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Judgment: approved by the Court for handing down (subject to editorial corrections)* | Delivered: **9/10/09**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

KRISTOPH EMMANUEL ALAUYA

HIGGINS LJ

[1] This is an application for leave to appeal against that part of the sentence imposed by Weir J on 29 January 2009 whereby he ordered that the applicant should serve a minimum term of 22 years before he could be considered for release by the Parole Commissioners.

[2] On 14 March 2008 the applicant was arraigned and pleaded not guilty to the murder of Grace Moore and theft of items from her home. On 18 April 2008 the applicant pleaded not guilty to the rape of Grace Moore. His trial was fixed for 26 November 2008. Shortly beforehand he was re-arraigned and pleaded guilty to the offence of theft. The trial on the remaining offences commenced on 26 November. After prosecuting counsel's opening the applicant was re-arraigned and pleaded guilty to the murder of Grace Moore. The trial on the remaining count of rape continued and witnesses gave evidence. On 27 November he was re-arraigned and pleaded guilty to the rape of Grace Moore.

[3] The applicant is a Nigerian national who was born there on 11 April 1985 and is now 24 years of age. When he was 16 years or thereabouts he moved to Dublin where his sister was living. On 25 May 2005 he was arrested in the Republic of Ireland and charged with robbery, assault and hijacking on two consecutive occasions, 13 and 14 May 2005. The victims in each case were taxi drivers. After pleading guilty to these offences on 23 October 2005 at Naas Circuit Criminal Court he was released on bail to attend a Residential Drug Rehabilitation Course. He failed to complete the course. He was due to return to Naas Circuit Criminal Court on 14 November 2006 but failed to do so. Instead he fled the jurisdiction of the Republic of Ireland and came to Belfast. There he met up with some fellow Nigerians with whom he stayed.

[4] Grace Moore was 38 years of age and lived at 8A Erris Grove, Belfast, with her daughter then aged 16 years. On Friday 17 November 2006 Grace Moore met a friend and together they attended a concert at the Odyssey Centre. That night her daughter had gone to stay with a friend. On returning home the following day at lunchtime her daughter discovered the front door unlocked. On entering the living room she noticed various electrical items were missing from their usual place. On entering the kitchen she found her mother Grace Moore lying semi-naked and spread eagled in a pool of blood on the kitchen floor. She ran outside screaming. This alerted her grandparents who lived nearby. Grace Moore's father then entered the flat and witnessed the same dreadful scene.

[5] After attending the concert Grace Moore and her friend went to a nightclub in Howard Street, Belfast called Skye. There they met a group of black men that included the applicant. Grace Moore talked to and danced with the applicant. Grace Moore and her friend and the applicant and some others then left in a car and travelled to the Ormeau Road. The car stopped and Grace Moore's friend and one of the men got out to purchase a carry out. At this point the car drove off and left them there. Later Grace Moore and the applicant were dropped off in the city centre in Bedford Street. At some time they made their way to Grace Moore's flat. As the trial judge observed "The time of arrival is not known nor is there any eyewitness account as to what transpired there that resulted in her murder." What is clear is that the applicant attacked her, raped her, stabbed her twice in the neck and strangled her. Then the applicant proceeded to dismantle various electrical items that were in the living room and left taking them with him together with two cheque books. About 04.20 am he flagged down a taxi and went to a garage shop to buy food before going on to where he was staying. On arrival there he was asked about Grace Moore and he replied "She's at home, she's all right".

[6] Later that day he took the electrical items to another address in Belfast by taxi and in the process left the two cheque books on the back seat of the taxi from where they were later recovered. He returned that night to the Skye nightclub where he was recognised as the man who had been in Grace Moore's company the night before. The police were alerted and they brought him to a police station. There he denied he was ever in Grace Moore's flat. However the detailed forensic examination of the flat and in particular the kitchen demonstrated beyond doubt that he had been in the flat, that he had raped Grace Moore and that he had subjected her to a violent assault culminating in her death. Later he admitted that he had been in the flat, that he had fallen asleep, and that after he awoke he found Grace Moore not to be there and he then left taking various items with him from the flat.

