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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

NIGEL JAMES BROWN and GARY RYAN TAYLOR

APPEAL AGAINST SENTENCE

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ

[1] On 24 February 2010 Nigel James Brown and Gary Ryan Taylor were found guilty by a jury at Belfast Crown Court of the murder of Thomas Devlin and the attempted murder of Jonathan McKee on 10 August 2005. Both were found to have been involved in a joint enterprise. Nigel Brown was sentenced to life imprisonment with a minimum tariff of 22 years to be served before he may be considered for release. Gary Taylor was sentenced to life imprisonment with a minimum tariff of 30 years. Each received concurrent sentences of 15 and 20 years' imprisonment respectively for their convictions of attempted murder. On 29 November 2012 the Court of Appeal dismissed their appeals against conviction ([2012] NICA 52). Taylor renews his application for leave to appeal the tariff imposed and Brown appeals his sentence with the leave of the single judge. Mr Harvey QC and Mr MacCreanor QC appeared on behalf of Brown, Mr Orr QC and Mr Farrell on behalf of Taylor and Mr Hedworth QC and Ms McKay for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

[2] We have already set out in some detail the disturbing history of the events on the evening of the murder in our judgment dealing with the appeals against conviction and for the purposes of this hearing are content to adopt the account set out by the learned trial judge in his sentencing remarks.

[3] On the evening of 10 August 2005 Thomas Devlin, aged 15, Jonathan McKee, aged 17 and Fintan Maguire aged 16, were walking along the Somerton Road, Belfast, in a countrywards direction towards Thomas' house. Earlier in the evening they had been with another friend playing computer games and on the way home had made a diversion to a local petrol filling station where they had bought soft drinks, potato crisps, snacks and the like. By virtue of the date it was the middle of the school holidays and it is clear from the evidence that the boys were behaving in a completely law abiding and carefree manner. It was a warm, perhaps balmy, evening. As they approached the rear entrance gate of St Patrick's College they were attacked by the defendants. The first inkling of danger they had was when they became aware that Brown and Taylor were running towards them and clearly intent on causing them harm. They began to run. Fintan perceived that the intention was to get him first but he managed to run fast enough to escape; ultimately he got far enough along the Somerton Road to be able to climb over a second gate into the college and reach the relative sanctuary of the school grounds. Jonathan unfortunately was caught by Brown, as is established clearly by the evidence, and Thomas was caught by Taylor. In fact Thomas had tried to escape by climbing over the first set of school gates but was dragged back off the railings or brick pillar at the gates and brought to the ground by Taylor. What followed was a horrifying and brutal attack upon utterly defenceless and harmless boys. Once Taylor managed to get hold of Thomas he began to knife him repeatedly. He inflicted four wounds to the left side of his back, one to the abdomen, two to the back of the right bicep, one to the outer aspect of the right bicep, one to the right leg and two – one above and one below – the left eye. There were also three wounds to the right middle, ring and little fingers. The evidence established that a minimum of nine strikes were made with the knife to cause these wounds. It is self-evident that this was a sustained and deliberate attack designed to cause maximum injury, in fact indisputably the intention was to cause the death of Thomas.

[4] While that attack was taking place on Thomas, the defendant Brown was attacking Jonathan. Jonathan described how when set upon he put his arms up to cover his head and got a number of bangs on the head, shoulders and arms. He eventually fell down to a kneeling position and was punched about the left cheek from behind. He thought he was being struck with a piece of wood which was being swung "wildly" and "aggressively" at him. This attack ended when Brown moved further up the Somerton Road away from the immediate scene of the attack at the gates. Jonathan then walked round into the recess where the gates are located but was then confronted by Taylor, who had finished his attack on Thomas, and who then set about an attack upon him. In the course of that attack Jonathan was stabbed in the abdomen and a knife was thrust towards his back. Fortunately for Jonathan he was carrying a back pack which was full of paint aerosols, which they had been using earlier, and these appear to have prevented him suffering any knife injury to the back. The attack was carried out in a frenzied way and Jonathan described how scary and brutal it was. It continued despite his pleadings when he said things like "Please", "No", "Stop", "I am sorry", and apologising even though he had not done

anything. For reasons which never became clear Taylor did not continue further with the attack and eventually ran off up the road and rejoined Brown where they made their escape.

[5] Mr Lawrence Kelly was walking along the road and he immediately came to the assistance of the boys. He performed sterling efforts in trying to help both of them, and Thomas in particular. They were joined very shortly after the attack ended by Fintan. Mr Kelly summoned a friend of his who was a doctor and who then attended the scene. The medical evidence is clear however that nothing could have been done to save Thomas; he had sustained injuries which were so severe that they were unsurvivable. He was pronounced dead a short time after his arrival at the Mater Hospital. Fortunately for Jonathan his physical injuries were not as severe and he recovered from those quickly afterwards.

[6] Brown was 22 at the time of the offence. He has 72 convictions including the 2 convictions arising from this particular case. The details show that he has 30 convictions for assault on the police and other convictions for assault occasioning actual bodily harm, affray, criminal damage, possession of offensive weapons, riotous/disorderly behaviour and drugs offences. Taylor has fewer previous convictions but these included riotous behaviour, disorderly behaviour and two convictions for assault occasioning actual bodily harm and two convictions for affray which were imposed approximately a year before these offences.

