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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **02/04/19**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT
IN NORTHERN IRELAND

THE QUEEN

–v-

MARK WARD

(No 2: Tariff)

Before: Deeny LJ, McCloskey J and Sir Ronald Weatherup

McCLOSKEY J (delivering the judgment of the court)

[1] By the judgment of this court delivered on 12 November 2018, [2018] NICA 40, ("*our first judgment*") the Appellant's appeal against conviction was dismissed. This further judgment determines his appeal against sentence, which is brought with the leave of the single judge.

[2] The prosecution case giving rise to the jury verdict of guilty is outlined in [2] – [5] of our earlier judgment. The defence case is outlined at [6] – [8]. It suffices to refer to, without repeating, these passages.

Sentencing of the Appellant

[3] The Appellant was punished by the imposition of a minimum term (or "*tariff*") of 16 years imprisonment. The trial judge delivered a reserved decision on sentencing. It is clear from this that, for the judge, the stand out feature of the death was the use of gratuitous, extensive and severe violence involving stamping or kicking with a shod foot: see [1] – [4] and [16]. The judge further highlighted that the victim was evidently intoxicated and, in terms, helpless when attacked.

[4] The judge debated whether the mental health assessment of the Appellant, his previous serious brain injury, his adult ADHD and his limited coping skills should, whether singly or in unison, be treated as mitigating his culpability. Drawing on R v Turner and Turner [2017] NICA 52 at [49] he concluded that there were no mitigating factors. The abandoning of his gravely injured friend combined with the failure to summon assistance was considered to be an aggravating factor.

[5] The judge's evaluation of the Practice Statement was as follows. First, he highlighted the dichotomy of the so-called "*normal starting point*" of 12 years and the "*higher starting point*" of 15/16 years. He rejected the Appellant's submission that this case belonged to the first of these categories on the basis that the death was the product of a quarrel or loss of temper between two people known to each other. His reasons were expressed at [12] thus:

> "*The difficulty with this submission is that the Defendant has given no account to the police or in evidence as to what occurred. He continues to maintain his innocence. In these circumstances the court is being invited to speculate as to what occurred in the absence of any account from the Defendant.*"

The judge further highlighted paragraph [10] of the Practice Statement. This indicates that cases to which the "*normal starting point*" applies will not have certain characteristics, which include "*extensive and/or multiple injuries … inflicted on the victim before death*": see paragraph [12](j). The final ingredient of his reasoning was the evidence indicating that the deceased was vulnerable through intoxication at the time of the killing. For these reasons the judge selected the higher starting point.

The Appellant's Case

[6] On behalf of the Appellant Mr Charles MacCreanor QC (with Mr Aaron Thompson, of counsel) developed the omnibus ground of appeal that the sentence was wrong in principle and manifestly excessive by reason of the judge's failure to adopt the "*normal*" starting point. Mr MacCreanor highlighted the indications in the evidence that the Appellant and the deceased were known to each other, they habitually socialised together and had a history of drunken quarrels, disputes and assaults. Continuing, Mr MacCreanor emphasised that this was not a case of a planned attack on the victim. He further submitted that the injuries inflicted on the deceased did not warrant adoption of the higher starting point. Finally, Mr MacCreanor criticised the judge for his refusal to treat as a mitigating factor the Appellant's (mere) intention to cause grievous bodily harm, which was accepted, and his assessment of the aggravating factor noted in [4] above..

Consideration and Conclusions

[7] Our first conclusion is that the expressed reasoning underpinning the judge's rejection of the main plank of the Appellant's challenge to his tariff, namely error of principle in opting for the "higher" starting point, betrays no error on his part. Mr MacCreanor's argument, in substance, is that there was sufficient evidence to warrant the inference that the death arose from (in the language of the Practice Statement) "*a quarrel or loss of temper between two people known to each other*". We would observe that this is open textured language. No definition is provided. An appellate court's review of a sentencing judge's evaluation of this issue in any given case will normally entail the recognition of a reasonable degree of latitude on the part of the judge. The decision whether paragraph [10] of the Practice Statement applies in a given case is not a mechanistic one. Rather, it involves an evaluative judgment on the part of a judge who has become progressively immersed in the dense detail and nuances of the trial from its inception to its conclusion.

