Neutral Citation No: [2018] NICC 15 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL10727** *Delivered:* **13/09/2018**

IN THE CROWN COURT AT BELFAST

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-v-

JAMES BRENDAN PATRICK DEVINE

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COLTON J

[1] The defendant was charged with the following offences.

[2] First Count – murder contrary to common law.
Second Count – theft contrary to section 1 of the Theft Act (Northern Ireland) 1969.

Background Circumstances

[3] The background to the case has been set out by Mr David McDowell QC who appeared with Mr Philip Henry on behalf of the prosecution in a helpful opening to the court.

[4] On the evening of Sunday 6 November 2016, at 5:15pm Margaret Lamelas, the sister of the defendant, phoned the police to tell them that her brother had just arrived at her home in Ballymoney, saying that he had murdered his friend James Hughes and wanted to hand himself in.

[5] The defendant, James Devine, had called his mother that morning at around 8.00am. He told her he had blood all over his coat. She asked why and he told her he "stabbed a boy to death". She again asked him why and he made an allegation against the deceased, James Hughes, which is not substantiated. Knowing they were good friends, she feared that the allegation came from his "hearing voices", which he had experienced before. She told him he would have to give himself up. After the phone call she waited for an hour or so, thinking he would give himself up but she was not content and called him back. He sounded "full with drink". He asked could he come up to Ballymoney.

[6] He arrived at about 6.30 pm, while his sister was preparing dinner. He had got the train and bus up from Belfast. He came in and sat down on a sofa in the living room. He had a wad of cash with him that she said was his savings. (This money totalling £6080 or thereabouts forms the basis of the second count on the indictment). He told his sister that the money was his savings and asked her to take it and split it between her and other family members saying that where he was going he would not need it.

[7] They then sat down and had dinner and he told her that he had stabbed Seamus (this was the name by which he knew the deceased). He said "I stabbed him and I stabbed him" and that Seamus was begging for his life, that he just could not stop. He said he had no remorse and repeated the allegation against the deceased he had made earlier. He told her he had been in the deceased's flat in 14D Divis Tower sitting upright in the chair. Later, he told her to ring the police and she did so.

[8] Police attended 14D Divis Tower, Belfast, the home of Mr Hughes, at approximately 7.30 pm. There, they found the door had been forced open. There was a trail of blood from the front door to the kitchen. James Hughes was found dead in the kitchen. He was sitting on a computer chair with his head leaning against the wall. There was dried blood on his chest, head and face. His top was heavily bloodstained and there was a pool of blood around his feet. There were no signs of life. There were two knives, each with its blade 6 or 7 inches long lying on the kitchen floor. It is presumed that these knives came from the deceased's flat.

[9] James Hughes had last been seen on the Friday night, 4 November. It appears that he may have been killed on Saturday night, 5 November. The defendant had been seen on the Sunday morning after 10.00 am, getting out of the lift in Divis Tower. He was very unsteady on his feet and his eyes were bulging giving the appearance that he was on drugs.

[10] The post mortem later revealed that Mr Hughes had died from stab wounds to the neck, chest and abdomen. There were a total of 33 stab wounds in all. There were injuries to the left jugular vein which would have, of themselves, proved rapidly fatal. There were injuries to his lung and liver. There were a number of further stab wounds to his back.

[11] Examination of his left hand showed wounds consistent with defensive action, indicating that he had grasped the blade of a knife. An injury to his forearm suggested he had raised it to protect himself.

[12] Police then attended 20 Meadow View, Ballymoney arriving at approximately 8.00pm. As they contained the area, at approximately 8.35pm, James Devine walked out of the front door unprompted. In fact he had said to his mother he was going to the shop and that he would be back in a minute.

[13] He was detained, and arrested. In response to the caution, he indicated that he understood. He was compliant as he was handcuffed and an evidence protection kit was placed on him. During that procedure he made a number of comments to the police saying, "I murdered him", "I killed a man", "I have to own up to it" and "I killed him because I had to". He said it was a friend and asked where they had found the body. He said that he had murdered him in his flat and had stabbed him over and over again. He again made an allegation against Mr Hughes.

[14] He was then placed in the back of a police car and began to rip off his evidence protection kit and tried to get out of the car, lashing out at the officers. He was verbally abusive towards police, shouting "You're the fucking black watch" and required to be restrained.

[15] Later, in the custody suite at Musgrave station, when he was having his hands swabbed for evidence, he told the police officer that he should "do a good job on this one. It's the one I stabbed him with." He also said that he "went back to him twice but he was not showing any signs of life."

