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Judgment: approved by the Court for handing down | *Delivered:* **18/09/2015**
*(subject to editorial corrections)**

IN THE CROWN COURT SITTING AT BELFAST

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REGINA

-v-

PAUL BUSTARD

First defendant;

OLWYN BUSTARD

Second defendant;

JAMES GAWN

Third defendant.

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MAGUIRE J

Introduction

[1] In this case the first defendant pleaded guilty to a charge of manslaughter on 6 May 2015. Originally he had been charged with murder. In connection with the manslaughter to which the first defendant has now pleaded guilty the second defendant has pleaded guilty to a charge of assisting an offender, namely the first defendant, and the third defendant has pleaded guilty to a charge of withholding information about the first defendant knowing that the information would be of material assistance to the police.

[2] Each of the defendants must now be sentenced by the court.

[3] The background to the offences can be summarised shortly for the purpose of these sentencing proceedings. The deceased was a man called Stephen Davidson. At the time of his death he was aged 31. He was killed in the early hours of Sunday 10 February 2013. On that day at around 16.45 hours his body was found at 18 Ballyholme Road, Bangor. He was found by his mother who had been trying without success to get in touch with him earlier that day. The deceased was found in the living room seated on the right hand side of a sofa. There was a large amount

of blood around his left hip. As a result of the body being discovered, police and ambulance services were tasked to the scene. They arrived around 17.15 hrs. Mr Davidson was declared dead on the arrival of a doctor at 18.22 hrs. In the usual way, the scene was secured and an investigation conducted.

[4] The post mortem on the deceased revealed that the cause of death was two knife wounds to the chest. Each had been separately administered. Each was distinguishable at skin level. Below skin level the wounds joined and followed a path towards the heart, entering it. The right ventricle of the heart was transfixed *viz* the knife had gone through to the other side. The deceased also had injuries to his face and body, including superficial incisions to this left hand, one to the palm of the hand. There was also a small incised wound to the back of his right hand.

[5] Both the deceased and the first defendant had had a history of drugs use and had been prescribed methadone, a drug used in order to treat persons addicted to heroin. Both the deceased and the first defendant had been in each other's company on the evening of Friday 8 February and then on Saturday 9 February and had, *inter alia*, on 9 February gone to Boots the chemist in Bangor in order to pick up a supply of methadone. They then went to branches of Clear Pharmacy looking for syringes. At 21.10 hours on the Saturday night the deceased, the first defendant and his girlfriend were seen at a Maxol garage on the Newtownards Road, Bangor. When at the garage, the first defendant allegedly stole flowers from it. This was reported to the police and prompted the police to go to his house. When the police arrived, around 22.30hrs, the deceased and the first defendant's partner were cooking steaks for dinner but when the police searched the house the first defendant could not be found. Thereafter, it appears that the deceased, the first defendant and his partner obtained a lift to the deceased's house at Ballyholme Road, Bangor. Strangely, they appear to have taken the meal which had been in the course of preparation at the first defendant's address with them in food containers. On the basis of statements recorded by police from those who provided the lift, the arrival at Ballyholme Road was about midnight. One of the persons who provided the lift went into the house with the deceased, the first defendant and his partner. He later left the house around 01.00 hrs but while there he witnessed a verbal altercation between the deceased and the first defendant. This arose out of drug related matters.

[6] At 02.31 hours on the morning of 10 February 2013 the deceased sent a text to his girlfriend. He said that he was at home in bed or going to bed and that they would text each other in the morning.

[7] Around 03.00 hours on 10 February 2013 the first defendant was seen staggering down the middle of Ballyholme Road heading towards High Street with his girlfriend.

[8] It may be surmised that the incident which caused the deceased's death occurred between 02.30 hours and 03.00 hours on the morning of the Sunday at the deceased's home at Ballyholme Road, Bangor. It appears that the only persons

present at the house at the time of the incident giving rise to the deceased's death were the first defendant, his partner and the deceased.

[9] The precise details of what occurred in the course of the events leading up to the death cannot be determined with confidence. The first defendant's account is that for no obvious reason the deceased launched a sudden and unprovoked attack on him. This was followed by a short period of calm which gave way to a further attack involving the deceased striking the first defendant with a barbell and producing weapons. In the course of the attack on him, the first defendant says that he sustained severe knife wounds to the fingers of his right hand. According to the first defendant, he reacted in self-defence, by taking a knife from the deceased. This was then used to jab the deceased's chest once. Upon doing so the first defendant says he was able to unlock a door and make his way out of the house. In accepting the first defendant's plea to manslaughter, the prosecution appear to have accepted that initially the first defendant probably had acted in self-defence and that it was only near the end of the incident that the first defendant acted unlawfully by using undue force. Notably the first defendant, when medically examined, had a variety of injuries on him. These may suggest that he had been the subject of an attack made on him by the deceased. For example, he had injuries to his hand which were likely caused by a knife and he also had injuries to the back of his head which may have been caused by a barbell striking him. Such a barbell was found at the scene. The deceased also, it appears, was a person with a significant criminal record containing, in total, some 40 convictions. In particular, there is evidence before the court which is consistent with him having, in the past, been involved in violent conduct. In 2000 it appears that the deceased used a knife to stab a man in the Republic of Ireland. In 2009, he was involved in an incident in Northern Ireland in which he assaulted a man. In the course of the assault, he produced a claw hammer. He also threatened to stab the victim. These events, the court is inclined to accept, add to the plausibility of the deceased at some stage that morning, in circumstances which may never be known, attacking the first defendant. Evidence has also been uncovered that the deceased may have been involved in paramilitary activity. This arose mainly from an examination of his phone after the deceased's death. Various images redolent of paramilitary involvement came to light. However, the significance of such material, in terms of the events of this case, is unclear to the court.

