Neutral Citation No: [2025] NICA 15 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12733** *ICOS No:* **19/4415/A01&A02** *Delivered:* **04/04/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

SEAN ANDERSON
and
GARY ANDERSON

Mr S Toal KC with Ms A Smyth (instructed by KRW Law) for the Applicant Sean Anderson
Mr K Mallon KC with Mr S Mooney (instructed by Clarendon Legal Solicitors for the Applicant Gary Anderson
Mr L McCollum KC with Mr G McCrudden (instructed by the Public Prosecution Service) for the Crown

---

Before: Keegan LCJ, McBride J and Fowler J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is a renewed application for leave to appeal sentences imposed on Sean and Gary Anderson following convictions for murder. Leave was refused by the Single Judge, Colton J.

Case history

[2] The applicants were committed for trial in the Crown Court on 28 February 2019. At arraignment on 5 April 2019 they pleaded not guilty to a single count of murder. On 5 May 2022, two days into their trial for murder the applicants were rearraigned and pleaded not guilty to murder but guilty to the lesser offence of manslaughter. The prosecution rejected the plea to manslaughter and so the trial continued. This trial lasted from 3 May 2022 to 9 June 2022 after which the jury

returned a unanimous verdict of guilty on count 1 of murder in relation to both applicants.

[3] The applicants were sentenced on 9 June 2022 by His Honour Judge Babington ("the judge") at Londonderry Crown Court to life imprisonment for murder. On 23 March 2023, the judge fixed the minimum term which each applicant would have to serve as follows. In relation to Sean Anderson, he fixed the minimum term at 17 years and in relation to Gary Anderson at 15 years.

Factual background

[4] The index offending occurred on 4 March 2018. On that date, the two applicants who are brothers, had invited some friends to their home in Grafton Street in Londonderry. This street has been described as a terrace of houses on each side. The applicants and their friends had gathered in the living room which is the front room of the house, and they were listening to music, talking and having some drinks when unexpectedly at about 2am, two men came into the house and went straight into the front room where the applicants were. There is no dispute that these two men were the deceased who was aged 35 at the time, Mr Karol Kelly, and a Mr Aaron Coleman who was 28 years old at the time.

[5] The two brothers were sitting on sofas and were subjected to an attack by Coleman and the deceased. It is reported that this attack did not take very long, perhaps two minutes or less. However, both applicants were kicked and punched and suffered injuries. Gary Anderson also sustained a broken tooth. The reason for this attack is unclear save some reference is made to the fact that it may have been due to the deceased's belief that a relative of his had been badly assaulted by the two brothers a week or so earlier at a football match. Coleman gave evidence at the trial and said that he and the deceased went into the house looking for a drink as the off-licence that they had gone to was shut. He said that when they went in a fight broke out and the deceased and he were attacked. However, the evidence given by Coleman was directly contradicted by a number of witnesses who had been in the front room, and it is now not controversial that the applicants were attacked by the deceased and Coleman in their house.

[6] The deceased and Coleman left the house after the attack. At trial Coleman said that they walked out and as they were walking up the street, they saw people chasing them and that one of them had a knife. Coleman said that they started running and when they reached the top of Grafton Street they split up. Coleman said that he then left the area and went down a back lane towards a bar and back to the house of a friend in the area. He said that the deceased was running towards an entry which had a gate that was locked. Coleman said he shouted to the deceased that this was so. A shoe that belonged to the deceased was later found close to this locked gate suggesting that there could well have been some sort of altercation at that point.

[7] There was also eyewitness evidence given by a number of witnesses who lived on the street and saw the attack or parts of the attack that resulted in the death of the deceased. The judge summarises this evidence as follows:

> "Generally, evidence was put before the jury that there were at least three or four men involved in what was going on. There appears to have been a chase up the street and then back down the street. Some of the witnesses knew the defendants as residents of the street. A number said that one of those doing the chasing was the skinny Anderson, which it was agreed was Sean Anderson. There was also evidence that one of the chasers had something in his hand, possibly a knife. One witness saw the person who was Sean Anderson involved in a punching motion on a person on the ground about half a dozen times. The heavier built Anderson – Gary Anderson – was seen by someone else to kick the person who was on the ground. At this time this witness said both Andersons were at the back of a van – a Ford Transit minibus."