[16] He was interviewed on 7 and 8 November 2016. He gave a prepared statement saying that he suffered from paranoid schizophrenia and his memory from Friday 4 November until his arrest was "not great". He said that on Friday, he got the bus and train from Ballymoney to Belfast. He was drinking Buckfast. He thought he had got his medication as usual from the Falls Pharmacy. He had no memory where he slept on Friday and Saturday night, save for vague memories of being in the house with fellow drinkers from Divis.

[17] He said that on Sunday he walked into James Hughes' flat to find him dead in his kitchen. He said the experience did not feel real, nor did his arrest and detention. He claimed to remember nothing of the killing. Nor did he remember admitting the crime to his mother and sister when he went to Ballymoney.

[18] He said he could not remember what he had said to police and that he was still heavily intoxicated having consumed alcohol on top of his medication, which he acknowledges he should not have done. He said he did not believe he had taken illegal drugs.

[19] He said that Seamus Hughes, one of his best friends, had helped him a lot. He described him as a gentleman and said he had no reason to attack or murder him.

[20] His interviews continued with him occasionally answering questions against his solicitor's advice. He said he did not know if he had murdered Seamus Hughes, but thinks he did it.

[21] Mr Devine had previously spoken of his good friend Seamus Hughes to his sister. He said that Mr Hughes was "wild" good to him and that he would have cooked for him and looked after him.

[22] After interview James Devine was charged with murder, replying "I have nothing to say to that".

[23] Subsequent DNA analysis revealed DNA matching Devine and a blood smear on the lock of the front door of 14D Divis Tower and a bloodstain on the edge of the kitchen sink.

[24] Blood was found on Devine's watch strap and a sample of the money in his possession. It was a mixture of Devine's and Hughes' blood. DNA from blood spots on his boots, waterproof over trousers, hooded jacket and shirt matched that of Mr Hughes. Further smears on the jacket and shirt also matched Mr Hughes. Mr Hughes' blood was also on a knife found in the sink.

History of Proceedings

[25] After being charged with the offences of murder and theft the defendant was detained at HMP Maghaberry from where he was transferred on a hospital order to the Shannon Clinic, Knockbracken Healthcare Park, Belfast under the care of Dr Bunn, consultant psychiatrist. He remains there to this day.

[26] The arraignment in the matter was delayed because there was a concern about the defendant's fitness to plead. In a medical report obtained by the defendant's solicitors from Dr Maria O'Kane, consultant psychiatrist, dated 5 December 2017 she set out the defendant's medical history and expressed the view that he was not then well enough or fit to plead.

[27] As a result of intensive medical and nursing care under Dr Bunn the defendant was subsequently reassessed as being fit to plead. He was arraigned on 9 March 2018 and pleaded not guilty to the counts on the indictment. At the arraignment counsel for the defendant, Mr Greg Berry QC who led Mr Luke Curran, indicated that the defendant fully accepted that he had committed the act of killing Mr Hughes and the only issue that remained outstanding was whether he met the test for the defence of diminished responsibility and further medical evidence was awaited in that regard.

[28] On receipt of further expert medical evidence obtained on behalf of the defendant and the prosecution, the defendant applied to be re-arraigned and on 8 June 2018 he pleaded guilty on Count 1 of the indictment to the offence of manslaughter by reason of diminished responsibility. That plea was accepted by the prosecution and the remaining Count 2 was "left on the books", not to be proceeded with without the leave of the court or the Court of Appeal.

The medical evidence in relation to the defendant

[29] The court received the following medical reports.

(a) Medical reports from Dr Maria O'Kane, consultant psychiatrist, dated 5 December 2017, 18 May 2018 and 20 June 2018 prepared on the instruction of the defendant's solicitors.

(b) Reports from Dr Christine Kennedy, consultant psychiatrist, instructed by the PPS dated 12 February 2018, 21 May 2018 and 18 June 2018.

[30] I am grateful to both Dr O'Kane and Dr Kennedy for their comprehensive and helpful reports and for the expedition with which they were prepared.

[31] With regard to diminished responsibility, section 5 of the Criminal Justice Act (Northern Ireland) 1966 as amended by section 53 of the Coroners and Justice Act 2009, sets out the requirements which must be established in order to establish a defence of diminished responsibility. The defendant must be suffering from an abnormality of mental functioning which –

(a) Arose from a recognised medical condition.

(b) Substantially impaired his ability to do one or more of the things mentioned in the statute.

(c) Provides an explanation for the defendant's acts and omissions in doing or being a party to the killing.

[32] The things referred to in the statute are –

(a) To understand the nature of the defendant's conduct.

(b) To form a rational judgment.

(c) To exercise self-control.

[33] There is no dispute between the doctors that the defendant meets the statutory test.

