Neutral citation No: [2013] NICC 22

Ref: **MAG9023**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **27/11/2013**

IN THE CROWN COURT SITTING IN BELFAST

_____

REGINA

-v-

DANIEL BERNARD GASKIN
and
GERARD GASKIN

_____

MAGUIRE J

Introduction

[1] On 20 June 2013 each of the defendants in these proceedings was found guilty of manslaughter by a jury. This judgment is concerned with the sentencing of each defendant.

The facts giving rise to the convictions

[2] The convictions herein arose from the unlawful killing of Seamus Holland, a man aged 55 years of age at the date of his death. The killing occurred in the early hours of 21 November 2010 and resulted from a severe beating meted out to him by the defendants. At the time of the beating the deceased lived at an address at 6 Upton Court, Belfast. The first defendant was aged 20 and then lived at an address in the Turf Lodge area. The second defendant was then aged 28 and lived at an address in the Lagmore area of Belfast.

[3] The defendants were both nephews of the deceased who was their mother's brother.

[4] On the evening before the killing of the deceased each of the defendants had been drinking heavily. In the case of the first defendant, his evidence was that he had left his parents' house in the Turf Lodge area some time after 8.00 pm. He had gone to his girlfriend's house. He started drinking Carlsberg lager and on his own evidence he had consumed some 12 tins while in her house. He then went with his girlfriend to his own mother's house. For a short time he stopped with his girlfriend

there, before going on to a bar in the Turf Lodge area called the Green Hut. There he had more alcohol over a period of about 45 minutes. He then returned with his girlfriend to his mother and father's house. When he got there he took further drink with them. At first the mood was good but after a time, according to his evidence, the parents began to argue. The argument was about Seamus Holland, the deceased in this case.

[5] The second defendant's account was that on the day before the killing he initially had been working. When he stopped work he went round to a friend's house where he started drinking. Thereafter, he was engaged in what was described as non-stop drinking over a substantial period of time. In one of his accounts, the second defendant said that he had drunk a full bottle of vodka and loads and loads of tins of beer. The second defendant also indicated that he had taken drugs on the evening before the killing. Eventually in the early hours of the morning the second defendant went to his parents' house in Turf Lodge. When he arrived there his parents were present as was the first defendant and his girlfriend. While in the house he consumed further alcohol. He heard his parents arguing over Seamus Holland.

[6] In the case of the first defendant he had often before heard his parents argue about Seamus Holland. This was, he said, something they resorted to when they were drinking. For many months the first defendant had known what the argument was about – what its essential subject matter was. At the heart of his parents' recurrent rows lay the allegation, which repeatedly became the subject of discussion on these occasions, that when the first defendant's mother was a child she had been sexually abused and raped by Seamus Holland. The first defendant had heard of this many times before that night. However, in more recent times, he had told his older brother, the second defendant, about it. After the argument between his parents had been going on for some time, the first defendant's account was that he and his girlfriend left the room and went upstairs to watch television.

[7] The second defendant also heard the argument between his parents. He knew from what his brother had told him some time before what the argument was about. In his evidence, he indicated that as a result of hearing what his parents were saying about Seamus Holland he wanted to confront him. By this time it was the small hours of the morning.

[8] According to the second defendant he decided, while in his parents' house, to go and beat Mr Holland up. He spoke to his brother the first defendant about this and, at the second defendant's instigation, the first defendant left his girlfriend to go down to Mr Holland's house with his brother for the purpose of giving Mr Holland a beating.

[9] Before they left the parents' house both brothers put on gloves which the second defendant had obtained.

[10] The second defendant equipped himself with a heavy iron bar. This, he said, was obtained from a trolley jack at the front of the house. The two then walked to Mr Holland's house at 6 Upton Court. The walk was of some ten minutes duration. Both admitted when giving evidence that they were angry and that their object was to give Mr Holland a beating. The wearing of the gloves can only have been as a way of seeking to avoid later detection for the commission of the acts which they had in mind.

[11] In evidence before the court at the trial, the first defendant denied that he knew his older brother had an iron bar with him. Notwithstanding that the iron bar was of significant dimensions and weight, he claimed not to have been aware that his brother was carrying it to Mr Holland's house. Later the first defendant also claimed not to have been aware of it when it was being used by his brother when the deceased was being beaten up. The first defendant claimed he had no knowledge of it until close to the end of the incident.

[12] The two brothers arrived at Mr Holland's house in the early hours of the morning. When they arrived, there were four people up and about in the living room. They were Seamus Holland, Shauna McCann, Gerard McCann and Julie Ann Duffy. All of these persons had been drinking heavily that evening and they were all, to a greater or lesser degree, intoxicated. When the defendants arrived they were invited into the living room. According to the second defendant before going into the living room he left the iron bar at or about the bottom of the staircase which adjoined the hall. Once in the living room both defendants had a drink.

[13] After a time, the second defendant asked Mr Holland to come out to the kitchen with him. Mr Holland did so. They left the room. At this point the second defendant must have retrieved the iron bar. Once the two were in the kitchen, within a short time, judging by the noise heard in the living room by the others, the beating of Mr Holland began.

[14] A feature of the case is that for the first time in a revised defence statement served in 2013 the second defendant claimed that once he had gone into the kitchen with Mr Holland there was allegedly an exchange between the two before any violence occurred. The exchange was along the following lines. The second defendant said to Mr Holland "how could you do that on anyone, never mind your own sister"? In reply, Mr Holland allegedly said that "it didn't do her any harm". Interestingly, when interviewed by the police just a few days after the incident the second defendant when giving his first account of what had happened did not make any mention of this exchange at all. Nor did he mention it in his original defence statement filed in this case.

[15] Shortly after the second defendant and Mr Holland left the living room the occupants of the room began to hear thuds in the kitchen. The second defendant called the first defendant into the kitchen. The first defendant went into the kitchen.

Once there, while it is impossible to be certain about the exact sequence of events, he participated with the second defendant in beating Mr Holland up.

