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Judgment: approved by the Court for handing down | *Delivered:* **11/04/2018**
*(subject to editorial corrections)**

IN THE CROWN COURT OF NORTHERN IRELAND

SITTING AT LAGANSIDE COURTS, BELFAST

THE QUEEN

-v-

RHYS MAGEE

SENTENCING REMARKS

COLTON J

[1] The defendant was born on 23 July 1997. On the indictment he was charged with the following counts:-

- Count 1 – Murder of Richard Miskelly contrary to common law;
- Count 2 – Perverting the course of justice contrary to common law;
- Count 3 – Perverting the course of justice contrary to common law.

[2] He pleaded not guilty at arraignment to all of the counts on 25 October 2017.

[3] On 11 January 2018 (and in advance of his trial date which was 15 January 2018) he applied to be re-arraigned and pleaded guilty to Count 1. The prosecution applied to leave Counts 2 and 3 "on the books" in the usual terms on the basis that they were subsumed within the main charge.

[4] Having pleaded guilty, the court accordingly imposed upon the defendant the only sentence permitted by law for that offence, one of life imprisonment. It is now my responsibility in accordance with Article 5 of the Life Sentences (Northern Ireland) Order 2001 to determine the length of the minimum term that the defendant will be required to serve in prison before he will first become eligible to have his case referred to the Parole Commissioners for consideration by them as to whether, and if so, when he is to be released on licence. I make it clear however that if and when he

is released on licence he will, for the remainder of his life, be liable to be recalled to prison if at any time he does not comply with the terms of that licence.

Factual Background

[5] The deceased is Richard Miskelly (DOB 29/10/92). At the time of his death he was aged 24 years. He was living with his mother and sister Ashley in Newtownards. He had just secured (but not started) his first full-time job with Poundland.

[6] At around 9.00pm on 25 February 2017 the defendant arrived at 278 Bangor Road, Newtownards, which is the home of Lloyd Harbinson and his family. At approximately 10.15 pm he travelled from that house with Lloyd and a number of other young males to spend the evening at Mandela Hall, Belfast.

[7] Number 278 is a substantial property set just off the dual carriageway. There is a long driveway up to the house.

[8] The other occupants of number 278 are Lloyd's mother Victoria Moore, her partner Kyle Wilkinson and their daughter who was then aged 4. At around 9.00 pm Victoria Moore invited Ashley Miskelly over for a drink. Ashley is her friend and employee and she arrived at the house shortly thereafter in the company of her aunt Deborah Appleton. These three women were socialising together in the kitchen and were aware of Lloyd and his friends leaving the house for their night out. Ashley knew Lloyd but did not know the defendant or his other friends.

[9] At some stage later in the evening it was agreed that Ashley would invite her brother, Richard Miskelly, to number 278. They had been drinking together earlier that evening. Richard arrived at the house before midnight; his aunt Deborah left shortly thereafter. Mr Miskelly was with his friend Stephen Mullan. The atmosphere was good and those present were drinking. Mr Miskelly and some of the others took cocaine and cannabis. Ashley Miskelly fell asleep.

[10] At around 04.00 am the defendant arrived back at number 278 with Lloyd Harbinson. They did not know Messrs Miskelly and Mullan. When they happened upon them in the kitchen Harbinson told them to "*get the fuck out*" and began to push them out the door. All four of the men in question were intoxicated. The two men, that is Mr Miskelly and Mr Mullan left the house.

[11] Shortly thereafter Harbinson saw them at the bottom of the driveway and decided to go out and challenge them again. The defendant went with him and they followed the two men for a short distance. Harbinson then approached Mullan and struck him to the right cheek, causing him to fall to the ground. Mullan was further assaulted whilst he was on the ground and was trying to protect himself. During this time he observed his friend Richard Miskelly lying on his back on the ground

about 10 feet away. He saw the defendant kicking him on the head. The assailants then ran back towards number 278.

