Neutral Citation No: [2024] NICA 65 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12613** *ICOS No:* **20/075812** *Delivered:* **21/10/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

JOHN PAUL WHITLA

IN THE MATTER OF A REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2002

Mr Frank O'Donoghue KC with Ms Nicola Auret (instructed by the Public Prosecution Service) for the Crown
Mr Eugene Grant KC with Mr David McKeown (instructed by GR Ingram & Co, Solicitors) for the Respondent

---

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

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

Introduction

[1] This is a reference brought by the Director of Public Prosecutions for Northern Ireland ("DPP") under section 36 of the Criminal Justice Act 1988 as amended by section 41 of the Justice (Northern Ireland) Act 2002. The sentences referred to this court were imposed upon the respondent by His Honour Judge Lynch KC ("the judge") after conviction following a guilty plea for a number of offences as follows:

(i) Murder of Nathan Gibson on 16 January 2020, contrary to common law (count 1).

(ii) False imprisonment of JB, contrary to common law (count 2).

(iii) Common assault, contrary to common law and section 47 of the Offences against the Person Act 1861 (count 3).

(iv) Trespass with intent to commit a sexual offence, namely a sexual assault, contrary to Article 67 of the Sexual Offences (Northern Ireland) Order 2008 (count 6).

[2] The sentencing exercise focused on the murder charge (count 1) for which the respondent received a mandatory life sentence with a minimum tariff of 15 years imprisonment. Where a life sentence is imposed the protection of the public is achieved by the executive discretion over the time of release, after the minimum term has elapsed, as an offender will not be released if he still presents sufficient risk to the public. The other material sentence is that imposed on count 6 for trespass with intent to commit a sexual offence. That offence was committed against the partner of the deceased, JB. On that count the judge indicated that he would have sentenced the respondent to an extended custodial sentence of six years which meant that he added three years to the minimum tariff for murder to reach 18 years which was then reduced to 15 years on account of the guilty plea.

[3] The Public Prosecution Service ("PPS") maintained that the sentence imposed was unduly lenient.

The nature of a reference

[4] This court in *R v Sharyar Ali* [2023] NICA 20, explained the nature of a reference. The court stressed the fact that the reference procedure does not provide the prosecution with a general right of appeal against sentence and adopted a passage from *Taylor on Criminal Appeals* (3rd ed, 2022), which summarises the applicable legal principles as follows:

> "13.51 As to the nature of the test for granting leave in a reference application the approach of the Court of Appeal Criminal Division (CACD) can be summarized as follows:
>
> (l) The court may only increase a sentence that is unduly lenient and not merely because it is of the opinion that the original sentence is less than that court would have imposed, unless the disagreement results from a manifest error.
>
> (2) Leave should only be granted in exceptional circumstances and not in borderline cases.
>
> (3) Section 36 was not intended to confer a general right of appeal on the prosecution. The purpose of the regime has been stated as being to allay widespread public

> concern arising from what appears to be an unduly lenient sentence. A sentence will be unduly lenient where, in the absence of it being altered, it would affect public confidence or the public perception of the administration of justice.
>
> (4) The procedure for referring cases ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.
>
> (5) It has been held that a sentence is unduly lenient 'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'
>
> (6) The CACD will ask: was the judge entitled, acting reasonably, to pass the sentence that they did? Did the judge give full reasons for doing so? Was the reasoning and conclusion open to the judge?
>
> (7) The CACD will pay due deference to the advantage of the sentencing judge. The court has noted that sentencing is an art and not a science and that the trial judge is well placed to assess the weight to be given to various competing considerations.
>
> (8) Leniency of itself is not a vice. The demands of justice may sometimes call for mercy."

[5] In a subsequent case of *R v McKenna and Sheridan* [2023] NICA 43, the Court of Appeal also summarised the position as follows at para [9]:

> "[9] It follows from the above that there is a high and exacting threshold for a reference to succeed. The Court of Appeal when considering a reference must first decide whether to grant leave. The court must also decide whether a sentence is unduly lenient not simply lenient. Finally, even if a court decides that a sentence is unduly lenient the court retains a discretion whether to interfere with a sentence in the circumstances of a particular case and in some instances where double jeopardy is in play."

We proceed on the basis of these principles.