[16] At an early stage Shauna McCann, hearing the commotion in the kitchen, went from the living room to it. She ran to it and tried to intervene to get each of the defendants off Mr Holland. She says she saw Mr Holland bent over and being punched by both brothers. The punches, she said, were to all about his body. Mr Holland was shouting "enough enough". She tried to get the brothers off him. At this, she said, the brothers lifted her and threw her out of the kitchen into the hall. The kitchen door was then closed by them and held shut. She could still hear Mr Holland shouting "enough enough". She tried to get the door open but it was held from inside the kitchen and she could only prise it open a little.

[17] With the door open just a little she said she could see Mr Holland on the floor. She could see the second defendant holding an iron bar which he was using to hit Mr Holland. She said the blows were one a second. When doing this, the second defendant was holding the iron bar with both hands. She saw the first defendant kicking Mr Holland while he was on the ground. There was, she said, blood all over Mr Holland's face. The door was pushed shut against her. Within seconds, she said the two brothers came out and walked into the hall. Shauna McCann had retreated to the living room. One of them said "That's what he gets for raping my mummy years ago". Those present in the house were instructed to give the assailants 15 minutes to get away before phoning the ambulance.

[18] On leaving the house the second defendant had in his hand the iron bar. As he and his brother began their walk back to their parents' house the second defendant disposed of the iron bar by throwing it into a culvert by the side of the road.

[19] According to the brothers, when they were walking back to their parents' house and later when they arrived there, they did not discuss what they had done. Shauna, in the aftermath of the incident, phoned for an ambulance which later arrived and took Mr Holland to the Royal Victoria Hospital. Around 13.30 hours that afternoon Mr Holland died.

[20] It seems clear that the brothers learnt later on that day about Mr Holland's death. After discussion with their legal representatives they went to the police the following day – Monday 22 November 2010.

[21] It is right to record that subsequently each of the brothers were interviewed by police. Initially each admitted his involvement in the death of Mr Holland. Each gave to the police an account of what had occurred. However each of these accounts was less detailed than the account which each later gave to the court when giving oral evidence.

The pathologist's evidence

[22] The autopsy on the body of Seamus Holland was carried out by Dr Lyness, the Assistant State Pathologist, on 22 November 2010, the day after the deceased's death. Dr Lyness gave evidence at the trial. It is clear from his report and from the evidence given by him at the trial that the injuries sustained by the deceased were very considerable. From the commentary part of his report the following points emerged:

- The deceased had multiple lacerations to the face and scalp as well as abrasions and bruising. These injuries could have been sustained by kicking, stamping and blows with a blunt instrument. Patterned bruising on the left cheek was suggestive of a footwear mark. Bands of bruising behind the left ear would be consistent with having been struck with a rod-like weapon. There were also fractures of the nasal bones.
- There was extensive bruising of the trunk with heavy bleeding into the soft tissues. There were numerous bands of bruising in keeping with having been struck by a rod-like weapon.
- There was extensive bruising of all four limbs consistent with multiple blows, such as kicks, punches or blows from a blunt instrument. At least twelve puncture wounds, the majority of circular appearance, were found on 3 of the 4 , limbs.
- The left fibula was fractured as was the left ulna and the right olecranon.
- The features of the limb injuries suggest blows from a weapon and at least one protruding relatively pointed object, such as a nail. Laceration of the arms would be consistent with defensive type injuries, having been sustained as a consequence of the victim raising his arms in an attempt to protect his head.
- There were incised wounds of the left ring finger consistent with having been caused by a bladed weapon with a sharp edge such as an knife.
- There were multiple fractures of the ribs
- The neck revealed areas of bruising probably caused by either grasping of the neck or blunt force trauma.

[23] The court is satisfied that the accounts given to it and to the police by each of the defendants fall short of accounting for the totality of the injuries found on the deceased's body.

The trial

[24] Each of the defendants faced a charge of murder at the trial and each pleaded not guilty to murder. While each of the defendants, according to the Crown, were willing to plead guilty to manslaughter the Crown was not prepared to accept such a plea. Ultimately the jury decided that each should be convicted of manslaughter. In the case of each defendant the jury found that the defendant could rely on the partial defence of provocation. In the case of the second defendant, the jury also indicated

that they accepted he was suffering from diminished responsibility at the time of the killing.

[25] It is unclear as to what exactly the provocation which the jury found consisted of. It could have been that the jury accepted that the provocation arose from the information received by each defendant and brought to the fore by their parents row just before the incident, *viz* that Mr Holland was allegedly responsible for sexual abuse of their mother. It could be that the jury accepted the second defendant's account that when he spoke to Mr Holland in the kitchen, Mr Holland said the words quoted above at paragraph [14] and that this provoked the second defendant. If the jury accepted this last as the provocation they must have been prepared to overlook the fact that this exchange had not been referred to immediately after the event by the second defendant during his police interviews. If the exchange of words in the kitchen was the provocation found by the jury this produces the anomaly that at that time the first defendant was not there in the kitchen and therefore could not have been provoked in the same way. The provocation in respect of him must be the allegation of sexual abuse of his mother at the hands of the deceased as brought home by the row of the parents just before the incident.

[26] Having heard all of the evidence it seems to the court that the provocation was the same in both cases *viz* namely the allegation that Seamus Holland sexually abused the brothers' mother when she was a child, as brought home by the parents' row that evening.

[27] As far as diminished responsibility is concerned, there is no doubt that there was evidence before the court that the second defendant suffered from a personality disorder. Dr Bownes, a consultant forensic psychiatrist, gave evidence before the jury on the second defendant's behalf. He indicated that he had knowledge of the second defendant over an extensive period. He thought the second defendant over the years had demonstrated a catalogue of symptoms such as anxiety, depressed mood and irritability. He had a low tolerance to frustration or annoyance. While the second defendant had been offered assistance by health care professionals over the years he had often failed to take it. In 2012 Dr Bownes said he learnt about a complaint the second defendant had made in 2006 to a nurse. This was a complaint that he himself had when younger been sexually abused. In Dr Bownes' view, the second defendant did not suffer from a major mental illness but there were personality based deficits and deficiencies of a pervasive and enduring nature. Dr Bownes' put the matter thus:

> "Mr [Gerard] Gaskin suffers from borderline or emotionally unstable personality disorder characterised by a marked tendency to act compulsively, without consideration of the consequences, together with affective mood instability."