[7] In accordance with the practice statement on life sentences adopted in this jurisdiction following the decisions in R v McCandless and Others the

learned trial judge concluded that this was plainly "a higher starting point case". Counsel for the prosecution and the defence were in agreement with this conclusion. While counsel were not agreed as to the factors which made this a higher starting point case the judge identified two factors which to his mind did so. The first was the evidence of sexual maltreatment of the deceased in the admitted rape before the killing. The second was that the victim was a vulnerable person, a woman living alone who was no match in physical strength to the offender and quite unable to defend herself against the ferocity of his attack up her. Consequently the learned trial judge adopted a higher starting point of 16 years.

[8] The judge next considered whether any aggravating features existed. He acknowledged that there should be no double counting. He then identified two aggravating factors. Firstly what he described as the "cold blooded ransacking" of Grace Moore's flat and the theft of her personal possessions as she lay dead on the kitchen floor. He found this to arise from an associated offence namely theft within the meaning of Article 5(2) of the Life Sentences (Northern Ireland) Order 2001. He identified as further aggravating features relating to the applicant his convictions in the Republic of Ireland for the violent robbery of two taxi drivers.

[9] He then considered whether any mitigating factors existed. He concluded that the applicant was entitled to some minimal credit for his belated pleas of guilty albeit they were 'piecemeal and not timely'. Next he considered whether the applicant had exhibited any remorse or contrition and concluded that he could see none. At paragraph 22 of his sentencing remarks he said:

> "As the Court of Appeal observed in R v. Quinn [2006] NICA 27 and affirmed in R v. McCartney [2008] N1JB 373 at para [27]
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> > 'It is frequently difficult to distinguish authentic regret for one's actions from unhappiness and distress for one's plight as a result of those actions.'
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> Bearing those observations in mind I look hard for indications of remorse and contrition but see none in any of your behaviour after the commission of this terrible rape and murder. All your actions, from ransacking the house and removing property, to buying food on your way into Belfast, to going back to the same club on the following night, to denying your presence in the house to police, to changing your story to an incredible account when confronted with

> the forensic evidence and culminating in the "drip-feed' approach to your pleas of guilty - all point convincingly away from any demonstration of contrition or remorse. This conclusion is reinforced by the dissembling approach taken to Dr Davies when he asked you about your pleas of guilty to the rape and murder as I have earlier recounted. The only matter pointing in the opposite direction is Dr Davies' assertion that "there was evidence to suggest that he experiences a degree of remorse". With great respect to Dr Davies I cannot discern his basis for that conclusion. My assessment is that what you feel is sorry for yourself and not for what you have done to Grace Moore, her parents and her daughter. That conclusion is not displaced by Mr O'Donoghue's account which I entirely accept of your tearful state when you instructed him during a legal consultation that you had decided to plead guilty to the then remaining count of rape. Indeed, Mr O'Donoghue was characteristically realistic when he said to the court that while he had been instructed to apologise to the court and to the family for all the offences, he appreciated that that instruction might seem 'somewhat hollow'."

The learned trial judge had before him various psychiatric and psychological reports which considered in detail the applicant and his background as well as the effect of the murder on Grace Moore's close relatives.

[10] Mr O'Donaghue QC and Mr Farrell appeared on behalf of the applicant and Mrs McKay on behalf of the Crown. The grounds of appeal alleged –

> "1. That the tariff of 22 years imposed upon the Appellant in respect of his life sentence for the offence of the murder of Grace Moore was manifestly excessive and wrong in principle for the following reasons:
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> (a) That insufficient credit was given to the appellant for his plea of guilty to the offence of murder.
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> (b) That the learned trial judge was wrong, on the evidence adduced to the Court,

to conclude that the Appellant had shown no remorse or contrition.

(c) That in the circumstances and for the reasons set out in the written submissions provided to the Court (copy attached), the appropriate tariff range was between 18 and 20 years."

[11] At the outset of his submissions Mr O'Donoghue QC accepted that, on the basis of the evidence before the learned Trial Judge, he was entitled to conclude that the applicant had shown no evidence of remorse. He confined his submission to two points –

"i. that a minimum term of 22 years was manifestly excessive and wrong in principle; and

ii. that inadequate credit was afforded to the applicant by way of mitigation arising from -

a) the absence of evidence of premeditation; and

b) the fact that he did plead guilty to the offence of murder."