[34] In her report of 21 May 2018 Dr Kennedy says at paragraph 2.3:

> "Mr Devine has a longstanding diagnosis of paranoid schizophrenia dating from 2006. Paranoid schizophrenia is a mental illness described in the

> International Classification of Diseases 10 at F20.0. It is a serious mental illness characterised by the so-called positive symptoms – presence of delusions (fixed false beliefs) and hallucinations (predominantly auditory but also visual, olfactory or somatic) involving the perception of persecution or grandiosity in one's beliefs about the world – and negative symptoms (such as lack of drive and motivation). Such core symptoms must be present for a minimum of one month. There is much evidence of Mr Devine's chronic persistent mental illness as evidenced in the medical records.
>
> 2.4 Mr Devine also has recorded diagnosis of personality disorder not otherwise specified (F60.9) and of Opiate and Alcohol dependencies (F11.2 and F10.2 respectively). The personality disorder diagnosis is not found on any formal structural diagnostic assessment that I can see. However, his record would suggest longstanding emotional and behavioural difficulties and the presence of problematic traits eg paranoid, emotional unstable, dissocial and anxious/avoidant."

[35] She goes on to say at 2.9:

> "I believe at the time of the killing Mr Devine had an abnormality of mental functioning arising from a recognised medical condition, namely paranoid schizophrenia."

[36] It was her view that delusional thinking induced by this recognised medical condition substantially impaired his ability to form a rational judgment and possibly to exercise self-control, which provides an explanation for his conduct.

[37] In her report of 18 May 2018 Dr O'Kane was of the opinion that at the time of the offence, Mr Devine was experiencing a psychotic relapse of his chronic relapsing psychotic disorder and that he had stabbed Mr Hughes to death on the basis of a fixed and unfounded belief. It was her opinion that at the time he was suffering from a recognised mental disorder, a chronic relapsing psychotic disorder, most likely Schizoaffective Disorder which substantially impaired his ability to understand the nature of his conduct, form a rational judgment and exercise self-control.

[38] Dr O'Kane went further and suggested that the defendant's medical condition was such as to afford him a defence of "loss of control" under sections 54 to 56 of the Coroners and Justice Act 2009 and also that he met the test of "insanity" under the Criminal Justice Act (Northern Ireland) 1966.

[39] The plea in this matter was accepted on the basis of Dr Kennedy's report. She did not agree with Dr O'Kane's opinion in relation to loss of control under sections 54 to56 or insanity. At the hearing, whilst Mr Berry QC indicated that these issues were "in play", he did not say that the defendant should be sentenced on this basis. Having considered the detailed medical reports I preferred the opinion of Dr Kennedy and propose to sentence the defendant on the basis of her opinions which formed the basis of the acceptance of the plea in this case.

[40] It is clear from the contents of both medical reports that the plea to manslaughter by reason of diminished responsibility was properly accepted by the prosecution.

Victim Impact

[41] Before determining the appropriate sentence it is essential that the court remembers the victim in this case and acknowledges the impact his brutal and unnecessary death has had on his friends and relatives.

[42] I have been provided with victim impact statements from Mr Hughes' niece, Nuala Barr, and his sisters, Mairead McVeigh and Veronica Lillis.

[43] It is clear from all that I have read that Mr Hughes was a man with very special characteristics. I note that he was described by the concierge of Divis Tower, Eleanor Smith, as having been an intelligent, kind, generous and thoughtful man who in the past had had mental health problems of his own but had also worked as a psychiatric nurse in England. He had converted to Buddhism some years before and arising from his faith had befriended and helped many people in the community. One of those to benefit from his help and kindness was in fact the defendant whom he had encouraged and supported.

[44] It is clear from the statements of his close relatives that he was a well read, thoughtful human being committed to the Buddhist philosophy of peace which makes his violent death all the more poignant.

[45] Each of the statements I have read in their own individual and eloquent way demonstrate the profound personal grief of each of the authors. They have brought home to me the impact the tragic and traumatic death James has had on his immediate family and others in the community whom he helped and befriended.

[46] Whilst it is the responsibility of the court to deal with the defendant it does so fully cognizant of the impact of Mr Hughes' death.

The appropriate sentence

[47] I am obliged to counsel for their written and oral submissions in respect of the appropriate sentence.

Is a hospital order appropriate?

[48] In a case such as this, given the defendant's medical condition, the first issue to determine is whether or not a hospital order, with or without restrictions, would be an appropriate disposal. It is evident from the contents of the psychiatric reports that both clinicians are of the opinion that the imposition of a hospital order, with or without restrictions, under Articles 44 and 47 of the Mental Health (Northern Ireland) Order 1986 would not be an appropriate disposal. This matter is first addressed in the comprehensive report of Dr Kennedy, dated 18 June 2018.

