a simple answer, which delineates the two offenders. The offender, Toher, pleaded guilty to manslaughter, and that is a factor which increases his culpability for the incident.

[29] This is well-travelled legal ground highlighted in the case of *R v Gault* [1995] 16 Cr App R(S) 1013 where Lord Taylor CJ noted that:

> "The maximum sentence for manslaughter was life imprisonment and "a different approach is justifiable, and, indeed, proper when the court has to punish an offender for manslaughter rather than for one of the statutory offences."

[30] This legal principle has been approved in *R v Dudley* [2006] 2 Cr App R(S) 77 and in *R v Pollock* [2005] NICA 43. There cannot be much argument that the manslaughter offence is considered in a different way from the statutory offences as this was in simple terms a case involving a level of hostility by virtue of the use of a car as a weapon with the attendant consequences. The question for this appeal is then whether the 16 years in Toher's case was manifestly excessive.

[31] In assessing this, the real issue is, whether, the 16 years covered the totality of the offending in Toher's case. There was the manslaughter. Then there was the causing grievous bodily injury to two other individuals by virtue of dangerous driving. Then there was the conspiracy to possess cocaine. Then there was the perversion of the course of justice. This is quintessentially a case where one must look at the overall assessment made by the judge.

[32] Having conducted the necessary analysis we agree with Mr Harvey that the trial judge has over sentenced on the drugs offence and the offence of perversion of the course of justice. We think it likely, as the prosecution conceded, that the drugs offence, which was a conspiracy to possess, should only have attracted a sentence in the region of 18 months to two years. Similarly, the perversion of the course of justice offence should have attracted a sentence in the range of one to two years.

[33] Therefore, the question arises, whether the trial judge has reached a flawed position assessing the totality of the offending in coming to 16 years. We think there is some modest adjustment that probably should be made for the mistake of the judge in over sentencing for the drugs and perversion of the course of justice offence.

However, the real issue is whether that makes any difference on the overall sentence. To that we now turn.

[34] This was a serious case of manslaughter, which caused the death of a young woman because of the driving of a car in the way described. We do not agree with the analysis that the statutory maxima for causing death by dangerous driving should have been the ceiling. In a manslaughter case, the maximum sentence is life imprisonment, and the court is entitled to look beyond the parameters of the statutory offence, given the different nature of the offence of manslaughter. Therefore, we do not agree that in principle the most the judge could have got to was 14 years on the driving.

[35] That said, in getting to 16 years, the judge also considered the drugs offences and the perversion of the course of justice. We think, if a sentence of 18 months is applied to each of those, rather than the sentences of four years and three years, it logically would lead a court to think that the trial judge over-estimated the total sentence. That said, we think the trial judge has been generous in not applying the perversion of the course of justice sentence consecutively to any sentence, given that it arises, not as part of the index offence, but entirely separately, and this court has said, on a number of occasions, that the better outcome is in many cases to apply a consecutive sentence for perversion of the course of justice see *R v Luong Bui* [2022] NICA 78.

[36] The question is - has the over estimation of the drugs offence brought the 16 years up to a level that makes it manifestly excessive? We can see that the 16 years might have been inflated slightly but that is outweighed by the fact that we think the perversion of the course of justice offence could well have been consecutive. Hence, whilst the headline offence might have reduced by a year or so, taking into account a consecutive sentence for perversion of the course of justice it leads to the same outcome, that 16 years overall is not manifestly excessive given the nature of the offending in this case. We, therefore, reject those grounds of appeal.

[37] That leaves us with the only ground of substance which relates to the reduction given to this applicant for a guilty plea. The ancillary point made as part of this is that the applicant in this case did show remorse, and in that regard, the submissions made by Mr Harvey relied on a report which does corroborate the case from a consultant psychiatrist Dr Caroline Donnelly dated 30 May 2019.

[38] From Dr Donnelly's report we can see that in the immediate aftermath of the index events Toher attended Cavan Hospital Emergency Department on 13 October 2017. The attendance notes "severe anxiety and now very depressed following RTA on 7/10/17 in which a lady RIP. Has no feeling in his body, not eating, severe headache, intent on hanging himself, had rope but did not do it." A subsequent Mental Health Assessment on 13 October 2017 notes that "He feels distraught since the accident. He currently is extremely tearful and emotional …" This attendance also noted "feels remorseful after the act …" There are further review attendances

noted including on 16 October 2017 which notes that "Telephone call with Padraig, who reported he has an appointment with a solicitor and PSNI at 2pm in Enniskillen. Reported he was facing up to his responsibilities and that he has anti-anxiety meds if needed."

