

**THE QUEEN v DAVID ANDREW NICHOLSON**

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**DECISION ON TARIFF**

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**Before Kerr LCJ and Campbell LJ**

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**KERR LCJ**

*Introduction*

[1] On 26 November 1996 Campbell J sitting at Antrim Crown Court sentenced the prisoner to life imprisonment after his conviction by a jury of the murder of Harry Balmer on 2/3 November 1995. On 11 November 1997 the prisoner's application for leave to appeal, grounded on the possibility that a co-defendant was the killer and that the preponderance of medical evidence established that he was suffering from diminished responsibility, was refused. He has been in custody since 6 November 1995. He is now aged 35.

[2] On 16 June 2004 Campbell LJ and I sat to hear oral submissions on the tariff to be set under Article 11 of the Life Sentences (NI) Order 2001. The tariff represents the appropriate sentence for retribution and deterrence and is the length of time the prisoner will serve before his case is sent to the Life Sentence Review Commissioners who will assess suitability for release on the basis of risk.

*Factual background*

[3] At 12.50am on Friday 3 November 1995 a 999 call was made from a public telephone kiosk in Mill Street, Ballymena. The male caller, later identified as the prisoner, reported a murder at 23 Duke Street and hung up, giving his name as Joe Bloggs. Police attended the scene and discovered the body of Harry Balmer lying on the floor of the living room. At 2.55am police noticed the prisoner and his co-defendant pushing a shopping trolley filled with food and a radio through Ballymena and arrested them on suspicion of

burglary of a local cafe. Later on that same morning an investigating officer connected the prisoner with the taped 999 call. He and his co-defendant were arrested on suspicion of murder and the investigation ensued.

[4] The Court of Appeal judgment provides this summary of the relevant factual issues: -

“At the trial the prosecution case, based on the evidence of various witnesses and the admissions of the applicant, was that at about 9 pm on Thursday 3 November 1995 the applicant and Alan McDermott (McDermott) were in Church Street, Ballymena. The applicant was carrying a white plastic bag. He attempted to sell a knife to two boys who described it as about 10 or 11 inches long, having a black wooden handle and a red plastic cover on it which looked new. The boys refused to buy the knife. This knife proved to be the murder weapon. This was admitted by the applicant. At about 10.30 pm two young men were seen climbing in through the window of 35 Hill Street, Ballymena, which is a derelict house, access from which can be gained to 23 Duke Street, Ballymena through a ground floor window. The late Mr Balmer lived in 23 Duke Street. The Crown invited the jury to infer that these two young men were the applicant and McDermott. There was evidence to the effect that at about 11 pm the applicant entered Papa's Kitchen in Queen's Street, Ballymena where Mr Hammad Musavi worked and told him a story that his girlfriend had ordered food and paid for it and that he was supposed to collect it. The applicant was on the other side of the counter from Mr Musavi when he was speaking to him and Mr Musavi had a good view of him. He appeared to Mr Musavi as if he had been 'out of a fight'; he was nervous and unsettled. A stain of blood was seen on his hand or his sleeve. This was described by Mr Musavi as a spot which was not too large. Mr Musavi subsequently went to an identification parade at Donegall Pass RUC Station where he picked out the applicant from a group of seven or eight persons.

...