[12] A witness living directly opposite the scene observed two males standing at the entrance of number 278 at approximately 05.00 am. She heard one say to the other "*what the fuck have you done?*" before both went out of sight.

[13] Stephen Mullan made his way over to Richard Miskelly. He saw that he was limp and seriously injured and he tried to physically support him as he telephoned for an ambulance. Whilst he was speaking with the operator the defendant appeared and started to carry out CPR and chest compressions on Mr Miskelly. The defendant took the phone from Mr Mullan and engaged with the operator until the paramedics appeared. In a statement Lloyd Harbinson made to the police he told them that he wanted the two males out of his house as he believed they were taking drugs and he was concerned for his young sister who was sleeping upstairs. He said the two men left "*pretty much immediately*" when told to go. He and the defendant then started to tidy up the kitchen. After about 10 minutes he saw the males still hanging about the entrance to the house and he went out with the defendant to tell them to "*fuck off*".

[14] Lloyd Harbinson states that after he told them to clear off, he saw the defendant swing his right arm and hit Richard Miskelly to the head. Harbinson said that he pushed Mullan away when he tried to intervene and that he then swung at Mullan and pushed him to the hedge and then onto the ground. Harbinson looked over his shoulder and saw the defendant putting Miskelly to the ground. He is unable to say how many times the defendant punched him. He and the defendant then turned to go back to the house. Harbinson then saw Miskelly get into a sitting position. As he did so, he claims that the defendant returned to him and "*volleyed*" Richard Miskelly on the head with his right foot causing him to fall back and hit his head on the ground. Mr Miskelly was lying motionless. Harbinson said that the defendant appeared to be in shock and that he told him that he thought he had broken his foot. Harbinson and the defendant went back to the house and woke Kyle Wilkinson. All three men then went outside to Mr Miskelly. Harbinson realised that something was "*seriously wrong*" and returned to his bedroom. He was aware of emergency services arriving at the scene. A short time later the defendant came to his room and said "*you got home an hour before me and you didn't see anything*". (This forms the basis of Count 2 on the indictment). A few minutes later Harbinson went to the kitchen where he saw the defendant with Kyle Wilkinson. It was then that he was told that Mr Miskelly was dead.

[15] Harbinson later spoke to a police officer at the scene and gave his account of what happened during which he indicated that he had arrived back at number 278 with the defendant and not an hour before him.

[16] Police and paramedics arrived at the scene at about 05.45 and despite all efforts, Mr Miskelly could not be resuscitated. The defendant was still at the scene

when Sergeant McCutcheon spoke to him to try and establish what had happened. The defendant appeared to be in shock. He told the officer that he had got a taxi back to number 278 by himself and that the taxi had dropped him off at the bottom of the driveway where he came across the male lying on the ground. (This formed the basis of Count 3 on the indictment).

[17] He said that Mullan had been kneeling down beside the injured man and that he helped move him before running into the house for help. The Sergeant advised the defendant that he was not convinced by his account and told him that now was the time to tell the truth.

[18] The defendant was arrested at 09.05am that day. Following a series of interviews he was charged with murder to which he replied "*I did not murder Richard Miskelly and I am very sorry for his family and his death.*"

[19] A post-mortem examination was conducted on 28 February 2017 by Dr Lyness. In his post-mortem report he records:-

> "*In summary, death in this case was the result of the effects of subarachnoid haemorrhage secondary to traumatic rupture of the left vertebral artery. The history provided indicates a temporal relationship between his having been kicked on the left side of the neck and then immediately slumped backwards unresponsive. Indeed the side of the neck is a vulnerable area for traumatic basal subarachnoid haemorrhage and the autopsy findings of patterned bruising and abrasion in this region and fractures of the adjacent jaw would support such a scenario*".

[20] Mr Miskelly was also found to have bruising and abrasions to the scalp and face.

[21] The relatively minor injuries, according to Dr Lyness, could have been sustained as a result of falls and collapse episodes secondary to contact with the ground whilst he was being assaulted. The more serious injuries were "*undoubtedly caused by blunt blows, such as punching, kicking, stamping or a combination*".