[8] There was further evidence called from witnesses including one who said she had been woken up by shouts of "get him and run." This witness when looking out the window saw two men attacking the bald man. There is no dispute that the bald man was the deceased. The taller of the two attackers was seen kicking him and was described as doing this in "a really aggressive fashion." This witness shouted something along the lines "you better not kill him" and a reply came from Gary Anderson which formed some materiality for the judge of "you better shut up or I'll fucking kill you too." This witness said that she had seen the Andersons before and knew where they lived.

[9] Two knives were found in an open area behind the wall in the back yard of 8 Grafton Street on which the deceased's blood was found. DNA evidence connected Gary Anderson to one of the knives. There was also light blood staining on the right lower front of Sean Anderson's T-shirt which matched that of the deceased. A blood sample recovered from the back of the right forearm of his sweatshirt showed the deceased as being the predominant profile. Gary Anderson's clothing was examined and his right trainer shoe had numerous bloodstains and a smear on the left-hand side which were both attributed to the deceased.

[10] Assistant State Pathologist, Dr Ingram, had carried out a post-mortem and gave evidence at the trial. He described in terms of 10 categories of injury and, in particular, three significant stab wounds. Dr Ingram told the jury that two of these stab wounds needed hospital treatment, however, they were survivable whereas one wound was not survivable, this was a stab wound which was almost horizontal in shape to the right chest area measuring 4cm long and gaping by 1.2cm. Dr Ingram

said that internally two and a half of the right ribs were cut by this blade which also nicked the sack around the heart and the large vein. He said it nicked the gullet and the aorta, which is the main artery of the body. This incision therefore caused considerable haemorrhaging from the aorta and caused the death.

The judge's sentencing remarks

[11] In his sentencing remarks, the judge referenced *R v McCandless* [2004] NICA and asked himself whether the normal or higher starting point should be applied in respect of each defendant and then whether there should be any variation by reason of aggravating or mitigating factors with reference to them. He also referred to the victim personal statements he received from the deceased's mother, sister and brother. In his remarks he records that having read these statements he recognises the grief of family members at the loss that they have suffered. He states that "no words from this court can lessen the pain, hurt and sense of loss felt by Karol's family. Unfortunately, I cannot bring Karol back – I can only carry out my task in this court as the law prescribes."

[12] The judge set out the background to the offence, eyewitness evidence, autopsy report, medical evidence and forensic evidence. He referred to the police interviews of Sean Anderson and the evidence of Sean Anderson. He also referred to Gary Anderson's police interviews. (Gary Anderson did not give evidence.) He then referred to the evidence of Michael Dunlop. Michael Dunlop was a co-defendant in the case and chose to give evidence. He was acquitted of murder but found guilty of attempted grievous bodily harm with intent which related to him banging the deceased's head off the end or side of the Ford Transit van. The judge's assessment of the evidence of Dunlop was that it was "at times inconsistent and at times he obviously told lies."

[13] The judge refers to the pre-sentence report and representations, firstly, in relation to Sean Anderson. In summary he records as follows. Sean Anderson was nearly 20 years old at the time of the murder. He was raised in a stable home environment. He left school without any qualifications but embarked on third level qualifications. He did not drink and had never taken illegal substances. The author of the pre-sentence report said that he was evasive when asked questions, but he did accept that he had a knife and that his actions with the knife had contributed to the death of another person. His stance was that he never intended to kill him. He did go on, to say that he was sorry for what had happened and could not imagine what it must be like for the deceased's family. Sean Anderson at the date of sentencing had nine previous convictions including two for disorderly behaviour, one for assaulting police and one for criminal damage, the other matters were road traffic matters. He was assessed as posing a high likelihood of reoffending due to a number of factors including his age and level of maturity, his alcohol consumption and its links to his offending, his lack of coping skills to manage situations of conflict appropriately together with his lack of consequential thinking skills. Given the nature of the offending which resulted in another man losing his life, a risk

management meeting was convened, and it was deemed that Sean Anderson met probation's criteria for being a significant risk of serious harm at this juncture.

[14] The defence in Sean Anderson's case commissioned a report from a Dr Ferguson, Consultant Clinical Psychologist, which did not assess the risk at the level that probation did. However, evidence was called from Dr Ferguson which revealed Dr Ferguson relied primarily on Sean Anderson's account. He was, asked if that version was incorrect and the incident was far more violent, would that change his view regarding Anderson's lack of insight or otherwise. In reply, Dr Ferguson said that might change his view and would sway his opinion on whether he was a dangerous offender or not.