[7] The pre-sentence report in respect of Brown demonstrated an evident pattern of public order offending with most of his previous convictions related to assaults on the police, and offences motivated by sectarianism. Negative peer associations, distorted attitudes and beliefs, and habitual misuse of drugs were significant contributors to his behaviour and offending history. A wide range of court disposals have had limited impact. Brown has been assessed by PBNI as presenting a high likelihood of re-offending. He was also assessed as posing a risk of serious harm. A psychiatric report noted that his early childhood and upbringing had been disrupted by his father's physically violent behaviour in the family home, the break-up of his parents' marriage and his mother's difficulty in managing his behaviour effectively. It is well recognised that the impact of disturbing childhood experiences can have adverse effects on behaviour, social adjustment and personality development that may persist into adult life. He presented at interview as a young man with relatively limited intellectual resources and only basic literacy skills. He reported abusing benzodiazepines and alcohol at the time of the offences and if he were to resume his former pattern of abusing psychoactive substances on his discharge to the community, the risk of further similar behaviour was likely to be significantly increased.

[8] The pre-sentence report on Taylor stated that drug and alcohol abuse had been a significant feature of Taylor's lifestyle since his early teenage years. He asserted that sectarian attitudes had always been common place amongst his peers

and local community. He admitted that his own attitudes were also sectarian in nature and this was reflected in his previous offending. He had a history of involvement in riotous behaviour against members of the Catholic community. This had also resulted in convictions for assault. He had been assessed as presenting a high likelihood of re-offending. He was also considered to present a risk of serious harm. Unlike Brown he was a young man with a very usable level of cognitive ability.

[9] We have had the benefit of victim impact statements from the Devlin family and the two boys who survived the attack. For all of them the consequences of that night have been life changing and enduring. The emotional impacts and the effects on the mental health of the Devlin family have been profound and devastating.

The relevant legal principles

[10] R v McCandless [2004] NICA 1 remains the relevant guidance for the determination of minimum terms in life sentence cases under the 2001 Order and we set out for convenience the relevant portions of the Practice Statement issued by Lord Woolf in May 2002 which was approved in that case below:

> *"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

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."

The judgment below

[11] The learned trial judge accepted that there were a number of the paragraph 12 factors present. The victim was a child. Multiple injuries were inflicted on the victim before death. Those factors were accepted by the appellants as justifying the higher starting point. The prosecution invited the judge to the view that the attempted murder was so close to the concept of multiple murders that this also should be recognised as a paragraph 12 factor. He took the view that it did not strictly fall within the terms of the paragraph but accepted that he should give it weight while recognising that a separate sentence would be imposed in respect of that count and that he should not double count.

[12] The judge rejected a prosecution submission that he should sentence on the basis that this was a sectarian attack. The learned trial judge did not accept that submission because there was no evidence of anything said or proof of any circumstances which could establish such a factor. He concluded, however, that there was no motive or explanation for this attack and concluded that a completely motiveless attack was of similar culpability to one based upon religion, race or other such motives. That was a conclusion that was challenged in particular by Taylor. It was submitted that the specific reference to race, religion and sexual orientation in the paragraph 12 factors supported the view that a killing with such a factor should be treated as being more culpable than a killing carried out in a random fashion.

[13] The judge then looked at the aggravating factors set out in paragraph 14 which arose in these offences. He accepted that this was not a murder in which the victims were identified in advance. He was, however, satisfied beyond reasonable doubt that Taylor went pre-armed with a knife and that Brown, who had armed himself with a piece of wood, knew that Taylor had the knife at the time of the attack. He also noted that the criminal records in relation to each were aggravating factors. The learned trial judge referred in his sentencing remarks to some convictions for assault of police officers and an attempt to possess a class C drug all of which were committed after these offences. We do not consider that anything turns on this. Taylor's record may have been shorter than that of Brown but it showed the recent use of serious violence on two occasions and multiple episodes of conduct putting the public in fear.

[14] By way of mitigation the judge noted that Taylor was 4 days short of his nineteenth birthday and came from a fractured home environment. It was submitted on behalf of Taylor that some allowance should be made for the fact that Taylor was informed by the prosecution in July 2008 that he would not be prosecuted before being told in March 2009 that a decision had been taken to reverse that decision. The learned trial judge rejected that submission. Taylor suffered no detriment as a result of the earlier correspondence. He believed that he had got away with this horrendous attack. That is no basis for mitigating the appropriate sentence in this case. We agree that the analogy with cases in which a sentence is referred from the Crown Court to the Court of Appeal is inappropriate. In those cases the offender has already been sentenced and is then sentenced again. In this case the offender had not been subject to any trial process.

