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

Delivered: **19/01/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOHN STANLEY FOSTER

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an application for leave to appeal a sentence of seven years, comprising a custodial period of three years six months and a licenced period of three years six months, passed upon the applicant, John Stanley Foster, by Burgess J at the Crown Court sitting in Downpatrick on 28 January 2014. Mr James Gallagher QC and Mr Noel Dillon appeared on behalf of the applicant while the Crown was represented by Mr Frank O'Donoghue QC and Mr Samuel Magee. The court wishes to acknowledge the assistance that it derived from the carefully constructed skeleton arguments and oral representations submitted by both sets of counsel.

Factual background

[2] The applicant and Mr Mills ("the deceased"), who were known to one another, met by chance in Ballynahinch in the early hours of the morning of 30 September 2012. Both men had been drinking heavily in different licensed premises. Evidence was given of an incident which had occurred between them about a year earlier which had resulted in a confrontation. Since then although their paths rarely crossed, they appear to have shared a mutual degree of antipathy.

[3] The deceased had been given a lift home by a Ms Alison Walsh. She had stopped her car immediately adjacent to the shop front of Xtravision in Dromore Street, Ballynahinch. The applicant was standing in the roadway at that location. There was an initial verbal confrontation between the two men which seems to have lasted for just under two minutes. The applicant then crossed the road and attempted to gain access to the Cloisters Bar. During the course of his police

interviews he maintained that he had been trying to get away in order to avoid any further confrontation. The applicant was refused entry to the premises and returned to the roadway. Further exchanges of a confrontational nature took place between the applicant and the deceased after which the applicant returned to the Cloisters Bar side of the road. The deceased then crossed the road towards the applicant in a manner which the learned trial judge considered to be confrontational and, in his view, warranted the applicant believing that it would be necessary to defend himself.

[4] A scuffle or fight then ensued which lasted approximately 32 seconds. The deceased fell and it was clear from injuries that he sustained that he struck his head forcefully upon the road surface. The evidence of Mr Bentley, Deputy State Pathologist, was that fractures to the eyebrows and to the jaw and neck as well as a large abrasion on the top right hand side of his forehead could be attributed to contact with the road when the deceased fell. The learned trial judge had little doubt but that such injuries would have meant that the ability of the deceased to defend himself in any ensuing fight would have been severely reduced.

[5] CCTV showed that the applicant then straddled the deceased and delivered up to 12 severe blows to the deceased's head as he lay on his back on the roadway. Mr Bentley concluded that fractures to the middle of his face, including the nasal bones and cheek bones, were the result of multiple heavy blows.

[6] The result of the facial fractures was to cause blockage or other damage to the airways, a situation that was potentially compounded by the presence of blood from cuts to the inner parts of both lips and a broken nose. The consequence of the blockage was to deprive the brain of oxygen which led to cardiac arrest and some brain damage although the latter was not the result of any of the direct blows. All attempts to resuscitate the deceased failed despite the efforts of those at the scene and, tragically, the deceased died on Sunday morning 1 October 2012. In terms of the assistance rendered to the deceased at the roadside it is to be noted that the applicant himself returned to the deceased and turned him on to his side in the recovery position. The applicant then remained on the pavement outside the Cloisters Bar until the arrival of the police when he moved off towards the Pizza Perfecto about 12 yards away.

[7] The applicant was subsequently charged with the murder of the deceased on 6 June 2013 a charge to which he pleaded not guilty upon his arraignment on 28 June 2013. The trial commenced in Downpatrick before Burgess J on 25 November 2013 and, on 3 December 2013, after several days of evidence, essentially in response to prompting on the part of the learned trial judge, a count of manslaughter was added to the indictment to which the applicant immediately pleaded guilty.

The applicant's case

[8] On behalf of the applicant Mr Gallagher advanced a number of eloquent and reasoned submissions:

(*i*) It was accepted by the prosecution and the learned trial judge that the physical confrontation had been initiated by the deceased, who, after goading the applicant, crossed the road in a "purposeful manner" to directly confront the applicant and that, during the initial stages of the fight, the applicant was acting in self-defence. Mr Gallagher drew the attention of the court to the fact that, following his arrest, the applicant continued to maintain to the police that he had acted in self-defence and repeatedly asked them to refer to the CCTV in support of his case.

(*ii*) Both men had been drinking heavily for many hours. However, it was accepted that the meeting between the deceased and the applicant on the evening of 30 September 2012 was completely coincidental and, although there does appear to have been a previous incident involving some degree of physical violence in the Dundrum Inn in 2011, it was also accepted that, upon this occasion, neither had sought out the other with any view to confrontation.

(*iii*) It also appears to have been accepted that at least some of the initial blows struck by the applicant might be regarded as having been delivered in self-defence, although it was clear from both the number and severity of the blows delivered that his reaction became both unreasonable and extreme. The applicant had repeatedly made the case to the police that he had acted in self-defence although, after being shown the CCTV, he conceded that he had "gone over the top".

[9] Mr Gallagher reminded the court that the applicant had returned to the deceased when he was lying prone in the roadway and turned him on to his side in the "recovery position". He submitted that such an action clearly reflected remorse on the part of the applicant who continued to demonstrate genuine feelings of contrition and regret during the course of his police interrogations to such an extent that one interviewing officer observed that:

> "You're obviously quite emotionally disturbed by what all has happened or done a lot of tears and crying and what not."

