

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT DUNGANNON

R

-v-

TOMAS HORNAY

The Honourable Mr Justice Burgess

Introduction

[1] On 30 January 2015, after a trial at Dungannon Crown Court, the defendant was convicted of the murder on the 1 August 2013 of Luis Mazario Ximines, a 36 year old man. The defendant was 34 years of age at the time of the murder. He has been in custody since 1 August 2013.

[2] On 24 March 2015 I heard submissions on his behalf in relation to the tariff to be set under Article 11 of the Life Sentences (Northern Ireland) Order 2001 (“the 2001 Order”). The tariff represents the appropriate sentence for retribution and deterrence and is the length of time a prisoner will serve before his case is sent to the Life Sentence Review Commissioners who will assess his suitability for release on the basis of risk.

Background to the Offence

[3] In the early hours of 1 August 2013 two occupants in a bedroom in a private dwelling house at 24 Woodvale Park, Dungannon were awakened by screams in the bedroom they shared with the defendant and the deceased. All were employed by a local business and all came from East Timor. The deceased and the defendant had known each other for some years. When police arrived they found the deceased lying on his back on his bed with stab wounds to his neck, chest and abdomen, 8 wounds in total. The stab wounds had penetrated his heart, stomach and liver, and had severed his carotid artery. The combination of his wounds had caused his rapid death.

[4] Police recovered two kitchen knives from the bedroom floor. One had a narrow blade, approximately 5 inches in length, with what appeared to be a fairly sharp tip. The other knife had a long narrow blade which was badly bent, almost into a U shape. The plastic handle of this knife had partially broken away. Fragments of the handle were found on the deceased's bed. There was splattered blood on the wall behind the bed and on the coving around the ceiling.

[5] The defendant asserted that in July 2013 he received on Facebook a photograph of his wife/partner who was unclothed. He asserted that the deceased saw the photograph and made insulting and derogatory remarks about the lady – calling her a 'puta', a bitch, a prostitute. He alleged that the deceased continued to make such remarks up to the time of his death and this had a considerable adverse effect on him – it distressed and angered him and affected his sleep, because in his words he was 'thinking about Ximines'. He said he had thoughts that he wanted to kill him and that over a period he experienced 'several voices' which 'told me to kill him'. None of the other residents in the house had heard any such remarks, nor noticed anything untoward between the two men.

[6] At about 3.00 a.m. on 1 August 2013 the defendant got out of bed to go to work. The other occupants of the room, including the deceased, were asleep in bed. He told police that he hadn't slept all night thinking about what Ximines had said and was angry and nervous. He went to the kitchen to make breakfast and at that stage he said that he had no plans to kill Mr Ximines. However he also said that he was still thinking about the remarks the deceased had made and decided to act because 'he couldn't take it anymore' and voices were telling him to kill him. He put chilli seeds into a glass of water and took the two knives from the kitchen. He went to the bedroom where he threw the water with the chilli seeds over the deceased's face while he was still sleep, the intention being to blind him if he awoke. He then stabbed him. It was accepted that in putting the seeds into the water and arming himself his actions indicated premeditation and a degree of planning.

[7] He then left the house and went to the police station, saying that before his arrival he also tried to ring the police but language had been a barrier. At the station there were again language problems, but it became clear that he was admitting to killing the deceased and he was arrested. He was described as looking distant. Later that day there were a series of police interviews, conducted with the assistance of an interpreter. Prior to the interviews he was examined by a Forensic Medical Officer. He was assessed as fit to be interviewed.

[8] The defendant was remanded to Maghaberry Prison on 3 August 2013 and remained there until 13 November 2013 when he was transferred under the provisions of the Mental Health (Northern Ireland) Order 1986 to Shannon Clinic, a secure mental health centre, under the care of Dr Adrian East.

[9] From the outset the defendant has accepted that he was the person who first threw water into which he had put chilli seeds over the face of Mr Ximines while he

was lying asleep with the intention of ensuring he could not resist; who armed himself with two knives; and who stabbed Mr Ximines while he lay on his bed with the intention of killing him. It is accepted by him that the wounds caused Mr Ximines death.

[10] The defendant was re-arraigned on the first day of the trial and pleaded guilty to the offence of manslaughter. He denied murder on one or both of two grounds:

- (a) diminished responsibility; and
- (b) loss of control.