Interviews

[22] The defendant was interviewed between 18.17 and 22.33 on 26 February, and between 11.06 and 20.52 on 27 February 2017. There were eight interviews overall. In the first interview he maintained his account at the scene, i.e. that he had come upon the deceased and simply assisted him.

[23] By the second interview he had admitted this initial account was untruthful. He said that both he and Harbinson had punched Miskelly and that when Miskelly came at him subsequently he punched him again causing him to go down for a third time. The defendant said that he lost his temper and instead of leaving him on the

ground he kicked him. He said that Miskelly had thrown a "*bong*" (a plastic bottle that may have been used for the earlier consumption of drugs) at him and this is when he "*lost it*". He said "*I literally just saw red*". He commented that Miskelly was in a vulnerable state such that "*probably I could have pushed him over with a finger*". He accepted that he had not felt threatened when he punched Miskelly the second time. He said that he believed he connected with Miskelly's neck and that, following the kick, Miskelly was unresponsive. He said that he was panicking and thought that he had seriously hurt him.

[24] At the third interview he said he had engaged in anger management classes for 3 weeks when he was aged 15. He said that his consumption of alcohol and Ketamine on the night in question would have caused him to lose his temper more quickly.

[25] In the fourth interview he admitted the redness to his knuckles had been caused by striking the deceased rather by punching a wall as he had earlier told the forensic medical officer. In the fifth interview he said he had been very, very drunk and that he had been affected by Ketamine. He said that what he thought had caused him to lose his temper most was Miskelly throwing the "*bong*". He also spoke of how he had not assisted Miskelly initially but then returned to him and performed CPR.

[26] In the sixth interview he denied saying to Harbinson "*I got home after you and found him in the lane*".

[27] In the seventh interview Harbinson's statement was put to him and he said that a lot of the contents were not true. He admitted kicking Miskelly because he thought he was going to get up and go for him as he did previously when he threw the "*bong*".

[28] In the final interview he claimed that he did not punch or kick Mr Miskelly "*to the full extent*". He said he had not been out with the intent of severely injuring Miskelly and that the only reason he had assaulted him was to make sure he did not get back up to harm him. He denies saying to Harbinson that he thought he had broken his foot and denied that he had "*volley kicked him*". He said that panic had caused him to give the initial false account to police. He again said that the consumption of alcohol and Ketamine would have clouded his judgment. He said that when he kicked Mr Miskelly to the neck he was not thinking of the consequences and that his actions were reckless.

The relevant legal principles

[29] As indicated earlier the task for the court is to fix the minimum term the defendant must serve before the Parole Commissioners will consider whether it is safe to release him on licence.

[30] Article 5(2) of the Life Sentences (Northern Ireland) Order 2001 provides that the minimum term:-

> *"… 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."*

[31] The legal principles that the court should apply in fixing the minimum term are well settled.

[32] In **R v McCandless & Ors [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 are required to fix tariffs under the **2001 Order**. The relevant parts of the Practice Statement for the purposes 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 paragraph 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:*
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> *(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 8/9 years (equivalent to 16/18 years).

The higher starting point of 15/16

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 a 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) the extensive and/or multiple injuries were inflicted on the victim before death;

(k) the offender committed multiple murders.

Variation of the starting points

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 features 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 combination 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; or

(b) spontaneity and lack of premeditation.

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."

The appropriate tariff

[33] In considering the appropriate tariff I should impose I am grateful for the written and oral submissions I have received from counsel in this case. Mr Ciaran Murphy QC appeared with Ms Laura Ievers on behalf of the prosecution, Mr Martin O'Rourke QC appeared with Mr Andrew Moriarty on behalf of the defendant.

