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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT IN NORTHERN IRELAND

THE KING

v

STEPHEN McKINNEY

Mr McCartney KC with Mr Halleron (instructed by Roche McBride Solicitors) for the Appellant
Mr Weir KC with Mr Chambers KC (instructed by the Public Prosecution Service) for the Crown

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Before: Keegan LCJ, O'Hara J and McFarland J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] On 21 July 2021 the appellant was convicted following a trial by jury at Dungannon Crown Court heard before McBride J ('the trial judge') in respect of one count of murder contrary to common law. On 15 December 2023 we dismissed an appeal against conviction for the reasons given in our judgment reported at [2023] NICA 84. On 25 November 2021 the appellant was sentenced to a mandatory life sentence with a minimum tariff of 20 years. The appellant now appeals that sentence with leave of the single judge.

[2] This judgment provides guidance to sentencers dealing with murder cases in a domestic context where coercive and controlling behaviour is established.

Factual Background

[3] We have set out the background previously and so we simply summarise the core features of the case for the benefit of the reader of this judgment. The appellant

was the husband of the victim, Lu Na McKinney. On 6 April 2017 the appellant and the victim hired a day boat at the Manor House Marina. They went out on the boat for a few hours on that date. The appellant subsequently booked a cruiser on 11 April 2017 for a family holiday from 12-14 April 2017. Lu Na could not swim.

[4] On 12 April 2017 the appellant, the victim and their two children boarded the hired boat. That evening they went for a short boat trip before returning to moor for the night at the west jetty on Devenish Island, Lough Erne. No other boats were moored there.

[5] At 1:15am on 13 April 2017 the appellant made a 999-call seeking assistance, stating that his wife had fallen into the water. Police and RNLI personnel were tasked to the scene and arrived shortly afterwards. They saw a body in the water almost touching the stern of the hire boat which was moored at the jetty. They retrieved the victim from the water and carried out CPR. The victim was then conveyed by boat and ambulance to the South Western Acute Hospital, Enniskillen. The victim was pronounced dead at 2:52am.

[6] The post-mortem evidence revealed that the victim had died as a result of drowning. There was no evidence of a struggle. The deceased had Zopiclone (a sedative) in her blood at a level above that regarded as therapeutic.

[7] The appellant's case was that the deceased had fallen into the water and, despite jumping in, he had been unable to save her. He said in interview that she had awoken from her sleep, went out to the back of the boat to check if it was moving and had then fallen in. 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.

Legal Principles

[8] Both the appellant and the prosecution agree that the guiding authority in this jurisdiction for the imposition of the appropriate tariff in murder cases remains *R v McCandless and others* [2004] NICA 1. This is a case which has been applied as a guide to sentencers in murder cases in our jurisdiction for the last 20 years and was utilised by the trial judge in this case.

[9] We remind ourselves of what *McCandless* says. First, it applies a Practice Statement made by Lord Woolf. The underpinning policy position which informed the Practice Statement is explained in paras [6]-[8] of the judgment. Specifically, the Practice Statement followed the Sentencing Advisory Panel in England & Wales consultation paper entitled "Tariffs in Murder Cases." The panel proposed dividing such cases into three groups, a central group representing what might be regarded as a standard case, with higher and lower groups of cases lying in a bracket significantly varying above or below the central group in culpability. Of course, this approach has now been overtaken in England & Wales by the Sentencing Act 2020.

[10] We have no such statute in Northern Ireland and so sentencers here continue to utilise *McCandless* as the trial judge did in this case applying para [9] which reads as follows:

> "[9] The *Practice Statement* set out the approach to be adopted in respect of adult offenders in paragraphs 10 to 19:
>
> ***The normal starting point of 12 years***
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> 10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.
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> 11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).
>
> ***The higher starting point of 15/16 years***
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> 12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing

a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary 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.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty.

Very serious cases

18. A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are

> several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.
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> 19. Among the categories of case referred to in para 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime or the offence was a terrorist or sexual or sadistic murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate."