[11] Evidence was given on behalf of the defence by Dr Adrian East, Consultant Forensic Psychiatrist, Dr Richard Bunn, Consultant in Forensic Psychiatry, and Dr Carol Weir, Consultant Clinical Psychologist. Evidence was given on behalf of the prosecution by Dr Fred Browne, Consultant Forensic Psychiatrist. Their evidence fell into two areas:

- (a) The mental state of Mr Hornay at the time he killed Mr Ximines; and
- (b) Based on their opinion of that mental state, whether he fulfilled the statutory criteria of the defence of diminished responsibility and loss of control.

[12] Dr East and Dr Bunn gave their opinion that at the time of Mr Hornay killing Mr Ximines it was highly likely that he was suffering from 'an abnormality of mental functioning', namely a severe or major depressive episode with psychotic features, that psychotic feature being Mr Hornay's account that he had heard voices prior to the morning of 1 August and in the kitchen on that morning. Such a mental condition, in their opinion, met the criterion of a 'recognised mental condition' and as a result the defendant's ability to form a rational judgment or to exercise self-control would have been substantially impaired. They formed their opinions based on what Mr Hornay said about the hearing of voices; on the records of his mental condition on admission to Maghaberry, throughout his time in Maghaberry and Shannon Clinic; and on Dr East's attendances on him in Shannon. On the basis of the degree of his condition and the treatment it required including electroconvulsive treatment (ECT) they had extrapolated backwards to inform those opinions.

[13] Dr Browne disagreed with the underlying opinion of Dr East and Dr Bunn that it was likely, let alone highly likely, that at the time he killed Mr Ximines the defendant was suffering from a major or severe depressive episode with psychotic features - and therefore was not suffering from an abnormality of mental functioning which arose from a recognised mental condition. He formed his opinion on virtually the same information as that which formed grounds for the opinion of Dr East and Dr Bunn - that is what Mr Hornay said in interview and the records both from Maghaberry and from Shannon. He was not afforded the opportunity to

consult with Mr Hornay. However he grounded his opinion on his assessment of the evidence of Mr Hornay's assertion as to "hearing voices" and the absence, he concluded, of other features which would inform the presence of a severe depressive condition prior to or at the time of Mr Ximines being killed.

[14] By their verdict it is clear that the jury rejected the claim that he was suffering from diminished responsibility at the time he killed the deceased.

[15] In the same way, based on much of the evidence informing that verdict, they also held that the prosecution had satisfied them beyond a reasonable doubt that the killing of the deceased was not the result of a loss of control - but born out of revenge or out of anger for remarks he says were made by the deceased; or was not attributable to anything said which constituted circumstances of an extremely grave character which caused him to have a justifiable sense of being seriously wronged.

Personal circumstances

[16] The defendant is now 36 years of age and comes from East Timor. He is one of a family of five children. His parents were shot dead in 1980 during a period of internal conflict in East Timor. He was raised by an aunt. The lady described as his partner lives there with his parents. There are no children of that relationship. The evidence is that he left school when he was 10 or 11 to go to work on the family farm. He came to Northern Ireland in 2008 and commenced work in Moy Park - work described as low level. Prior to these events the defendant was a man of good character with no convictions recorded against him.

[17] The defendant admitted the offence of manslaughter. From the outset he has never resiled from the fact that it was he who killed Mr Ximines. In interview for the purpose of preparing the pre-sentence report he states that the deceased was his friend, and he expressed his regret for killing him. He continues to say that he was directed to kill the deceased by 'spirits' or 'voices'. However he also accepts that he made a clear decision to kill the deceased.

[18] The evidence of Dr East and Dr Bunn described the nature of his psychiatric state of mind after his remand into custody, and the treatment that has been required. The impact has clearly been severe. Dr Weir carried out a number of assessments and tests which allowed her to give her opinion as to his emotional and cognitive function status at the time of her report. She also had access to all of the records and the interviews and the report of Dr East. While it was difficult to communicate in order to complete all of the tests she was satisfied that his IQ was low and he came over to her in terms of his emotional functioning as 'dull'.