[15] The judge also records that Mr McCartney KC who appeared with Mr Devlin for Sean Anderson at the lower court, suggested that the case should be looked at from the standpoint of being on the borderline between intent to kill and causing serious harm. He said there had been an element of provocation and really this case was all about an excessive response to what had occurred in the house, or to put it another way, an overreaction. He said there was no suggestion of premeditation, rather a complete lack of premeditation.

[16] The judge then deals with Gary Anderson's pre-sentence report and representations as follows. He refers to the fact that Gary Anderson was 21 years old at the time of the murder. He was living at 8 Grafton Street with his mother, younger sister and brother. He attended school but left prior to his GCSEs but then achieved some qualifications in maths, English and joinery thereafter. He had a history of anxiety and depression. No history of alcohol or illegal drug use. He clearly realised according to the pre-sentence report that his actions that night "were bad and he could have handled the situation differently." The report said that the offence before the court evidences a number of offending related factors, but he has made references of regret regarding his actions and as such he was assessed as presenting a medium likelihood of reoffending, but he has not been assessed to be a significant risk of serious harm.

[17] Mr Mallon KC, who represented Gary Anderson at the lower court and continues to represent him on appeal, made submissions that this defendant not only accepts his culpability for involvement in Mr Kelly's murder, but he has said that he is not seeking to appeal the verdict of the jury. The judge, therefore, records that he has accepted his life in prison, he has achieved enhanced prisoner status and a position as a prison orderly. The court was also provided with a number of City & Guilds qualifications that he achieved subsequent to the offence whilst on remand which Mr Mallon said demonstrated a desire to reintegrate into society once eligible for parole and released on licence.

[18] In terms of the offence the judge's conclusion is as follows in relation to both Sean and Gary Anderson.

> "It is extremely difficult to know exactly what occurred at the time Karol Kelly was killed. There is no doubt that the death of the deceased was a result of actions by both Andersons – in effect, a joint enterprise in which the deceased sustained multiple stab wounds some of which were undoubtedly inflicted when the deceased was lying defenceless on the ground. All three defendants told lies at times, whether that be in their police interviews or whether it was when two of them were giving evidence.
>
> Both Sean Anderson and Gary Anderson asked to rearraigned on the second day of trial and pleaded guilty to manslaughter, but this was not acceptable to the prosecution. The pleas of guilty to manslaughter were a recognition that there was a joint enterprise between the two Andersons. As far as Sean Anderson was concerned, he accepted that he assaulted the deceased with a knife causing the serious facial wound, shown as injury two. Gary Anderson denied any actual assault with a knife, although saying that he kicked the deceased while he was lying injured on the ground, but his comment to one of the witnesses as set out above, properly puts the matter in perspective. Likewise, the comment at or about the time of arrest by Sean Anderson that it was him rather than his brother may also be significant. Both defendants were linked by blood to the deceased and also to the knives in the case. The medical evidence was significant as he suffered three penetrating stab wounds to his torso. Sean Anderson accepts that he caused the facial wound and appeared to be saying that he was holding the knife when one wound was caused to the deceased's body. Other evidence suggests that he caused the majority of the wounds to the deceased. Gary Anderson denied causing any stab wound, but again, other evidence suggests he may well have used a knife against the deceased."

[19] Then the judge turns to explain his sentencing of each of the applicants as follows.

Sean Anderson

[20] In relation to Sean Anderson, the main findings he made were as follows:

(i) He was satisfied that Sean Anderson was responsible for the majority of the stab wounds.

(ii) Whilst accepting that incident as a whole was initiated by the deceased and Mr Coleman, the judge said that is equally true that the attack on the deceased was in revenge for what occurred. However, the judge describes this as "completely out of proportion to anything that had occurred."

(iii) He was satisfied this was a higher starting point case on the basis the offence involved extensive or multiple injuries that were inflicted on the deceased before death, particularly to his torso, but also to his head and face.

[21] The judge then refers to five aggravating features as follows:

(i) This was an attack in which three persons were involved.

(ii) The deceased had become a vulnerable victim because he had been isolated from his friend and was at that time helpless on the ground.

(iii) This was a sustained attack which probably occurred in two different locations.

(iv) There was the use of a weapon, two knives.

(v) A number of injuries and the brutality of the injuries demonstrated gratuitous violence in which at least seven stab wounds were inflicted on the deceased.

(vi) There was, the judge found, on Sean Anderson's part, a minimum level of remorse at best.