The applicant's previous record

[10] The applicant is now some 33 years of age and he has accumulated ten previous convictions of which two were in respect of serious assault and one of common assault. He also has two previous convictions for disorderly behaviour. The pre-sentence report from the Probation Service confirmed an admission on the part of the applicant that he had been intoxicated when he committed all of his

public order offences although he tended to minimise responsibility through his belief that they had been committed due to the action of the others. The author of the report noted that:

> "He has, however, demonstrated the potential to behave in an aggressive manner, particularly when he is intoxicated, and the sentencing options imposed to date have been insufficient in preventing further offending."

[11] The author noted that the previous convictions had been for offences of a less serious nature and that this offence was a "substantial escalation in seriousness". However, the report also referred to the applicant having demonstrated remorse for the consequences of his actions and a willingness to address the relevant factors. The applicant was not assessed as representing a risk of significant serious harm.

Discussion

[12] In dealing with the general principles to be observed when considering cases of manslaughter Kerr LCJ, in the course of giving judgment in R v Magee [2007] NICA 21, confirmed at paragraph [22] that:

> "[22] It is not surprising that there are relatively few decisions in this jurisdiction which could properly be described as guideline cases for sentencing for manslaughter. Offences of manslaughter typically cover a very wide factual spectrum. It is not easy in these circumstances to prescribe a sentencing range that will be meaningful."

After referring to the apparent increase in prevalence of offences of wanton violence among young males, typically committed when the perpetrators were under the influence of drink or drugs or both, the learned Lord Chief Justice went on to say at paragraphs [26] and [27]:

> "[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 eight and fifteen years' imprisonment. This is, perforce, the most general of guidelines. Because of the potentially limitless variety of factual situations where manslaughter is committed, it is necessary to recognise that some deviation from this range

> may be required. Indeed, in some cases an indeterminate sentence will be appropriate. Notwithstanding the difficulty in arriving at a precise range for sentencing in this area, we have concluded that some guidance is now required for sentencers and, particularly because of the prevalence of this type of offence, a more substantial range of penalty than was perhaps hitherto applied is now required.
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> [27] Aggravating and mitigating features will be instrumental in fixing the chosen sentence within or – in exceptional cases – beyond this range. Aggravating factors may include -
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> (i) the use of a weapon;
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> (ii) that the attack was unprovoked;
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> (iii) that the offender evinced an indifference to the seriousness of the likely injury;
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> (iv) that there is a substantial criminal record for offences of violence; and
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> (v) more than one blow or stabbing has occurred."

[13] In his carefully researched and informative paper on "Sentencing in Cases of Manslaughter, Attempted Murder and Wounding with Intent" delivered to the Judicial Studies Board for Northern Ireland on 13 September 2013 Sir Anthony Hart confirmed that manslaughter was often described as one of the most difficult categories of case in which to sentence because of the wide factual spectrum. After analysing a wide number of guideline decisions both of this court and at first instance, he identified seven broad sub-categories the first of which is probably the most relevant for the purpose of this application and which provides as follows:

> "(*i*) Cases involving substantial violence to the victim. While sentences range from 6 years on a plea to 14 on a contest, pleas in cases at the upper end of the spectrum attract sentences of 10 to 12 years with sentences of 12 years being common. Sentences of 6 to 8 years tend to be reserved for cases where there are strong mitigating personal factors, or the defendant was not a principal offender."

[14] While accepting that the initial blows may have been struck in self-defence, there can be absolutely no doubt in this case but that the applicant did cause

substantial violence to the deceased at a time when the deceased was lying prone and helpless in the middle of the road. Such a conclusion can be firmly based upon the graphic evidence of the CCTV film. As the learned trial judge recorded in the course of his sentencing remarks:

> "[9] The defendant is seen on top of the deceased and to deliver up to some 12 blows aimed at the deceased's head. Medical evidence disclosed extensive fracturing to the middle of the face including the nasal bones and the cheek bones. In Mr Bentley's opinion these were the result of multiple heavy blows to the face. … The court is satisfied that these fractures were caused by the defendant punching the deceased repeatedly in the face. While the defendant may well have found it necessary to defend himself, by his plea and indeed by his own admission in interview, the force used by him was unreasonable, and I am satisfied that given the number of blows and the nature of those blows his reaction was extreme."

All of the central facial bones showed extensive fracturing although it also appears that the deceased may have been vulnerable insofar as he had suffered previous fractures of the skull.

[15] The terrible consequences of the events of the evening in question for members of the deceased's family may be ascertained from the moving and articulate Victim Impact reports compiled by his brother and his children. In particular, the adverse effect which her father's death appears to have had upon his daughter's school career is a matter of great concern.

[16] We have given careful consideration to the conscientious and admirably analysed sentencing remarks of the learned trial judge who recognised the fact that cases of this type are inevitably highly fact specific. We bear in mind that it was not the applicant who initiated the incident, that his resort to self-defence was reasonable at first, that he subsequently expressed significant genuine remorse and that he entered a plea when the indictment was amended to include manslaughter. On the other hand it seems clear that he himself appreciated the risk of becoming aggressive after consuming alcohol, to which he appears to have continued to resort despite the fact that he had been diagnosed as epileptic, and it is clear that he rained a number of heavy blows sufficient to cause extensive facial fractures upon the head of a man who lay helpless beneath him. As Kerr LCJ observed in R v Quinn [2006] NICA 27 substantial sentences are required to deter individuals from this type of wanton violence and to remind them that if their actions go beyond what they in their drunken condition intended they must face the consequences. Deterrent sentences are also required to mark society's outright rejection of such behaviour

and to reflect the inevitable emotional consequences of the loss of a life. We accept that this could be regarded as a severe sentence. However, we do not consider that the starting point of 10 years reduced to 7 in order to reflect the guilty plea and remorse on the part of the applicant could be regarded as either manifestly excessive or wrong in principle and, accordingly, the application for leave to appeal will be refused.