[39] Another attendance with Dr Donnelly on 30 May 2019 also refers to the fact that Toher had suicidal ideation after the crash, that he wrote a suicide note for his parents and that he could not live with himself. He also said that "I'll think about that girl for the rest of my life." Toher also expressed frustration with the fact that Phair's case was delayed and said "I put my hands up. I admitted to what I had done to avoid putting her family through a trial." Toher's background appears stable in that he has a supportive family and an employment history. His main issue appears to have been addiction to cannabis.

[40] The trajectory of how the plea was entered is also important. The trial was listed on 28 May 2019. Toher was arraigned on 18 December 2018 and pleaded not guilty. However, at that stage, as Mr McDowell accepted, all parties knew that he was broadly accepting the prosecution case and that he was likely to plead guilty but was awaiting an expert defence report. He then pleaded guilty once the report was received on 7 March 2019 in advance of trial. The prosecution also accept that Toher made admissions in interview and has shown remorse. The plea to quote from the prosecution was as the applicant claims, welcome. The only real point in defence of this argument is that it would have been open to the judge to apply a greater reduction than the 25% permitted but it was within discretion.

[41] The relevant statutory provision is Article 33 of the Criminal Justice (Northern Ireland) Order 1996 which provides:

> "33(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account:
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> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given.
>
> (2) If, as a result of taking into account any matter referred to in paragraph (1), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so."

[42] In *R v Maughan* [2022] UKSC 13 the Supreme Court considered the issue of reduction for pleas paras [27]-[29] and [49] in the context of the system in Northern Ireland and said:

> "27. The court system in Northern Ireland more closely resembles that in England and Wales. The biggest difference, however, is that save where cases are directly transferred to the Crown Court pursuant to article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or article 4 of the Children's Evidence (Northern Ireland) Order 1995 the Northern Ireland system still requires committal for trial. That means that the vast majority of cases remain in the Magistrates' Court until all of the papers have been prepared upon which the prosecution will rely at the Crown Court. At that stage the District Judge must determine whether there is a case fit for trial and, if so, the accused must be committed to the Crown Court.
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> 28. Even where the accused provides full admissions or indicates an express intention to plead guilty the committal process requires considerable administrative work by the police and prosecution services. To that extent, therefore, the provision of an early plea in indictable cases in Northern Ireland does not provide all of the utilitarian benefits which are achievable in the other jurisdictions. That does not alter, however, the underlying rationale for the reduction in sentence.
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> 29. An admission at interview will remove inconvenience for witnesses, provide vindication for victims and sometimes relief from anxiety. Despite the need to fulfil the committal process, the steps taken to achieve committal can be proportionate and provide some additional utilitarian benefit.
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> …
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> 49. The sentencing practices applied by the Court of Appeal in Northern Ireland are typical of those applied from time to time in all three jurisdictions over many years. They are justified by the utilitarian approach and the interests of victims and witnesses which have largely been accepted throughout the United Kingdom as the bases for the discount for the plea. They reflect the statutory background and circumstances of that

> jurisdiction and are well within the area of discretionary judgement available to that court."

[43] Between paras [50]-[52] the Supreme Court also referenced the benefits of early guilty pleas as follows:

> "50. Early guilty pleas by those who have committed offences promote confidence in the general public in the system of the administration of justice. The achievement of that outcome is affected by the structure of the system of criminal justice in each jurisdiction. The absence of a mechanism to enable indictable cases to be brought speedily to the Crown Court in Northern Ireland has resulted in long standing and unfortunate systemic delay.
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> 51. The passing of the Criminal Justice (Committal Reform) Bill by the Northern Ireland Assembly on 14 December 2021 creates an opportunity to repair that systemic failure. It provides for the abolition of committal in indictable offences and should ensure that such cases reach the Crown Court promptly. Such a change will inevitably require support by way of amendments to Crown Court Rules, including consideration of when an indication of an intention to plead guilty should be given if the defendant is to avail of the maximum discount. That will be a matter for the Court of Appeal in Northern Ireland based on the underlying principles which have been recognised in all three jurisdictions for many years.
>
> 52. In summary, the meaning of "proceedings" in article 33 of the Criminal Justice (Northern Ireland) Order 1996 does not include the investigative process leading up to charge or the issue of a summons. Article 33 does not, however, prevent the development by the Court of Appeal of guidelines in respect of the reduction in sentence for a guilty plea based on administrative resources, inconvenience to witnesses and vindication and relief to victims. There was no error of law arising from the consideration of those guidelines by the Crown Court or the Court of Appeal."