[49] In her various reports she sets out the defendant's medical history and in particular the care he has received as a result of his transfer to the Shannon Clinic under the terms of Article 54 of the Mental Health (Northern Ireland) Order 1986, where he has remained, since his arrest.

[50] Notwithstanding that treatment it is clear that Mr Devine continues to exhibit active symptoms of paranoid schizophrenia, although these are at a manageable level due to compliance with anti-psychotic medication, abstinence from alcohol and drugs and the managed external environment. It is Dr Kennedy's opinion that his insight into his mental health, his risk profile and the wide ranging nature of the treatment he needs remains poor.

[51] Given his undoubted medical condition it is clear that the court needs to consider the option of a hospital order. The issue is whether or not it is the most suitable means of dealing with the defendant. In this regard the court has a particular focus on the requirement of the protection of the public from serious harm.

[52] In assessing the effectiveness of a hospital order Dr Kennedy refers to concerns she has expressed previously in this type of case.

[53] At paragraph 2.11 of her report she says:

> "However, I would have concerns that Mr Devine might be considered at subsequent Mental Health Review Tribunals (to which he is regularly entitled) to no longer meet the criteria for detention in hospital. It

> is likely that, after a concerted period of medical treatment in a secure psychiatric unit with limited access to destabilisers, Mr Devine will present as mentally stable. He has already demonstrated an ability to avoid community forensic staff and/or misrepresent a situation to the staff supervising him in the community. A tribunal decision based on legal criteria for discharge and detention being met could result in an individual of the highest risk being in the community relatively early with an unrealistic expectation that his risk could be managed by forensic and community mental services alone. There are very limited forensic mental health services and they are not available out of normal working hours or at weekends."

[54] In her view what is required is:

> "A robust risk managed process and a multi-agency approach re safeguarding the public in the future from any recurrence of life threatening harm."

[55] She acknowledges that there is medical opinion elsewhere in the UK that would recommend cases of grave offending mediated through mental illness or managed by forensic mental health services being dealt with by way of restriction hospital orders, citing toxicity of prison for persons with mental illness, ready access to drugs and other hazards etc in the custodial environment, as well as inevitably poorer quality mental health provision than that available in an secure psychiatric unit.

[56] However, she feels that his problem can be addressed in this jurisdiction. At paragraph 2.13 of her report she says:

> "However, local experience is that the offender can be sentenced to custody in Northern Ireland with the needs for specialist mental health care thereafter dictating the location of interventions. If, for example, it was shown over time that Mr Devine's needs could not be met in prison, he could remain in hospital but of course remain a sentenced prisoner with release only determined by PCNI in due course. In practice these more bespoke arrangements allow for the needs of the patient prisoner and for society to be both met."

[57] In this regard I note that this arrangement is in fact already in place and that arising from his medical condition Mr Devine has been referred to the Shannon Clinic, a secure psychiatric unit, where he is receiving the appropriate medical care and attention from Dr Bunn and his staff.

[58] Reassuringly Dr Kennedy says that following a custodial sentence this can continue. She says at paragraph 2.14 of her report:

> "Following custodial sentencing, Mr Devine can be transferred very quickly from HMP Maghaberry back to Shannon Clinic for on-going treatment. (His current bed could be held and his return occur within 2 to 3 days of sentencing). The transfer would occur under the auspices of Articles 53/55/47 of the Mental Health Order (Northern Ireland) 1986 negotiated between psychiatrists and the DOJ NI. Further treatment in my view should involve a referral to the State hospital Carstairs (provider of Northern Ireland high secure care) for assessment of suitability for more specialist input there. Mr Devine could spend time in secure psychiatric hospital(s) as determined by his needs for treatment. It is hard to be certain exactly what treatment he needs at this juncture and how long it might take. At a point where hospital treatment was no longer indicated, he could be returned to custody (if appropriate) to serve whatever tariff might be outstanding, complete any additional offence related work and in due course satisfy the requirements of the Parole Commissioners. There would of course need to be very close working over the years between Shannon Clinic, potentially the State hospital, Prisoner Mental Health and the Prisoner Development Unit at HMP Maghaberry. This could be coordinated through the sentence management process and the equivalent in Health of Promoting Quality Care reviews. The treating consultant psychiatrist, Dr Bunn (or delegate) would need to remain actively involved in the co-ordinating of Mr Devine's care and oversight of his mental health management."

