

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 7/09/11

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DESMOND ANDREW HEANEY

Defendant/Applicant.

Before: Morgan LCJ and Higgins LJ

MORGAN LCJ

[1] The applicant was convicted of the murder of Patrick Fleming and sentenced to life imprisonment with a minimum tariff of 22 years by Mr Justice McLaughlin in Antrim Crown Court on 16 May 2008. The applicant renews his application for leave to appeal the minimum tariff set on the grounds that it was manifestly excessive and wrong in principle. The applicant contends that this was not a higher starting point case as the injuries inflicted were not extensive and/or multiple, that the attack was spontaneous and lacked premeditation, that in the particular circumstances the pre-arming by the applicant with a knife was not an aggravating feature when set in proper context, that the applicant was still a relatively young man of 26 years and that he had after conviction confessed to the probation officer indicating a degree of contrition and acceptance of culpability.

Background

[2] On Monday 14 May 2006 at around 2.30 am a group of people were drinking in a flat belonging to John Neill at 43 Hazelbank Road, Coleraine. The applicant was one of those present. Originally from the Ballymena area, the applicant had arranged to stay for the weekend in a flat upstairs which belonged to John Neill's brother, Peter. The applicant's girlfriend and two children were also staying with him and were asleep in the upstairs flat.

[3] A man called Joseph Fleming arrived at the flat where the drinking party was taking place. He called one of the occupants, Kevin Gilmore, to come out with him and they began fighting outside in the street. Gilmore

received a beating in the course of the fight. Peter Neill, one of the others present at the party, went outside and broke it up. He then returned to the flat. About fifteen minutes later there was a knock at the door. Joseph Fleming had returned accompanied by Patrick Fleming, the victim, and Martin Kennedy. They entered the flat and Joseph Kennedy starting fighting with Peter Neill. Patrick Fleming was standing at the doorway to the living room. He appeared to be blocking any egress from the flat. The applicant came out of the kitchen with a knife and stabbed Patrick Fleming five times in the chest. The applicant then left the flat and made off up the road. He met up with Gilmore and got into a parked car which had the keys in it and drove off.

[4] The victim had collapsed. The others attempted to help him and called for an ambulance. At around 3.30 am John Neill flagged down a passing police vehicle which took the victim to hospital where despite emergency surgery he died. The police apprehended the applicant at around 4.45 am. During police interviews the applicant denied stabbing the victim and maintained that the witnesses were lying.

[5] The autopsy report showed that the victim was a 40 year old man of slim build and 5 foot 9 inches in height. Death was due to stab wounds to the chest. There were five stab wounds in all, two of them to the centre of the front of the chest. One of these had passed through the right lung and the large vein that drains blood from the upper part of the body to the heart and extended as far as his spine. The second stab wound had also passed through the rib cage into the right side of the chest cavity and through the right lung. Both stab wounds would have allowed air to enter the chest cavity and would have resulted in heavy bleeding.

[6] The third and fourth stab wounds to the right side of the chest would not have been life threatening. The fifth stab wound in the region of the left arm pit had only passed through soft tissues and would not have been life threatening on its own. All the stab wounds could have been inflicted by the same weapon with a blade of approximately 21 centimetres in length and 2.3 to 3.5 centimetres wide. If the weapon had a sharp point it would have required no more than a moderate to great force to inflict the stab wounds. There were no defensive injuries on the victim's body.

[7] Since his childhood the applicant's lifestyle had been chaotic. His parents separated when he was 8 years old and he was admitted to care when 14 years old. He began committing offences mainly in relation to motor vehicles shortly thereafter and later moved on to burglary. He had more than 150 convictions. He had one conviction for a serious assault when he used a hammer to attack a man at a party when he had consumed a large quantity of alcohol. He also had 4 convictions for possession of offensive weapons including the use of a Japanese ornamental sword to frighten one victim. He

was a binge drinker and also used cocaine and ecstasy. He was assessed as giving rise to a high risk of reoffending and a significant danger to the public.

The issues in the appeal

[8] Article 5 of the Life Sentences (Northern Ireland) Order 2001 requires the court to set a tariff which the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. The Court of Appeal confirmed in R v McCandless and others [2004] NICA 269 that courts in this jurisdiction should adhere to the Practice Statement of Lord Woolf CJ when fixing minimum terms. The relevant passages dealing with the normal starting point, the higher starting point and variation from the starting point are set out below.

The normal starting point of 12 years

[9] 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.

[10] 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 nontechnical 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

[11] 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

[12] 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.

[13] 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.

[14] 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.

[15] 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.

[16] 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."

[17] The learned trial judge considered that this case fell within the higher starting point as there were multiple injuries inflicted prior to death. The applicant did not take issue with the fact that the five wounds could have constituted multiple injuries but suggested that the speed with which these were inflicted did not have the character of the prolonged or sadistic attack contemplated by this factor. We do not accept that submission. If there was evidence of prolonged or sadistic treatment of the victim that would be an additional feature falling within the factor immediately preceding the factor with which we are concerned. We are entirely satisfied that the learned trial judge was correct to treat this as a higher starting point case.

[18] In his admission to the probation officer the applicant stated that he had armed himself with a knife which had been thrown onto a stool beside him by someone else. The learned trial judge heard the evidence and was satisfied beyond reasonable doubt that he had in fact gone into the kitchen to get the knife. That clearly constitutes arming himself with a weapon in

advance. We accept that the period of time involved was short but the aggravating factor was his decision to arm himself before putting himself in a position where he could commit the offence.

[19] The applicant was 26 years old at the time but there was nothing to suggest that he had not reached full maturity. His extensive experience with the criminal justice system should have left him fully aware of the consequences of his actions. His age cannot be regarded as a mitigating factor (see R v Hamilton [2008] NICA 27). We also consider that the learned trial judge correctly recognised the limited weight that could be given to his contrition as shown by his confession after the trial to the probation officer.

[20] The last issue concerns the element of spontaneity and lack of premeditation in the commission of the offence. The learned trial judge accepted that there was a perception of fear as a result of the return to the party of the group which had been responsible for inflicting what the judge described as an absolute hiding on Gilmore. The applicant went into the kitchen to get the knife once the fight started. The learned trial judge accepted that these facts demonstrated a degree of spontaneity and lack of premeditation. The absence of any planning or premeditation will always be a significant factor in the determination of any sentence.

Conclusion

[21] We accept that a tariff well in excess of the higher starting point was appropriate in this case but in light of the element of spontaneity and lack of premeditation we consider that a period of 22 years was manifestly excessive and we substitute for it a period of 20 years. To that extent we give leave and allow the appeal.