The trial judge's sentencing remarks

[11] The trial judge heard this case over a number of months and so was obviously well placed to assess the evidence that both she and the jury heard. She identified the approach she took at para [20] of her ruling as follows.

> "[20] Whilst the court is enjoined to sentence the defendant in accordance with the verdict of the jury, its obligation is to sentence him on a factual basis which has been established beyond a reasonable doubt by the evidence and the defendant is then entitled to be sentenced on the factual basis which on the evidence is most favourable to him."

The above approach is correct.

[12] Thereafter, the trial judge made four significant factual findings as follows:

(i) First, she then found as a fact at para [15] that the appellant was coercive and controlling towards the deceased. She said that she was "satisfied that the defendant manipulated and controlled the deceased and treated her in an abusive and degrading fashion throughout the marriage."

(ii) Second, she found that this murder was premeditated.

(iii) Third, at para [22] the trial judge said that she was "satisfied the jury accepted the defendant lifted Lu Na and placed her in the water." She also said that if she was wrong about that the alternative possibility is that he pushed her into the water.

(iv) In para [23] the trial judge also found that the jury must have been satisfied that he did not reboard the boat but rather doused himself with bottled water to make it look like he jumped into the lough. Therefore, she found that the appellant did not rescue his wife.

[13] After having established the factual basis for her sentence, the judge considered the victim impact, referencing a statement from Lu Na's cousin and the profound effects upon her children one of whom is now tragically deceased. Lu Na's daughter has had to deal with the enormity of this event but has done so with the help of social services.

[14] Paras [29]-[35] explain the judge's rationale for reaching her decision that the appropriate minimum tariff in this case should be 20 years. We set these paras out *in extenso* as follows:

> "[29] I have determined this case attracts a higher starting point based on Lu Na's vulnerability due to the fact that she was under the influence of Zopiclone. I therefore will not use this as an aggravating feature as that would amount to double counting in coming to the appropriate tariff.
>
> [30] Nonetheless, I consider that there are a number of other serious aggravating features.
>
> [31] Firstly, I am satisfied beyond reasonable doubt on the basis of the evidence that the jury considered the murder was premeditated. The defendant planned the boat trip. He knew that his wife could not swim, and he knew that she took Zopiclone. He knew the effects Zopiclone had on her, and I am satisfied beyond reasonable doubt that the evidence in this case established that he organised a boat trip so that he could murder her. He knew that she either would not awaken from Zopiclone once placed in the water and would die by drowning or he knew that she could not react to the dangers presented once pushed into the water because of her consumption of Zopiclone and therefore she would drown. I am further satisfied that he moored at a remote location so that he could murder his wife without there being any eyewitnesses and in circumstances where he would have a cover story that she accidentally drowned. After he murdered her, the defendant put in chain a number of carefully prepared scripts that she had died by accident which he relayed on the 999 call, to various

witnesses and to the police. He further attempted to point any finger of suspicion away from him by stating he attempted to rescue her when in fact he failed to take any such action but rather doused himself with water to make it look like he had jumped into the Lough to save her.

[32] Secondly, the children were both present when this murder was carried out. It is accepted the children did not witness the incident, but they were present. The children were not present by accident but rather by design as the defendant sought cynically to use his children's presence to throw suspicion away from him for the murder he intended to commit. As a result the defendant put his children through the additional trauma of being removed by the police from their cabin in the middle of the night from an island in circumstances where they must have known their mother was gravely ill or deceased. Indeed, reference to the impact of being present at the scene of the incident is something the defendant's daughter specifically refers to in the victim impact statement prepared on her behalf.

[33] Thirdly, I find that Lu Na's murder was the culmination of the coercive controlling behaviour of the defendant throughout the marriage. Although there was no violence in the marriage the defendant subjected his wife to coercive control and forced her to engage in a number of sexual activities against her will. When confronted with the prospect of her divorcing him with all its consequences the defendant murdered her. It was recognised in *McCandless* that particularly in domestic violence cases the fact that the murder was a culmination of cruel and violent behaviour by the offender over a period of time is an aggravating factor. Although *McCandless* refers to violence, I consider that this category should also cover cases of coercive controlling behaviour. Coercive control is something that has only recently been recognised as a crime in this jurisdiction and I consider that it is a particularly aggravating factor in cases involving the death of a spouse.