[10] The prosecution and the first defendant agreed the following facts at the time when the first defendant pleaded guilty to manslaughter:

> "1. The defendant, Paul Bustard, unlawfully killed Stephen Davidson shortly before 3.00 am on Sunday 10 February 2013. Death was caused by two stab wounds to the chest which penetrated the heart. The wounds were caused by a knife.
>
> 2. Bustard initially acted in self-defence. Near the end of the incident, he acted unlawfully resulting in

> Davidson's death. During the incident, Bustard received injuries to his hand which were caused by a knife.
>
> 3. Bustard and Davidson were heroin addicts. They had been in each other's company on 8 February and during the day on 9 February, along with Bustard's girlfriend Meabh Farrell.
>
> 4. After the incident, Bustard and Farrell left the house. No assistance was rendered to the deceased.
>
> 5. On the Sunday, Bustard and Farrell left their home and attempted to find accommodation. They stayed at an address in Newtownards before returning to Bangor on Monday 11 February. They were arrested in a public bar at 1.40 pm."

[11] The court has before it detailed evidence as to the course of events after the first defendant left the deceased's house. It is unnecessary to go into this in detail. When he left the house, the first defendant, joined by his partner, staggered up the road to a filling station. At this stage he was bleeding from the injury to his right hand and from an injury to the back of his head. At the filling station he was provided with tissue paper so that he could attend to his injuries. It appears that he declined offers for an ambulance to be summonsed. While he and his partner wanted to get a taxi to bring them home, several taxi drivers refused to take them, presumably because of the blood coming from his injuries. Eventually they were able to get a taxi to take them home where they stayed overnight. Around 04.00 hrs police arrived at their address. This was not in connection with the events the court is dealing with but was because of a report that a male had been seen breaking into their property. In fact it seems to be the case that the first defendant and his partner had had to break into their own house because they had lost the keys to it. While the police were at the house the first defendant, who was intoxicated, told the police that he had been stabbed by a man called "Stevie" in the house at Ballyholme Road, Bangor. He said that the injuries to his fingers were caused by Stevie, who at one point he referred to as "Kirk". The police called an ambulance but he refused to go to hospital or obtain treatment from the paramedics. Notably he made no mention of having stabbed the deceased and neither he nor his partner sought any assistance for the deceased.

[12] At 11.06 hrs on the Sunday morning contact was made with the couple's landlord. This indicated that they needed to get away for a few days and asked whether he might know someone who has a caravan. Contact was also made by text with the third defendant who later (at 14.44 hrs) offered his flat as a place they could stay in. Attempts were also made by the first defendant to contact his solicitor. Around 17.30 hrs the couple left their house with a large number of plastic bags

containing their possessions. They went by taxi to an address in an area called Dicksonia. They remained at this address until at 04.07 hrs on the Monday they were picked up by a taxi and taken to the third defendant's address in the centre of Bangor. They stayed at this address until 10.20 hrs on the Monday morning when they got a taxi back to their own address. When the taxi reached the area of their address, however, they got the taxi driver to reverse and leave the area when they saw that police were present at the address. At this point they directed the taxi driver to take them to the first defendant's parents' house where they left off a number of plastic bags containing possessions. The driver of the taxi was then instructed to take them to the Imperial Bar in Bangor. At 11.45 hrs the first defendant sent the third defendant a text which referred to police being all over Bangor. At 11.51 the third defendant sent a text to say that the deceased was dead. The first defendant responded by saying "He was bout to top me only I fixef jim good an proper, was just a case of self defence me n meabh havda get outa here asap even afraid da go tp ur flat fsin yeds bar". The first defendant and his partner were both shortly afterwards (at 13.40 hrs) arrested by police at another bar in Bangor. Following arrest the first defendant replied "Self defence. Self defence. He stabbed me in the back of the head and tried to cut her. I only meant to cut him in the ribs but it must have went right through".

[13] While it is accepted by the first defendant that he acted with excess force, which given the nature of the wounds found on post mortem, represents an unsurprising concession, it has been suggested on behalf of the first defendant that at the time of incident he was in a state of intoxication due to his extensive use of drugs that day. The court is inclined to accept that this is likely and that there may be strength in the point that the first defendant at the time may not have been thinking straight.

[14] When the first defendant's partner was medically examined following her arrest she was found to have a number of linear wounds on both forearms and on her left upper abdomen. These were attributed to an attack on her by the deceased. Later, however, she admitted that these were, in fact, self-inflicted. This led to a charge being preferred against her of perverting the course of justice, to which she later pleaded guilty and was sentenced.