[34] Before determining the appropriate tariff it is essential that I highlight the Victim Impact Statements that I have received. I have read statements from Richard's sister Ashley and his mother Shirleen who have lived with Richard throughout his entire life. I also read a statement from Richard's father, also Richard. Each of these statements in their own individual and eloquent way demonstrates the profound personal grief of each of the authors. They have brought home to me the impact the tragic, pointless and traumatic death of Richard has had on his closest relatives. It is clear from these statements that he had a close and loving relationship with his sister and parents. All of them have suffered greatly as a result of Richard's death. Their loss was particularly acute at Christmas. Their lives have been irreparably damaged. The statements illustrate the fact that the impact of Richard's death will resonate with his family for the rest of their lives. I can only hope that the defendant, as he reflects upon his actions which caused Richard's death, will understand the extent of the damage he has caused.

[35] In coming to a determination of the appropriate tariff I bear these statements fully in mind. I recognise that the loss of Richard's life cannot be measured by the length of a prison sentence. There is no term of imprisonment that I can impose that will reconcile Richard's family to their loss, nor will it cure their anguish. Equally I bear in mind the guidance of the Court of Appeal in **Nunn** [1996] 2 Cr App R (S) 136 (reiterated in **R v Norman McKenzie** [2017] NICA 29):

> "*The opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than otherwise would be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways, leading to improper and unfair disparity …*
>
> *If carried to its logical conclusion, the process would end up by imposing unfair pressures on the victims of crime or the survivors of crime resulting in death, to play a part in the sentencing process which many of them would find painful and distasteful. It is very far removed from the court being kept properly informed of the anguish and suffering inflicted on the victims by the crime.*"

Additional material

[36] I have received the following additional material.

(a) Medical report from Professor Trinick, consultant chemical pathologist and general physician dated 5 January 2018.

(b) Medical report from Dr Ian Hanley, consultant psychologist dated 14 February 2018.

(c) Medical report from Silver Birch Medical Practice dated 15 February 2018.

(d) Medical report from Dr Stephen Best, consultant psychiatrist dated 18 February 2018.

(e) Pre-sentence report from the Probation Board for Northern Ireland dated 20 March 2018.

(f) Ten personal references for the defendant from a former school principal and various family and friends.

[37] The various medical reports and pre-sentence report confirm the defendant's history of what took place prior to the fatal assault. When he initially met up with Lloyd Harbinson he consumed a large bottle of Buckfast. After leaving Lloyds house and before attending a nightclub in Belfast he took some Ketamine in crystal form and sniffed it. Whilst at the nightclub he consumed 3 or 4 more bottles of beer. After the nightclub he took further Ketamine before returning to Lloyds' family home where he ultimately encountered the deceased and his friend.

[38] He indicated to the doctors that he had only taken Ketamine on one previous occasion.

[39] In his report Professor Trinick, who conducted a lengthy interview with the defendant, analyses and explains the effects of Ketamine in the following way:

> *"The psychological reactions which occur as the drug wears off are common and include agitation, confusion and hallucinations. These aspects are called the 're-emergence phenomenon' in which the patient will experience nightmares or delirium when coming round from the drug. It is for this reason that when we use Ketamine in hospital we nearly always offer an intravenous dose of Midazolam which is a sedating Benzodiazepine which stops the patient getting 'twitchy' and becoming aggressive and dangerous. It is well recognised that the subject can exhibit aggressive or violent behaviour acting irrationally, hurting someone, or getting hurt in an unpredictable way …*

Ketamine is widely expected to make patients twitchy and aggressive when used, so a sedating Benzodiazepine drug is often given as well as Ketamine. On this occasion the Ketamine was taken 1½ hours before the incident, which is within the time when Ketamine would be effective. As patients emerge from the effects of Ketamine they can experience hallucinations and psychotic moments when they can react aggressively to circumstances. This is known as the re-emergence phenomenon and is relatively common and consists usually of agitation, confusion and hallucinations. This is what seems to have happened to Mr Magee."

[40] The medical reports confirm that the since the commission of this offence he has suffered a significant depressive reaction. He has been treated by way of medication including anti-depressants, confirmed by his general practitioner. He has undergone some counselling with mental health professionals and in the early aftermath of the incident he self-harmed. He is not currently suffering from any mental disorder.