[8] In our first judgment we drew attention to the distinctive roles of appellate court and trial judge at [26]:

> "[The appellate court] *is remote from the arena of the trial and its ambience, nuances, emphases, twists and turns.*"

We consider that in any case where there is no irresistibly obvious answer to the question of whether the "*quarrel*" provision of [10] of the Practice Statement applies, an appellate court will normally pay appropriate respect to the sentencing judge's evaluation of this issue. If there is any clearly identifiable error, factual or otherwise, in the judge's approach the respect to be otherwise accorded will be diminished. That, however, is not this case.

[9] Mr MacCreanor's challenge to the judge's evaluation of the extent and severity of the injuries inflicted on the victim prior to his death suffers from essentially the same frailty. We consider that in the exercise of assessing this issue a certain judicial margin of appreciation was engaged. This court is unable to identify any significant error, factual or otherwise, in either the judge's assessment of this issue or his observation, accurately grounded in the evidence, that the victim was vulnerable through intoxication. The further basis for making this inference, also grounded in the evidence, is found in the nature and distribution of certain of the injuries sustained by the victim, as recited by the judge in [2] – [3] of his sentencing decision. This discrete facet of his decision also provides ample justification for his conclusion in [12] that the extent, multiplicity and severity of the injuries inflicted on the victim before death engaged [12](j) of the Practice Statement.

[10] As submitted by Mr David McDowell QC (with Mr Ian Tannahill, of counsel) on behalf of the prosecution there is a clear evidential basis for the assessment that the victim had suffered an attack of obvious brutality. While we take cognisance of Mr MacCreanor's reliance upon the decision of this court in R v Meehan [2012] NICA4, where an appeal against a tariff of 14 years was dismissed, we consider the

exercise of comparing and contrasting the case specific facts of Meehan with those of the present case an unprofitable one. Meehan embodies no legal rule or principle to which this court must give effect or, for that matter, by which the sentencing judge was bound.

[11] For the series of reasons expressed above we reject the Appellant's challenge to the sentencing judge's adoption of the "*higher*" starting point.

[12] The second element of the Appellant's case entailed a challenge to the judge's approach to the issue of mitigation. Mr MacCreanor's contention that the judge should have treated the Appellant's (mere) intention to inflict grievous bodily harm, to be contrasted with an intention to kill, as a mitigating factor can be sustained only on the basis *of an error of principle*.

[13] Paragraph [16] of the Practice Statement recites:

> "*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 premeditation.*"

In R v McCandless and Others [2004] NI 269, Carswell LCJ stated at [40]:

> "*It is clear, however, that a proven intention to cause grievous bodily harm rather than to kill is a mitigating factor which should be taken into account: see the Practice Statement, paragraph [16]. We consider that a larger deduction should be allowed for this factor than the judge made, for it is a powerful indicator of culpability.*"

It is trite that this statement is not to be divorced from its immediate context.

[14] One of the main features of the Practice Statement is that it is not overly prescriptive. It eschews rigid boundaries and margins. It does not embody a series of inflexible instructions to sentencing judges. In many places its language, as we have observed above, is open-textured. Its general orientation is to resist the application of a strait jacket approach to sentencing judges. Furthermore, it neither modifies nor dilutes the well-established sentencing principle that mitigation equates with reduced culpability. We consider that [16] of the Practice Statement is to be approached in this way. We decline to treat it as prescribing an inflexible rule.

[15] In sentencing the Appellant the judge was disposed to accept that in principle the lesser of the two requisite forms of *mens rea* could attract some mitigation. He reasoned, however, that it did not do so in the instant case on account of the use of "*gratuitous and extensive violence in the course of an attack which involved the use of a weapon in the form of a shod foot*": see [16] of the sentencing decision. We consider that this reasoning cannot be impeached in any way.

[16] We further consider the judge's approach to the aforementioned issues to be harmonious with previous decisions of this court, in particular R v Turner and Turner [2017] NICA 52. We draw attention to the following passage at [42]:

> "*Leaving the deceased after this vicious assault with no means of obtaining assistance was considerable evidence that each* [accused] *was content that the victim should be left to die. As R v Peters and Others [2005] 2 Cr App R(S) 101 made clear, whether or not the intention only to cause GBH constituted a mitigating circumstance would depend upon the facts of each case. In a case of this sort where gratuitous and extensive violence was used in the course of the attack, including the use of a weapon, the mitigation is unlikely to be material.*"

In short, a murderer's intention to cause grievous bodily harm, rather than kill, will not invariably attract mitigation. Furthermore, in appropriate cases there will be no distinction between an aggressor's use of feet for the purpose of kicking or stamping on a helpless victim prostrate at ground or floor level and the use of a weapon for like purpose. This is clearly such a case.