Aggravated and mitigating circumstances

[15] The principal aggravating factors in this case appear to the court to be as follows:

- The fact that a weapon (a knife) was used by the first defendant to the chest of the deceased.

- The fact that the first defendant stabbed the deceased not once but twice as the post mortem evidence clearly established (contrary to the first defendant's claims that he stabbed the deceased only once).

- The fact that in the aftermath of the incident there was no attempt to enlist any medical assistance for the deceased. The court cannot accept the first defendant's argument that this simply was overlooked in the agony of the moment or that at a later stage there was an attempt to call for an ambulance to assist the deceased. It is plain that when the police arrived at the first defendant's home at 04.00 hrs on the Sunday morning the opportunity was not taken to seek any form of assistance for the deceased.

- The fact that after the events in the house the first defendant and his girlfriend instead of offering themselves to the police instead sought for a day and a half to evade the police. This, in the court's view, is clearly evidenced by the chronology of events after the incident.

- The fact that the first defendant and his girlfriend concocted an account involving the girlfriend allegedly sustaining knife injuries to her arms in order to evade responsibility. The court finds it most unlikely that the first defendant was not complicit in this as he maintains.

- The fact that the first defendant disposed of the knife used in the attack. It has not yet been recovered.

[16] The principal factors in mitigation it seems to the court are:

- As the plea of manslaughter and the general agreed facts indicate the first defendant's actions were probably responsive and in self-defence.

  The first defendant acknowledged from the outset following his arrest that he had jabbed the deceased with a knife.

- The first defendant has expressed remorse to the court. While it is difficult to say whether the remorse is completely genuine or whether it is an expression put forward due to the circumstances in which he now finds himself the court will give him the benefit of the doubt.

The first defendant's criminal record

[17] The first defendant's criminal record contains some 81 previous convictions. It is significant in this case as it depicts an individual who has for long lived a life of crime and demonstrates that the first defendant has regularly committed significant offences of violence. Such offences of violence are evidenced by the following convictions:

1992 Grievous bodily harm with intent: detained in Young Offenders Centre for 3 years.

1993 Assault occasioning actual bodily harm: detained in Young Offenders Centre for 2 years and 6 months.

1997 Assault occasioning actual bodily harm: imprisonment for 18 months.

1997 Assault occasioning actual bodily harm (x2): imprisonment for 3 years concurrent.

2004 Common assault (x2): 3 months imprisonment concurrent.

2006 Attempt to commit grievous bodily harm. Assault with intent to resist arrest. Attempted false imprisonment (x2). Attempted threats to kill (x2). Assault on police: 12 years imprisonment (concurrent sentencing).

2007 Assault on police (x2). Common assault. Possessing an offensive weapon: 4 months imprisonment (concurrent sentencing).

2011 Common assault. Resisting police. Assault on police (x2): 3 months imprisonment (concurrent sentencing).

[18] The court heard in particular and in some detail about the 2006 convictions referred to above. These are the most serious convictions on the first defendant's record. The convictions involved a female aged 17 and a young man who was her boyfriend. The 17 year old had gone with the first defendant to his mother's house. Once there the first defendant locked the living room door and refused to let the female leave. He had ordered her to close the blinds. Mr Bustard then telephoned her boyfriend and ordered him to attend the property or he would "neck his girlfriend". The first defendant went into the kitchen of the flat before re-appearing with a large kitchen knife. He stuck the knife into the floor between the young lady's feet before putting the knife away. The boyfriend arrived a few minutes later. He entered the living room and sat on the sofa next to the 17 year old. The first defendant took mobile phones from the two and smashed them against a wall in the living room. The first defendant was smoking cannabis. When asked by the boyfriend what this was all about he punched him on the head before stabbing him to the right thigh with the knife. At this the girl began to scream prompting the first defendant to stab her to the left inner thigh. The knife was thrust with sufficient force to go through the 17 year old's leg, leaving an exit wound. After approximately 45 minutes a man arrived having been contacted by the first defendant. While this man was present the first defendant again stabbed the boyfriend in the arm and the 17 year old on the left outer thigh. At one point the first defendant bounced the knife off the boyfriend's wrists leaving a cut. Throughout the incident the first defendant said things to both to make them believe

he was going to kill them. At one juncture, he threatened to cut them across the face. Later the two victims were able to escape. When arrested and interviewed regarding these matters the first defendant chose not to answer any questions directed to him by the police.

[19] On behalf of the first defendant, it has been submitted that the above event in 2005, for which the first defendant was convicted in 2006, should not carry any significant weight with the court. This was because it involved, it was argued, a quite different sort of incident than that which the court is dealing with. The present case, it was argued, did not involve initiated violence on the first defendant's part unlike the incident in 2005 and, in the present case unlike the incident in 2005, the first defendant was reacting self-defensively to an attack upon him.