[44] With these principles in mind we return to the facts of this case. As we have said the applicant cooperated at interview. He also expressed remorse. Mr Harvey candidly accepted that the arraignment could have been adjourned for the expert report. The applicant would then have pleaded guilty at arraignment. The situation

is remedied to some extent in that the re-arraignment occurred five weeks later when the expert report came in and well before the trial date. Without wishing to be prescriptive we would suggest that should this type of situation arise in future we think that an adjournment of the arraignment is a possible solution. We do acknowledge that ultimately a decision to adjourn an arraignment will be for the trial judge. Alternatively, the trial judge could record that credit is not lost by virtue of a short period being sought for clarificatory evidence. This case should provide some guidance on the approach going forward.

[45] Mr McDowell confirmed that the family always knew a guilty plea was coming from Toher and it was welcomed. There were therefore some utilitarian benefits from Toher's approach and relief to family and witnesses (albeit there had to be a trial given Phair's position). The early indication of a plea signalled that a trial was not sought by Toher and provided vindication for the victims. We were also told that Toher accepted an immediate remand into custody upon his plea.

[46] Accordingly, in the specific circumstances which prevailed in this case some further reduction should have been applied to reflect the approach taken by Toher at any early stage. We consider it important to note that he made admissions at interview and, did thereafter, cooperate with police. The expert report of Dr Donnelly demonstrates that Toher has shown remorse for his actions. On the evidence he also appears to be a person who has an ability to try to improve himself within the prison setting.

[47] The statutory provision refers to a plea being given at the earliest possible opportunity. In addition, allowance should be made for genuine remorse. In this case, we think that the reduction should have been somewhere in the region of 30% which is near the maximum. In these circumstances the judge erred in principle in applying a lesser discount. Despite the careful attention paid to this case by the judge he has erred as to the reduction for the guilty plea for the reasons we have given. In reaching this conclusion we stress that the judge did not have the benefit of the Supreme Court decision in *Maughan* or the additional more focussed arguments we have received.

[48] Therefore, we think, that in Toher's case the sentence should be reduced from 12 years by a further year to one of 11 years to reflect the issue of an early plea of guilty and remorse. The sentence will be adjusted in that limited way, the disqualification will remain for 10 years.

[49] In relation to Phair, we consider that there is a point to be made of substance as to his culpability for the death of Natasha Carruthers given that he was pursued by Toher and Toher pleaded guilty to manslaughter. That much is plain and whilst, considered by the judge, was not given enough prominence. In other words, following from the case of *R v Z* [2005] UKHL 22 (*Hassan)*, Phair was entitled to raise the fact that even though his defence of duress was rejected by the jury it was a valid

issue to raise and can come into account in relation to mitigation. This approach is validated by *Hassan* at para [22] as follows:

> "If it appears at trial that a defendant acted in response to a degree of coercion but in circumstances where the strict requirements of duress were not satisfied, it is always open to the judge to adjust his sentence to reflect his assessment of the defendant's true culpability. This is what the trial judge did in *R v Hudson and Taylor*, below, where he ordered the conditional discharge of the defendants."

[50] We are not so convinced in relation to the reduction given for the youth of this man. Even though he was 23 years of age, he had a track record for previous offending. It does not seem to us to be at the core of the case that he was a young person who could treated in a more lenient way. Notwithstanding that, we think, that the culpability for the driving has been under-estimated, certainly as far as Natasha Carruthers goes, given the manslaughter conviction of Toher. We, therefore, think that the right sentence for the driving offences in Phair's case where duress was a mitigating factor is somewhere in the region of nine years.