[41] The medical reports and the pre-sentence report confirm that the defendant attended grammar school but only achieved modest GCSE results. He continued his studies at Bangor South East Regional College where he completed Level 2 and 3 in sports studies. He has worked full-time since leaving school and also does some part-time work. He is a good sportsman and played football at a reasonably competitive level.

[42] He lived with his mother in the family home with his three younger brothers. His father left the family home when the defendant was very young though he has maintained contact with him. Indeed the defendant's father returned from Australia after the commission of these offences to have more contact with him. He had previously been in a steady relationship with a partner with whom he has had a child, although they are now separated. He nonetheless hopes to maintain contact with his son.

[43] In terms of his history he has no previous criminal convictions. However in November 2014 he completed a Diversionary Youth Conference relating to an offence of assault occasioning actual bodily harm in which the victim suffered a cut to his eye which was a result of a head-butt from the defendant. He wrote a letter of apology to the victim and completed anger management work.

[44] The various reports indicate that this occurred at an unsettling time in the defendant's life when he witnessed domestic violence in the family home between his mother and a former partner. This had an adverse impact on his education and is the probable explanation for his disappointing GCSE results.

[45] The Probation Service confirmed that the defendant has had some psychological difficulties but has applied himself well in Hydebank. He is abstinent from drugs and passed a drug test on 16 January 2018. He is on the enhanced regime within custody and is on the cleaning party which is reflective of his positive engagement with the prison regime.

[46] Although not material for a sentencing exercise in a murder case, the PBNI has concluded that the defendant does not meet its criteria to be assessed as a significant risk of serious harm to others at this time.

Application of the principles

[47] At the sentencing hearing there was disagreement about the appropriate starting point. Mr O'Rourke argued that the appropriate starting point was clearly the "normal" one of 12 years. The case involved the killing of an adult victim arising from a quarrel or loss of temper and the case did not have the characteristics referred to in paragraph [12] of **McCandless.** Mr Murphy argued that the higher starting point was appropriate because of the victim's vulnerability. This arose from his inebriation, the fact that he was markedly smaller in stature than the defendant and that he was in a kneeling/seated position when he was kicked to the region of the head. He also referred to the multiple injuries suffered by the deceased.

[48] Mr Murphy draws my attention to paragraph [12] of **McCandless** which indicates that the higher starting point will apply to cases where "*the victim was in a particularly vulnerable position*". The paragraph goes on to set out a number of examples which includes at "*(f) the victim was a child* ***or was otherwise vulnerable***". Mr O'Rourke argues that the deceased's vulnerability was not such as should elevate the starting point into the higher category. He submits that a reading of the Practice Statement endorsed in **McCandless** points to the requirement of a particular characteristic of a victim which renders him or her inherently vulnerable, such as a child or a person with a disability. By way of analogy he refers to the sentencing regime under the Criminal Justice Act 2013 Schedule 21, which is applicable in England and Wales. He also refers me to the sentencing remarks of Weir J in **R v McAuley** [2015] NICC 7 to which both counsel referred in their submissions. In that case a powerfully built man of 6 feet 1 inch stabbed his intoxicated partner three times causing her death. Notwithstanding her obvious vulnerability the court (with the agreement of the prosecution and defence) took the view that the case attracted the normal starting point of 12 years.

[49] In applying the Practice Statement I bear in mind that it is not to be interpreted as a straitjacket designed to create a rigid compartmentalised structure into which each case must be shoe horned. As the Court of Appeal said in M**cCandless**:

> *"… 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."*

[50] The Court of Appeal has made it clear that selecting a starting point is not a mechanistic or formulaic exercise. The guidelines are there to assist the court to proceed to, what in the circumstances of the case, it considers is a just and proportionate sentence having regard to the guidelines.