[20] The court has already accepted that in the present case it is plausible that the first defendant may have acted initially in self-defence, but, it seems to the court, that this does not mean that for sentencing purposes the court should not take into account that the first defendant is a person with a significant record, involving violence. The 2005 incident encapsulates the violence the first defendant is capable of, whether or not the occasion which resulted in violence was reactionary or self-initiated.

The pre-sentence report

[21] In respect of the first defendant the court has received a pre-sentence report dated 4 June 2015.

[22] It is based on two interviews with the first defendant together with his criminal record, the depositions in the case and previous probation records in respect of him. It is also based on various other interviews.

[23] The report notes that at present the first defendant is 42 years of age and has had a chaotic lifestyle characterised by chronically abusing drugs and associating with like-minded peers. The first defendant, it is noted, acknowledges his chronic abuse of drugs as a factor which has impeded him all his life.

[24] The author sets out a variety of violent incidents in which the first defendant was involved. Having described the circumstances of the present offence under the heading "Offence Analysis", the author notes that "in interview [the first defendant] has expressed a level of victim empathy but does not appear to fully realise the devastating impact his actions will have had on the victim's family circle". The author assessed the first defendant as "a high likelihood of re-offending" based on a number of factors which are set out. These are:

> "
>
> - Previous violence and willingness to use weapons.

- Relationship instability and poor attachments.
- Substance abuse.
- Poor problem solving skills.
- Prior supervision failure.
- Negative peer influence.
- Lack of insight into offending behaviour.
- Chaotic and unstructured lifestyle.
- Pro-criminal attitudes."

The report goes on to refer to protective factors. These include:

"

- Expresses remorse.
- Some recognition of harm caused.
- Willingness to engage with external controls upon release.
- Acknowledgement of the need for a secure and stable placement if he is to begin to engage in effective intervention.
- His engagement in a variety of prison based programmes."

[25] Under the heading "Risk of Serious Harm" the author explains that an offender is viewed as a significant risk of serious harm when there is high likelihood that he will commit a further offence, the impact of which is serious harm, death or serious personal injury, whether physical or psychological. Reference is then made to a risk assessment meeting which was held to discuss the first defendant's case on 5 June 2015. It is stated in the report that:

> "Mr Bustard's current and previous offending behaviour are very concerning and as such he is assessed by PBNI as presenting a significant risk of serious harm at this time."

[26] The pre-sentence report further notes that as the first defendant presents as a high risk of re-offending "his engagement in therapeutic intervention is essential in order to help him address his offending behaviour and the serious risk he represents". Ultimately the report refers to suggested licence conditions which may be appropriate in the first defendant's case. These include:

"

- That he reside in accommodation approved by PBNI.
- That he participate in any programme of work deemed suitable by PBNI.
- That he engages fully with addiction services.

- That he discloses any developing relationship with a female to PBNI."

Dr Pollock's report

[27] The above report was submitted to the court on behalf of the first defendant. It is based on an assessment carried out on 5 June 2015. The author, Dr Philip Pollock, is a consultant clinical forensic psychologist.

[28] The court has read the report in full but for present purposes will draw out the following particular points from it:

(i) The report was based on a letter of instruction which sought an expert opinion on whether the first defendant represented a significant risk to members of the public of serious harm by committing further offences.

(ii) The report offers the view that the first defendant showed genuine regrets for his actions and their consequences for the victim, the victim's family and, to a lesser extent, himself.

(iii) The report referred to a variety of work the first defendant had been engaged in while in prison; courses completed; courses currently engaged in and so on. These include work to address his substance addiction. Notwithstanding these, the author notes that in September 2014 the first defendant smoked cannabis when on bail which resulted in a breach of bail. Further, he failed a drugs test in prison six months before the report.

(iv) At interview with the author, the first defendant indicated that he was motivated to avoid re-offending in the future and wants to alter his choice of lifestyle activities. The author notes that "Mr Bustard fully acknowledged that such changes would be entirely new developments within his lifestyle choices and that he has not evidenced these types of activities and pursuits in the past while in the community".

(v) Under the heading "Criminal History" the author notes that "Mr Bustard is assessed as a serial offender who appears from his persistent offending to have failed to profit from experiences or punishment."

(vi) It is also noted that the previous assessment of the first defendant demonstrates his severe drug abuse "with difficulties in his personality, particularly with emotional, unstable and dissocial traits" (Dr Brown) and his "polysubstance dependence with significant deficits in his personality of anti-social type with some dissocial traits" (Dr Bunn). In short, Dr Pollock refers to the first defendant as presenting with substance use disorder (poly drug).

(vii) The author accepts that the first defendant shows indications of contemplation of change and has taken some action to engage with services and programmes to actively achieve change in recent times. Dr Pollock notes that this is positive but a relatively new development. He goes on to note that "a cynical perspective might argue that Mr Bustard is engaging with services given his predicament and to influence sentencing … Mr Bustard will be required to translate this voiced commitment into real time changes".

