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COURT DISMISSES APPEAL AGAINST SENTENCE BY STEPHEN McKINNEY

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal against sentence by Stephen McKinney for the murder of his wife Lu Na McKinney. In doing so, the court provided guidance to sentencers dealing with murder cases in a domestic context where coercive and controlling behaviour is established.

Background

At 01:15 on 13 April 2017, Stephen McKinney ("the appellant") made a 999 call stating that his wife had fallen into the water at Devenish Island, Lough Erne. When the police and RNLI arrived they found Lu Na McKinney ("the deceased") in the water immediately beside the boat. The police and RNLI carried out CPR but she was pronounced dead at 02:52. A port-mortem report found that the deceased died as a result of drowning and that she did not have any injuries consistent with a struggle. A blood sample showed that she had Zopiclone, a sedative, in her blood and that this was above the therapeutic level.

The appellant's case was that his wife had fallen into the water and, despite him jumping in, he had been unable to save her. The prosecution relied on a number of strands of circumstantial evidence including differing accounts given by the appellant and his demeanour during the 999 calls as well as in the aftermath of the incident. The appellant was convicted by a jury on 21 July 2021 of the murder of his wife. He appealed against his conviction on seven grounds which it was submitted individually and collectively made the guilty verdict unsafe.

Legal Principles

The guiding authorities in Northern Ireland for the imposition of the appropriate term in murder cases is *R v McCandless & Others* and the *Practice Statement*[2].

The trial judge made three significant factual findings in this case:

- The appellant was coercive and controlling towards the deceased. The judge was satisfied that the appellant "manipulated and controlled the deceased and treated her in an abusive and degrading fashion throughout the marriage."
- The murder was premeditated.
- That she was satisfied the jury accepted the appellant lifted the deceased and placed her in the water. She found that the jury must have been satisfied that the appellant did not reboard the boat but rather doused himself with bottled water to make it look like he jumped into the lough and did not rescue his wife.

[1] The panel was Keegan LCJ, O'Hara J and McFarland J. Keegan LCJ delivered the judgment of the court.
[2] See Notes to Editors.

The trial judge determined that the case attracted a higher starting point based on the deceased's vulnerability due to the fact that she was under the influence of the sedative Zoplicone and considered there were a number of other serious aggravating features:

- The murder was premeditated.
- The children were both present when the murder was carried out.
- The murder was the culmination of the coercive behaviour of the appellant throughout the marriage . Although there was no violence in the marriage the appellant subjected the deceased to coercive control and forced her to engage in a number of sexual activities against her will.
- The appellant breached the trust of the deceased and he used his position as her husband to lure her to the location where he then killed her.

The trial judge did not consider there were any matters by way of mitigation.

The Appeal

Ground 1: The trial judge erred in finding as a fact a version of events which maximised the culpability of the defendant and excluded all other possibilities that would have also been consistent with the jury's verdict.

The appellant contended that the trial judge was bound to sentence on the "factual basis which on the evidence is most favourable to him." He said there was no way of knowing the factual basis upon which the jury convicted him and that the "Route to Verdict" did not refer to the many strands of circumstantial and expert evidence heard during the trial. This, he said, left open the possibility of multiple factual scenarios. The appellant submitted that the factual basis on the evidence, which was most favourable to him, and therefore the basis upon which he should have been sentenced was:

- That he pushed the deceased into the water as the result of a heated argument on the deck.
- That he knew she couldn't swim and was vulnerable as a result of consuming Zopiclone.
- That in pushing her into the water he intended <u>at best</u> to cause her really serious harm.
- That he entered the water in a failed attempt to save her before she drowned.

The prosecution argued that an examination of the Route to Verdict was of no assistance as it established only that the jury found the appellant to have been guilty of murder beyond a reasonable doubt, and that any attempt to discern the basis of that finding, or what strands of evidence the jury accepted or rejected, was a pointless exercise.

The court agreed. It said it did not need to know these things because they were completely irrelevant to the judge's role in determining the factual basis for sentencing the defendant. The prosecution also argued that the appellant had not advanced a detailed argument as to why the trial judge was wrong to come to the conclusions that she did as regards the evidence. The prosecution further contended that there was no evidence for the factual basis now put forward by the appellant that the murder could have been on the basis of a heated domestic argument which

ended with the appellant pushing the deceased into the water. This scenario was never put during the course of the trial.

