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Judgment: approved by the Court for handing down | *Delivered:* **23/6/2011**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THE QUEEN

-v-

PAUL JAMES MORRIN

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Higgins LJ, Coghlin LJ and Hart J

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HART J (delivering the judgment of the court)

[1] The defendant and appellant was convicted of the murder of Gerald Martin O'Hagan in the early hours of 3 February 2006, and on 23 April 2008 he was sentenced to life imprisonment with a minimum term of 20 years imprisonment before he could be considered for release by the Parole Commissioners. He was refused leave to appeal against conviction on all grounds except one, and on 23 May 2011 we gave our reasons for dismissing his appeal against conviction. See [2011] NICA 14.

[2] The defendant was given leave to appeal against sentence by the single judge, and following the dismissal of his appeal against conviction we later heard the appeal against sentence, and having done so we reserved our decision. It is unnecessary to rehearse all of the details relating to this murder as we have already set them out at some length in our earlier judgment dismissing the appeal against conviction. It is, however, necessary to refer to some parts of the evidence again. Gerald O'Hagan was found in a kneeling posture beside a bed with his knees on the floor, and his head and trunk lying face down on a duvet on the bed. The duvet was saturated with blood, and projected blood was found on the duvet close to the pillows, and on the sleeping bag on top of the bed near the bedstead at the foot of the bed, as well as on the wall of the room. There was also a transferred bloodstain on the wall. This bloodstain, which was referred to as a "smeared" bloodstain, and

the linear projected spots of blood, matched the blood of the deceased Gerald O'Hagan.

[3] Dr Ingram, the Assistant State Pathologist, concluded that Gerald O'Hagan died as the result of several wounds.

(1) A stab wound to the left side of the neck, entering at the back and transacting the left internal jugular vein, before emerging on the left side of the front of the neck.

(2) There were 14 stab wounds to the back of the trunk, 6 of which inflicted serious injuries, the other 8 were relatively superficial and had not damaged any internal structure.

It was therefore clear that Gerald O'Hagan died as the result of a large number of blows inflicted as he was struck repeatedly from behind. What happened prior to this attack, or why he was attacked, is unknown, but he was clearly completely defenceless when he was attacked in this fashion from behind, a conclusion supported not just by the posture in which his body was found and the wounds having been inflicted from behind, but by his being intoxicated and of slight build when compared to the defendant.

[4] Mr Brian McCartney QC (who appears with Mr Martin Rodgers) confined his submissions to arguing that the minimum term of 20 years imprisonment selected by the trial judge was wrong in principle and manifestly excessive because –

(1) the judge engaged in double counting of the aggravating features of the case; and

(2) penalised the defendant for contesting the case and the manner in which it was contested.

[5] At the outset of the hearing Mr McCartney drew to our attention two reports which had been prepared on behalf of the defendant prior to the trial and asked that we should receive them and take them into account. We allowed Mr Ramsey QC (who appears with Mr Chesney for the prosecution) time to read these reports and then considered whether we should receive them in evidence. When the court enquired why these were not placed before the trial judge prior to sentencing Mr McCartney said that a view had been taken by the defendant's solicitor that they were not relevant and that neither he nor Mr Rodgers had seen them.

[6] Section 25(1)(c) of the Criminal Appeal (Northern Ireland) Act 1980 provides that:

> "the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice … receive any evidence which was not adduced at the trial".

However, by s. 25(2) (d) the court is required to consider:

> "whether there is a reasonable explanation for the failure to adduce the evidence at the trial".

As the reports were available to the defence prior to the trial and a decision was taken not to rely upon them we considered that we should not receive them.

[7] Article 5(2) of the Life Sentences (Northern Ireland) Order 2001 states that the minimum period to be served by a prisoner sentenced to life imprisonment before he can be considered for release by the Parole Commissioners shall be such 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."

In R v. McCandless and others [2004] NI 264 the Court of Appeal set out the approach to be followed by judges in this jurisdiction, and directed judges to apply the *Practice Statement* issued by Lord Wolff CJ in May 2002. This provides that the minimum term in the case of adult offenders shall be selected by having regard to a normal starting point of 12 years or a higher starting point of 15/16 years, as can be seen from the relevant portions of the *Practice Statement*.

> *"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. "

[8] It is clear from the circumstances of the present case, and indeed Mr McCartney QC did not argue the contrary, that the higher starting point of 15 to 16 years was appropriate in this case. First of all Gerald O'Hagan was in a particularly vulnerable position when he was attacked because he was

attacked from behind and at a time when he was significantly intoxicated. As the judge observed, Gerald O'Hagan

> ". . . was vulnerable, given his youth, modest build [and] the fact that he was extremely intoxicated."

In addition, extensive and multiple injuries were inflicted upon him by this attack. That being the case, two of the features identified in the *Practice Statement* as requiring the adoption of the higher starting point of 15 to 16 years were present. We consider that the trial judge was entirely justified in his sentencing remarks when he said:

> "As appears from the nature and distribution of the wounds, the attack by the defendant on this vulnerable and incapacitated young boy was chilling, sustained, ferocious and unexplained."