The agreed facts of this case

[6] This murder occurred on 16 January 2020. Shortly after 9pm on that date, police received a 999 call from a resident of Legahory Court, Craigavon. The resident reported that a neighbour, JB, of Legahory Court, Craigavon, had arrived at his house and told him that a male had broken into her house and told her that he had murdered her partner Nathan Gibson, and that he was going to rape her. It was reported to police that the suspect was known locally as "Eyeball Paul" and that he was covered in blood. Police identified "Eyeball Paul" as the defendant (now "respondent").

[7] Police attended and spoke with JB. She stated that the respondent, who she had known for approximately two years, had left her house covered in blood. She reported that her partner, Nathan Gibson, was missing and that she had not seen him for a number of hours. She reported that she had been on nightshift the previous evening and returned to their home that morning, retiring to her bed at approximately 11:30am. She said that her partner, Nathan Gibson, had woken her about 6pm and that they had discussed eating arrangements. She, however, was tired and had gone back to sleep. She stated that her next memory was of Nathan Gibson coming back into the bedroom to say that he was going to meet the respondent. She said that the respondent and the deceased had known each other since childhood and had become friendlier over the preceding three years as they had served community service together. She reported that Nathan Gibson had said that he was meeting the respondent as he had three boxes of "Bud" for him. (Buds is a reference to Pregabalin/Lyrica which is prescription tablet.) JB reported that the deceased sold these tablets.

[8] JB then reported that she fell back to sleep, and what appeared to be a short time later, she heard a knock to the front door. She quickly got dressed and went to the door but by that time there was no one there. She looked out and observed a man walking away from her door. She thought it was the respondent but dismissed this thought as she believed that Nathan Gibson was with the respondent. She closed the door and went back into her home and messaged a friend. Immediately following the exchange of these messages, she heard a further knock on her door and then heard shouting through the letter box. The respondent asked her to open the door, claiming that two men had just jumped him and that she needed to open the door. JB then said that she knew it was the respondent as she recognised his voice. She opened the door, but just enough so that her body was blocking the space of the door to stop him gaining entry to her house. She could see that the respondent had blood on both his arms and hands, and she thought that he had been hurt and he said that he was. She said that his hands appeared to be covered in blood. She further reported opening the door to him and bringing him into the kitchen to help him. She said that he had a bottle of WKD (alcoholic beverage) with him. She said that she could not see any wounds on him but described how he had blood on both his hands that went up to both elbows. She said that she started to tend to him by using a dry cloth, but he said that he wanted a wet cloth, which JB said surprised her

as she thought he needed a dry cloth to absorb the blood. She then said she realised that he was not bleeding but he claimed that he had an injury to his arm and that he needed Sellotape. She did not have Sellotape, and she thought it was a strange request and she became suspicious that he did not want Sellotape for any cuts. She then thought that he wanted to Sellotape her.

[9] JB described how the respondent had put down the cloth and proceeded to take Nathan Gibson's phone from his pocket. He then admitted to her that he had killed Nathan. She said that he was very calm. She took the phone from him. She said that at that point she knew that the respondent was telling the truth as there was no way that Nathan would have handed over his phone. She said that this was when she began to get scared. She told him not to be silly, but the respondent repeated that he had killed Nathan. He then said to her "why are you panicking there is nothing to worry about, I'm not going to hurt you, you're a lovely wee girl, look I know you're a lovely wee girl, stop panicking and worrying." She asked if she could have a smoke, and he said "yes."

[10] At this point the respondent went to her front door and locked it from the inside. JB reported that she was just about to light up her cigarette when he said "no." He took her by the arms and ushered her into the living room and said that she could smoke in that room. He pushed her towards the chair in the corner of the living room. She describes herself as being very frightened but resisted panicking. She went to open the window of the living room, but he said "no." He warned her not to scream. JB then said that the respondent sat on the sofa while she sat in the chair nearest the window. She finished her cigarette and then he said to her that they would wait for Nathan to come back. He told her that she could not leave until Nathan returned. He said that "the Firm" were taking him for a drive and that he would be back soon. She said that she knew from Facebook that certain people in the area who were involved in drugs called themselves "the Firm." She described herself as being very scared but doing her best not to show it. She described the situation as being too much for her to conceal her fear. She then explained that the respondent said very calmly "why are you worrying, there is nothing to worry about, you are fine. Just calm down there, just calm down love, I know you are a lovely wee girl."