[28] In Dr Bownes' view this abnormality substantially impaired the second defendant's ability to appropriately manage. In addition, the second-named defendant had poor educational achievement and limited intellectual functioning.

[29] It must have been on the basis of Dr Bownes' evidence above that the jury reached their conclusion that the second defendant suffered from diminished responsibility at the time of Mr Holland's killing.

The impact of the killing on others

[30] The court has been provided with reports from Dr Michael Patterson, consultant clinical psychologist, in respect of Anthony Holland, a son of the deceased; Lisa Craddock, a daughter of the deceased; and Gerard McCann, who was living with Mr Holland at the time of the attack.

[31] These reports show that each of these persons continue to this day to suffer, in differing degrees, from disturbing symptoms in the aftermath of the killing of Mr Holland.

[32] The court has taken the reports of Dr Patterson fully into account for the purpose of preparing this judgement, though it is not proposed to set out the details of his reports here.

Daniel Gaskin

[33] The first defendant is now aged 23. He is the second youngest in a family which included seven children. Daniel left school at the age of 16 without qualifications. Since then he has worked, *inter alia*, as an apprentice bricklayer and labourer. He is unmarried.

[34] While Daniel has a criminal record there are only two offences on it – one of criminal damage and one of taking a vehicle without authority. These relate to one incident which occurred on 22 June 2009. The convictions occurred on 5 December 2011 (after the killing of Mr Holland).

[35] As already noted, it is clear that this defendant had been drinking heavily prior to going to Mr Holland's house with his brother that morning.

[36] Daniel had been aware of his mother's allegations that she had been sexually abused by Mr Holland when she was a child for a substantial period. On the morning, because of the row which was going on between his parents, he and his girlfriend went upstairs to the bedroom.

[37] In the pre-sentence report, the author thought that Daniel's account suggested a lack of responsibility on his part for the incident and a lack of insight about it. There appeared to be clear instances of Daniel minimising his role in it. When asked

why he put gloves on before going to Mr Holland's house, he said to the probation officer that he had no reason to suspect that something serious would occur. In a similar vein, he has maintained that he knew nothing about his brother bringing to the scene and using an iron bar. The first defendant admits only to throwing a few punches and kicking Mr Holland on a few occasions.

[38] Undoubtedly, at various times that early morning, the first defendant could have acted differently. He could have refused to join his elder brother altogether or he could have walked away once he could see the attack occurring on Mr Holland. Indeed he could have tried to stop his brother from executing the attack or sought help for Mr Holland. Instead, not only did he participate in the attack but he helped keep Shauna McCann from helping Mr Holland and was party to the threat to those in the house after the incident not to call an ambulance straightaway.

[39] In the view of the author of the pre-sentence report, Daniel Gaskin is assessed as having a likelihood of offending in the medium range in view of his poor consequential thinking; his minimisation of certain aspects of the offence; concerns regarding his alcohol management; and his willingness to engage in violent aggressive behaviour. It was concluded, however, that notwithstanding the gravity of the offence, Daniel Gaskin did not meet the Probation Service for Northern Ireland's significant risk of serious harm threshold. Influential to this conclusion were the defendant's limited criminal history; the absence of any previous violent offences; his less dominant role in the offence; and the overall stability of his employment and family life. In the Probation Service for Northern Ireland's view he demonstrated an acceptable level of insight and victim awareness.

[40] The court is prepared to accept the views of the author of the pre-sentence report and the court further accepts that the defendant's role was underpinned by the substantial consumption of alcohol and by the influence his brother and co-defendant had on him.

Gerard Gaskin

[41] The second-named defendant is now aged 32. He is an elder brother of the first defendant. This defendant, it appears, left the family home when he was just 13 years of age. He seems to have lived rough for a period. He has had a long relationship with alcohol and drugs.

[42] Prior to the incident he had been living in the Lagmore area of west Belfast with a partner and two children, who are now aged 11 and 5. He has in recent years enjoyed a good employment history mainly as a crane operator and as a forklift driver. This has secured some, but only limited stability in his life.

[43] The second defendant has for long involved himself in anti-social and criminal behaviour. He has accumulated a criminal record which contains some 64 offences. There is demonstrated a clear propensity for offences such as taking a

motor vehicle without consent and driving it away; dangerous driving; and driving without insurance or while disqualified or when unfit through drink or drugs. There are a number of offences of assault on the second defendant's record including common assault on an adult (head-butting a teacher at school) and assault occasioning actual bodily harm (a fight with a male person in which a knife with a two inch blade was used by the second defendant). In respect of the last offence at the same time he was convicted of having possession of an offensive weapon in a public place. In 1999 the second defendant was convicted of the offence of causing death by dangerous driving. This is a specified violent offence for the purpose of Schedule 2 to the Criminal Justice (Northern Ireland) Order 2008. This offence, the court understands, was committed when the second-named defendant was driving a vehicle at high speed on the wrong side of the road at 4 am in the morning. The vehicle hit a pedestrian who was crossing the road at the time. The vehicle did not stop after the impact. The vehicle involved in the incident had been stolen from an address some distance away.

[44] As will be noted from the discussion above relating to diminished responsibility, the second-named defendant has for long had an unstable personality.

[45] In respect of the offence of which he has been convicted, there is no doubt that he was already aware of the allegation that his mother had been sexually abused by Mr Holland before the early morning of the incident. His brother had told him of it some months before. He equipped himself and his brother with gloves and armed himself with a heavy iron bar. All of this occurred before he went to the house at 6 Upton Court. The object was to give Mr Holland a significant beating, though the court is prepared to accept that he did not go to Mr Holland's home intending to kill him.

[46] When the second defendant arrived at the house it must have been obvious that Mr Holland himself had a substantial quantity of alcohol taken and that he was in little position to defend himself. Notwithstanding this, the second defendant called him into the kitchen, armed himself beforehand with the iron bar, began the assault and then got his brother to come in and assist him.