[22] Having considered all of the matters outlined above the judge found that this was a higher starting point case of 16 years. He said the aggravating circumstances increased this to 18 years. He then said that age is a mitigating factor which reduced this to 17 years and that is how he settled on a final minimum tariff.

Gary Anderson

[23] In relation to Gary Anderson, the main findings of the judge were as follows:

(i) He said that this applicant played a lesser role than his brother, but he said that is not to minimise in any way, that he is guilty of the murder of Karol Kelly.

(ii) He was satisfied that Gary Anderson was remorseful.

(iii) He said his involvement was aggravated in the same way as his brother's. However, he was satisfied that he had a lesser role in the matter, so the correct starting point for him is 16 years when aggravated would move to 17 years.

[24] Therefore, in Gary Anderson's case the judge decided that when mitigating factors of age and remorse were taken into account, he would reduce the 17 years to 15 years.

Arguments on appeal

[25] There are essentially three grounds of appeal that are now relied on which are as follows:

(i) That the starting point chosen by the judge, namely the 15/16 years starting point deriving from *McCandless* as recalibrated by *R v John Paul Whitla* [2022] NICA 65 was incorrect.

(ii) That the judge incorrectly assessed aggravating and mitigating factors in each case.

(iii) That the judge failed to take account of delay and make an adjustment for delay.

[26] We will deal with each of these appeal points in turn whilst recognising that there is some overlap between grounds one and two.

Our analysis

Ground 1: The starting point

[27] This case was determined by the judge prior to the decision in *R v Whitla*. Therefore, the judge applied the authority of *R v McCandless and others* [2004] NICA 1, in selecting a starting point and in dealing with aggravating and mitigating factors. As all counsel recognised, the case of *R v Whitla* is now the authority which this court must apply. In *Whitla*, the Court of Appeal took the opportunity to recalibrate the guidance provided by *McCandless*. Para [43] summarises the ruling of the court as follows:

> "[43] We stress that what we have said does not amount to any sea change in terms of murder sentencing. It is simply a recalibration to reflect the complexion of cases we have had before our courts in the 20 years since *McCandless* was penned. In summary, *McCandless* should now be read with following revision:
>
> (i) The normal starting point is 15/16 years. This is based on high culpability.

(ii) In exceptional cases of low culpability, the starting point may reduce to 12 years.

(iii) In cases of exceptionally high culpability the starting point is 20 years.

[44] It is not necessary for us to redefine *McCandless* any further as the factors that feed into each starting point and aggravating or mitigating factors are comprehensively set out. In addition, sentencing judges are expressly reminded that they have the flexibility to vary the starting point upwards or downwards to take into account the particular circumstances of each case.

[45] However, we provide one further matter of clarification in relation to multiple stabbing cases as the issue has arisen. We reiterate the fact made in *Doyle* that where the court chooses the higher starting point because of one particular aspect of the case, it should not normally vary the starting point upwards because of the same factor. Where, however, there are several reasons that a case might be regarded as meriting a higher starting point, then some measure of increase of the minimum sentence may be warranted. It is important to avoid an over-mechanistic approach to this issue, while guarding against the danger of double counting."

[28] The above principles must be applied to the facts of this case when determining the first ground of appeal in relation to the starting point. We do not agree with Mr Toal's submission to the effect that as the judge has not expressly said he has flexibility in sentencing the sentencing is fundamentally flawed. This was a weak point. Crown Court judges are well acquainted with the flexibility they have, and this experienced judge is no exception. It is not necessary to expressly mention flexibility in every case.

[29] When assessing the remaining arguments, it is important to remind ourselves of what *McCandless* said in relation to "the normal starting" point of 12 years, now the lower starting point as defined by *Whitla*. Paras [10], [11] and [12] are relevant as follows:

"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.

[30] A specific reason why it is suggested that this is a lower culpability case is because of the age of the offenders who were both under 25 at the date of the offending. In this regard paras [24] and [25] of Lord Woolf CJ Practice Statement (reported at (2002) 3 All ER 417 reads as follows:

> "[24] In the case of young offenders, the judge should always start from the starting point appropriate for an adult (12 years). The judge should then reduce the starting point to take into account the maturity and age of the offender. Some children are more, and others less, mature for their age and the reduction that is appropriate in order to achieve the correct starting point will very much depend on the stage of the development of the individual offender. A mechanistic approach is never appropriate. The sort of reduction from the 12-year starting point which can be used as a rough check, is about one year for each year that the offender's age is below 18. So, for a child of 10, the judge should be considering a starting point in the region of five years.
>
> [25] Having arrived at the starting point, the judge should then take account of the aggravating and mitigating factors in the particular case, which will take the prescribed minimum term above or below the starting point. The sliding scale proposed is intended to recognise the greater degree of understanding and capacity for normal reasoning which develops in adolescence over time, as well as the fact that young offenders are likely to have the greatest capacity for change. It cannot take into account the individual offender's responsibility for and understanding of the crime."