[9] The first of Mr McCartney's submissions was that the trial judge had engaged in double counting when selecting a number of features as justifying a substantial upward adjustment of the minimum term in accordance with paragraph 18 of the *Practice Statement*. It states that a substantial upward adjustment may be appropriate in most serious cases for example:

> "If there are several factors identified as attracting the higher starting point present".

As Carswell LCJ pointed out in McCandless:

> "It is to be remembered that the figure of 15 or 16 years is only a starting point for the consideration of the court, and that having commenced from there its duty is to end up at a figure which properly represents the minimum period for which the perpetrator of the crime should be detained before his release can be considered. In assessing heinousness of the factors which bring the case into the higher bracket the court is not double counting, merely determining the seriousness of the crime."

[10] We have already referred to the violence inflicted on the deceased, but in addition there were what the trial judge described as "a number of macabre features." He said:

> "There are also a number of macabre features. The Defendant took a perfectly framed photo of the deceased after he had been murdered. This had all

> the appearance of a trophy photograph. Cigarette ash was also found on the back of the deceased's body, indicating that the Defendant, after he had murdered the young boy, was standing over the body smoking. A meat clever was also found under the cushion of a chair in the living room, whose purpose and location also remains unexplained."

[11] Although Mr McCartney argued that the trial judge had overlooked evidence given during the trial that the photograph could have been taken accidentally, we are satisfied that the trial judge was entitled to form the conclusion that he did, and to have referred to this photograph as one which "may have been a trophy photograph". Taking all of these circumstances into account, namely the vulnerability of the deceased at the time he was attacked, the extensive nature of the injuries inflicted upon him, the cold and casual viewing of the deceased's body, and the presence of cigarette ash on his back, indicative of the defendant having smoked at a point where the body was lying in front of him, we consider that this was a proper case in which to impose a minimum term significantly in excess of 15 to 16 years.

[12] Mr McCartney also drew attention to the fact that the judge appeared to have penalised the accused for contesting the trial. In his sentencing remarks the trial judge referred to the prosecution as having identified as an aggravating factor the defendant's attempt to evade responsibility, and he referred to the defendant's defences that the murder was either done by someone else or by the defendant whilst sleepwalking as "a complete charade", and later he said:

> "And he showed no remorse in contesting the case over two months, on a completely spurious basis, in the teeth of damning and overwhelming forensic evidence."

[13] It has long been recognised that a defendant cannot be penalised for contesting a case, no matter how much the defence advanced may be lacking in credibility, because every defendant has the right to plead not guilty, and that to impose a heavier sentence than otherwise would be the case because the case has been contested is impermissible. We consider that the trial judge's apparent acceptance of the prosecution's submission that the defendant's attempt to evade responsibility was an aggravating factor, and the remarks which we have cited, lend support to Mr McCartney's submission that the judge penalised the defendant for the manner in which he contested the case by treating this as an aggravating factor. In those circumstances we have considered the sentence afresh, and determined that the appropriate minimum term should be one of 18 years imprisonment. We vary the sentence accordingly, and to that extent the appeal is allowed.

[14] It may be of assistance to judges engaged in the difficult exercise of assessing the appropriate minimum term in such cases if we indicate that it may be helpful if judges were to consider the various factors in stages, first of all identifying which is the appropriate starting point, and explaining why that starting point has been chosen. The judge should then proceed to the second stage when he should consider whether the appropriate starting point should be varied upwards or downwards to take account of any aggravating or mitigating factors. Thirdly, and particularly in those cases where the aggravating factors are such that a minimum term in excess of 15 or 16 years is appropriate, judges should bear in mind the comments of Carswell LCJ to which we have already referred that the court's "duty is to end up at a figure which properly represents the minimum term for which the perpetrator of the crime should be detained before his release can be considered".

[15] As Carswell LCJ observed in R v W *Northern Ireland Sentencing Guidelines* Vol.1, 2.44 when considering the application of sentencing guidelines laid down, or approved, by this Court, guidelines

> "…do not provide a tariff to be applied in a mechanistic manner like logarithm tables. They are rather an avenue along which the sentencer may proceed in his consideration of the case with which he is dealing. He then has to reach a conclusion appropriate in all the circumstances of the case, and it need hardly be said that these will vary infinitely."

In R v Milberry [2003] 2 Cr. App. R. (S.) at p. 155 Lord Woolf CJ emphasised that

> "…it is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double counting must be avoided and can be the result of guidelines if they are applied indiscriminately."

Whilst Milberry was concerned with the application of sentencing guidelines in rape cases, the need for the judge to stand back and look at the overall sentence applies to all offences, and that process should form the fourth stage of the process of deciding what is the appropriate minimum term where the court is fixing a minimum term where the offender has been sentenced to life imprisonment.