[51] Ultimately not much may turn on this debate. What the court has to assess is the culpability of the defendant. That means he must be sentenced on the basis that he punched the deceased a number of times so that he was on the ground and in a vulnerable position. By virtue of his stature, his inebriation (although I note the PM reports he was only mildly intoxicated when he died although he was also found to have traces of cocaine in his blood) and the fact that he was either kneeling or seated means he was particularly vulnerable when he was kicked by the defendant. He was in no position to defend himself. As the defendant himself said in his interview "*Probably I could have pushed him over with a finger.*" Whilst the particular circumstances of this case may not easily fall into the specific categories identified in the guidelines I take the view that the normal starting point is the appropriate starting point in the circumstances of this case. However I regard the deceased's vulnerability at the time he was kicked by the defendant to be a significant aggravating feature which has the effect of varying the starting point upwards, close to the higher starting point in any event.

[52] The offence is further aggravated by the fact that the attack was an unprovoked one.

[53] In considering aggravating features I also take into account the fact that the police were initially misled by the defendant about what took place. However I do not consider this to be a significantly aggravating feature. It is clear that the police were in no way distracted from their investigation into the murder and the defendant very quickly admitted his role in the course of his second interview.

[54] Mr Murphy also argues the fact that he used a shod foot should be an aggravating feature. Whilst I acknowledge that there are some judicial dicta to that effect, the use of a shod foot can be distinguished from an offender who arms himself in advance with a weapon. In any event I take into account the fact that it was the use of the shod foot which caused the fatal injury and establishes the defendant's intention to cause serious injury which is the basis of the offence in this case.

[55] In terms of aggravating factors relating to the offender I have noted that the defendant was involved in an assault whilst he was a youth, although this did not

result in a criminal conviction. He did attend an anger management course at that time and there must be a concern that he still has anger issues as evidenced by his conduct in this offence.

[56] Overall taking account of all the circumstances of this offence and the aggravating features to which I have referred I have concluded that the appropriate tariff, prior to any mitigation, would be one of 15 years.

[57] In terms of mitigation the defendant asserts that his intention was to cause grievous bodily harm and not to kill the deceased. This is not conceded by the prosecution who rely on the nature, degree, severity and cause of the injuries sustained by the deceased. Mr Murphy also drew my attention to the comments of Stephens J in **R v McCarney** [2013] NICC 1 at paragraphs [31] and [32] which deals with intention to cause grievous bodily harm in the context of a murder case and in particular refers to the case of **R v Peters** [2005] 2 Cr App R (S) (1).

[58] In the **Peters** case the Court of Appeal in England and Wales considered Schedule 21 of the Criminal Justice Act 2003 where absence of an intention to kill may be a mitigating factor. Interestingly in the Practice Direction approved by **McCandless**:

> *"Mitigating factors relating to the offence will include:*
>
> *(a) An intention to cause grievous bodily harm, rather than to kill."*

[59] This point however is not crucial in consideration of this case. The situations in **McCarney** and **Peters** are far removed from the circumstances of this case. As Lord Justice Judge stated in **Peters**:

> *"We have sufficiently demonstrated that it cannot be assumed that the absence of an intention to kill necessarily provides any or very much mitigation. It does not automatically do so. That said, in many cases, particularly in cases when the violence resulting in death has erupted suddenly and unexpectedly, it will probably do so, and it is more likely to do so, and the level of mitigation may be greater, if injuries causing death were not inflicted with a weapon."*

[60] This case is an example of one of the "many cases" to which Lord Justice Judge referred.

[61] The defendant's plea to murder was made on a specific basis that he did not intend to kill the deceased. Whilst not conceded the prosecution do not seek to expressly establish that the defendant did intend to kill the deceased. Whilst one can never know with certainty what is in the mind of someone who acted in the way the

defendant did on the night in question I have come to the conclusion that he did not intend to kill the deceased. Reprehensible though his conduct was, and having regard to the fact that the death appears to have been caused by a single kick, his actions are consistent with an intention to cause serious bodily harm, rather than death. There is certainly an absence of clear evidence of intention to kill as would be apparent, for example, in someone who shots a loaded gun at a victim or stabs a victim with a knife. This conclusion is also consistent with the spontaneous nature of the defendant's actions in kicking the deceased and also his conduct in the immediate aftermath of the incident in terms of his contact with ambulance control and his unsuccessful attempt to perform CPR on the victim. I therefore consider that this is a case which involves an intention to cause serious bodily harm rather than intention to kill and that this is a mitigating factor.