[34] Finally, I consider that the defendant breached the trust of Lu Na. The defendant was the person she lived with, loved and married and he used his position as her husband to lure her to the location where he then killed her.

> [35] I do not consider there are any matters by way of mitigation."

This appeal

[15] Six grounds are raised which we deal with in the following sequence:

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

[16] In advancing this ground the appellant accepts that it is a matter for the trial judge to establish a factual basis for the conviction but contends that the trial judge is bound to sentence on the "factual basis which on the evidence is most favourable to him." The appellant states that there is no way of knowing the factual basis upon which the jury convicted. The appellant refers to a number of cases, which deal with scenarios whereby the jury may be questioned as to how they reached their verdict and also when alternative counts are left to them.

[17] The appellant refers to the "Route to Verdict" and comments that it does not refer to the many strands of circumstantial and expert evidence heard during the trial, and thus contends that this leaves open the possibility of multiple factual scenarios which would be consistent with the verdict returned.

[18] The core argument raised by the appellant is that the factual basis upon which he was sentenced by the trial judge was not sustained by the evidence and had the result of maximising his culpability. The appellant argues that in her assessment of the evidence the trial judge made findings in respect of issues which had been hotly debated during the trial. The appellant submits that the factual basis on the evidence, which is most favourable to him, and therefore is the basis upon which he should have been sentenced is as follows:

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

[19] The prosecution's responding argument states that it is a matter for the judge alone to determine the factual basis upon which to pass sentence. The prosecution contend that the cases referred to by the appellant are of little or no assistance to the issue at hand as manslaughter was not offered as an alternative, nor were alternative offences offered to reflect alternative factual circumstances. The prosecution assert that their case has always been that this case involved premeditated murder.

[20] The prosecution argues that an examination of the Route to Verdict is of no assistance as it establishes 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, is a pointless exercise. We agree that we do not need to know these things because they are completely irrelevant to the judge's role in determining the factual basis for sentencing the defendant.

[21] Further, the prosecution argues that the appellant has 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, stating that the trial judge was best placed to make the assessment of the evidence given the length of time she had devoted to the trial. The prosecution refers to the methodical and reasoned nature of the trial judge's analysis of the evidence and argue that it is for the appellant to establish how that analysis was so wrong as to fall outside of her discretion in reaching the conclusions she did based on the evidence. The prosecution state that the appellant has not established this.

[22] The prosecution contends that there is 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. The prosecution note that this scenario was never put during the course of the trial. It is a spurious argument and entirely without foundation.

[23] In dealing with these arguments we have already remarked that the trial judge at para [20] of her sentencing remarks stated that the appellant was entitled to be sentenced on the factual basis of the evidence most favourable to him. Having considered the defence submissions at the time the trial judge rejected their analysis of the facts based on the jury's verdict, in particular the proposition that the offence could have occurred in a heat of the moment argument and push followed by the appellant's failed attempt to rescue the deceased, as no evidence had ever been adduced, nor was sought to be adduced, regarding any such argument. We consider that the trial judge acted reasonably in rejecting this assertion as that case had never been made during the trial and would not have been a scenario contemplated by the jury. To our mind, 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.

[24] Hence, having considered the competing arguments on this foundational issue we consider that the trial judge cannot be faulted in her analysis and the factual findings she made which we have recorded at para [12] herein. To our mind there is no identifiable scenario upon which the jury could have convicted the appellant which did not involve premeditation notwithstanding Mr McCartney's suggestions put during oral submissions.