[11] The respondent then said that he needed a change of clothes. JB said that there were clothes upstairs and that she would go and see what she could get. She then went to go upstairs. She did not want the respondent following her up the stairs but saw that he was behind her as she proceeded up the stairs. JB then said that she had clothes in the tumble dryer, and she went to go back down the stairs. At this point she reported that the respondent blocked her way down the stairs and began to walk up the stairs, leaving her with no option but to walk back up towards the bedroom door. She described that once he got her up the stairs he grabbed her by the throat. She described this as a very firm and tight grip, but she accepted that she could breathe a little bit. She said that he threw her onto her bed, and he then jumped on to the bed beside her, but the bed was broken so he fell through it

landing on the bedroom floor. He then grabbed her dressing gown by the sleeve, but she was able to wriggle out of it. He grabbed her by the back of the neck and took her phone and left it on the bedroom dresser.

[12] JB said that still holding her neck he walked her to her son's bedroom and again calmly said to her that he was not going to hurt her, that the Firm had Nathan and that they just needed to stay there until he came back. In the room he pushed her on to the sofa bed. He closed the window blinds and then blocked the bedroom door before he sat on the floor. He then explained, according to JB, verified by her statement, that he worked for the Firm and that they had him kill Nathan. She also reported that in the next sentence he then said that Nathan was fine and that the Firm would be bringing him back and that she was to stop worrying. He also said that Nathan had been sleeping with his partner.

[13] JB said to him that this claim was ridiculous. Her evidence was that the respondent then repeated that he had killed Nathan, he explained that he had owed the Firm £7,000 for cocaine but that the debt had been taken out in Nathan's name. He said that the Firm had to deal with Nathan for that. JB then said he continued to drink from his bottle of WKD. At a point he stood up and said to her "right, you are a lovely looking wee girl, wee nurse and all, Nathan's always bragging about you." She described how he started stripping and said, "I'm going to ride you, stand up and take your clothes off." JB said she remonstrated but he said, "fucking stand up now or I will fucking kill you too like Nathan."

[14] Next, JB said that she thought that she was going to be raped by the respondent. She said that she started to pretend to unbutton her jeans slowly as he had said "fucking get naked before I kill you" whilst trying to make her way towards the bedroom door, but she did manage to pull the door open and ran down the hall and started to go down the stairs. She described how in one jump the respondent jumped from the bedroom doorway and got himself in front of her on the stairs. She could see the anger in his face and there was an altercation. This led to her having to propel herself out the upstairs window to escape to a neighbour's house. The police were then contacted.

[15] Thereafter, a search was commenced for the respondent. Before he could be found, at 23:39 hours police located a male with a bad head injury lying on one of the paths near the Lake Road between roundabouts in Craigavon. The body was cold and rigid, and his face was covered in blood. CPR was attempted, but the male was deceased. A paramedic pronounced life extinct at 00:08 hours on 17 January 2020. This body was subsequently identified to be that of Nathan Gibson.

The pathology evidence

[16] An autopsy was carried out on the deceased's body by Mr Christopher Johnson, Pathologist, on the morning of 18 January 2020. The cause of death was

identified as being stab wounds to the head and neck. Some extracts of the report are particularly relevant as follows:

> "There were approximately 18 stab wounds to the head and 31 stab wounds to the neck … the wound of most significance was fresh injury 30. This was a stab wound to the left cheek, and the stab track passed in a downward and backward direction into the neck to puncture the left internal jugular vein … this injury to this blood vessel would have caused copious bleeding, and once inflicted death would have occurred relatively quickly."

[17] The report also points out two other significant injuries. Fresh injury 27 was a stab wound to the left orbit. This passed through the orbital cavity (eye socket) fracturing the thin bones of posterior aspect of the orbit and passed into the skull, injuring the interior aspect of the brain. This injury had caused bleeding over the surface of the brain and an injury to the brain substance. The pathologist, Mr Johnson, opined that this stab wound also be expected to have caused quite severe bleeding and the overall effects would have been a serious threat to life.

[18] The other injury referred to is fresh injury 16, a stab wound to the right cheek, which had penetrated the right maxilla. During the assault the tip of a knife had pierced the frontal bone of the skull, and the tip of the blade had snapped off, becoming imbedded in the skull. Mr Johnson stated that it would have required considerable force to produce such injuries. The pathologist also stated that the autopsy revealed evidence to suggest that pressure may have been applied to the neck of the deceased at some point prior to his death. There was a linear petechial bruise to the left side of the neck, a fracture of the right side of the thyroid cartilage (the side of the voice box) and internal bruising to the muscles of the neck. There was no evidence, however, to suggest that this pressure played a direct role in the cause of death.