[62] I also consider that the commission of the offence was spontaneous and lacked any premeditation, which is another mitigating factor.

[63] In terms of the defendant's personal circumstances in coming to the appropriate sentence I have regard to his relative youth at the time he committed this offence. I do not consider that this is a case which compels me to a particular starting point because of his youth. He was over 18 at the time of the commission of the offence, he appears to have been of above average intelligence, he was in full-time employment, he was a good sportsman and there was nothing to suggest any particular vulnerability or immaturity below what one would expect for someone of his age.

[64] Mr O'Rourke referred me to the prescribed tariffs for the three age categories set out in Schedule 21 of the CJA 2003 which was discussed in our jurisdiction in the case of **R Wootton and McConville** [2014] NICA 69 and in **R v Peters** [2005] 2 Cr App R (S) 1.

[65] However, on this issue, I do not consider that an over mechanistic or mathematical approach is appropriate in this particular case. I accept the simple, well established principle that an offender's age, as it affects culpability and where the seriousness of the crime justifies it, is an appropriate mitigating factor.

[66] I do not propose to reflect the defendant's relative youth by way of reduction of the starting point, but rather I do take it into account in the overall mitigation.

[67] Notwithstanding the defendant's previous involvement in the assault committed on 7 December 2013 I consider that the defendant is a person of good character prior to the commission of this offence.

[68] In the course of this sentencing exercise he will have had to confront the uncomfortable truths about his conduct, which was so reprehensible and unnecessary. He will have to face the consequences of his actions for the remainder of his life. However there are many positive features in the defendant's background.

He has good family support and relationships, he has behaved positively whilst in custody, he has engaged well with services, he has a proven work record and has engaged in positive sporting recreational activities.

[69] Mr O'Rourke further argues that the defendant should be given some credit for genuine remorse for his actions. It can of course be difficult to assess whether or not any expressed remorse is genuine. In this case, in the course of his interviews and when he was formally charged the defendant did express some remorse. When he was formally charged he said "… *I am very sorry for his family and his death*".

[70] When he was examined by Dr Best, consultant psychiatrist, he expressed guilt and remorse for his action. He demonstrated what Dr Best records as "*genuine distress*" when he described what had happened on the night in question.

[71] Dr Hanley, consultant psychologist records the impact this offence has had on the defendant's mental condition and states:

> "*Mr Magee expressed appropriate concern for the impact of Mr Miskelly's death on others. At no point did he express self-pity or complain at the significant changes in his circumstances that have resulted from this tragic incident. He feels guilty over his involvement in the death of the deceased …*"

[72] In the pre-sentence report the author records "*the defendant expressed remorse for his actions and for the loss the deceased's family now have to cope with.*"

[73] None of the experts who have interviewed the defendant suggest that his expressions of remorse are anything other than genuine.

[74] It is clear from the victim impact statements that the family of the deceased do not consider that Mr Magee has demonstrated any remorse at all. This is a factor which has aggravated their sense of grievance and loss.

[75] At the end of the day an expressed remorse can be of little mitigation in such a serious crime. On balance I do accept his remorse is genuine. I do take it into account but in a limited way having regard to the nature of this offence.

[76] Having taken account of all the mitigating factors which I have identified I have come to the conclusion that the appropriate tariff would be one of 12 years.

[77] The issue that remains is what discount, if any, should be allowed for the defendant's plea of guilty.

[78] The Court of Appeal has given very clear guidance on this issue in the case of **R v Turner and Turner** [2017] NICA 52.