[59] In response to Dr Kennedy's opinion Dr O'Kane in her report of 20 June 2018 says:

> "In point 2.14, page 9 of her report, Dr Kennedy outlines the recommended disposal for Mr Devine, namely a custodial sentence but with a caveat that this should facilitate his transfer to the medium secure Shannon Clinic or the State high secure unit in Carstairs if required, based on his mental state. In addition to this he can be managed through the sentence management process who have access to care and treatment for his psychiatric illness. This option allows him to be safely discharged to appropriate support under the guidance of the Parole Board from the time his tariff is spent. In my opinion this offers the least restrictive and most supportive option to Mr Devine as outlined by Dr Kennedy."

[60] Having regard to the medical evidence it seems to me that the defendant does meet the first test in Article 41 of the Mental Health (Northern Ireland) Order 1986 in that he is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment. However, in my view the second condition required for a hospital order namely that "the court must be of the opinion, having regard to all the circumstances, including the nature of the offence and the character antecedents of the defendant and to the other available methods for dealing with him, the most suitable means of dealing with the case is by means of a hospital order".

[61] The medical evidence, together with the requirements of appropriate punishment and protection of the public points towards a custodial sentence rather than a hospital order.

[62] Whilst the court has some concern about the potential risks of a custodial sentence I am satisfied on the basis of the medical evidence that in fact the defendant will receive the appropriate and necessary treatment if a custodial sentence is imposed on the basis that he will be transferred back to the Shannon Clinic and receive the treatment as envisaged in Dr Kennedy's report. In particular this avoids the risk of the defendant being prematurely released into the community without the necessary protection and support.

[63] Counsel did not dispute that a hospital order would not be an appropriate disposal in this case and the court does not propose to adopt such a course.

Discretionary Life Sentence, Indeterminate Sentence or Extended Custodial Sentence?

[64] Manslaughter is a "specified offence" and a "serious offence" for the purposes of Chapter 3 of the Criminal Justice (Northern Ireland) Order 2008. The provisions of Article 13 of the Criminal Justice (Northern Ireland) Order 2008 are engaged.

[65] The relevant statutory framework is set out in Articles 13 to 15 of the 2008 Order as follows:

> "13.-(1) This Article applies where –
>
> (a) a person is convicted on indictment of a serious offence committed after 15 May 2008; and
>
> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
>
> (2) If –
>
> (a) the offence is one in respect of which the offender would apart from this article be liable to a life sentence;
>
> (b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more of offences associated with it, is such as to justify the imposition of such a sentence,
>
> the court shall impose a life sentence.
>
> (3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall –
>
> (a) impose an indeterminate custodial sentence; and
>
> (b) specify a period of at least two years as a minimum period for the purposes of Article 18, being such a period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[66] Article 14 of the 2008 Order deals with the imposition of an extended custodial sentence in the following terms:

> "14.-(1) This Article applies where –
>
> (a) a person is convicted on indictment of a specified offence committed after 15 May 2008; and
>
> (b) the court is of the opinion –
>
> (i) That there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
>
> (ii) Where the specified offence is a serious offence, that the case is not one which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.
>
> (2) The court shall impose on the offender an extended custodial sentence."

[67] The assessment of dangerousness is dealt with in Article 15 of the 2008 Order in the following terms:

> "15.-(1) This Article applies where –
>
> (a) a person has been convicted on indictment of a specified offence;
>
> (b) it falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences.
>
> (2) The court in making the assessment referred to in paragraph (1)(b) –
>
> (a) shall take into account all such information as is available to it about the nature and circumstances of the offence;

(b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and

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

[68] The first question therefore is whether the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.

[69] The applicable legal principles have been discussed by the Court of Appeal in R v Sean Kelly [2015] NICA 29 and R v EB [2010] NICA 40. The Court of Appeal has endorsed the approach of the Court of Appeal in England and Wales in the case of R v Lang [2005] EWCA Crim 2864. These authorities must of course be read in the context of the matters referred to in Article 15(2) of the 2008 Order. As Gillen LJ set out in the judgment of the court in **Kelly** the following principles can be distilled from the relevant authorities:

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

(2) Factors to be taken into account in assessing the risk include the nature and circumstances of the current offence, the offender's history of offending including not just the kind of offence but its circumstances and the sentence passed, whether the offending demonstrated any pattern and the offender's thinking and attitude towards offending.

(3) Sentencers must guard against assuming there was a significant risk of serious harm merely because the foreseen specified offence was serious. If the foreseen specified offence was not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant."

[70] In terms of the material available to the court in addition to the circumstances of the offence itself and the very detailed medical evidence I also received a pre-sentence report from PBNI dated 14 August 2018.