An autopsy on Mr Balmer was carried out by the Deputy State Pathologist at 1.45pm on 3 November 1995; the cause of death was internal and external haemorrhage, that is to say, bleeding inside the body and outside it due to multiple stab wounds. The striking feature at first sight was the presence of multiple cuts and stab wounds visible on the clothing and on exposed parts of the body which were quite heavily bloodstained. There was very heavy blood staining on the face and neck and trunk especially, specifically above the level of the waist. An analysis of the dead man's blood indicated a concentration of 220 milligrams per 100 millilitres and a concentration of 322 milligrams per 100 millilitres of urine. These levels indicated that the deceased had consumed a considerable amount of alcohol to a point of causing a degree of intoxication. There were in all 78 separate stab wounds. The wounds varied considerably in size and shape, but all could have been made by a single knife with a single sided blade.<sup>1</sup> Death was due to bleeding which was likely to have been caused by the multiple wounds; it was likely to have been rapid. On the right side the knife blade had completely severed the carotid artery. The concentration of wounds on the right side of the neck, trunk and right lower limb would suggest that the deceased was on his left side when the majority were inflicted. There would, therefore, appear to have been some degree of movement of the deceased during the course of the stabbing. The level of alcohol could have caused the deceased to fall asleep. Clearly some of the blood would have been contained within the body but there must have been external bleeding as well. It would seem reasonable that the attack started with the deceased on the settee and ended up with him falling to the floor. The droplets of blood found in the room probably did not spurt directly from the deceased but came from the blade of the knife as it

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<sup>1</sup> The trial judge, in his charge to the jury on Dr Carson's evidence of the post mortem, stated: "...the injuries seen on Mr Balmer's body were all stab wounds, seventy eight, and some to some very vulnerable parts such as the carotid artery which is at the side of the neck, and the chest injuries, these being the most damaging. And he did say that would have required, in his opinion, sustained vigour to inflict these wounds..."

was raised and lowered, becoming extensively bloodstained itself. As the knife was swung back jabs of blood would strike off probably in all directions; blood would also squirt out of the body and the body surface would have been bloody. There were blood splashes on the duvet cover consistent with blood squirting or spurting from the attacked body; blood might have been anywhere in that room as a result of splashes.

...

It was apparent that the body had received numerous stab wounds and a considerable quantity of blood was present on the clothing and the underlying carpet. It appeared that the body had been turned over during the attack. The presence of smeared blood staining over the skin of the right buttock of the body would also support the proposition that the body had been turned causing the blood to smear. Beside the head, at the back of the body, was a duvet, partly on the floor and partly on the adjacent settee; this showed small areas of blood staining at various locations over its surface. There was smeared blood staining on the pillow and on the back of the settee. Immediately above and below and on the wall behind the settee splashes of blood were present up to a height of 1530 millimetres; this would support the proposition that the deceased had been lying on the settee when he was first attacked. The smears of blood would most likely have come off the weapon. It would appear that it was a knife and the smears had come off the blade of a knife. Blood on the back of the settee and on the wallpaper would certainly not have come directly from the body. Some of the blood on the duvet may have come from the body. Beyond the body was a television set with a table lamp on top; blood splashing was present over the front and top of the television and there was smeared blood on the wall above the fireplace at a height of 1500 millimetres. There was splashed blood to the front of the television screen which gave the impression of cast-off blood from a knife probably during the course of the attack.

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Graham Devine gave evidence that he had a number of criminal convictions and that he was on bail awaiting trial on a charge of possession of drugs with intent to supply. He was in custody for about four months from the 14 June 1996. During that time he shared a cell with the applicant for a month to six weeks. The applicant told him that he was charged with the murder of a man called Balmer and at some stage got his preliminary enquiry papers for his trial. One evening the applicant told him: "I don't care if there is cameras in that vent or bugs in this cell but I murdered him". Devine was asked to repeat this and said that he was told: "I don't care if there is cameras in this cell or behind this vent or in this cell, I murdered him but when I left the body his trousers were not down round his ankles and it was lying on the sofa". The applicant mentioned that an asthma inhaler had been found beside the body but that it was not his. He said he had stabbed Balmer all over and the end of the knife was crumpled up. Devine said that he read the applicant's papers, that the applicant told him that McDermott had nothing to do with it and was outside at the time, that there was blood everywhere.