The court considered that the trial judge acted reasonably in rejecting the assertion that the offence could have occurred in a heat of the moment argument. It had never been made during the trial and would not have been a scenario contemplated by the jury. The court said the evidence heard at trial in relation to the impact the ingestion of Zopiclone would have had on the deceased would render the possibility of a heated exchange an unlikely scenario in the event that this scenario had been advanced. It held that the trial judge could not be faulted in her analysis and the factual findings she made:

> "Properly analysed the trial judge gave careful consideration to all of the evidence put before the jury on a circumstantial basis and satisfied herself as to the basis upon which the verdict was returned. The trial judge acted entirely reasonably in her conclusions that there had been premeditation in respect of the murder, and in her reading of the facts of the case. It goes without saying that she was best placed to make this assessment given the evidence heard over a number of months before her and that she gave careful consideration and analysis of all the evidence put before the jury on a circumstantial basis and satisfied herself as to the basis upon which the verdict was returned. We therefore dismiss this ground of appeal."

Ground 2: The trial judge erred in selecting the upper starting point of 15/16 years as identified in McCandless.

The appellant took issue with the application of the *McCandless* guidance and submitted that the only factor in the Practice Statement that was arguably present in this case was that the victim was vulnerable due to her consumption of Zopiclone. He argued that this did not automatically require the upper starting point and that the correct starting point should have been 12 years which could then be varied upwards to reflect the relevant aggravating factors. The appellant also argued that the "failure of the prosecution to identify the unlawful act which caused the deceased to be in the water cannot exclude the possibility that this is a case which lies on the borderline between manslaughter and murder, a factor which would mitigate toward the normal starting point."

In reply the prosecution argued that the trial judge was entitled to conclude that the case fell to have a starting point in the upper category. It said the deceased was vulnerable due to her consumption of Zopiclone and as a result she had limited functionality and poor co-ordination, slower reaction times and it would have been dangerous for the deceased to be near water. The prosecution also rejected the assertion that the evidence reflected a case close to the border with manslaughter, stating that "on the contrary the evidence justified a conclusion of a premeditated plan to kill a vulnerable victim."

The court held that the trial judge had directed herself properly - each case is fact specific, and the guidelines were not to be imposed in a "rigid compartmentalised structure." It said the benefit of *McCandless* in this jurisdiction is that it allows sentencers flexibility in the myriad of different scenarios that come before the courts. The court also considered that the trial judge's conclusions as regards the vulnerability of the deceased due to the Zopiclone, and the rejection of the scenario involving an argument immediately preceding the deceased entering the water were entirely rational in the circumstances of the case and followed careful and considered analysis.

Consequently, there was no basis for sustaining an argument that this case was "close to the border with manslaughter":

> "Without doubt this was a case that required a higher starting point as per *McCandless*. To be clear, the normal starting point of 12 years is reserved for cases involving a spontaneous quarrel or loss of temper between two people known to each other. This category does not include cases which involve some build up or history, be that through a difficult marriage or relationship or cases involving a planned or premeditated attack. We find this ground of appeal to be weak and totally unrealistic and hence it is dismissed."

Ground 3: The trial judge erred in finding that the appellant's actions were premeditated and that this therefore constituted an aggravating feature.

The appellant contended that the strands of circumstantial evidence were insufficient to establish beyond a reasonable doubt that the offence had been premeditated or that there had been any degree of planning involved. He again asserted that the possibility of a heated domestic argument, which ended with the appellant spontaneously pushing the deceased into the water, could not be ruled out. He accepted that the circumstantial evidence provided a "lurking suspicion" of premeditation but refuted that this was to the required standard to sustain the trial judge's assessment.

The court said the trial judge had concluded that there had been premeditation after having heard the entirety of the evidence across a 12 week trial including: the impact of the Zopiclone; the appellant's awareness of the deceased's vulnerable state having consumed Zopiclone; the appellant's knowledge of the deceased's inability to swim; the mooring of the boat at a quiet, otherwise deserted jetty; the fact that the trip had been planned by the appellant; the tone of the 999 call made by the appellant; the appellant's failure to try and retrieve the deceased's body despite it being within touching distance once police arrived; his use of bottled water to douse himself to give the impression he had entered the water to rescue the deceased; and the various versions of the event he had given to police and other persons. It said there was no suggestion made during the course of the trial, or prior to the trial during interviews, that the appellant and the deceased had had a heated argument which ended with the appellant pushing his wife into the water. The court said the effects of Zopiclone ingestion on the deceased would have impacted on her ability to engage in such a heated argument. In light of this, the court said it was reasonable for the trial judge to conclude that there had been premeditation and as a consequence that it was reasonable for her to regard that premeditation as an aggravating factor. This ground of appeal was dismissed.