[19] The respondent was eventually located in an area known as Clonmeen. He appeared to have an injury to his leg and police suspected he had jumped from a bridge known locally as Curly Wurly bridge. The respondent was arrested by police and conveyed by ambulance to Craigavon Area Hospital. A murder investigation commenced. The reference finally points out that the respondent was interviewed on seven occasions between 17 and 19 January 2020. He denied being responsible for the murder of Nathan Gibson, claiming that Nathan and he were going to buy drugs at the path and that when they were there, two or three men were hiding in the bushes and attacked them. He stated that he went to JB's house, but never made any threats to kill JB. He stated that he tried to explain to JB what had happened between Nathan and him, but that she just jumped out the window. He denied assaulting JB.

The judge's sentencing remarks

[20] At this point in our judgment we acknowledge that the judge is an experienced Crown Court judge. As we would expect the sentencing remarks are of a high quality. The judge begins his remarks by setting out the facts of the case which were not in dispute. In terms of the case trajectory, he records that a decision to prosecute was taken on 17 July 2020. The case was listed for arraignment on 22 January 2021 and guilty pleas were entered on 20 September 2023.

[21] The judge then refers to the victim impact in this case, as he had received a victim statement from JB as well as a victim impact report authored by Dr O'Connell, Clinical Psychologist. The judge properly relates the clinical opinion given in relation to the trauma and effect of this incident upon JB.

[22] The judge then refers to what he describes as a "very comprehensive pre-sentence report" from the Probation Service of Northern Ireland from which he gleaned the following salient facts. First, the respondent was born on 12 September 1979 and, therefore, at the date of the alleged offences was aged 41 and is now aged 44. His parents had a difficult relationship, and his mother left home when he was six years old. When aged about five, he suffered a traumatic brain injury when it appears that the back wheel of a car hit his head, causing him to be dragged along the road for a distance. He was treated in intensive care for a couple of weeks. An MRI scan in 1995 showed "a focal area of atrophy, effectively, the right frontal lobe which appears to be of longstanding and in keeping with this clinical scenario." He developed epilepsy and experienced difficulties with memory, attention, literacy and numeracy from about that time. This translated into difficulties in school. He said that in his primary school and then Drumcree High School he was put into special educational units.

[23] After leaving school, aged 16, he had not engaged in any further education and has been unemployed and was in receipt of benefits at the time of his arrest. The judge refers to issues in this respondent's life in that his father died unexpectedly when he was 23 and they did not have a happy relationship. He also referred to sexual abuse in his life. Reference is made by the judge to past relationship history and also social services intervention with his children. This meant that on several occasions he has had to leave the home due to his offending behaviour which the judge notes, particularly, an assault upon his partner with a hammer in 2016 and his persistent drug use. Latterly, the judge said he has been the subject of a number of assaults, the most serious being one with a pickaxe handle resulting in a fractured skull and eye socket. The judge then refers to the fact that this respondent had a congenital heart condition. He also referred to his addiction history in terms of alcohol and drugs. He refers to the fact that in 2018 there was a note of his full-scale IQ being between 64 and 72 on the Weschler Adult Intelligence Scale which is the extremely low or borderline range.

[24] The judge then refers to the respondent's criminal record which comprises 89 convictions previous and present offences, stretching back to assault in 1993 and assault occasioning actual bodily harm. The judge records that up until July 2017 there are offences, and all cases were dealt with in the magistrates' court and involved some offences of violence, public order offences and offences of dishonesty.

[25] The judge then refers to the legal principles in play and the lead case in this jurisdiction of *R v McCandless and others* [2004] NICA 1. In relation to this, the judge sets out the relevant paragraphs of *McCandless* which we will discuss later in this judgment.