[19] Dr Browne accepted that there was a deterioration in the defendant's mental condition such as to amount to such a depressive condition after he was remanded to Maghaberry and subsequently to Shannon. He attributed those reactions to the fact that he had killed a friend or work colleague, the shame and guilt that he

expressed at that killing, and his remand into custody with amongst other things his isolation in that environment.

Victim Impact Report

[20] A statement has been received from an aunt of the deceased, his closest relative, as to the impact his death has had on the family, all of whom live in East Timor. It is written in poignant terms telling of the grief and loss visited on the family and friends of the deceased. The deceased was an only child, who is survived by his father who is in ill health and with little in the way of financial support. The death of his son has had a particularly severe impact on him, with friends and relatives concerned that he might harm himself such is his sense of loss and isolation. In restrained and measured terms it reminds us of the terrible consequences that follow such events as these, with the impact engulfing the lives of many.

Present Medical Condition

[21] Dr East has provided a report dated 5 March 2015 following an interview with the defendant on that date. The relevant portions state as follows:

‘Mr Horney (sic) has suffered from a major depressive episode with psychotic features. I consider this illness to be, at the time of writing, in a state of remission.

I believe that Mister Horney met the diagnostic criteria for this illness between the approximate dates of July 2013 and July 2014. He has effectively been free of symptoms of illness since that time.

I would note that Mister Horney’s illness was extremely resistant to treatment and required a course of both electroconvulsive therapy and antipsychotic therapy over a number of months to achieve improvement. At the time of writing his mental state has been maintained with antidepressant and antipsychotic medication which prescription I believe should continue for the foreseeable future.

Since the resolution of Mr Horney’s mental illness his compliance with his care plan has been very good. [He] has engaged in a package of occupational and therapeutic interventions at the Regional Secure Unit.

At the time of writing Mister Horney’s mental condition is in a state of remission and he no longer has a mental illness of a nature or degree that warrants his detention in hospital. As such I do not believe that [he] should return to Shannon Clinic following his sentencing hearing.’

[22] The report then advises of the contacts that there have been between Shannon and the prison's mental health services, who have visited him in Shannon. They have indicated that he will be placed in the most appropriate house to allow their engagement with him. Dr East confirms that he will remain responsible for ensuring the safe and effective handover of care on his transfer back to Maghaberry. In the event of any relapse which requires hospital treatment, then, as before, there is a procedure for him to be transferred back to the Regional Secure Unit for treatment.

Practice Direction

[23] In *R v McCandless & others* [2004] NICA 1 the Court of Appeal held that the *Practice Statement* issued by Lord Woolf 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."

Representations from the prosecution

[24] The prosecution indicated that the appropriate starting point was 'the normal starting point' of 12 years. Having considered the factors that would argue for the higher starting point, the only one possible present are the number of wounds. I do not believe that this argues for the higher starting point. It was suggested that the possibility that the defendant was suffering from a mental condition at the time of the killing, albeit falling short of a psychotic episode, meant that the higher starting point was not reached. However that is not a factor among those set out in paragraph 12, and therefore the role, if any, of such a condition falls to be considered as a factor under paragraph 11, as argued by the defence.

[25] The prosecution then identified 6 aggravating features:

- The victim was vulnerable as he was asleep. Mr Berry Q.C. for the defendant argued that vulnerability in this context referred to a personal feature of a victim. I do not agree with that submission. In Morrin [2011]NICA Hart J described vulnerability in terms of the vulnerable position and personal circumstances of the victim – that he was attacked from behind at a time when he was significantly intoxicated.
- The deceased suffered multiple injuries. Mr Berry suggested this was reserved for injuries such as might follow a prolonged beating. However this would be to constrain this factor too narrowly and the number of wounds in this case was significant.
- The throwing of the chilli seed mixture in a further attempt to incapacitate him. I believe this should be approached as an aspect of the vulnerability of the deceased or as an aspect of premeditation. It would potentially be double counting if seen as a factor on its own.
- The fact he armed himself with two knives. This rightly was accepted by Mr Berry as an aggravating feature.
- The defendant's expressed intention to kill the deceased, not to cause grievous bodily harm. I accept the submission of Mr Berry that the intent to cause grievous bodily harm should be seen as a mitigating factor rather than the intent to kill as an aggravating factor.
- Pre-mediation arising from the preparation of the chilli seed mixture. On the evidence before the court this was prepared a short time before the killing of the deceased, but nevertheless there was clearly a passage of time to allow for the thought process and the act of preparing the mixture, and therefore pre-mediation can be factored in to some extent as an aggravating feature.