[17] For the reasons elaborated above we conclude that the sentencing judge committed no error of principle in declining to treat the Appellant's intention to (merely) inflict grievous bodily harm as a mitigating factor in the fact sensitive context of this case.

[18] The final element of the Appellant's case challenges the sentencing judge's conclusion that the offender's "*previous serious brain injury, his adult ADHD and his limited coping skills*" did not amount to mitigation: see [17] of the sentencing decision. In making this conclusion the judge noted that he had been referred by prosecuting counsel to Turner (*supra*) at [49], where the court held that certain medical evidence –

> "*.. does not provide a basis for mitigation or explanation in relation to the administration of a beating of this kind upon the deceased.*"

As the passage at [18] indicates, the judge adopted this statement in full:

> "*These remarks are entirely apposite to the present case and the material relied upon by the defence likewise does not provide a basis for mitigation or explanation in relation to the Defendant's attack on the deceased involving unexplained, gratuitous and extensive violence.*"

[19] The conclusion of this court on this discrete issue in Turner was, of course, a case sensitive one. This is particularly clear from the court's resume of the pre-sentence report and a neuropsychological report at [13] – [17]. These passages rehearse some of the detail of the evidence relating to the moderately severe brain injury which the Appellant James Turner had suffered some 20 years previously, when aged 10, with resulting impairment of certain cognitive skills and member.

[20] The judge had at his disposal expert evidence of the Appellant's psychological profile via the report of Dr Carol Weir, the sworn testimony of Dr Weir in a *voir dire*, the report of Dr Mark Davies, consultant psychologist and the report of Dr Victoria Bratten, an educational psychologist. These reports disclose that some eight years previously, when aged 19, the Appellant suffered a head injury as a result of a motor accident. He had already been assessed as a person having moderate learning difficulties and one whose IQ belonged to the bottom 2.2% of the population. Dr Weir advised that the head injury had given rise to impairment of memory, concentration and attention, while affecting impulsivity. These features manifested themselves in "*behavioural outbursts*" and fatigue. Based on his medical records the Appellant also suffered from anxiety, panic attacks and depression. He had failed to co-operate in referrals to Community Addiction Services. In this context Dr Weir observed that one typical consequence of head injuries is that "*… levels of intoxication as a result of small amounts of alcohol are noted and the individuals find themselves drunk after consuming a low level of alcohol*".

[21] Dr Davies opined that the Appellant's general intellectual ability "*… falls on the borderline of Mental Handicap as defined by the Mental Health Order (NI) 1986.*" He continued:

> "*There is no evidence of specific cognitive impairment (in addition to his general level of impairment) and as such there is nothing to suggest that his cognitive functioning has been grossly affected by the head injury he sustained in 2009.*"

Dr Bratten, for her part, expressed this opinion:

> "*Considering Mr Ward's ill health and painful headache/teeth, in my opinion it is highly unlikely that his scores on the TOMM (*"Test of Memory Malingering") *were significantly affected, or caused, by his ill health.*"

Dr Bratten's assessment of the Appellant was unfavourable to him:

> "*.. I am of the opinion that he did not put forth his best effort and was attempting to portray himself in an unfavourable light …*

Mr Ward was attempting to portray himself as putting forth his best efforts, while not in fact doing so."

[22] Mr McDowell QC reminded the court that the language of the Practice Statement is "*mental disorder or mental disability*". He further highlighted, correctly, the absence of any evidence that the Appellant's intoxication was other than voluntarily self-induced. To this we add that the medical evidence makes clear the Appellant's awareness of his vulnerability to rapid intoxication by reason of his head injury when aged 19.

[23] We consider that the issue for the sentencing judge was whether any aspects of the medical evidence warranted the assessment that for some identifiable medical, psychological or kindred reason the Appellant's culpability at the time of committing the murder was reduced, thereby giving rise to some degree of mitigation. It is correct that the judge did not conduct the kind of assessment of the evidence bearing on this issue which this court has conducted. There is some force in Mr MacCreanor's submission that the judge disposed of this issue in conclusionary terms, without analysis or elaboration. However, the exercise which this court has conducted confirms that the judge's *terminus* cannot be faulted. We consider that his conclusion that none of the psychological or cognitive matters under scrutiny mitigated the Appellant's culpability involved no misunderstanding of the material evidence or error of principle.