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During the course of his interviews he claimed he had met the deceased once before for ten minutes at the flat of the deceased. He could not account for his own blood being found in the deceased's flat; he was adamant that he had never been in it. For a long time he denied that he had bled or had blood on his clothes but ultimately claimed that it got onto his clothing because he had handled the blood-stained murder weapon which he had taken from McDermott [the co-accused]. At one stage he suggested that the blood might have got from his hands onto his boots, though he said he might be grasping at straws. He said that he and McDermott had washed and dried themselves at

the flat in Leighinmohr in the early hours of the morning (after the murder of Balmer). He was asked to account for cuts on his right hand but could not do so. He said he and McDermott never left each other's sight that night in most interviews but when he put the blame on McDermott he said McDermott had left him for a few minutes. He said that he had nothing to say against McDermott who, the police were pointing out, was saying plenty against him. At one stage he said that McDermott had given him several beatings."

[5] Evidence was given by Dr Davidson, consultant psychologist, who said that the prisoner suffered from severe dependency on Benzodiazepene. He was of the opinion that the prisoner's loss of memory was linked with that dependency. Dr Bownes, consultant psychiatrist, gave evidence that the prisoner's judgment would have been impaired due to his dependency. Dr Fleming, consultant psychiatrist, said that a diagnosis of Benzodiazepene intoxication at the time of commission of the offence could not be established due to insufficient evidence.

#### *Antecedents*

[10] The prisoner's record consists of 6 prior appearances before the criminal courts between 1986 and 1994. All but one appearance, the first, were in the Magistrates' Court. In December 1986 the prisoner was sentenced to 2 years and 364 days YOC detention for arson by Belfast Crown Court, with lesser sentences for burglary, placing an article to cause a hoax bomb, communicating a hoax bomb and another count of arson. In March 1992 he received a 3-month sentence suspended for 15 months for assault occasioning actual bodily harm. He has three convictions for disorderly behaviour, all of which were dealt with by small fines.

#### *The NIO papers*

[11] A brief written representation has been submitted by the deceased's sister, Susan Balmer. Miss Balmer states that her brother was a peaceable man. After the murder she was placed on medication for stress and now suffers from asthma. She rarely goes out and is unusually anxious for her children when they are not with her. Miss Balmer adds that her whole family was devastated by the murder and that her sister, who is still on medication, is too distressed even to make a representation.

[12] The prisoner's solicitor, Stephen Tumelty, in written representations, indicates that the prisoner has had difficulty while in prison due to provocation from other prisoners. Mr Tumelty adds that it is to the prisoner's

credit that he has not risen to this provocation. The prisoner has made efforts to overcome certain psychiatric difficulties. He is a committed Christian and has severed all links to his former lifestyle.

*Practice Statement*

[13] 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 sentencers in this jurisdiction who were required to fix tariffs under the 2001 Order. The relevant parts of the *Practice Statement* for the purpose of this case are as follows: -

*“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."

### *Conclusions*

[14] This is clearly a case which comes within the higher starting point category. Many of the features outlined in paragraph 12 of the Practice statement are present here. The killing was done for gain (in the course of a burglary; it may well have been carried out in order to defeat the ends of justice (as in the killing of a witness or potential witness); the victim was vulnerable not merely by reason of his inebriated state but also because it is likely that the deceased was disabled by the first blows (it appears that he was lying on a sofa) and thereafter was unable to offer effective resistance.

[15] The only possible mitigating feature was that the case arguably came near one of diminished responsibility. Such diminution as the prisoner suffered, however, was contributed to, if not actually caused by, his drug dependence.

[16] The applicant contested the charge and cannot therefore claim credit for having pleaded guilty. He has not expressed remorse because, as Mr Farrell explained to us, he continues to refuse to admit his guilt. He has relevant previous convictions but none, of course, is remotely as serious as the present charge. The way that the unfortunate victim was done to death was horrific. We have taken all these factors into account, together with all that Mr Farrell has so ably said on his behalf. We have concluded that the appropriate tariff is sixteen years. This will include the time spent by the offender in custody on remand.