[15] In the case of Brown the learned trial judge noted that he had been subject to brutality by his father until his parents' marriage broke up when he was 13 years old. He was seriously damaged emotionally as a result. He had required considerable psychiatric support over a period in excess of 10 years. The judge accepted that Brown had not persisted with his attack on Jonathon McKee when the victim was not in a position to fight him off. Within 4 weeks of the attack he had also made a disclosure of his involvement in the attack to his step father in circumstances where he would have realised that his information would have been conveyed to

police through his step father's brother. Mr Harvey submitted that this went to establish his remorse.

Consideration

[16] In R v Stephen Brown [2011] NICA 70 this court said that the factors in McCandless were not intended to be comprehensive. They were designed to assist sentencers in assessing the culpability of the offender and the degree of harm caused by the offence. They should not be applied mechanically or interpreted strictly as if they were contained in a statute.

[17] It is clear that in the case of Taylor the learned trial judge concluded that this was a most serious case falling within paragraph 18. Although it was accepted that the tariff in his case lay well above the starting point of 15 or 16 years it was submitted that it lay somewhere between 20 and 25 years. That submission depended in part on whether the judge was entitled to attribute the weight he did to the conviction for attempted murder and the random nature of the killing as aggravating factors.

[18] There is no doubt that the attempt to murder Jonathon McKee was a determined and deliberate attempt to kill. Taylor stabbed at his back on a number of occasions. The stab strokes at the rucksack containing the aerosol cans were forceful and deep. It was entirely fortuitous that no significant physical injury was caused. The learned trial judge noted that it could not be said that this was a multiple killing on a literal reading of the paragraph but it clearly exacerbated the culpability of the offender not just because of the deliberate use of serious violence but also because of the intent behind it. We agree, therefore, that the learned trial judge was entitled to treat this as a serious aggravating factor akin to multiple murders.

[19] The second issue concerned the random nature of the killing. McCandless refers to murders motivated by race, religion or sexual orientation because discriminatory behaviour on such grounds is not uncommonly practiced and there is a need to make plain on a deterrent basis that those who kill with such motivation will be judged to have acted particularly culpably. In this case the learned trial judge found no such factor established and concluded that there was no motive for this murder. That means, therefore, that the murder was carried out randomly on the basis that whichever vulnerable person these offenders might meet would be attacked in this manner. The random nature of this offence means that there was no motive for the actions of the offenders other than a desire to kill on their part. Murders on such a basis naturally strike fear in the minds of those within the local community because such conduct is the mark of the serial killer. In our view such killings are inevitably highly culpable. They merit inclusion in or rank with those aggravating factors. We can find no fault with the weight which the learned trial judge gave to his finding on this issue.

[20] We are satisfied, therefore, that the judge properly assessed this as one of the most serious cases within paragraph 18 of the Practice Statement. Given that Taylor was 4 days short of his nineteenth birthday when the offence was committed we consider that any mitigation for age is modest and this court has repeatedly said that the strength of seriously aggravating factors in the areas of retribution and deterrence will significantly outweigh mitigating factors. We agree that a tariff of 30 years in the case of Taylor was a stiff sentence but we do not consider that it was manifestly excessive or wrong in principle. His appeal is dismissed.

[21] On behalf of Brown it was submitted that although a secondary party is indicted as a principal it does not follow that his culpability is the same. That submission is supported by the introduction to the Law Commission's final report on Participating in Crime published in May 2007 which noted that there were many circumstances where there was no parity of culpability between principals and secondary parties. The learned trial judge noted a significant difference in culpability in this case in that Taylor mercilessly and persistently engaged in multiple stabbings directed at both his victims which showed a determination to inflict maximum injury causing death to them. In Brown's case he engaged in a vicious attack on McKee but then desisted when McKee was at his most vulnerable. We accept, however, that Brown's culpability remains significant having regard to the fact that the jury have found that he had the intent necessary for attempted murder in respect of the subsequent attack on McKee by Taylor. In his sentencing remarks at paragraph 31 the learned trial judge explained that his decision to impose a significantly lower tariff of 22 years on Brown was designed to reflect principally that difference in culpability while also taking into account his personal circumstances.

[22] We consider, however, that there was another aspect to Brown's behaviour which was deserving of attention. The disclosure by Brown within 4 weeks of the attack that he and Taylor had been involved was clearly an important development in the investigation of the case and was helpful to the investigating team. That was recognised by the judge who indicated that he was making some allowance for it.

[23] The judge had, however, considered this evidence at some length when determining whether he should admit it as bad character evidence and had noted the circumstances in which Brown had made the disclosure. He described this as a deep and meaningful conversation in a family context while Brown was wrestling with his conscience. We are aware, as was the learned trial judge, that Brown's disclosure was in many respects self-serving and not an admission of the role he played in these gruesome offences. On the other hand there was no police intelligence to suggest the involvement of either offender at the time and the only explanation for the disclosure was that identified by the learned trial judge that he was wrestling with his conscience.

[24] Even if the disclosure did not amount to straightforward remorse the circumstances of it suggested that Brown was troubled by the enormity of what he had done and felt compelled to confess the fact that he had been involved. Taken in conjunction with the assistance this provided in the investigation of the offence we consider that some further allowance should have been made for that factor. We consider that the tariff of 22 years was consequently manifestly excessive and we substitute for it a tariff of 20 years. To that extent the appeal is allowed.