Pre-sentence Report

[71] The report sets out details of the defendant's background, much of which is included in the medical evidence. The defendant is a 44-year-old single man who experienced a traumatic upbringing. Due to background difficulties in his family life he was placed under the care of social services in his youth including placements in foster care. He has however remained close to his mother who has done her best to support him. As the medical reports I have received confirm the defendant has suffered from poor emotional and mental health since childhood. He has only experienced sporadic employment. He acknowledges that he has abused substances over a long period of time including all manner of illegal drugs and also excessive consumption of alcohol. Prior to committing these offences he was well supported in the community and had engaged with the mental health teams. His health was generally well managed by way of medication although his illness and paranoia would increase when abusing alcohol. The Probation Report records that the defendant has 56 previous convictions, the majority of which relate to assaults on police and public disorder type offending. His offending began in 1992 at the age of 17 and appears to be linked to substance abuse, aggression and his unstructured and chaotic lifestyle. He had been sentenced to a number of relatively short custodial sentences by 2002 at which time his offending escalated in seriousness with the committal of two offences of causing grievous bodily harm with intent. These offences involved the stabbing of two people in a hostel in which he was staying. These apparently relate to assaults committed against fellow hostel residents at a time when he was intoxicated and had his first psychotic episode. Following his release from custody Mr Devine continued to commit offences, primarily assaults on the police.

[72] As well as custodial and suspended custodial sentences Mr Devine was subject to periods of supervision in 1996, 1997, 2002, 2005 and 2010. The 2010 offence involved the possession of an offensive weapon, a 9" kitchen knife. He breached the orders imposed in 1996 and 1997. While probation supervision records are no longer available for the period of probation supervision undertaken in 2002, there is no breach of his custody probation order reflected in the defendant's criminal record. Probation supervision records indicate that a probation order imposed in 2005 was successfully completed, and during this period of supervision, Mr Devine completed the PBNI Anger Management Programme. In relation to a period of supervision which was imposed in 2011 and ended in February 2013, PBNI records indicate he engaged in addiction counselling but re-offended during the period of that order.

[73] On 16 September 2015 Mr Devine was sentenced to a two-year probation order for offences of criminal damage, attempting to inflict GBH, AOABH and assault on police, all of which occurred in the February 2013. This offence involved an attack on a fellow resident in Divis Tower. He forced his way into the flat and attacked him while he was in bed, punching him. These offences represented an escalation in the severity of his previous offending. This current offence occurred during the Probation Order imposed in 2015.

[74] In the Probation Report the defendant is recorded as repeating the assertions in his police interviews that he has a limited memory as to the events leading up to the murder of Mr Hughes. He has a recollection of calling to Mr Hughes' flat and of a heated argument between them. He accepts that his mental health had deteriorated significantly prior to the offence and that he had consumed a significant amount of alcohol during the relevant period. He is recorded as stating that he regrets having taken the life of Mr Hughes and expressed sympathy for his victim's family. He attributes his behaviour to the deterioration of his mental health and acknowledges his abuse of alcohol and drugs were significant factors. He repeats the unsubstantiated allegation against the deceased.

Article 13(1)(b) of the 2008 Order – Dangerousness

[75] In the pre-sentence report PBNI expressed the opinion that Mr Devine does meet the PBNI's criteria as posing a significant risk of serious harm to others. That assessment was based on the following factors:

- History of violence.
- Abuse of substances.
- Diagnosis of paranoid schizophrenia.
- Anti-social behaviour.
- Personality Disorder.

[76] This assessment is supported by Dr Kennedy in her report dated 18 June 2018. Whilst she acknowledges that the assessment of risk of future violence is complex and cannot be forecast with certainty at an individual level she is of the opinion that the risk factors in this case point to the defendant meeting the criteria set out in Article 13 of the 2008 Order. In summary she says:

> "Mr Devine has a very substantial number of historical risk factors, each of which independently link to a risk of future violence. The risk factors of high relevance to future violence and risk management and needing intervention are his violent offences, his alcohol (substance abuse) use, his Paranoid Schizophrenia, his dysfunctional and dramatic background with resultant problem personality traits including particularly his paranoid dissocial and avoiding traits, his conflictual inter-personal relationships, poor insight into mental health, risk profile and need for treatment, and his poor engagement with services."

[77] In her response to Dr Kennedy's report dated 22 June 2018 Dr O'Kane succinctly states that:

> "I concur with Dr Kennedy's account and Mr Devine's history of mental illness, addictions and dangerousness."

[78] The nature and circumstances of the offence committed by the defendant, the factors identified in the pre-sentence report, together with the very clear and, in my view, correct opinion of Dr Kennedy, supported by Dr O'Kane, lead me to the conclusion that there is a significant risk to members of the public of serious harm occasioned by the commission by the defendant of further specified offences under Article 23(1)(b) of the 2008 Order.

Life Sentence?