[12] In developing these points Mr O'Donoghue QC accepted that this Court is not bound by the views expressed by the trial judge nor is it confined to the higher starting point of sixteen years. He submitted that in selecting the higher starting point in a case in which the vulnerability of a female in resisting the attack of an aggressive male is an aggravating factor there is always a risk of double counting when sexual maltreatment is also an aggravating factor. In any case of sexual maltreatment there will always be present the vulnerable female factor. While the pleas of guilty to murder and rape did not take place before the trial commenced, nonetheless they did occur before the prosecution case was completed. Regardless of when it takes place a plea of guilty, particularly to the most serious offence of murder, should be recognised and an offender who does so is entitled to some credit for that plea. While the murder of Grace Moore was a serious case it was not a premeditated murder, which would attract more condign punishment. The Prosecution had accepted at trial that the murder was not premeditated and that the applicant and the deceased had some time before the murder been happy in each other's company. Mr O'Donoghue accepted that the learned trial judge was entitled to treat the theft of Grace Moore's possessions as an aggravating factor but it merited no more upward adjustment of the minimum term than 1- 2 years. Giving some credit to the applicant for his pleas of guilty and recognising that the murder of Grace Moore was not

premeditated, the learned trial judge must have concluded that if the case had been contested that the appropriate minimum term was in the region of 26 years. Such a minimum term after a plea of guilty was out-with the guidance provided by the Practice Statement and was more appropriate for a different type of case. If it was a lower figure in the region of 23/24 years then the learned trial judge had given minimal discount for the guilty pleas when such were usually in the region of 20– 30%. Whichever way one looked at it the minimum term arrived at was excessive. He contrasted the length of the determinate sentences of rape and theft with the duration of the minimum term and submitted that this supported his argument that the minimum term was too long. He submitted that the appropriate minimum term should be in the region of 18–20 years though it was difficult to understand how the aggravating factors in this murder, which was not premeditated, could increase the higher starting point to a minimum term of even 20 years. He accepted that the manner in which the deceased was left and the discovery of her body by her daughter and the witnessing of that scene by her father were all factors about the case to be taken into account but submitted that her relatives' reaction to that did not amount to an aggravating factor as it was out-with the control of the applicant. He compared the minimum term of 22 years with other lower minimum terms imposed in other serious cases of murder with aggravating factors.

[13] Mrs McKay submitted that the pleas of guilty in this case did not amount to mitigation as they were very late in the day and the evidence against the applicant was overwhelming. The only possible mitigating factor was the absence of premeditation which the prosecution accepted. Reducing the determination of a minimum term to a mathematical equation did not reflect the facts of this dreadful case. The discovery of the body by her daughter and the witnessing of the scene by her father were both aggravating factors.

[14] The home of the deceased was examined by forensic scientists. The deceased was found in the kitchen spread-eagled on the floor. There was no clothing on the lower half of the body and the upper clothing was moved exposing the chest. A brown suede bag was lying on the abdomen with the strap still around the back of her neck. Scattered on the floor to the right of the body were a bra, pants, a make-up bag, a pair of gloves and other assorted items. A large pool of blood surrounded the deceased's head extending out across the floor. The hands, face and neck were heavily bloodstained. Semen was found under the right thigh. The two bedrooms showed signs of having been ransacked. A post-mortem examination revealed that death was due to compression of the neck after she had been stabbed twice in the neck. Fractures of the voice-box had been caused by forceful compression of the front of the neck, possibly by the grip of a hand or hands. One stab wound was located on the left side of the neck and the track passed across the entire width of the neck to emerge at a second stab wound on the right side of the

neck. A third stab wound was located on the front of the neck. These wounds were caused by a sharp knife with a long pointed blade. Other less serious injuries indicated she had sustained some blows and a bite and a bruise on her back indicated pressure having been applied while she lay on the floor. Samples recovered at the scene and an examination of the clothing of the applicant proved beyond doubt that he was the assailant. Apart from ransacking the bedrooms he stripped the living room of electrical items of value. After leaving the premises he hailed a taxi and then went to a garage shop where he purchased food, as if nothing had ever happened.

[15] The Life Sentence (Northern Ireland) Order 2001 makes provision for the fixing by the trial court of the minimum term which a prisoner sentenced to imprisonment for life must serve before he is considered by the Parole Commissioners for release from prison. Article 5 of the Order provides -

> "5. - (1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.
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> (2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

[16] In R v McCandless & Others [2004] NICA 1 the Court of Appeal held that the Practice Statement issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 should be applied by judges in this jurisdiction who were required to fix minimum terms under the 2001 Order. The relevant parts of the Practice Statement for the purpose of this appeal commence at paragraph 12 -

> "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.

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."