Ground 4: The trial judge erred in finding that the presence of the appellant's children was an aggravating factor as they did not witness the incident.

This ground was conceded to a degree by the appellant and the court said this was rightly so. The appellant argued that as the children did not witness their mother's murder that it was a "question of the degree to which this fact should increase the sentence."

In her finding regarding the children the trial judge did not assert that the children had witnessed the incident. However, she found that their presence, in light of the other circumstantial evidence, was a deliberate act by the appellant and that this led to the additional trauma to them of being in close proximity to what was an emergency situation whereby their mother's well-being would

have obviously been in serious jeopardy, and which ultimately led to her death. The court commented that:

> "Their presence in a small boat, at a remote location in the middle of the night at the time of their mother's death and their subsequent removal by police to the local hospital all would have been an incredibly traumatic event for the young children. This ground of appeal is dismissed."

Grounds 5 & 6 were taken together. Ground 5 was that the trial judge erred in finding that the admitted bad character evidence was a relevant matter for sentence and finding that it amounted to coercive control. Ground 6 was that the trial judge erred in equating coercive control with "cruel and violent behaviour by the offender over a period of time" as set out in para 14(e) of McCandless.

The appellant contended that the trial judge had admitted bad character evidence in order to correct a false impression given by him as regards the state of the marriage. He refused any suggestion that he engaged in any non-consensual sexual activity with his wife and said this was a serious allegation which went beyond a suggestion that he was coercive or controlling. He relied upon the fact that the Practice Statement is silent as regards coercive and controlling behaviour, and that the closest feature to that is "cruel and violent behaviour" which, he submitted was not present on the evidence in this case.

The court, however, said the substance of this argument was unconvincing for the following reasons. First, twenty years on from *McCandless,* society and the legal system in this jurisdiction are much more alive to the issue of domestic abuse and coercive control. Indeed, the appellant's conduct would now amount to an offence of domestic abuse, contrary to the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 ("the 2021 Act"). The court also commented that, sadly, Northern Ireland is a jurisdiction where there is an extremely high number of femicide cases coming before our courts which include features of coercive and controlling behaviour.

The murder of the appellant's wife occurred on 13 April 2017, and he was not convicted until 21 July 2021, and not sentenced until 25 November 2021. This pre-dated the commencement of the 2021 Act, sections 15 and 16 of which did not come into operation until 21 February 2022. This meant there would have been no requirement for the trial judge to make a statutory ruling on aggravation by way of domestic abuse. Sections 15 and 16 of the 2021 Act now require sentencers to have specific regard to aggravation as to domestic abuse:

- Section 15 provides that an allegation of a charge being aggravated by domestic abuse may be specified on a charge, which is not a count of domestic abuse itself. If the court finds both the charge and the aggravation as having been proven then the judge should state so in court, upon conviction and the conviction will be recorded as having been aggravated by domestic abuse. The sentence should then reflect that aggravation.
- Section 16 sets out the parameters of when a charge may be regarded as having been aggravated by domestic abuse.

The court said that had these provisions been applicable at the time of sentencing in this case they would have undoubtedly resulted in the trial judge finding aggravation by virtue of the coercive and controlling behaviour of the appellant during the marriage. It added that even without this the trial judge could not possibly have left this element out of account in this case:

> "Lest there is any lingering uncertainty, we consider that coercive and controlling behaviour in a relationship is a specific aggravating factor which should be read into para [12] of the Practice Statement which *McCandless* applies. In any event the statutory provisions we have discussed require its consideration."

The appellant accepted he "had an unconventional sex life and could occasionally be rude and speak to, and about, his wife in derogatory terms" but argued that this did not amount to cruel and violent behaviour which he contended is required by *McCandless*. The prosecution, however, referred in detail to the content of the bad character evidence in question, namely SkypeChat25. The prosecution suggested that references by the trial judge about the deceased being coerced to engage in sexual acts against her will was not an accusation of rape per se, but rather they were sexual acts that the deceased would not have wished to engage in. The prosecution, however, argued that such behaviour would now be a criminal act in and of itself. The court said its conclusion on these points had not been difficult to reach:

> "That is because the trial judge gave careful and due consideration as to the nature of the bad character evidence and having done so reasonably concluded that not only was it reprehensible conduct for the purposes of bad character legislation, but further that it was evidence of the appellant's coercive control over the deceased and could be regarded as an aggravating feature for the purposes of sentencing. Given the content of the SkypeChat25 transcript she was correct in her assessment of the appellant's conduct towards the deceased in relation to the sentencing exercise under paragraph 14(e) of *McCandless*, which covers cruel and violent behaviour. As pointed out by the trial judge, the *McCandless* guidelines are not exhaustive nor are they to be applied rigidly and further that, as coercive control was not an offence on the statute books at the time of the *McCandless* case, it was reasonable for the trial judge to have drawn an analogy between that and the guidance under para 14(e) regarding "cruel and violent behaviour by the offender over a period of time."