[47] As noted earlier, the evidence of the pathologist in this case shows the seriousness of the attack on Mr Holland. After the incident ended, it appears that it was this defendant who told the occupants of the house not to ring for an ambulance for a period, though his brother did not disassociate himself from this. It was also this defendant who took the step of seeking to dispose of the iron bar in a nearby culvert.

[48] In the pre-sentence report, the author offers the view, which the court can accept, that Gerard Gaskin had for long misused alcohol and drugs as a way of coping. He notes, however, that Gerard Gaskin has even in recent years been angry and been likely, to use Gerard's own words, to react "like a time bomb on the verge

of blowing up". Gerard had, it seems clear, experienced times of hopelessness and despair (and has attempted suicide more than once), but at the same time he has repeatedly failed to make use of professional services when they have been offered to him.

[49] While the courts have placed the second defendant on probation on a number of occasions this has not changed the established patterns of behaviour which have beset this defendant.

[50] In respect of the risk of serious harm, in an important paragraph within the pre-sentence report, the author states:

> "Gerard Gaskin is before the court for the Unlawful Killing of Seamus Holland, a clear indication that he has the capacity to cause serious harm to others. This is compounded by a previous offence from 1999 where he killed a pedestrian while driving dangerously in a stolen car. He does have previous convictions for common assault and AOABH when he was aged 16 and 17 and a further common assault committed in 2004. His record highlights his willingness to take driving risks but does not evidence a significant history of violence … [the Risk Management Meeting] assessed Gerard Gaskin as representing a significant risk of serious harm in certain circumstances that would combine alcohol or drugs misuse with his inability to regulate his emotions and anger … [the Meeting] did not feel that there was a high risk of indiscriminate violence against the public but rather that, should the defendant be in a situation which triggers an angry or emotional reaction such as that around his own childhood abuse then there may continue to be risk of future harm depending on the circumstances of the stimulii. Any heightened response from Mr Gaskin would be intensified by alcohol or drugs misuse. There is some evidence of impulsivity; however acting without thinking appears to be in response to emotional stimulus such as anger and provocation rather than being a daily issue … the defendant needs to address his own childhood trauma and the resulting emotional deficits to reduce the risk of an emotional or angry response to certain situations. He must develop the skills needed to manage stress, anxiety and anger appropriately if he is to be

> successful in the aspiration to achieve long term stability."

[51] In fairness to the second defendant, the author at a later stage in the report indicates that there is evidence he can maintain some aspects of a stable life. Since obtaining bail in respect of the current charge, it is noted that the second defendant has reportedly stayed off alcohol - abstinence from which was one of his bail conditions.

[52] As a consequence of the content of the pre-sentence report the legal representatives of the second defendant sought and obtained from the court leave to file a psychiatric report from Dr Bownes in response. Dr Bownes in the course of the trial had provided two reports but it was thought necessary to obtain a further report from him.

[53] In the court's reading of Dr Bownes' latest report there is no express disagreement with the analysis quoted above from the pre-sentence report. Dr Bownes reiterated his view of Gerald Gaskin as being an individual with longstanding personality deficits of a clinically significant and borderline nature that could be considered as consistent with a disorder of adult personality. It is noted that the second defendant "caused problems for himself in the relationship settings and at work by engaging impetuously in damaging behaviour". In such circumstances, he had difficulty in coping with negative emotional states in stressful situations.

[54] Dr Bownes went on to say as follows:

> "Medical records indicate that Mr Gaskin had previously engaged impetuously in behaviour of an anti-social and irresponsible nature without apparent regard for potential risks and consequences and that had included causing death by dangerous driving when he was a teenager. It was also apparent from medical records that Mr Gaskin had failed previously to attend for appointments arranged with mental health professionals outside prison for monitoring of his mental health well-being and treatment requirements …"

[55] In short, Mr Gaskin suffers from a longstanding personality based deficit and a relative inability to cope with difficulty. When faced with stressful and demanding situations he will be likely to engage in maladaptive behaviour. Exposure to recalling traumatic experiences will be likely to produce significant emotional reactions from him and a risk of further dangerous behaviour will increase if he engages in alcohol abuse or illicit drug use.

[56] The court, looking at the pre-sentence report of the Probation Service for Northern Ireland and Dr Bownes report together, derives from them the opinion that the second defendant does represent a significant risk of serious harm when he is placed in stressful situations and either abuse of alcohol or drugs occurs. In such situations he is dangerous and likely to produce a heightened response and may act impulsively.

[57] To date it appears that the second defendant has been unable to take advantage of treatment opportunities or periods of probation to lessen the risk he presents in the circumstances described above.

The court's approach to sentencing in the context of provocation and diminished responsibility

[58] As indicated earlier in this judgment, the jury held that each defendant had acted as a result of provocation.

[59] This must be taken fully into account in the context of sentencing by the court. The court will therefore adopt the approach of Mantell LJ in R v Suratan [2002] EWCA Crim. 2982. This involves the acknowledgment by the sentencing court in a provocation case of the following:

> "… it is important to remember that the provisions of section 3 of the Homicide Act 1957 … mean that when sentencing an offender who is not guilty of murder but guilty of manslaughter by reason of provocation, the judge must make certain assumptions in the offender's favour.
>
> First, he must assume that the offender had, at the time of the killing, lost his self-control. Mere loss of temper or jealous rage is not sufficient.
>
> Second, he must assume that the offender was caused to lose his self-control by things said or done, normally and, as in the case with which we are concerned, by the person he has killed.
>
> Third, he must assume that the defendant's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions, and that as society advances it ought to call for a higher measure of self-control.

> Fourth, he must assume that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the defendant's offence from murder to manslaughter.
>
> Moreover the sentencing judge must make these assumptions whether the offender has been found not guilty of murder but guilty of manslaughter by reason of provocation by a jury after a contested trial, or the Crown has accepted a plea of not guilty of murder but guilty of manslaughter by reason of provocation."

[60] The court will duly make the assumptions in these cases which are referred to above.

[61] However, this will not mean that the two defendants will receive a nominal sentence. The court is entitled to have regard to all of the circumstances pertaining to the unlawful killing and to reflect the court's overall assessment of the gravity of the occurrence and the residual degree of culpability of the defendants once the assumptions above have been factored in.