[25] 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. To our mind, 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. We remind ourselves that this was also a case in which the defendant did not give evidence. It goes without saying that the trial judge was best placed to make an 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

[26] At the outset we note that we are not being asked to depart from *McCandless* in this case. Rather, the appellant takes issue with the application of the *McCandless* guidance.

[27] In this regard the appellant submits that out of the eleven factors referred to in the Practice Statement that only one is arguably present in this case, namely that the victim was vulnerable due to her consumption of Zopiclone. The appellant argues that the presence of one or more factors does not automatically require the upper starting point and refers to a number of cases which had relevant factors present, but which did not attract the upper starting point. The appellant argues that the culpability of defendants in the cases referred to was higher than that of the appellant in the present case, and states that the correct starting point was 12 years which could then be varied upwards to reflect the relevant aggravating factors.

[28] The appellant also argues 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."

[29] In reply the prosecution argue that the trial judge was entitled to conclude that the case fell to have a starting point in the upper category and that her vulnerability fell within the definition as per *McCandless*. The prosecution refer to the trial judge's finding that the deceased was vulnerable due to her consumption of Zopiclone and that as a result she had limited functionality and poor co-ordination,

slower reaction times and that it would have been dangerous for the deceased to be near water.

[30] The prosecution also rejects 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."

[31] We have considered these competing arguments. Having done so the first conclusion we reach is that the trial judge directed herself properly that each case is fact specific and that the guidelines were not to be imposed in a "rigid compartmentalised structure." The benefit of *McCandless* in this jurisdiction is that it allows sentencers flexibility in the myriad of different scenarios that come before the courts.

[32] Further, the trial judge concluded that the higher starting point was warranted in all the circumstances of the case. The trial judge's assessment of the evidence which may be relevant to imposition of the upper starting point include the finding of premeditation with associated planning, as well as her finding regarding the deceased's vulnerability due to the ingestion of Zopiclone.

[33] To our mind, 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 of the case. Consequently, there is no basis for sustaining an argument that this case was "close to the border with manslaughter." These findings are unimpeachable.

[34] 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

[35] The appellant concedes that premeditation, where found, would amount to an aggravating factor. The appellant accepts that the prosecution advanced several strands of circumstantial evidence but contends that these were insufficient to establish beyond a reasonable doubt that the offence had been premeditated or that there had been any degree of planning involved. In support of this ground the appellant again asserts 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.

[36] The appellant also maintains that the trial judge's finding is doubly prejudicial as it robs the appellant of a potential spontaneous factual basis for sentencing, while also providing an additional aggravating factor for sentencing. The appellant accepts that the circumstantial evidence advanced provided a "lurking suspicion" of premeditation but refutes that this was to the required standard to sustain the trial judge's assessment.

[37] Against these arguments the prosecution relies upon para [31] of the trial judge's sentencing remarks which deals with her findings as regards premeditation. The prosecution submit that the trial judge's careful analysis and subsequent conclusions are "unassailable." The prosecution also again rejects the appellant's assertion that the offence could have been committed as a spontaneous act.

[38] As per para [31] of her judgment, referred to by the prosecution, the trial judge comprehensively concluded that there had been premeditation after having heard the entirety of the evidence at trial over a number of months 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.

[39] As has been noted, 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. This scenario had never been suggested. In light of the expert evidence with regard to the effects of Zopiclone ingestion on the deceased her ability to engage in such a heated argument would as a matter of common sense have been severely impaired.

[40] In light of all of the above it was reasonable for the trial judge to conclude that there had been premeditation and as a consequence that it was unavoidable for the trial judge to regard that premeditation as an aggravating factor. This ground of appeal is 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

[41] This ground is now conceded to a degree by the appellant and rightly so. The appellant argues 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." The appellant also argues that the trial judge's reference to a breach of trust as an aggravating factor was an overlap that could lead to "over counting", as there was a "concurrent level of harm caused to children as a result."

[42] The prosecution contend that the presence of the children was an aggravating factor which properly should be considered in increasing the sentence from its starting point. The prosecution also refers to the trauma the children would have experienced that night and the fact that they had potentially formed part of the appellant's plan in murdering their mother by adding a "degree of authenticity" to his claim that the deceased's death was an accident.