(viii) Dr Pollock listed a range of negative and positive observations in Mr Bustard's case and referred to competing perspectives. It not proposed to set these out here. Ultimately Dr Pollock expressed the conclusion that "taking all information about the offender and the index offending into account, it is the opinion here that Mr Bustard is more likely than not to commit a further anti-social offence in future. He is designated to represent a high likelihood of general re-offending in the future. Furthermore Mr Bustard is designated to be more likely than not to commit a further violent offence in the future. It is here the opinion that Mr Bustard's case fulfils the threshold for significant risk of a violent offence in the future".

(ix) With regard to the interventions to assist the first defendant from re-offending, Dr Pollock says he would benefit from such as (i) continued involvement with addictions services, (ii) referral to the Cognitive Self-Change Programme to address attitudes that condone violent conduct and his propensity to engage in violent conduct, (iii) distress management work and improvement in his emotional regulation skills.

Victim impact

[29] Included in the papers before the court is a victim impact statement written by the deceased's mother. In it she describes the impact of the death of her only child as "horrendous". It is clear that she misses her son greatly and that the incident has shattered her confidence to a substantial degree. In short, her life has been turned upside down. The court will, of course, take fully into account Mrs Davidson's statement.

Dangerousness

[30] 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.

[31] 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 the first defendant, the dangerousness test in the 2008 Order is satisfied.

[32] It is clear from the legal authorities in this sphere that if the dangerousness test is passed in respect of the first 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.

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

[34] 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".

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

[36] 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 <u>shall</u> 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.

[37] 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.

[38] 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.

[39] 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).

[40] 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.

[41] 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.]

[42] 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.)

[43] 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)).

Application to this case

[44] Given:

- The circumstances of the present offence.
- The first defendant's extensive criminal record.
- The pattern of violent offending which can be identified within his record.
- The risk which he represents of further offending.
- The seriousness of potential further offending in terms of violent to possible victims.
- The clear view of the Probation Board that the first defendant is assessed as presenting a significant risk of serious harm at this time.
- The view of Dr Pollock to the same effect.

the court has no hesitation in concluding that the first defendant is a dangerous offender. In the court's view, the tests set in Lang and endorsed by the Northern Ireland Court of Appeal in EB are satisfied.

[45] The above being so, the court has asked itself whether the seriousness of the offence is such as to justify the imposition of a life sentence. The court reminds itself that such a sentence is intended for the exceptional case. In the light of this and taking into account the totality of the circumstances surrounding the offence, the court has concluded that a life sentence is not called for in this case.

[46] In accordance with the scheme of the 2008 Order, the court must now consider which of two options is that which should be preferred: an indeterminate custodial sentence or an extended custodial sentence.

[47] On this issue there has been recent guidance given from the Court of Appeal in the cases of R v Pollins [2014] NICA 42 and R v Cambridge [2015] NICA 4. The court has considered each of these decisions carefully. In the former Morgan LCJ said as follows:

> "[26] The central issue in this case concerned the approach to the imposition of an indeterminate custodial sentence. Although the sentence of imprisonment for public protection has now been abandoned in England and Wales some of the earlier case-law is relevant. We have been significantly assisted by the observations of Lord Judge in Attorney General's Reference (No 55 of 2008) [2008] EWCA Crim 2790. Apart from a discretionary life sentence an indeterminate custodial sentence is the most draconian sentence the court can impose. A discretionary life sentence is reserved for those cases where the seriousness of the offending is so exceptionally high that just punishment requires that the offender should be kept in prison for the rest of his life. It is not a borderline decision (see R v Jones and others [2005] EWCA Crim 3115 approved in R v Hamilton [2008] NICA 27). An indeterminate custodial sentence is primarily concerned with future risk and public protection (see R v Johnston [2007] 1 Cr App R(S) 112}.
>
> [27] However, in a case in which a life sentence is not appropriate an indeterminate custodial sentence should not be imposed without full consideration of whether alternative and cumulative methods might

> provide the necessary public protection against the risk posed by the individual offender. In that sense it is a sentence of last resort. The issue of whether the necessary public protection can be achieved is clearly fact specific. That requires, therefore, a careful evaluation of the methods by which such protection can be achieved under the extended custodial sentence regime".

[48] The question the court in this case has found difficult is whether the present is a case where an indeterminate custodial sentence is the only suitable way of dealing with the future risk which the first defendant represents and the need for public protection.

[49] It seems to the court that a strong case can be made that in the first defendant's case there is good reason to believe that his pattern of past behaviour – his substance abuse, his lifestyle, his willingness to use violence – is unlikely to change. Rather it will simply go on with all the risks that entails. The first defendant has not, it appears, responded to the opportunities he has been presented with in the past. As Dr Pollock put it, the first defendant has "failed to profit from experiences or punishment". Notably, even when the first defendant was on bail he breached his bail conditions by using cannabis and even when in prison he tested positive for drugs. There is, in short, scant cause for optimism.

[50] On the other hand, it is possible that the first defendant may, with assistance, be able to benefit from a programme of work directed at reducing his risk of re-offending. The court has read about positive activity he has engaged in in prison, including work concerned with reducing his substance addiction. It has been suggested that his motivation to avoid re-offending has strengthened and it is asserted that he acknowledges the need for change and his need to make different lifestyle choices. Dr Pollock has stated that he is at the stage of showing indications of "contemplation of change" and has taken some action to engage with services and programmes. The court is not, however, bowled over by this information.