[51] However, that does not result in an adjustment of sentence to any great extent for Phair. That is because of the other offences that are relevant in his case. Firstly, the drugs offences were the supply of cocaine, a Class A drug. We reject the attempts by Mr McCartney to downplay his type of offending. It is clear from the text messages that we have previously seen that the evidence points to Phair being a drug dealer. He also had drugs in his system whenever he was recovered from the wreckage of his car. When pressed Mr McCartney also accepted that Phair had only passed half of his drug tests in prison.

[52] The sentence of four years for supply is broadly in line with the previous authority in this area. The well-known case of R *v Aramah* [1982] 4 Cr App R (S) 407 has been applied in *R v McKeown and Han Lin* [2013] NICA 28 at paras [14]-[17]. In *Aramah*, when dealing with the supply of Class A drugs, the court stated:

> "It goes without saying that the sentence will largely depend on the degree of involvement, the amount of trafficking and the value of the drug being handled. It is seldom that a sentence of less than three years will be justified and the nearer the source of supply the defendant is shown to be, the heavier will be the sentence."

[53] As the prosecution rightly point out, there were three instances of supply or offer to supply cocaine by Phair. We, therefore, consider that the sentence of four

years was not beyond the parameters that the judge could have chosen in relation to the drugs charges.

[54] In addition, we are greatly troubled by the burglary offences, the facts of which were explained to us during the appeal. On 5 September 2016 Phair was convicted of domestic burglary and associated offences committed on 3 January 2013. He received a sentence of two years' imprisonment suspended for three years. He breached the suspended sentence in 2017 but it was not activated then. On 23 October 2018 Phair was convicted again of domestic burglary committed on 27 August 2017 and sentenced to 42 months. One year of the previous suspended sentence was activated to run consecutively, making a total sentence of 54 months. Both burglaries were of vulnerable and elderly persons in their rural homes at night. The first burglary involved the ransacking the house with threats to set fire to the house with the elderly occupant still inside. The second burglary was of a 96-year-old woman who was blind and hearing impaired.

[55] Phair was remanded in custody on 26 January 2018 in respect of the burglary offences. He was then remanded in custody on the instant offences on 26 November 2018. As such Phair ended up only being punished for the burglary offences by a short term of only an additional 10 months' imprisonment (the equivalent of a 20-month determinate custodial sentence) when the sentence was 54 months. By our calculations he saved serving a further 34 months of his sentence, 17 months of which would have been actual imprisonment for the burglaries. This was the result of the trial judge ordering the index sentences to commence immediately and not consecutively to the sentence for the burglary offences. In some way this should have been reflected to add to the overall sentence for the driving offences. Therefore, we consider that the total sentence of 11 years was appropriate in Phair's case. Whilst we have accepted that the starting point for the driving offences do not, of themselves merit 11 years, the drugs and burglary offences bring the overall sentence up. The 11-year term for the driving and drugs offences cannot be said by itself to be manifestly excessive, particularly when one takes into account that Phair was only being ordered to serve 20 months of an existing 54-month sentence, and was benefitting from a significant degree of leniency shown by the trial judge.

[56] The only other matter is the disqualification in Phair's case. This is a significant disqualification. It is not apt to refer to the case of *R v McKeown* [2016] NICA 24 as justifying a lesser disqualification. That was a case of causing grievous bodily injury by careless driving. The purpose of a disqualification is to reflect culpability and the need for public safety by virtue of risk. There should also be some correlation between the term of imprisonment and the extent of any disqualification.

[57] In this case, there is a problematic feature of Phair's circumstances in that he committed another similar offence four weeks after being released from hospital having sustained serious injuries himself and been involved in an incident that killed one young woman and seriously injured another. Whilst Toher is the more culpable

for the driving, the disqualifications should be the same. We will substitute a 10-year disqualification.

Conclusion

[58] The tragic circumstances of this case will remain for the victim's family and no sentence will change that. We have allowed the appeals in the limited respects set out below to correct the errors in sentencing we have identified in the specific circumstances of this case.

[59] In respect of Toher, leave to appeal is granted. The sentence for the manslaughter of Natasha Carruthers will be eleven years and the sentences for perverting the course of justice will be eighteen months and conspiracy to possess a Class A drug are each reduced to eighteen months. The other sentences, including the disqualification from driving, are unaltered and the custodial sentences will run concurrently as directed by the trial judge.

[60] In respect of Phair, his appeal is dismissed save the period of disqualification will be 10 years.