[17] 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 either to the offence or the offender in the particular case. As Carswell LCJ said in R v McCandless at paragraph 8 of the judgment -

"These starting points then have to be varied upwards or downwards by taking account of aggravating or mitigating factors. 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. Rather the sentencing framework is, as Weatherup J described it in paragraph 11 of his sentencing remarks in R v McKeown [2003] NICC 5, a multi-tier system. Not only is the Practice Statement intended to be only guidance, but the starting points are, as the term indicates, points at which the sentencer may start on

his journey towards the goal of deciding upon a right and appropriate sentence for the instant case."

[18] That the higher starting point was the correct one for the learned trial judge to select was not in dispute in this case, nor could it be. The applicant's culpability was not just extremely high but total. Only the applicant was involved in these three offences and the deceased suffered serious injuries. The deceased was in a vulnerable position. She was alone in her flat having become separated from her friend. There is no evidence that the separation of the deceased from her friend was planned, nonetheless it was a fact that she was so separated and therefore alone with a person she had only met a few hours earlier. She was no match for the greater physical strength and dominance of the applicant. Paragraph 12 lists various features that characterise such higher starting point cases. These are not exhaustive but several are present in this case. Prominent among them is sexual maltreatment, though also present were multiple injuries, killing for gain, either theft or rape, as well as killing through gratuitous violence or to defeat the ends of justice, as in killing the only potential witness. What is clear is that this was not a case of murder by reason of intent to cause grievous bodily harm. The manual strangulation causing fractures of the voice-box and the infliction of several stab wound to vital areas of the neck permit of only one conclusion, namely, that the applicant intended to kill. That the assault occurred in the kitchen, with an unopened bottle of wine close by and the deceased's handbag still round her neck and shoulder suggest strongly that she was attacked a very short time after they entered the flat. While it is accepted by the prosecution that the murder was not premeditated all the evidence points to it being very deliberate. An aggravating factor (identified in paragraph 14 of the Practice Statement) was the use of the knife on several occasions in vital areas, albeit that the knife came from the kitchen and he had not armed himself in advance. Nor are the aggravating factors mentioned in paragraph 14 exhaustive. In this case I would add the cruel manner in which the deceased was left to be found by whomsoever and the callous indifference shown by the applicant in ransacking the flat and removing the electrical items and proceeding to shop for food at a local garage as if nothing had happened. Further aggravating factors found by the learned trial judge included his previous convictions for violent offences to which may be added that he had fled the jurisdiction of the Republic of Ireland and spurned the opportunity to deal with his drug habit offered by the judge at Naas Circuit Criminal Court. The only mitigation was his plea of guilty. However this was late in the day. He had every opportunity to make admissions earlier. Instead he engaged in denial to the extent that he had never been in the deceased's flat. Maximum credit will be afforded to those who when first taxed about the offence immediately admit their guilt. Thereafter there is a diminishing scale at the end of which lie those offenders who, like the applicant, plead guilty after the trial has commenced. The strength of the case against the applicant combined with his late plea permitted only of minimum credit in

the circumstances. The learned trial judge did afford the applicant some credit, albeit not substantial, for his pleas of guilty. He was entitled to treat that credit as minimal in view of the substantial evidence against the applicant, the timing and occasion when the pleas of guilty occurred and their piecemeal fashion.

[19] It is accepted that this is a higher starting point case and it is clear that there are several factors in this case any one of which would justify the higher starting point. The culpability of the applicant is the first and most prominent. The selection of the higher starting point does not mean in every case that the trial judge starts at 15/16 years. The circumstances may justify a higher figure. The learned trial judge clearly distinguished sexual maltreatment in the form of rape from the nature of the violent assault on the deceased. There was no element of double counting involved in doing so. The aggravating features identified as the theft of her possessions and the ransacking of the flat as she lay dead in her kitchen were not matters of no or little importance. They were by contrast highly significant and telling features in what was a truly horrendous crime. In so doing and thereafter the applicant demonstrated a callous indifference to her circumstances. We do not detect any wrong approach in principle. The only issue is whether the minimum term fixed by the learned trial judge was manifestly excessive. It reflects the elements of retribution and deterrence.

[20] We have considered carefully the sentencing remarks of the learned trial judge and the submissions of counsel. This was as the circumstances outlined above demonstrate a truly heinous offence. We do not consider that the minimum term fixed by the learned trial judge was either wrong in principle or manifestly excessive and the application for leave to appeal is dismissed.