[26] The crux of the judge's sentencing decision is found at pages 15 and 16 of the transcript of his sentencing remarks, whereby he says as follows:

> "**Tariff**
>
> It falls to the court to set a minimum period that the accused must spend in jail on the murder count, before being considered for release – the tariff. The prosecution submit that this case falls into a higher starting point on the basis of the aggravating points in *McCandless*, as (i) gratuitous violence and (j) extensive and multiple injuries inflicted before death. They also suggest pre-planning, relying on the fact that the defendant brought a knife to the meeting with Mr Gibson and having arranged to meet him in the isolated area. I hold that there is insufficient evidential basis to establish this contention. The defence submit that the court should view the events within a context of the defendant's mental health and that he was grossly impaired by a combination of drink and drugs, which should lead to the conclusion that the injuries to Mr Gibson were a consequence of a frenzied attack, rather than a calculated intent to subject him to torture before death.
>
> I will now set out the observation of Lord Carswell in *McCandless*:
>
> > 'We think it important to emphasise that the process is not to be regarded as one of fixing each case into one of two rigidly defined categories, in respect of which the length of term is firmly fixed.'
>
> The factors that weigh with the court are:

(i) This is a case I am satisfied, of a specific intention to kill.

(ii) The unfortunate Mr Gibson was subjected to a brutal attack in which due to the minor injuries caused, as well as the fatal ones, add to the pain and distress he suffered before the death supervened.

(iii) The voluntary ingestion of drink, drugs, including this – this inhibition may in part explain the defendant's actions but is not a mitigating factor. I find it hard to comprehend how his undoubted mental limitations impact upon the nature of the offending, but I have taken them into account to determine the appropriate sentence.

However, based on the above factors, I determine that this case falls at the higher starting point as found in *McCandless*.

I turn back to the events relating to [JB]. Anyone hearing what she was subjected to at the hands of the accused can readily imagine the fear engendered in her by his actions. I accept she genuinely felt the defendant intended to rape and then to kill her. The defendant forcibly detaining her was with the intention of carrying out at least a serious sexual assault. In my view, these offences, whilst sequentially connected to the murder, should be regarded as standing to be considered for sentencing purposes in their own right. It would be an affront to justice and to the victim if her ordeal was – ordeal were to be simply subsumed in the sentence imposed for murder. The maximum sentence on count 2 is life imprisonment and count 6 10 years. I regard the offences as extremely serious, taken in their own right.

I deem the appropriate starting point tariff for the murder as 15 years, taking into account all the relevant matters pertaining to the facts of the case and the defendant's personal mitigation. In relation to the offences against [JB], the sentence of the court had the defendant been convicted after trial would

> have been six years. I will add this to – as an element of the tariff, allowing for the fact that the defendant would be entitled, notionally, at least, to be released after he had served half that sentence at three years making the total starting point of 18 years."

[27] Finally, the judge refers to *R v Sharyar Ali* [2023] and *R v Turner and Turner* [2017] NICA 52 and applies a reduction of three years for the plea leading to a final minimum tariff of 15 years. All other sentences on the other counts were made concurrent. A finding of dangerousness was also made which is not material to this appeal.

Core issues pertaining to this reference

[28] The core of the prosecution case advanced by Mr O'Donoghue KC was that the starting point chosen for the murder minimum tariff was too low. In this regard, the prosecution accepted that the case had been presented in an inadequate way before the Crown Court judge, in that cases involving multiple stabbings which were, it was argued by the prosecution, of particular assistance, were not put before the judge. Two cases have been raised before us, and so we will discuss them briefly as follows. The first case is *AG's Reference No.6 of 2004 (Conor Doyle)* [2004] NICA 33. This was a domestic violence case involving multiple stabbings where the sentencing judge increased the starting point to reflect the horrific injuries to the deceased. Para [33] of the judgment reads as follows:

> "[33] Having concluded that this is a higher starting point case, we must then examine any aggravating or mitigating features that might prompt a variation from the norm suggested by the Practice Statement. It seems to us that where the court chooses the higher starting point because of one particular aspect of the case, it should not normally vary the starting point upwards because of the same factor. Where, however, there are several reasons that a case might be regarded as meriting a higher starting point, then some measure of increase of the minimum sentence may be warranted. It is important to avoid an over-mechanistic approach to this issue, while guarding against the danger of double counting. Adopting this course we have concluded that some increase in the starting point figure is justified because of the horrific nature of the assault on Miss Snoddy."

[29] Relying on this decision, the prosecution maintains that as the present case involves a high number of stabbings involving the face and the throat, it is submitted that the starting point should have been raised.