England and Wales

[24] The conclusions expressed in the foregoing paragraphs dispose of this appeal. We express our gratitude to the parties' respective counsel for co-operating with the court in its exploration of the rather different approach to tariff fixing in the jurisdiction of England and Wales. In a recent decision, Re McGuinness' Application [2019] NIQB 10, the Divisional Court noted, at [29] – [30], the differences between the two jurisdictions in this field. The main difference is that Northern Ireland has no equivalent to Schedule 21 to the Criminal Justice Act 2003 and certain related measures. The court observed that in consequence the exercise of determining the tariff in England and Wales is "*more prescriptive*" and "*more mechanical*": see [30]. While it is a fact that heavier tariffs prevail in England and Wales, this flows from that jurisdiction's different sentencing regime. While the relevant Northern Ireland authorities initiated a review of the life sentence in 2005, this did not give rise to any reform.

[25] In short, there has been no statutory alteration of the legal rules and principles governing the life sentence in Northern Ireland during almost two decades, since the introduction of the Life Sentences (NI) Order 2001. Nor has there been any development in judicial practice since the Lord Chief Justice stated the following in McCandless at [10], 15 years ago:

> *"We are not unmindful of the mandatory minimum terms prescribed in England and Wales for certain classes of case by the Criminal Justice Act 2003, but we consider that the levels laid down in the Practice Statement, which accord broadly with those which have been adopted for many years in this jurisdiction, continue to be appropriate for our society."*

[26] This has remained the consistent approach in subsequent cases: see Attorney General's Reference Number 6 of 2004 (Doyle) [2004] NICA 33 at [22], R v Hamilton [2008] NICA 27 at [28] and R v Wooton and Others [2014] NICA 69 at [20]. Kerr LCJ said the following in Hamilton.

> *"[28] While the views of the legislature in another part of the United Kingdom of the circumstances in which a whole life tariff should be imposed are not irrelevant, as we said in Attorney General's Reference No 6 of 2004, the touchstone in this jurisdiction for the fixing of minimum terms in life sentence cases remains the Practice Statement issued by Lord Woolf CJ and reported at [2002] 3 All ER 412. Carswell LCJ had referred to this in paragraph [10] of the judgment in McCandless in the following way: -*
>
> *'[28] In a number of decisions given when imposing life sentences and fixing minimum terms, including those the subject of* the present appeals and applications, judges in the *Crown Court have taken account of the principles espoused by the Sentencing Advisory Panel and by Lord Woolf CJ in his Practice Statement and have fixed terms in accordance with those principles and on a comparable level with the terms suggested in them. We consider that they were correct to do so. We have given careful consideration to the level of minimum terms which in our view represent a just and fair level of punishment to reflect the elements of retribution and deterrence. We are not unmindful of the mandatory minimum terms prescribed in England and Wales for certain classes of case by the Criminal Justice Act 2003, but we consider that the levels laid down in the Practice Statement, which accord broadly with those which have been adopted for many years in this jurisdiction, continue to be appropriate for our society.'*
>
> *[29] It is, of course, necessary to remember that the Practice Statement is intended only to provide guidance and must not be applied rigidly. This court emphasised the point in Attorney General's Reference No 6 of 2004 when we said: - "There is a temptation to try to strain the words*

> *of the Practice Statement in order to fit a particular case into a specific category or species of case instanced in the statement in pursuit of the aim of consistency. This should be firmly resisted, not least because of the infinite variety of murder cases and the facts that give rise to them. Moreover, Lord Woolf was careful to make clear that the examples that he gave to illustrate the broad categories were precisely that, examples rather than an exhaustive list of all those cases that might be classified in one group or the other.""*

It may be that the legislative provisions in England and Wales would, in an appropriate case, lend support to a judge in this jurisdiction who considered it his duty to impose a longer tariff than that envisaged by Lord Woolf's Practice Statement. Beyond this we do not venture.

[27] We consider it helpful to draw attention to these matters with the aspiration of ensuring that there is a properly informed understanding of the tariff imposed in this case and indeed in others in Northern Ireland.

Omnibus Conclusion

[28] For the reasons given we reject the Appellant's case that his tariff of 16 years was manifestly excessive or wrong in principle. The appeal against sentence is dismissed accordingly.