[79] The next stage in considering the appropriate disposal is the consideration of Article 13(2)(a) and (b).

[80] The offence is one in respect of which the court can impose a discretionary life sentence. Does the seriousness of the offence justify the imposition of such a sentence?

[81] If it does not, then under Article 13(3) if the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender or further specified offences, the court shall impose an indeterminate custodial sentence.

[82] I found this the most difficult aspect of the sentencing exercise.

[83] In determining this issue I am guided by the judgment of the Court of Appeal in the case of R v Sean Hackett [2015] NICA 57. In the course of the judgment Morgan LCJ states as follows:

> "[51] All parties were agreed that the only appropriate custodial sentences were a life sentence or an indeterminate custodial sentence. In both cases the subsequent release of the prisoner on licence is dependent upon an assessment of dangerousness by the Parole Commissioners. The distinctions between the two are that:
>
> (i) the Parole Board has a power to direct the expiry of the licence where the prisoner has been released on licence for a period of at least 10 years; and
>
> (ii) a whole life sentence cannot be imposed by way of an indeterminate custodial sentence.

> The second distinction is not material to the issues in this case.

[52] The approach which the court should take in applying the similar provisions in England and Wales was addressed in R v Kehoe [2008] 1 Cr App R (S) 41 and is helpfully encapsulated in paragraph 17:

> 'When, as here, an offender meets the criteria of dangerousness, there is no longer any need to protect the public by passing a sentence of life imprisonment for the public are now properly protected by the imposition of the sentence of imprisonment for public protection. In such cases, therefore, the cases decided before the Criminal Justice Act 2003 came into effect no longer offer guidance on when a life sentence should be imposed. We think that now, when the court finds that the defendant satisfies the criteria for dangerousness, a life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave.'

[53] Lord Judge CJ returned to this issue in R v Wilkinson (Grant) [2009] 1 Cr App R (S) 628 where he said that the crucial difference between a discretionary life sentence and a sentence of imprisonment for public protection arising at the time of sentence is the seriousness of the instant offence as assessed in the overall statutory context. He continued at paragraph [19]: "In our judgment it is clear that as a matter of principle the discretionary life sentence under section 225 should continue to be reserved for offences of the utmost gravity. Without being prescriptive, we suggest that the sentence should come into contemplation when the judgment of the court is that the seriousness is such that a life sentence would have what Lord Bingham observed in R v Lichniak [2003] 1 AC 903 would be a 'denunciatory' value, reflective of public abhorrence

> of the offence, and where, because of its seriousness, the notional determinate sentence would be very long, measured in very many years."

[84] In this case I do not consider that an extended custodial sentence would be adequate for the purpose of protecting the public. The issue is whether or not the court should impose a life sentence or an indeterminate custodial sentence.

[85] As Mr Berry points out in his submissions the 2008 Order is a "game changer" in terms of the appropriate sentence in diminished responsibility cases. As the Court of Appeal said in Hackett there is no longer any need to protect the public by passing a sentence of life imprisonment for the public are now properly protected by the imposition of the sentence of imprisonment for public protection.

[86] The court should only impose a life sentence in cases where the culpability of the offender is particularly high or the offence itself particularly grave. A life sentence should be reserved for offences of the utmost gravity.

[87] In the course of the sentencing hearing Mr McDowell did not express a view on the degree of culpability of the defendant in this case. Mr Berry submitted that because of his severe mental illness, bearing in mind the opinions of both consultant psychiatrists, particularly that of Dr O'Kane, that the defendant's culpability could be categorised as "medium to low". Specifically, he says that this is not a case of "high culpability".

[88] In considering this matter I must have regard to the fact that the defendant was drinking before the offence and was well aware of the impact of alcohol upon him, having past convictions for alcohol fuelled violence. It appears that he entered Mr Hughes' home and killed him by multiple stab wounds. He indicated to his family that Mr Hughes pleaded for his life but that he did not stop. He also took a sum of money from the victim.

[89] Self-evidently any unlawful killing is a grave matter. The offence can be committed in a very wide range of circumstances as is reflected in the wide range of sentencing disposals open to a court on a conviction. Therefore, any assessment of the appropriate sentence has to be seen in the overall statutory context.

[90] This was a truly shocking offence. The medical evidence clearly indicates that at the very least at the time he committed this offence the defendant suffered from a serious mental illness and that his ability to form a rational judgment and exercise control in relation to the events on the day of the killing was substantially impaired as a result of that mental illness. It is clear that as a result of the 2008 Order, as interpreted by Court of Appeal, the imposition of life imprisonment will be rare in cases such as this. Because of the factors I have identified I do not agree that the

defendant's culpability was low and clearly in those circumstances punishment is appropriate.