[62] In the course of the sentencing hearing, the court's attention was drawn by both defendants to a publication by the Sentencing Guidelines Council of 2005 called "Manslaughter by Reason of Provocation". This is described as a guideline but it is plain that it applies only in England and Wales and does not apply in Northern Ireland.

[63] This does not, however, render the publication of no interest. The court is willing to take it into account as it does provide a useful framework of analysis. In particular, it draws attention to what might logically be viewed as the important factor of the degree of provocation in a given case. It describes this as "a critical factor" in the sentencing decision (paragraph 3.2). It advises that the sentencer should look at the nature and duration of the provocation and sets out a list of factors which should be taken into account in this regard. These include whether the provocation involves gross and extreme conduct on the part of the victim; the offender's previous experiences of abuse; any mental condition which may affect the offender's perception of what amounts to provocation; the nature of the conduct; and the period of time over which it took place and its cumulative effect. The sentencer should also consider whether the provocation was suffered over a long or short period and the nature of it. Further, it offers the guidance that the extent and timing of the retaliation should be assessed. As paragraph 3.3 points out, the court should assess "the intensity, extent and nature of that loss of control … in the context of the provocation that preceded it".

[64] At paragraph 3.4, the document refers to the circumstances of the killing itself. It indicates that these will be relevant to the offender's culpability. A number of points are made under this head. For example, the offender's violent response to provocation is likely to be less culpable the shorter the time gap between the provocation and the killing. It goes on to refer to taking advantage of favourable circumstances for carrying out the killing. This will enable the assailant to affect the assault upon the victim, particularly if the victim is unable to put up resistance.

[65] The context of the relationship between the offender and victim is also stated to be something the sentencer should bear in mind, as is post offence behaviour such as immediate and genuine remorse or concealment of, or attempts to dispense with, evidence.

[66] The use of a weapon – especially one carried to the scene – will usually be an aggravating factor.

[67] It seems to the court that the sort of factors described above are relevant and the sentencer should seek to allocate appropriate weight to them.

[68] In the present case, the court has already expressed the view that having heard all of the evidence, it considers that the provocation in this case, in respect of both defendants, relates to the defendants' knowledge of their mother's allegation that Mr Holland had sexually abused her when she was a child as brought home by the events of that morning. It seems to the court that it is this which (in each case) inspired the attack by the defendants on Mr Holland. The court is not of the opinion that the provocation in this case consisted of what the second defendant has attributed to Mr Holland on the basis of an alleged conversation with him in the kitchen. The court retains significant doubts about whether that conversation ever occurred, as the only evidence to support it is a claim not made at the time of the police investigation but several years later by the second defendant.

[69] In this case the court's estimation is that neither defendant had lost control until a point well into the attack on Mr Holland. On the contrary, in the court's view, both had control at the stage at which, inspired by Gerard Gaskin, the two equipped themselves with gloves and, in Gerard's case with an iron bar, and they went to Upton Court to give Mr Holland a beating. They had not lost control when they entered the house and they had not lost control when Gerard invited Mr Holland to the kitchen or when he lifted the iron bar from the stairwell before going into the kitchen. In the court's estimation, Gerard had not lost control when he began to assault Mr Holland and when he first used the iron bar on him. When Daniel came into the kitchen when his brother summoned him, the court is of the view that Daniel knew why he was being summoned and voluntarily went into the kitchen. When Daniel started assaulting Mr Holland and when he helped to expel Shauna McCann from the kitchen he had not lost self-control.

[70] At the very core of the assault the court's reckoning is that both brothers, in the jury's estimation, lost their self-control with the effect that they killed a man they only intended to give a severe beating to. However, in the court's view, their control resumed when they knew they had gone too far. Their thoughts turned to avoiding detention. Accordingly, they warned the persons in the house not to call an ambulance immediately so that they would have time to escape. In so stipulating they knew that a man badly in need of medical help would have it delayed or at least that was their intention. They had not lost self-control as they were leaving the house and Gerard had not lost self-control when he disposed of the iron bar which he had used.

[71] As regards the element of provocation in this case, the court considers it to have been low. Both the defendants were before the morning in question well aware of their mother's allegations against Mr Holland. Neither had heard of them for the first time that night. The underlying events at issue took place when the defendants' mother and her brother were in their youth.

[72] It is impossible in this case, in the court's estimation, to ignore the fact that unlike what would occur in many other cases of provocation this was not a case of either defendant being themselves ridiculed, abused, insulted or attacked. It was not a case of immediacy between the behaviour of the alleged provoker and the response triggered.

[73] This is a case, moreover, where there was a substantial period of time following the provocation. In that time the defendants developed a plan and executed it, deliberately (in the case of Gerard) carrying a weapon to the scene which could only result in serious injury being done to the party it was used against. While the court accepts that the treatment of the defendants' mother by Mr Holland, if true, was wholly reprehensible and that each of the defendants to a degree may have mulled over the allegation in their minds from time to time and have been disturbed by it, this of course would not justify each of their decisions to give Mr Holland a beating.

[74] The court's approach to the jury's finding of diminished responsibility in the case of the second defendant follows a similar approach to that referred to above in relation to provocation.

[75] As before, the sentencer must respect the jury's decision. Thus the court must take into account when sentencing Gerard Gaskin the elements within that defence *viz*:

(a) that at the time Gerard was suffering from a mental abnormality; and

(b) that such mental abnormality substantially impaired his mental responsibility: (see section 5(1) of the Criminal Justice Act (Northern Ireland) 1966).

[76] Taking these factors into account, however, does not mean that the court should not also make its assessment of the gravity of what occurred that morning and of the residual culpability of the second named defendant's actions.

[77] This court is of the view that considering all the facts of the case the second defendant's residual culpability is high, notwithstanding that the jury have accepted his defence of diminished responsibility.

Dangerousness

[78] It is not disputed, as between the parties, that the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"), as far as it affects sentencing, is relevant and potentially applicable in this case.

[79] Manslaughter, it is accepted by all, is both a "serious" offence for the purpose of Schedule 1 Part 1 of the Order and is a "specified violent offence" for the purpose of Schedule 2. In these circumstances the court is obliged to consider whether, in the case of each of the defendants, the dangerousness test in the 2008 Order is satisfied.