[51] There are interventions which might assist the first defendant to avoid re-offending if he is prepared to devote himself to them.

[52] It is the court's view that the decision it must take as between an indeterminate custodial sentence and an extended custodial sentence is a close call. In the end, the court will opt for an extended custodial sentence as the alternative to what otherwise would be a sentence of last resort.

The elements within the extended custodial sentence

[53] As indicated at paragraph [39] *supra*, there are two elements which go to make up an extended custodial sentence: the first may be described as the appropriate custodial term and the second is the extension period.

The appropriate custodial term

[56] The term "appropriate custodial term" for the purpose of an extended custodial sentence is defined at Article 14 (4) of the 2008 Order. It means a term (not exceeding the maximum term) which is the term which would be imposed in compliance with Article 7. Article 7, in turn, indicates that for the purpose of the length of custodial sentences, the term in question "is that which, in the opinion of the court, is commensurate with the seriousness of the offence".

[57] The court must therefore decide what is the term in this case which is commensurate with the seriousness of the offence.

[58] As regards the offence of manslaughter it has long been recognised that sentencing is a difficult task because offences of manslaughter cover a very wide factual spectrum.

[59] What seems clear is that from the point of view of the sentencer there can no "one fits all" approach and that the exercise necessarily and to a substantial extent is fact specific.

[60] This does not mean, however, that the citation of authority is not worthwhile but it does mean that the court should be careful not to adopt an approach which is unduly rigid.

[61] Both prosecution and defence in the present case have provided extensive citations of authority to the court. All of the cases cited have been carefully considered by the court. In the interests of economy the court will only make direct reference to the principal cases which have been drawn to its attention.

[62] The court will refer briefly to three cases relied on by the prosecution and two cases relied on by the defence.

[63] The leading case, relied on by the prosecution, is that of R v Magee [2007] NICA 21. This was an appeal to the Court of Appeal against a sentence for manslaughter which had comprised 9 years' custody and 3 years' probation. The applicant for leave to appeal had stabbed the deceased in the arm pit area. The evidence was that no more than moderate force had been required to cause the fatal wound. The basis for the plea of guilty was not altogether clear. The defence maintained that the prosecution had accepted that the applicant had acted in self-defence whereas the prosecution put the matter differently. It maintained that it had accepted the plea on the basis that an element of provocation and self-defence could not be excluded. Ultimately the Court of Appeal viewed the case as one where

the applicant had been the instigator of a confrontation between himself and the deceased. There had been a certain amount of "squaring up". However the stabbing had been a wholly disproportionate response to this. The trial judge's sentence was upheld.

[64] In the course of giving its judgment the Court of Appeal dealt more generally with sentencing in manslaughter cases. It indicated that wanton violence among young males while not a new problem was becoming more prevalent. Such offences were typically committed when the perpetrator was under the influence of drink or drugs. In the Court of Appeal's view, there was a need to react by the imposition of sentences which marked society's utter rejection of such offences. In an important passage, which has been applied in numerous cases since (including all of those here being reviewed), Kerr LCJ said:

> "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 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."

[65] Kerr LCJ went to deal with aggravating and mitigating factors in the context of manslaughter cases. He made the point that these will be instrumental in fixing the chosen sentence within – or in exceptional cases – beyond the range. He said:

> "Aggravating factors may include (i) the use of a weapon; (ii) that the attack was unprovoked; (iii) that the offender evinced indifference to the seriousness of the likely injury; (iv) that there is a substantial criminal record for offences of violence; and (v) more than one blow or stabbing has occurred".

[66] It seems to the court that it should in the present case take the guidance of the Court of Appeal into account, though of course it is accepted that the facts of that case are not the same as the present case and the first defendant and the deceased were beyond being referred to as "young males".

[67] The second case drawn to the court's attention by the prosecution is R v Foster [2015] NICA 6, another Court of Appeal judgment. In this case the defendant had been attacked by the deceased and his initial response had been in reaction to this. However it was clear that the response, however reasonable in self-defence to begin with, soon exceeded reasonable proportions, with substantial violence being meted out to the deceased while he lay helpless on the ground. The trial judge had imposed a sentence which had a starting point of 10 years but which had been reduced to 7 years in recognition of the defendant's guilty plea and his remorse. The Court of Appeal affirmed this sentence. Notably Foster's record was not as bad as the first defendant's in this case and the probation service in that case did not view him as representing a risk of significant serious harm. The Court of Appeal plainly did not consider that the defendant's drunken condition at the time of the assault should mitigate his offence.

[68] The decision in R v Harwood [2007] NICA 49 is the third prosecution citation to which the court wishes to refer. This was another stabbing case involving three stabs to the chest where only a moderate degree of force had been required to inflict serious injuries and cause the deceased's death. The prosecution accepted the plea of guilty to manslaughter in this case because it could not exclude the possibility that the defendant was defending himself at the relevant time from a knife attack aimed at him by the deceased. The defendant, however, over reacted so taking his actions beyond reasonable self-defence. In this case the trial judge had imposed a sentence of 13 years which was affirmed by the Court of Appeal. Higgins LJ, on behalf of the court, considered that a starting point of 17 years may have been justified but that there should be a reduction to 13 years in view of the defendant's guilty plea.