The court also noted that the jury heard evidence from the deceased's solicitor which included the deceased's claims of infidelity, hurt and humiliation and that the marriage was over, and she wanted a divorce. This evidence was admitted without challenge and was clearly relevant to motive. The court considered that the trial judge was entirely correct in finding that the appellant engaged in coercive and controlling behaviour over his wife, and that this amounted to cruel, if not physically violent, behaviour which would satisfy the criteria as set out in *McCandless* for it to be considered an aggravating factor. This ground of appeal failed.

In terms of mitigation, the court found no merit in the point raised that there had been no pre-sentence report in this case. This had been agreed position at the trial. It was also submitted that the trail judge erred in failing to reduce the sentence because of the appellant's clear criminal record. The court was not attracted to this argument:

"In this jurisdiction it has long been recognised that being of good character and not having a criminal record is something which stands in a defendant's favour when it comes to sentencing and may lead to a reduced sentence. However, this factor is clearly less relevant where the offending is very serious, as it is here. In cases of murder, having a clear record is not a mitigating factor which is likely to affect sentence. Have a bad criminal record will be an aggravating factor which is likely to increase sentence, but the converse does not apply in these most serious of cases. Accordingly,

we reject the suggestion that the appellant's sentence for murder should have been reduced by reason of his clear criminal record."

Conclusion

The court concluded, without any hesitation, that the tariff imposed by the trial judge was not manifestly excessive, nor was there an identifiable error of principle or law: "In fact, this sentence signalled a permissible move towards higher tariffs to reflect the horrific elements of this crime. "

The court noted that the trial judge had summarised the chilling circumstances of this case when she said.

> "36 … You abused, degraded her and manipulated and controlled her and finally you took away her life. It was such a needless and cruel action. You were someone that she should have been able to trust but you betrayed that position, and you ended her life prematurely. Lu Na has been described as gentle and light-hearted. She was only 35 years old when she died. You denied her the opportunity of seeing her kids grow up, going to college and having their own families. You have left a trail of destruction in your wake. Two young children have been deprived of their mother's love, care and support. As a result of your action you have left the children without parents to care for them and their lives have been irreparably damaged. You have also deprived a mother of her only child and have caused endless hurt and pain by your cruel and callous actions. You committed this crime in cold blood. It was carefully planned and ruthlessly executed and carried out when Lu Na was entirely defenceless."

The court said it echoed these sentiments and reiterated the position that this case should now make clear that pre-existing coercive and controlling behaviour is also an aggravating factor that will result in higher sentences when domestic murders of this kind occur and that sentences of 20 years and possibly more will be upheld. It concluded by reflecting that no sentence can right the wrong that has been done to this defenceless victim and her family in China. It praised Lu Na's daughter who it said has shown great resilience with the help of those supporting her and wished her well:

> "We hope that the sentence imposed provides some solace and satisfaction that the appellant was brought to justice and properly punished for his cruel actions which he thought he could get away with. Accordingly, we dismiss this appeal."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).
2. The minimum term is the term that an offender must serve before becoming eligible to have his or her case referred to the Parole Commissioners for them to consider whether, and if so when, he or she can be released on licence. Unlike determinate sentences, the minimum term does not attract remission. If the offender is released on licence they will, for the remainder of their life, be liable to be recalled to prison if at any time they do not comply

with the terms of that licence. The guidance is set out in the case of R v McCandless & Others [2004] NI 269.

3. A Practice Statement [2002] 3 All ER 417, sets out the approach to be adopted by the court when fixing the minimum term to be served before a person convicted of murder can be considered for release by the Parole Commissioners. It also sets out two starting points. The lower point is 12 years, and the higher starting point is 15/16 years imprisonment. The Practice Statement also identifies that in very serious cases a minimum term of 20 years and upwards may be appropriate with cases of exceptional gravity attracting a minimum term of 30 years. The minimum term is the period that the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. This sentencing exercise involves the judge determining the appropriate starting point in accordance with sentencing guidance and then varying the starting point upwards or downwards to take account of aggravating or mitigating factors which relate to either the offence or the offender in the particular case.

ENDS

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