[80] It is clear from the legal authorities in this sphere that if the dangerousness test is passed in respect of either defendant, the sentencing options for that defendant contract so that the court is required to impose one of the particular types of sentence found in Chapter 3 of the 2008 Order. The sentences found in Chapter 3 are as follows:

(i) A life sentence.

(ii) An extended custodial sentence.

(iii) An indeterminate custodial sentence.

[81] The nature of each of these sentences is dealt with in the 2008 Order as is the test of dangerousness.

[82] The test of dangerousness is found at Article 13(1)(b) and is met where a person is convicted on indictment of a serious offence (as here) and

> "(b) the court is of the opinion that there is a significant risk to members of the public of serious harm by the commission by the offender of further specified offences".

[83] The first question therefore is whether this test of dangerousness in the case of each defendant has been passed. If it has, the court goes on to Article 13(2).

[84] Article 13(2) indicates that if the offence is one in respect of which the offender would, apart from this Article, be liable to a life sentence (as is here the case) and:

> "(b) the court is of the opinion that the seriousness of the offence … is such as to justify the imposition of such a sentence",
>
> the court shall impose a life sentence." (My emphasis)

In assessing dangerousness the Order at Article 15 directs the court about certain factors. The court is obliged to take into account all such information as is available to it about the nature and circumstances of the offence. The court may, however, take into account any information which is before it about any pattern of behaviour of which the offence forms part and any information about the offender which is before it.

[85] Once the dangerousness test is passed, therefore, the court is required to ask whether the offender should be sentenced to life imprisonment. If the answer is yes, the court must impose a life sentence.

[86] If the answer to the question above is no, and the court considers that a life sentence is not in the circumstances justified, the court then considers whether an extended custodial sentence should be imposed or whether an indeterminate custodial sentence should be imposed.

[87] The concept of an extended custodial sentence is described in Article 14 of the Order and is made up of two parts:

> "(i) the sentence of imprisonment which is equal to the aggregate of (a) the appropriate custodial term; and
>
> (ii) 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": see Article 14(2) and (3).

[88] In contrast an indeterminate custodial sentence is defined in Article 13(4) and is a "sentence of imprisonment for an indeterminate period". Such a sentence is

subject to the provisions of the 2008 Order dealing with release of prisoners and duration of licences: see Part 4, especially Articles 18 and 22.

[89] In his sentencing decision in R v Shaw and Shaw [2011] NICC 34 McCloskey J has analysed and discussed the above provisions of the 2008 Order. As he puts the matter at paragraph [11]:

> "Chapter 3 establishes a hierarchy of sentencing mechanisms all available to the court in respect of "dangerous" offenders. The hierarchy is constituted by, in descending order of precedence, the life sentence, the IPP [indeterminate custodial sentence] and the extended custodial sentence. Where the court forms the requisite opinion it must invoke the appropriate sentencing mechanism accordingly." [My emphasis.]

[90] As regards the test of dangerousness, the Court of Appeal in Northern Ireland in R v EB [2010] NICA 40 has indicated that the judgment of the Court of Appeal of England and Wales in R v Lang [2006] 2 AER 410 is of assistance in respect of how to assess the issue of significant risk of serious harm. In Lang the following was said:

> "(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 demonstrates 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 pre-sentence probation and medical reports…the

sentencer would be guided, but not bound by, the assessment and risk in such reports. A sentencer who is contemplating differing from the assessment in such a report should give both counsel the opportunity of addressing the point.

(iii) If the foreseen specified offence is serious, there will clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm. For example robbery is a serious offence. But it can be committed in a wide variety of ways, many of which do not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there is a significant risk of serious harm merely because the foreseen specified offence was serious…in a small number of cases, where the circumstances of the current offence or the history of the offender suggest mental abnormality on his part, a medical report may be necessary before risk can properly be assessed.

(iv) If the foreseen specified offence is not serious, there will be comparatively few cases in which a risk of serious harm will properly be regarded as significant…repetitive violence or sexual offending at a relatively low level without serious harm does not of itself give rise to a significant risk of serious harm in the future. There may, 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." (See Re EB at paragraph [11] quoting from paragraph [17] of the Vice President's judgment in Lang.)

[91] Other points on the interpretation of Chapter 3 of the 2008 Order, worthy of note, are:

(a) Life sentences, in this context, are intended to be reserved to a small category of exceptional cases: see McCloskey J at paragraph [12]; R v Kehoe [2008] CLR 728 at paragraph [18].

(b) An indeterminate custodial sentence is concerned with future risks and public protection: see McCloskey J at [17] quoting R v Johnston and Others [2007] 1 CAR(S) 112.

(c) In respect of indeterminate custodial sentences in R v Wilkinson and Others, the Court of Appeal in England and Wales said:

> "[16] … it is well understood that an IPP has a great deal in common with a life sentence. Its justification is the protection of the public. It is indeterminate. Release depends on the judgment of the Parole Board as to the risk which the prisoner represents. The court must fix a minimum term before which release cannot be considered, calculated by reference to the hypothetical determinate term which would have been called for if the indeterminate sentence were not being passed."

(d) The procedure for fixing a minimum term in this context is that "the court, taking into account the seriousness of the offence … must identify the notional determinate sentence which would have been imposed if a life sentence or imprisonment for public protection had not been required. This should not exceed the maximum permitted for the offence. Half that term should normally then be taken and from this should be deducted time spent in custody or on remand" – see Lang *supra* at paragraph [10].

(e) "When the offender has served the period specified he may require the Secretary of State to refer his case to the Parole Board who may direct release if "satisfied that it is no longer necessary for the protection of the public" that he should be confined. If released he will remain on licence indefinitely …" (Lang *ibid*). (For the precise mechanisms within the Northern Ireland scheme: see, Article 18 of the 2008 Order).

(f) The minimum period for the purpose of the 2008 Order is defined as:

> "… such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence …" (Article 13 (3) (b)).