[91] On balance however I have come to the conclusion that this case does not meet the high threshold for the imposition of a life sentence.

[92] The court considers that the imposition of an indeterminate custodial sentence under the 2008 Order is sufficient to provide appropriate retribution and deterrence in respect of this manslaughter conviction and to provide protection to the public in the future. In this regard I emphasise the importance of ensuring the protection of the public. Irrespective of any tariff I impose the defendant can only be released on licence if this is approved by the Parole Commissioners who will be best placed to assess the need to ensure that safety of the public. Even if released on licence after serving an appropriate tariff he will be subject to recall should any concern arise about the conduct of the defendant or any risk he poses to the public.

The Appropriate Tariff

[93] Having decided that I should impose an indeterminate custodial sentence it falls on the court to determine the length of the minimum term the defendant will be required to serve in prison before he will first become eligible to have his case referred to the Parole Commissioners for a consideration by them as to whether, and if so, when he is to be released on licence.

[94] The court has gained assistance from the paper on sentencing in cases on manslaughter prepared by Sir Anthony Hart on 9 March 2011.

[95] In the relevant section of his paper, in relation to manslaughter cases involving diminished responsibility he says:

> "Where the defendant was suffering from diminished responsibility at the time of the offence, and the psychiatric history shows that he may continue to be a danger to members of the public in future, sentences of life imprisonment with a minimum term of 5-6 years are almost always imposed, although in one case (Murray) a minimum of 12 years was imposed."

[96] The paper then refers to a number of sentencing decisions in this jurisdiction involving cases of manslaughter. As a general proposition the court should be careful of comparing sentences imposed in other cases which are inevitably fact sensitive.

[97] Much of the relevant ground in this assessment has already been covered in this judgment. The court repeats its view that the defendant's culpability was more

than minimal. This was a truly shocking offence. The defendant entered the deceased's home and stabbed him repeatedly in the face of his pleas to desist. The defendant had consumed alcohol, knowing the effect this has had on his conduct in the past. He stole from the deceased after the killing. It involved the infliction of multiple injuries as a result of a gratuitous frenzied and sustained attack with the use of knives.

[98] The defendant also has a relevant and significant criminal record for crimes of violence.

[99] In the court's view the degree of culpability of the defendant in this case is such as to require a tariff in excess of the 5-6 years referred to in Sir Anthony's paper.

[100] In terms of mitigation Mr Berry urged that the defendant was remorseful for his actions. He referred to expressions of remorse in the pre-sentence report. I am not entirely convinced that this is so. It seems to me the defendant's insight into his conduct is somewhat limited. In any event I consider that any reduction in sentence for remorse would be very minimal in the circumstances of this case. It is also correct that the defendant has had a very difficult and dysfunctional upbringing but again, in the context of such a serious offence, this must be a very minor and mitigating factor.

[101] The key mitigating factor of course is the fact of the defendant's diminished responsibility, as a result of which he was unable to form a rational judgment or exercise control when he committed this horrific offence. This means as a matter of law, the case must be distinguished from one of murder.

[102] In determining the ultimate tariff the defendant is entitled to a reduction by reason of his plea of guilty.

[103] Having regard to the circumstances of this case the court takes the view that this should be considered to be an early plea and this is accepted by the prosecution.

[104] It is a long and firmly established practice in sentencing law in this jurisdiction that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate.

[105] Had this matter been contested and the defendant convicted of manslaughter by reason of diminished responsibility I would have imposed a minimum tariff in the range of 10-12 years, to reflect the aggravating and mitigating factors I have identified. I propose to reduce that tariff to one of 8 years because of the circumstances in which the plea was entered in this case and the defendant's approach to the offence. Overall, I consider that this tariff is one which is appropriate in all the circumstances of the case.

[106] In imposing this tariff I make it clear that before the defendant can be considered for release in to the community it will be necessary for the Parole Commissioners to assess whether or not he can be safely released and in this regard they should have, as a minimum, access to the medical evidence which was available to this court. Furthermore, if that assessment shows that at any time it is safe to release him, sufficient safeguards must be imposed to ensure, so far as this can be achieved, that he does not present a risk to the public after he is released. Even if he is released on licence he will be liable to be recalled to prison if at any time he does not comply with the terms of that licence.

[107] I therefore impose an indeterminate custodial sentence in respect of the offence of manslaughter by reason of diminished responsibility to which the defendant has pleaded guilty. The court specifies a tariff of 8 years pursuant to Article 13(3)(b) of the 2008 Order as the period appropriate to satisfy the requirements of retribution and deterrence in respect of the manslaughter conviction, which tariff must be served before the defendant can be considered for release on licence.