[69] Harwood's sentence was the stiffest of those cited to the court.

[70] The defence drew the court's attention to two first instance decisions both of which involved stabbings which led to the deceased's death and the acceptance by the prosecution of guilty pleas to manslaughter. In each case following a plea the court sentenced the defendant to 5 years.

[71] R v Johnson [2014] NICC 2 was a decision of Weir J. The defendant pleaded guilty to the manslaughter of his brother. Both had drunk a lot and a row broke out between them. The defendant equipped himself with a knife. He pursued his brother out of the house and there was a struggle. The brother collapsed outside the house and, after a time, died. The pathologist's reports indicated that in the course of events there were wounds sustained by the deceased consistent with the use of a knife but these did not suggest a deliberate attack with intent to cause fatal injury. Nor, it appeared, did they seriously incapacitate the deceased. Rather it was the deceased's intoxication coupled with the fight which had occurred which would have been likely to increase blood loss. In this case the defendant had no relevant criminal record and the court referred to his "many excellent personal qualities". What had brought him down was his addiction to alcohol. The defendant has not been assessed by the probation service as dangerous.

[72] It is the court's view that this case very much revolved around its own particular circumstances.

[73] The other case cited by the defence was R v Cassidy [2009] NICC 57. This was a judgment of Hart J. The defendant pleaded guilty to manslaughter of a man whom she had been living with. On the evening in question there had been extensive drinking and the deceased was drunk. A row developed and not for the first time the deceased allegedly berated and threatened the defendant. At one point she claimed he lunged at her. She had obtained a knife. Death resulted from a single knife wound to the chest. This would not have required the use of more than moderate force. The defendant's case was that she had acted in self-defence and that the infliction of the wound was by accident. The defendant was a troubled woman with children who had been viewed by the probation service as being at the low end of a medium risk of re-offending. She was treated as having no relevant record.

[74] Again it seems to the court that this case cannot be divorced from its specific facts.

Assessment

[75] With the exception of Magee, the various cases cited may best be viewed as illustrations of the operation of the law in this area. Magee itself is guidance which the court should have regard to but operate flexibly.

[76] It would, in the court's view, be a mistake to seek to try to reconcile one decision with another and it declines to engage in an exercise of this nature.

[77] The court's outlook is that it should consider the present case within its own factual matrix and to assess where it should take its place in the spectrum of disposals having regard to the range of aggravating and mitigating circumstances. In this regard the court accepts that the case is one where at the crucial moments the first defendant was reacting self defensively to an attack on him by the deceased. In this attack, the court reminds itself, the first defendant sustained injuries, including ones inflicted on him, in all probability, by a knife. However, there can be no running away from the fact that stabbing the deceased twice to the chest and so ending his life by causing wounds which compromised key organs and so resulted in more or less immediate death went beyond what was reasonable.

[78] In the court's view, moreover, this is plainly a case where the significant aggravating factors outweigh those factors there are in mitigation. The court must, in particular, single out the failure on the part of the first defendant on a prolonged basis to seek medical assistance for the deceased, despite there being numerous opportunities to do so.

[79] The court's conclusion, having weighed in the balance, the range of factors in this case is that a sentence of 10 years is the appropriate sentence in this case after a contest. This figure has been arrived at following a case specific analysis and has not been dictated by the deployment of any particular formula. It is a figure which is within the range set in Magee.

[80] The 10 year figure is after a contest and therefore requires moderation by reason of the first defendant guilty plea to manslaughter. The court considers that this plea was entered at the first opportunity as until the prosecution indicated a willingness to accept such a plea it was reasonable for the first defendant to pursue the course of contesting the charge of murder.

[81] The court sees no reason why it should not adopt the view that the case is one which should attract significant discount, as from his first interview with the police, the first defendant made the case that while he had stabbed the deceased it had been in self-defence. He did not acknowledge the use of excess force at this time.

[82] The court will reduce the proposed sentence in all the circumstances to one of 7 years and sets it as the appropriate custodial term.

The extension period

[83] The role and function of the extension period has been explained recently in the Court of Appeal in R v Cambridge (*supra*) by Gillen LJ. He said:

> "The extended period will be for such period as is considered necessary to protect the public from serious harm. The protective element should not be fixed as a percentage increase of the commensurate sentence. On the contrary, the protective element should be geared specifically to meet the statutory objective i.e. the protection of the public from serious harm and to secure rehabilitation of the offender to prevent further offending. The punishment element cannot dictate the period required to ensure the necessary level of protection. The two aspects of sentence thus serve different purposes".

[84] The extension period in the case of a violent offence, which is this case, cannot exceed 5 years.