The starting point for sentence computation

[92] An important element in the court's consideration of what ought to be the appropriate sentence in these cases is the starting point which, in the context of a determinate or notionally determinate sentence, it should adopt.

[93] Where the offender's conviction is for manslaughter, as in each case here, it has long been recognised that sentencing is a difficult task and that there is a wide range of sentence available to the court. Each case, moreover, ultimately will largely be dependent on its individual facts.

[94] In Northern Ireland the Court of Appeal in R v Magee [2007] NICA 21 addressed this issue in a recent manslaughter case. Kerr LCJ, said at paragraph [26]:

> "We consider that the time has now arrived where, in the case of manslaughter where the charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between 8 and 15 years. This is, of course, the most general of guidelines … in some cases an indeterminate sentence will be appropriate …".

[95] It seems to the court that it should approach the establishment of the starting point bearing the above general guideline case in mind. The court notes that the guideline in Magee has also been used in the context of manslaughter cases arising from diminished responsibility (see R v Crolly [2011] NICA 58 at paragraphs [22] – [26]) and it sees no reason why the same approach ought not to be taken in provocation cases.

[96] In the Sentencing Guideline Council's 2005 document "Manslaughter by Reason of Provocation" (referred to *supra*) a different approach is adopted. While this court does not regard itself as in any way bound to follow the England and Wales guideline, it is of interest. In manslaughter by reason of provocation cases, the document notes that the maximum sentence, in England and Wales as here, is life imprisonment. However, the approach taken is to provide suggested sentencing ranges and starting points associated with whether or not the provocation is graded as low, substantial or high. In a "low" case, the sentencing range is 10 years to life and the starting point is 12 years custody. In a "substantial" case, the range is 4-9 years with a starting point to 8 years. In a "high case", the sentencing range, if custody is necessary, is up to four years with a starting point of three years custody.

[97] Once the starting point is established the court has then regard to whether it should increase or decrease the sentence from that base having regard to aggravating and mitigating factors.

[98] Having regard to all of what has been said above, and in the light of hearing all of the evidence, the court considers that the starting point for sentencing in these cases should be one of 12 years' custody. It seems to the court that this figure takes account of the gravity of the offence; the guidelines already discussed above; the victim impact statements which the court has received and read; and the reduction of the charge of which each of the defendants has been found guilty from murder to manslaughter. In the court's view, given a range of 8 to 15 years, as *per* Magee, 12 years is the correct starting point in these cases. For reasons given earlier, moreover, in the court's view, the provocation in these cases falls, if the court deploys the English Sentencing Council's Guidelines, *supra*, into the low category. It follows that a 12 year starting point also emerges if the matter is approached in that way. For its own part, the court prefers the approach taken by the Northern Ireland Court of Appeal in Magee to the more rigid and mechanical approach found in the English guidelines, though whichever is chosen in these cases, produces the same result, in the court's view.

[99] The court finally will now deal with the disposal of the two cases before it.

Daniel Gaskin - Disposal

[100] The court considers that there is no sufficient evidence or information in the first defendant's case to cause it to regard him as passing the dangerousness test. This is also the view of the author of the pre-sentence report. Accordingly, in his case there is no need to deploy the sentencing regime associated with Chapter 3 of the 2008 Order.

[101] The above conclusion focuses the court on the appropriate determinate sentence to be imposed in Daniel's case.

[102] Mr Harvey QC (who appeared with Mr McCreanor) for the first named defendant accepted that this defendant's conviction must attract a custodial sentence, a submission with which the court agrees in view of the gravity of the offence and the circumstances surrounding it.

[103] As indicated earlier, both defendants offered to the Crown a plea of guilty of manslaughter at an early stage of these proceedings which the Crown declined to accept. Each also admitted his involvement in the killing when first interviewed by police – albeit that there may be doubts about whether the police were told about the totality of what occurred. Specifically, the Crown submitted to the court that it should give to the defendants full credit for these matters. In view of this, the court will grant a discount in the period of custody of one third. This will reduce the sentence in Daniel's case to 8 years.

[104] The court will then consider whether there are significant points of mitigation in Daniel's case. In its view these are as follows:

(i) The first defendant clearly played a lesser role than the second defendant, though the exact extent of his role cannot be determined with certainty. The court will treat him as having used fist and feet on Mr Holland only.

(ii) The first defendant has a very limited criminal record. Indeed, he had a clear record at the time of the offence.

(iii) It is probable that without his brother's invitation Daniel would not have got involved in this incident at all.

[105] In the first defendant's case there are a range of aggravating factors such as the fact that he wore gloves when he left the house which tends to demonstrate that he was preparing himself to avoid later detection for his acts; that he knew of the vulnerable state of the deceased before the attack; that he attacked the deceased in his own home; that he attempted to repel Shauna McCann's attempts to intervene; and that he declined to assist the deceased at any stage even when he knew about the severity of the beating he was receiving.

[106] Balancing the points of mitigation against the aggravating factors in Daniel's case leads the court to the view that it should further reduce Daniel's sentence by two years to one of six years.

[107] The sentence of the court in the first defendant's case will therefore be one of six years.

[108] Under the terms of Article 8 of the 2008 Order the court will order that the first named defendant serve a period of three years in custody and three years on licence. The period spent by the first defendant in custody on remand will count against his period of 3 year period in custody.

[109] Under Article 23 of the 2008 Order the court recommends that the following conditions should attach to his period on licence. First, the defendant shall present himself in accordance with the instructions given by the Probation Officer to the PBNI Programme Delivery Unit to participate actively in an alcohol/drug counselling and/or treatment programme during the probation period and shall comply with instructions given by or under the authority of the person in charge. Second, the defendant must engage in a programme of work as deemed suitable by his supervising Probation officer.

Gerard Gaskin - Disposal

[110] In the light of the pre-sentence report and Dr Bownes report the court is satisfied that in the second defendant's case the test of dangerousness has been passed. In other words, the court is of the view that the second defendant represents a significant risk of serious harm to members of the public by the commission by him of further specified offences.