[43] 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. As adumbrated by the prosecution, 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 will be taken together.

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

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

[44] In support of these grounds the appellant refers to the trial judge's ruling on the admittance of the bad character evidence, noting that she had rejected its admittance under propensity of coercive control, but rather admitted it in order to correct a false impression given by the appellant as regards the state of the marriage. Therefore, the appellant refutes any suggestion that he engaged in any non-consensual sexual activity with his wife, stating that this is a serious allegation which goes beyond a suggestion that he was coercive or controlling.

[45] The appellant relies upon the fact that Lord Woolf's Practice Statement contained within *McCandless* is silent as regards coercive and controlling behaviour, and that the closest feature to that is "cruel and violent behaviour" which, the appellant submits, was not present on the evidence in the case. The substance of this argument is unconvincing for the following reasons.

[46] First we make the obvious point. Twenty years on from *McCandless* our society and legal system is now much more alive to the issue of domestic abuse and

coercive control. Indeed, as the prosecution rightly point out the appellant's conduct would now amount to an offence of domestic abuse, contrary to section 1 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021. Sadly, we are also a jurisdiction where there is an extremely high number of femicide cases coming before our courts which include features of coercive and controlling behaviour.

[47] The murder of Lu Na occurred on 13 April 2017. The appellant was not convicted until 21 July 2021, and not sentenced until 25 November 2021. The 2021 Act received Royal Assent on 1 March 2021 but as per The Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 (Commencement No. 1) Order (Northern Ireland) 2022 sections 15 and 16 did not come into operation until 21 February 2022. They would not therefore have been in operation at the time of the appellant's conviction, so there would have been no requirement for the trial judge to make a statutory ruling on aggravation by way of domestic abuse. Now sentencers must have specific regard to aggravation as to domestic abuse by virtue of the following statutory provisions.

> "**Aggravation as to domestic abuse**
>
> 15—(1) It may be specified as an allegation alongside a charge of an offence against a person ("A") that the offence is aggravated by reason of involving domestic abuse.
>
> (2) An offence as mentioned in subsection (1) does not include the domestic abuse offence (see section 1).
>
> (3) Subsection (4) applies where—
>
> (a) an allegation of aggravation is specified as mentioned in subsection (1), and
>
> (b) the aggravation as well as the charge is proved.
>
> (4) The court must—
>
> (a) state on conviction that the offence is aggravated by reason of involving domestic abuse,
>
> (b) record the conviction in a way that shows that the offence is so aggravated,
>
> (c) in determining the appropriate sentence, treat the fact that the offence is so aggravated as a factor that increases the seriousness of the offence, and

(d) in imposing sentence, explain how the fact that the offence is so aggravated affects the sentence imposed.

(5) However, if—

(a) the charge is proved, but

(b) the aggravation is not proved,

A's conviction is as if there were no reference to the aggravation alongside the charge.

What amounts to the aggravation

16—(1) For the purposes of section 15, an offence committed by a person ("A") is aggravated by reason of involving domestic abuse if the three listed conditions are met.

(2) The listed conditions are—

(a) that a reasonable person would consider the commission of the offence by A to be likely to cause another person ("B") to suffer physical or psychological harm,

(b) that A—

(i) intends the commission of the offence to cause B to suffer physical or psychological harm, or

(ii) is reckless as to whether the commission of the offence causes B to suffer physical or psychological harm, and

(c) that A and B are personally connected to each other at the time.

(3) An offence committed by A can be aggravated by virtue of this section whether or not—

(a) the offence is committed against B, or

(b) the commission of the offence actually causes B to suffer harm of the relevant sort.

(4) Nothing in this section prevents evidence from being led in proceedings for the offence about harm actually suffered by B as a result of A's commission of the offence.

(5) The references in this section to psychological harm include fear, alarm and distress."