[30] The second case now relied on in is *R v Desmond Heaney* [2011] NICA 43. In that case the defendant, having been convicted of murder after a contest, had been sentenced to life imprisonment with a tariff of 22 years. This was reduced to 20 years by the Court of Appeal. Again, this was a multiple stabbing case which the Court of Appeal discussed. The prosecution make the case that these two authorities, whilst involving very different factual backgrounds both involve the use of a bladed weapon in circumstances where the court was not prepared to accept planning and premeditation as a further aggravating factor, but clearly support the submission that not only do these cases attract the higher starting point but that they attract a starting point that goes well beyond the minimum higher starting point of 15/16 years. The prosecution maintain that both authorities support the submission that this type of case is to be regarded as exceptionally grave and falling within the category of case that was within the contemplation of the Court of Appeal as set out in *McCandless* sub-para [19].

[31] Accordingly, the prosecution contended that the starting point in this case should have been in the order of 20-23 years. The main argument for this along with the fact that this was a multiple stabbing case, is that the prosecution submits that the judge was wrong not to find that this was a case of some pre-planning or premeditation. Reliance is placed upon the fact that JB, in her statement, referred to the fact that there was a background to this case in terms of killing on instructions from the Firm, but the prosecution say that, in any event, there can be no doubt on the evidence that Nathan Gibson had left his home to meet the respondent. He had clearly met with the respondent, who on the available evidence, had plainly armed himself in advance with a bladed weapon which he used with repeated and lethal effect upon the deceased at a time when they were in a remote location together. Hence, the prosecution submitted that whether the killing was prompted by an instruction from others, the inference that the attack and killing was pre-planned, premeditated and foreseen, is irresistible. Therefore, the prosecution case is that the starting point for the killing alone was at least 20 years. If the court concludes that there was evidence of pre-planning and premeditation it ought to have been higher.

[32] In addition, the prosecution pointed to further aggravating factors given the trespass and assault on JB. The prosecution, however, did not take any issue with the methodology employed by the judge in that he thought a six-year extended sentence would be appropriate and so he added three years to the tariff. There is no issue taken with the plea reduction.

[33] In response to the prosecution arguments, the respondent's position advanced by Mr Grant KC, was that this reference was devoid of merit. In particular, the argument was made that the judge faithfully applied *McCandless*. Mr Grant maintained that the judge could have considered this a lower starting point case. However, he did not on the basis of aggravating factors, but he could not have gone beyond the 15 years. In addition, Mr Grant made the case that the three-year

increase for the other offence was entirely appropriate and the reduction for the plea was also appropriate.

[34] Mr Grant took some issue with the prosecution's reliance on the cases of *Doyle* and *Heaney*. In this regard Mr Grant made the case in argument and in written submissions that neither *Doyle* nor *Heaney* are guideline cases and are both fact specific. Moreover, he submitted that both decisions point out that when assessing the appropriate starting point, the court must weigh up all the factors of the case as identified by the Practice Direction. Mr Grant forcefully made the point that the judge was entitled to reach his own conclusion on whether there was premeditation and planning in this case, and he said that this court should not interfere with the judicial exercise of judgment on that.

[35] In addition, Mr Grant referred to the fact that there was a significant and pertinent mental health history on behalf of the respondent in this case. He referred to the long and complex history which was before the sentencing court as contained in psychiatric reports of Drs O'Kane, Anderson and Bunn and a psychological report from Dr Weir. This was a case where there had to be a fitness to plead hearing which, ultimately, resulted in the judge finding that the respondent was fit to plead. The thrust of the argument then made by Mr Grant was that the sentencing judge is vastly experienced and well placed to consider the impact of the respondent's mental state and the role of that in his level of culpability in the commission of the offences and that this history cannot be ignored.

[36] Finally, Mr Grant reiterated the role of the appellate court and the nature of a reference. He submitted that the judge did not err in law, that the sentence is not unduly lenient nor is wrong in principle, and so he asked the court to dismiss the sentence.

R v McCandless

[37] This decision has been applied in our jurisdiction for a considerable period of time. It has also recently been discussed in a number of other murder cases by this court, such as *R v Hutchison* [2023] NICA 3, *R v Nauburaitis* [2024] NICA 37 and *R v McKinney* [2024] NICA 33. All of these decisions point to the fact that sentencing for murder in Northern Ireland allows for flexibility on the part of sentencers within the guidelines provided by *McCandless*. It seems to us, that these cases also reflect the fact that as societal conditions change, judges should be aware of different issues which may not have been expressly stated in *McCandless*, but which, nonetheless, they can take into account. In particular, in *Hutchison*, the fact of a prolonged history of domestic violence against the victim and other partners was a relevant aggravating factor. In *Nauburaitis* the fact that there was desecration of the deceased's body was also an additional aggravating factor.