[111] The above conclusion is reached having considered the totality of the facts giving rise to the second defendant's conviction; on an assessment of the jury's disposal of his case; on the basis of the second defendant's criminal record as highlighted already in this judgment; and on a consideration of the expert reports available to the court, especially the pre-sentence report. The court also wishes to make it clear that it had the opportunity to assess the second defendant when he gave evidence before it. That assessment coincides with what has been said about him earlier in this judgement, particularly at paragraphs [55]–[56] *supra.*

[112] The specified offences which the court considers the second defendant may commit include offences against the person where violence may be used and/or offences where serious harm may befall others as a result of reckless behaviour on the second defendant's part.

[113] The court is not of the opinion that a life sentence is needed in the second defendant's case as it does not view the case as one where the element of exceptionality required to make this type of disposal has been demonstrated.

[114] The court has considered the use of an extended custodial sentence but has decided that it would be unlikely to protect the public adequately. Gerard Gaskin has in the past been on periods of probation in the community but he does not appear to have significantly benefited from these. A longer period of probation, in the court's view, based on the second defendant's past performance, would not secure the goal of protecting the public against the risk he represents.

[115] The court considers that in the second defendant's case it should impose an indeterminate custodial sentence. In the court's view this would be the best way of seeking to protect the public against the risk of serious harm which the second defendant represents. Therefore once the second defendant has completed the service of the minimum period which will be specified below, he shall not be released until such time as the parole authorities are satisfied that it is no longer necessary for the protection of the public from serious harm that he be confined.

[116] In calculating the minimum period the court has regard to the various points already rehearsed in this judgment and referred to *supra*. It must consider what should be the notional determinate sentence. Consistently with what has already been said in the first defendant's case, the starting point should be a period of 12 years custody. As in the case of Daniel Gaskin the court will apply a discount of 4

years in recognition of the second defendant's willingness at an early stage to plead guilty to manslaughter and his early admission of his involvement in the killing to police.

[117] The balance of aggravating and mitigating factors in the second defendant's case is different to that in the first defendant's case. Many of the aggravating factors referred to in the case of Daniel apply equally in Gerard's case, but the court must take into account those aggravating factors in the second defendant's case which are particular to him: the use by this defendant of the iron bar brought by him to the location and his central role in instigating the attack on the deceased. Gerard's criminal record is, moreover, far worse than Daniel's and is a further additional aggravating factor. Moreover, it was Gerard who sought to dispose of the iron bar, although Daniel was aware of this occurring.

[118] The mitigating factors in Gerard's case are relatively few. The court will take into account the revelation in the course of the trial that Gerard had himself at a young age been the subject of sexual abuse. It is also prepared to view the second defendant's impairment of mental responsibility as a further factor which should be considered for the purpose of reducing sentence.

[119] Ultimately, the court has set off those factors tending to aggravate the sentence against those factors which tend to mitigate it. When this is done it concludes that the balance lies in favour of an addition to the sentence of a year. This means that the overall sentence in the second defendant's case is one of 9 years.

[120] In accordance with authority the court will determine the minimum period by reducing the notional determinate period of 9 years by half. Accordingly, the minimum period will be 4.5 years. This means that Gerard Gaskin must serve a period of 4.5 years in custody (minus such period as has been spent on remand in custody prior to trial) before he can be considered for release. Once that period has expired it will be for the parole authorities to determine at what point he may safely be released. If he is safe to release at the end of the minimum period (in the opinion of the parole authorities) he can be released then but otherwise he must remain in prison until the public no longer requires protection from the risk of serious harm which he represents.

[121] It is right that it should be recorded that Mr Kelly QC (who appeared with Mr Greene) for the second defendant argued that the case was not one which overcame the threshold of dangerousness. He argued that the case was akin to R v Brook [2012] 2 Cr App R(S) 76. In that case the Court of Appeal of England and Wales was dealing with a case of manslaughter where a plea of provocation had been accepted by the jury. While the judge at first instance had imposed an IPP the Court of Appeal quashed this sentence. They held that an indeterminate custodial sentence should not have been imposed in this case where the only evidence of dangerousness was the nature of the appellant's attack on the deceased. The same applied here, Mr Kelly

suggested. Mr Kelly also argued that in the present case the second defendant's record provided no or insufficient support for a finding of dangerousness.

[122] As is clear from the court's disposal in the second defendant's case, it does not accept these arguments. In the first place, Brook, in the court's view, is distinguishable from the instant case. The appellant in that case had no previous convictions in marked contrast to the present case. But, in any event, it is this court's view that the decision of the Court of Appeal was very much based on the specific facts of that case and rested on the particular impact of the plea of provocation in the circumstances there arising for adjudication. In this court's view, Brook does not expound a proposition that where there is a case of manslaughter based on provocation the defendant cannot be sentenced as a dangerous offender. Indeed, the Court of Appeal says as much at paragraphs 7 and 8 of the judgement. An example of where an IPP was imposed in England and Wales in a provocation case and was upheld by the Court of Appeal is R v Banazek [2010] EWCA Crim 1076. In each case the matter will be one of considering the particular circumstances.

[123] As regards the second defendant's criminal record, it is the court's view that it is relevant and material to the issue of whether the threshold of dangerousness has been passed, as is evident from the court's earlier discussion of this matter. Accordingly, the court rejects any suggestion that it should disregard the second defendant's record for this purpose.

[124] The surmounting of the threshold of dangerousness by the second defendant in this case, in short, is the result of a consideration of the range of factors in this case, taken together in line with the approach, already set out, in Lang. The court has sought to make a determination on this issue on the basis of all the material and information available to it about the second defendant.

Conclusion

[125] The court sentences the first defendant to a determinate sentence of 6 years imprisonment, made up of a custodial element of 3 years (minus time spent in custody on remand) and a licence period of 3 years. After the expiry of the custodial element the first defendant will be released on licence.

[126] The court sentences the second defendant to an indeterminate custodial sentence with a minimum period of 4.5 years. The effect of this has already been explained. This is the equivalent of a notional determinate sentence of 9 years.

[127] The two types of sentence imposed are different and it would be wrong for the two to be seen as the same. While Daniel will be released at the end of the custodial period, Gerard, because of the nature of his sentence, may or may not be, depending on the view formed by the parole authorities, as described above.