[48] Section 15 states 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 under section 1 of the 2021 Act. Both the charge itself, and the allegation of aggravation on the grounds of domestic abuse must be proven before the charge can be regarded as having been aggravated on that basis. 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.

[49] Section 16 sets out the parameters of when a charge may be regarded as having been aggravated by domestic abuse. The test is whether a reasonable person would consider that the victim was likely to suffer physical or psychological harm as a result of the commission of the offence by the defendant. The defendant must also have either intended that harm (physical or psychological) would be caused to the victim as a result of the commission of the offence or been reckless as to whether that harm would be caused.

[50] Had the above provisions been applicable at the time of sentencing they would to our mind have undoubtedly resulted in the judge finding aggravation by virtue of the coercive and controlling behaviour of the appellant during the marriage.

[51] Even without this statutory imprimatur the judge could not possibly have left this element out of account in this case. It is nonsensical to say that as *McCandless* does not specifically mention this type of behaviour a judge is precluded from considering it. *McCandless*, as we and previous senior courts have said, should not be applied mechanically. It is a guide only which must be adapted to modern circumstances and move with the times. Also, the facts will dictate the outcome and ensure that a just result is reached in a particular case.

[52] 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.

[53] Returning to the facts of this case, the appellant accepts that he "had an unconventional sex life and could occasionally be rude and speak to and about his wife in derogatory terms" but argues that this does not amount to cruel and violent behaviour which he contends is required by *McCandless*.

[54] The prosecution refers in detail to the content of the bad character evidence in question, namely SkypeChat25, which was the subject of judicial scrutiny, not only by the trial judge, but by the panel during the course of the appeal against conviction at paragraphs 30-35. The prosecution suggests 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 were sexual acts that the deceased would not have wished to engage in.

[55] The prosecution argue that the trial judge was justified in her conclusion equating coercive and controlling behaviour with cruel and violent behaviour at para [33] of her judgment. The prosecution points out that such behaviour would now be a criminal act in and of itself.

[56] Our conclusion on these points has 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.

[57] Given the content of the SkypeChat25 transcript the trial judge 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."

[58] We note that the jury heard evidence from the deceased's solicitor Helen Salmon, which included the deceased claims of infidelity, hurt and humiliation. The account from the deceased was that the marriage was over and that she wanted a divorce. This evidence was admitted without challenge and as the single judge states at para [44] of his judgment was clearly relevant to motive.

[59] There is one valid point raised by Mr McCartney that it may not be accurate to say that the controlling and coercive behaviour occurred from the outset of the marriage. That may be correct. However, we are satisfied that there was ample evidence of this type of behaviour at least in the latter stages of the marriage. Therefore, the trial judge's finding is not undermined and nor is the ultimate

sentence affected given all of the aggravating factors that the judge found in this case which we agree with.

[60] Accordingly, we consider that the trial judge was 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 also fails.

[61] As to mitigation, we find no merit in the point now based upon the fact that there was no pre-sentence report in this case. That was an agreed position which experienced defence counsel Mr O'Rourke KC took no issue with at the sentencing hearing and no criticism is made of him.

[62] Mr McCartney also submitted before us that the trial judge had erred by failing to reduce the sentence in light of the appellant's clear criminal record. We are not attracted to this late argument. The Sentencing Council of England & Wales refers under "Good character and/or exemplary conduct" as follows:

> "This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character may reduce the sentence.
>
> However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor."

[63] 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. Having 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

[64] In light of the above and notwithstanding the grant of leave (which was generous), we conclude without any hesitation that the tariff imposed by the trial judge was not manifestly excessive, nor is 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.

[65] The judge summarised the chilling circumstances of this case at para [36] of her ruling 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."

[66] We echo these sentiments and reiterate the position 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.

[67] We conclude this judgment by reflecting that no sentence can right the wrong that has been done to this defenceless victim and her family in China. We also praise Lu Na's daughter who has shown great resilience with the help of those supporting her. Hopefully she will be able rebuild her life. 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.

[68] Accordingly, we dismiss this appeal.