[38] At this point it is important to remind ourselves of what *McCandless* actually says before we provide some further guidance on it. The relevant passages are 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**
>
> 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.
>
> 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**
>
> 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.

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."

Consideration

[39] Recently, in *R v McKinney* this court reiterated that each murder case is fact specific. In this jurisdiction the Court of Appeal has also consistently said that the guidelines that derive from *McCandless* applying the Practice Statement of Lord Woolf should not be applied in a rigid compartmentalised way. The benefit of *McCandless* is that in this jurisdiction it allows flexibility to sentencers in the myriad of different scenarios that arise in murder cases. We repeat what we have said in many previous decisions that judges should be free to consider factors not specifically mentioned in *McCandless* as aggravation in a particular case, including a track record of domestic violence (see *R v Hutchison*) and desecration of a dead body (*R v Nauburaitis*). This way murder sentences in Northern Ireland have been able to

reflect the circumstances of murder cases with the benefit of the reference procedure if sentences are thought to be too lenient or appeal if manifestly excessive. It is the function of the Court of Appeal to set appropriate guidelines and to review any guidelines previously given.

[40] This appeal turns upon application of *McCandless* once again. As such we consider that the time has come to refresh the *McCandless* categories. This approach is based on the collective experience of the members of this court that a lower starting point of 12 years, previously termed the normal starting point (sub para [10] of the Practice Statement) rarely arises in murder cases. Only exceptionally if the circumstances explained in *McCandless* arise may consideration be given to the lower culpability of the offenders. The experience of this case illustrates the fact that having to consider this starting point in every case may deflect the sentencer away from reaching an appropriate sentence. Recourse to this starting point will only arise where culpability is low and so arises in only a small number of cases. This should be the practice going forward.

[41] We are cognisant that most murder cases in Northern Ireland will fall within what has previously been termed the higher starting point of 15/16 years which involves high culpability (sub para 12] of the Practice Statement.) As such we think it better that this should now be termed the normal starting point.

[42] In addition, where exceptionally high culpability arises a higher starting point as described in sub para [19] of the Practice Statement adopted in *McCandless* can be applied of 20 years or more. We are content that the descriptors given in *McCandless* cover most circumstances that arise for this higher bracket based upon exceptionally high culpability but repeat the fact that sentencers have flexibility to consider modern circumstances. Multiple stabbing cases can come within this bracket.

[43] We stress that what we have said does not amount to any sea change in terms of murder sentencing. It is simply a recalibration to reflect the complexion of cases we have had before our courts in the 20 years since *McCandless* was penned. In summary, *McCandless* should now be read with following revision:

(i) The normal starting point is 15/16 years. This is based on high culpability

(ii) In exceptional cases of low culpability, the starting point may reduce to 12 years.

(iii) In cases of exceptionally high culpability the starting point is 20 years.

[44] It is not necessary for us to redefine *McCandless* any further as the factors that feed into each starting point and aggravating or mitigating factors are comprehensively set out. In addition, sentencing judges are expressly reminded that they have the flexibility to vary the starting point upwards or downwards to take into account the particular circumstances of each case.

[45] However, we provide one further matter of clarification in relation to multiple stabbing cases as the issue has arisen. We reiterate the fact made in *Doyle* that where the court chooses the higher starting point because of one particular aspect of the case, it should not normally vary the starting point upwards because of the same factor. Where, however, there are several reasons that a case might be regarded as meriting a higher starting point, then some measure of increase of the minimum sentence may be warranted. It is important to avoid an over-mechanistic approach to this issue, while guarding against the danger of double counting.

[46] Thus, we turn to consider the circumstances of this case. In doing so we must first unfortunately highlight some flaws in the prosecution approach which we think led the judge into error. First the prosecution did not argue the pre-planning element of this case with the necessary vigour. Evidence of some preplanning was evident from the statement of JB. This was underestimated in the prosecution written submission to the judge with the result that he did not consider this fact established. Having had the benefit of a better argument we consider that there was in fact sufficient evidence to make a more positive finding on this aspect than the judge did. In our view the respondent's actions in arming himself with a knife and inflicting multiple stab wounds cannot simply be explained as drug rendezvous gone wrong. There was clear evidence from JB that a drug debt was in the background of this case. This is plain from the statement she gave which we set out at para [12] and [13] of this judgment.