[79] In that case the Court of Appeal considered the discount which was appropriate in tariffs in murder cases and came to the conclusion, at paragraph 40:

> "*We consider, therefore, that there are likely to be very few cases indeed which would be capable of attracting a discount close to one third for a guilty plea in a murder case. The circumstances of a mercy killing for example might possibly achieve that outcome. Each case clearly needs to be considered on its own facts but it seems to us that an offender who enters a not guilty plea at the first arraignment is unlikely to receive a discount for a plea on arraignment greater than one sixth and that discount for a plea in excess of five years would be wholly exceptional even in the case of a substantial tariff.*"

[80] The court however did go on to state that:

> "*We have concluded, however, that it would be inappropriate to give any more prescriptive guidance in this area of highly fact sensitive discretionary judgement. Where, however, a discount of greater than one sixth has been given for a plea in a murder case the judge should carefully set out the factors which justify it in such a case.*"

[81] As is clear from the history set out above, the defendant pleaded not guilty at arraignment and did not enter a guilty plea until shortly before the trial date.

[82] At the outset I take the view that the defendant is clearly entitled to a reduction for his guilty plea in this case.

[83] It is a long and firmly established practice in sentencing law in this jurisdiction that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate.

[84] In determining what the lesser sentence should be the court should look at all the circumstances in which the plea was entered.

[85] An important aspect of all of the circumstances is the stage in the proceedings at which the defendant has pleaded guilty. Maximum credit is reserved for those defendants who plead guilty at the earliest opportunity. Conventionally in this jurisdiction a defendant could expect a reduction in the range of one third of his sentence for a guilty plea entered at the first available opportunity – although this could be influenced by the attitude adopted at the police station when first interviewed and on whether or not there was an overwhelming case against the defendant. Those who enter guilty pleas at later stages in the proceedings will

obviously not be entitled to maximum credit. As a general principle the later the plea in the course of the proceedings, then the less the discount will be.

[86] Before considering the particular circumstances of this case it is important to understand the rationale behind allowing discounts for guilty pleas. A plea of guilty is an indication of remorse. A plea of guilty and an acknowledgement of guilt by a defendant can provide a sense of justice and relief for the relatives and friends of the victim. A plea can lead to a significant saving of time and public expense which is in the public interest.

[87] The Court of Appeal decision in **Turner** clearly affects the way in which sentencing judges should approach the question of discount for a guilty plea in a murder case. Mr O'Rourke argues that in this case the defendant should receive a discount greater than one sixth. He points to the fact that, in effect, the defendant admitted the offence in the course of his second interview with the police. All the ingredients of the murder were in fact admitted at that time.

[88] He quite frankly indicated that the reason for the delay in the plea was the defendant's difficulty in understanding that he could be guilty of murder even though he had not intended the death of the victim.

[89] Notwithstanding legal advice that was given to him it appears that the defendant was influenced by others who ill-advised him. These were persons who should have had a responsibility to the defendant and who he felt were acting in his best interests.

[90] He says that this approach should be viewed through the prism of the defendant's youth which made it more difficult for him to come to the undoubtedly correct decision to plead guilty in this case.

[91] As indicated I do consider that he is entitled to a reduction in his sentence for his plea of guilty. I consider that the appropriate discount is, notwithstanding the points made by the Mr O'Rourke, one sixth of the term that I would otherwise impose.

[92] It was clear from circumstances of this case and indeed the defendant's own admissions that this was a clear case of murder. There was an overwhelming case against him and whilst it is regrettable that he may have listened to some ill-advice from persons close to him this was a case which should have been met with a much earlier plea.

[93] I therefore propose to reduce the tariff by one sixth namely two years because of his plea of guilty and the minimum tariff he will serve before he can be considered for release will be one of ten years.

[94] The defendant will also be given credit for the following periods in custody namely:-

- 26 February 2017 – 27 February 2017
  2 days in PSNI custody;

- 28 February 2017 – 17 October 2017
  232 days on remand;

- The remainder of the tariff will commence on the date upon which the life sentence was imposed, that is 11 January 2018.