[26] There are no aggravating factors relevant to culpability arising from any personal factors of the defendant.

Representations on behalf of the defendant

[27] Mr Berry asks the court to reduce the normal starting point based on the factors in paragraph 11 of *McCandless* which he says significantly reduce the culpability of the defendant. He says three of the factors are relevant, namely:

- That the case came close to the borderline between murder and manslaughter. The factor that separated the evidence of the experts was the presence or absence of a psychotic episode. It was accepted that a person could be in a moderate or low level depressive state without a psychotic episode presenting itself. Dr Browne did not have the opportunity to examine Mr Hornay. Clearly something occurred that morning against a backdrop where there was no evidence of any confrontation between the two men before this day, and the absence of any confrontation during the night – something I would have expected the other two men in the room to report. While there can be a reactive severe depressive condition, reacting to events such as killing someone, I am satisfied that there was some factor that adversely affected the mental state of the defendant when he got up that morning, short of a diagnosis that would have sustained a defence of diminished responsibility;
- That he suffered from a mental disorder, or mental disability which lowered the degree of his criminal responsibility, although not affording a defence of diminished responsibility. I have covered that in the preceding point; and
- That he was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress. This is grounded on the claim that the deceased over a period of time called the defendant's partner/wife a 'puta', with all the implications that carried in the culture of East Timor.

[28] In terms of mitigation I have listened carefully to Mr Berry's submissions.

- (a) The defendant made clear his responsibility for the death of Mr Ximines from the start, reporting himself to the police station. He continued to accept that he was responsible, culminating in his plea of 'guilty' to manslaughter. His counsel were confronted with reports from two eminent doctors as to his state of mind at the crucial time of the killing of the deceased. It was entirely proper for them to explore that position. The trial therefore centred on the role of his mental health and in that regard to his credibility as regards his motives and the background to the alleged presence of 'voices'. Indeed the opinions of the medical experts drew heavily on that history. The jury by their verdict did not accept that evidence.

The pre-sentence report states that he expresses remorse for his actions in killing someone he knew as 'a friend'. In these circumstances I can afford substantial credit for his plea.

- (b) The defendant has a clear record and was hard working, trying to assist his family back in East Timor. He is described in the pre-sentence report as quiet and withdrawn, and Dr Weir's report describes his IQ as low.
- (c) Given the enormity of his offence, his cultural background is not a feature that I believe can justify, or could begin to justify any reduction in sentence – see A/G Ref No. 1 of 2011 EWCA Crim 930 LCJ.
- (d) The defendant's mental health has clearly improved which allows for his transfer back to prison from Shannon. There are nevertheless on-going mental health issues which will require careful management. However I am satisfied that his health and well-being will be adequately secured by, amongst other things, the provision of the requisite medical assistance and oversight. That includes the facilities to address any deterioration in his mental health as evidenced by his transfer to Shannon and the treatment and help he was given there – allowing for his condition to be in remission.
- (e) I accept that the prison environment will be of particular difficulty for him with the possibility of deterioration in his mental health. Indeed on the evidence of all the medical advice it is the isolation that he encounters in prison that contributed to some extent to that mental condition either developing or deteriorating. His inability to speak English will present its own problems, adding to that sense of isolation. For that reason I believe I can allow a modest discount on his sentence.

Conclusions

[29] I am grateful to counsel for their written and oral submissions. I am satisfied that the factors referred to in paragraph 11 should play a part in reducing the normal starting point of 12 years but not to the extent of 8/9 years as submitted by Mr Berry. There are a number of aggravating factors and a number of mitigating features. Taking those into account I have determined that the period should be one of 10 years. I have also stood back and am satisfied that this properly represents the minimum term for which the defendant should be detained before his release can be considered.

[30] The defendant is sentenced to the mandatory sentence of life imprisonment with a minimum term of 10 years. This will include the period spent on remand.

[31] Finally I impose the obligatory Offender Levy of £50.