[47] Furthermore, this was clearly a higher starting point case. The prosecution should have been much clearer on this in written submissions and should have provided the judge with the multiple stabbing authorities we have examined. If the judge had been assisted in the way he should have been, we are confident he would have arrived at a higher sentence in this case.

[48] There were multiple injuries in this case (factors from para [12] (i) and (j) of the Practice Statement applied) and also, a clear vulnerability on the part of the deceased which make this a case of high culpability bringing it into the high culpability starting point of 15/16 years or even the exceptionally high bracket of 20 years given the fact that this was a multiple stabbing incident.

[49] The standout characteristic of this stabbing was the number of wounds inflicted to the face and neck in such a brutal fashion. These stark facts mean that the judge was entitled to increase the starting point by varying the sentence upwards from the minimum tariff when high culpability was established. The judge could have put this case into an even more serious category, or he was entitled to uplift the higher starting point because of the serious aggravating features he identified. Either way, the starting point should have been 20 years for murder. There was, to our mind, no mitigation that would reduce this down save reduction for the plea. This was not a case where lower culpability was established on the medical evidence. The judge rightly said that the voluntary ingestion of drink, drugs, "may in part explain

the defendant's actions but is not a mitigating factor." He also said, "I find it hard to comprehend how his undoubted mental limitations impact upon the nature of the offending, but I have taken them into account to determine the appropriate sentence."

[50] The above approach accords with recent authority. In *R v Harland & Gracey* [2023] NICC 8, O'Hara J discusses the issue by reference to a decision of the fact that Hutton LCJ in *R v Doran* [1995] NIJB 75 stated that there is no automatic reason for reducing a sentence due to mental health difficulties. The Court of Appeal in England & Wales, also dealt with this issue in *R v PS and others* [2020] 4 WLR 13. In those cases, the question was as to the effect which mental health conditions might have on sentencing judges when assessing culpability and harm and any aggravating or mitigating factors. The *R v PS* decision was given in the context of guidelines issued by the Sentencing Council of England & Wales which are not binding in this jurisdiction.

[51] Applying the approach outlined in *Harland & Gracey*, it is clearly possible to make allowance for a mental illness in some circumstances where it can be said to reduce culpability. Each case will of course depend on its own facts. In this case the judge considered the issue and decided that there was no reduction in culpability based on the medical evidence he had. In our view his assessment on this issue cannot be faulted.

[52] In relation to the murder the judge could have added additional years to the minimum tariff for the separate trespass charge or he could have used that as an aggravating factor to increase the minimum tariff. Either way there is rightly no issue taken with the three years he settled upon to reflect this additional offending against a second victim. So, before any reduction for the plea the sentence should have been 23 years.

[53] The judge applied credit for the plea which is not under challenge as it was roughly one sixth which is appropriate applying *Turner* and *Ali*.

[54] As this is a case which involves considerable custodial sentences double jeopardy does not arise.

Conclusion

[55] In summary, we have carefully considered all the relevant factors in deciding how to exercise our discretion in this reference. We find that the sentence was unduly lenient given some pre-planning and the fact that a brutal multiple stabbing such as this required an uplift on the starting point selected to reflect the horrific nature of this crime. We are satisfied that an adjustment in the sentence is necessary and so in the interests of justice we consider that the respondent's minimum tariff will have to be increased. To our mind the minimum tariff pursuant to the mandatory life sentence for murder should have been in the region of 20 years with

three years then added for the separate offence against JB (to reflect a six-year extended sentence for the offence against her). If a one sixth reduction is made for the plea that leaves a final minimum tariff of just over 19 years which we round down to 19 years.

[56] Accordingly, we grant leave and allow the reference. We quash the sentence passed and replace it with a revised minimum tariff. Our decision means that the respondent will as part of his sentence of life imprisonment have to serve a term of 19 years after which he becomes eligible for release on life licence if the Parole Commissioners determine that imprisonment is no longer necessary for the protection of the public from serious harm. It is for the Parole Commissioners to decide whether he is released at that stage.