[85] Gillen LJ in Cambridge also explained how the extended custodial sentence works. He stated:

> "the effect of this is that after the appellant has served the relevant part of a sentence, the Secretary of State

> shall release him if the Parole Commissioners direct his release when they are satisfied it is no longer necessary for the protection of the public that he should be confined. The relevant part of the sentence is one half under Article 28 of the 2008 Order. The Secretary of State, on the recommendation of the Parole Commissioners can revoke the applicant's licence and have him recalled to prison. Thus the offender may, in the events that happen and depending on his behaviour, have to serve the whole or part of the extension period."

[86] In the present case protecting the public from significant harm carries great weight with the court. The first defendant will need to apply himself fully over an extensive period of time if he is successfully to reduce the risk he currently represents. The public will require protection for a substantial period. Accordingly, the court is of the view that an extension period of 4 years is appropriate and proportionate in this case.

[87] It follows from the above that the extended custodial sentence which the court imposed on the first defendant is one of 7 years imprisonment with an extension period of 4 years.

The cases of the second and third defendants

[88] The second defendant is the first defendant's mother. She has pleaded guilty to one offence as follows: that on 11 February 2013, knowing or believing the first defendant to be guilty of an offence, she did an act with intent to impede his apprehension or prosecution *viz* she sent him a text advising him to turn off his phone.

[89] It appears that the first defendant and his partner had been in contact with the second defendant. This contact was aimed at seeking to get her to convince the first defendant's father to take him to Boots to obtain methadone on the evening of Sunday 11 February 2013. At 02.02 hrs the second defendant texted the first defendant's partner saying:

> "Tell Paul not to use his phone … switch it of (sic)."

The call was intended to impede the first defendant's apprehension.

[90] The second defendant is 64 years old. She is divorced from her husband (the first defendant's father) though recently they have become engaged. According to the pre-sentence report, when interviewed by the author of it, she was confused and had a poor recollection of events. It appears she has suffered from a problem of alcohol dependence and has a significant history of physical and mental illness. Her

likelihood of re-offending was assessed in the pre-sentence report as medium. She is not assessed as posing a significant risk of serious harm. She has a previous conviction for theft but it is now of some vintage (1996).

[91] While offences of the type the second defendant has pleaded guilty to are usually of a high degree of seriousness, especially where the principal offence itself is one of considerable gravity, as here, there is scope in the second defendant's case for the court to take the view that her action was in the nature of a one-off, taken when she was in a situation of considerable pressure. It does not seem to have had a significant impact on the course of justice.

[92] In the court's view, the offence merits a term of imprisonment but the court will follow the recommendation in the pre-sentence report and will suspend the sentence.

[93] The court, therefore, sentences the second defendant to a term of 1 year's imprisonment suspended for two years.

[94] The third defendant, James Gawn, like the last defendant, faces a single charge, to which he has pleaded guilty.

[95] The charge is that he withheld information from the police knowing or believing that the first defendant had committed an offence and that the information in question would be of material assistance to police in securing the first defendant's apprehension or prosecution. The effect of failing to provide the information was to delay the police's arrest of him.

[96] The background surrounding the offence arose out of contact made by the first defendant with the third defendant on the evening of Sunday 11 February 2013. The first defendant, it appears, told the third defendant that he had been stabbed the night before and that it was the deceased who stabbed him. Perhaps strangely in these circumstances the third defendant responded by texting:

> "Holy fuck mate. I thought he was a nice fella. Are you ok chum. Go and stay in the flat if you need to mate."

It appears that the third defendant also agreed to lend the first defendant money.

[97] On the following day, having discovered that the deceased was dead, the third defendant was in further contact with the first defendant, telling him to stay put in the flat.

[98] When questioned by police on the evening of 13 February 2013 the third defendant admitted he was a friend of the first defendant but he claimed to be unaware that the first defendant has been in his flat.

[99] Despite the knowledge the third defendant had concerning the first defendant's whereabouts, after he knew that the deceased had died in an encounter with the first defendant, he took no step to inform the police of where the first defendant was, so delaying the first defendant's arrest.

[100] The third defendant is a man aged 51. He is currently unemployed. In 2011 he was the victim of a severe physical assault when he was set upon by a gang. He has had a long history of alcohol abuse but maintains he does not now drink as much as he did. He has been diagnosed as suffering from bi-polar disorder. He is separated from his wife.

[101] The third defendant has a criminal record which contains some 14 offences. Most of these are alcohol related. The last offence on his record is 2011.

[102] The pre-sentence report assesses the risk the third defendant presents as being one of a low likelihood of re-offending. The current offence is described as having been committed "within a serious yet also unique context". This creates the foundation for the author's view that "there is no evidence to suggest he is likely to commit an offence of this type in the future."

[103] The pre-sentence report notes that the third defendant has reduced his alcohol consumption in recent years. He is not viewed as a significant risk of serious harm.

[104] The court will deal with the third defendant's case in the same way as it has dealt with the second defendant's case. While the offence is one of a high degree of seriousness, especially given the gravity of the principal offence, the court considers that there is scope to treat the offence as a unique one which had only a limited impact on the police investigation and on the course of justice.

[105] In these circumstances a prison sentence is warranted. The court will sentence the third defendant to a term of 1 year's imprisonment but will suspend the sentence for a period of 2 years.