[31] Mr Toal made the case that as both Anderson's were under 25, they would not have had the same understanding of the offending and maturity to make decisions and so their culpability should be lowered. Mr Toal pitched this point at a high level of generality utilising some policy documents including from the Howard League for Penal Reform. Whilst interesting, and of note, given the ongoing sentencing review in England & Wales, the problem for Mr Toal and Mr Mallon in advancing this argument is that there was no objective evidence put forward from an expert as to how either of these applicants had reduced culpability on the basis of their age or lack of maturity. It is not enough to make a general statement to this effect in a serious case of murder. Rather, an expert would have to opine that for some reason culpability was lowered by virtue of lack of maturity or an underlying learning issue or something else of that nature. The absence of any verification is fatal to the argument that this is a lower culpability case falling into the 12-year starting point bracket on the basis of age or lack of maturity.

[32] Considering the case thus far the judge was not wrong in principle for settling upon that the 15/16 year starting point. This was appropriate on the basis of the multiple injuries caused and the vulnerability of the victim. There was ample evidence to bring this murder within that category. The only caveat is that the judge

needed to be careful not to double count those factors when looking at aggravation and mitigation. We will return to that in due course.

[33] Notwithstanding what we have just said, a further argument appears to be that the starting point should have been reduced because utilising para [11] of *McCandless* above, 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 (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress.

[34] This argument merits some consideration because the judge's sentencing remarks are not clear on a number of issues which are material as follows. First is the obvious question in this case whether or not the starting point should have been reduced because of technical provocation on the basis of what happened in the run-up to the offending. It is clear that this was a live question and yet we are not persuaded that the judge has fully addressed it. The second question is whether or not the judge has properly addressed the issue of an intention to kill as opposed to an intention to cause grievous bodily harm which was, again, put in play by counsel.

[35] On the first point we have considered the case of *R v Cain* [2017] EWCA Crim 327 which was a case of section 20 assault. The Court of Appeal found that the judge was wrong to dismiss the defence submission on provocation and altered the sentence accordingly. This authority only goes so far however as we are dealing with a murder, where provocation is not a defence. Loss of control is a partial defence to murder and was available to the applicants, but this was not established on the facts and so not left to the jury. An appeal against conviction was mounted by Sean Anderson to include the failure to leave loss of control to the jury but that has not been pursued. We must, therefore, proceed on the basis that the judge's ruling not to leave loss of control to the jury was correct.

[36] *Blackstone's Criminal Practice 2025*, also refers to the general principles in this area from D20.29-D20.35. These are in particular that the court must sentence consistent with the jury verdict and should be extremely astute to give to the offender the benefit of any doubt about the facts of the offence per Watkins LJ in *Stosiek* (1982) 4 Cr App R(S). The position is we think more nuanced in a murder case such as this as a judge will charge on the basis that the prosecution must prove either an intention to kill or cause grievous bodily injury and so a conviction may be on either basis.

[37] At the appellate stage we have not had the benefit of seeing and hearing the witnesses as the trial judge did over a month of trial. However, we must consider the sentencing remarks as a whole to decide whether any error arises which affects the sentences substantively. We do know that the jury convicted of murder and were therefore satisfied as to the requisite intention. What has not been specifically found by the sentencing judge is whether on the facts that was an intention to kill or to cause grievous bodily injury. The judge should have resolved that issue and

expressed the position clearly in his sentencing remarks. At this remove we give the benefit of the doubt to the applicants and resolve the issue in favour of an intention to cause GBH. This is a tenable position given the circumstances of the case we have discussed and the limited evidence of an intention to kill.

[38] However, this outcome does not assist the applicants in terms of the starting point. That is because 16 years is now the normal starting point which will include cases where the intention is to cause GBH depending on the aggravating factors present. If the intention was to kill, then the sentence would have been in excess of the 16 years starting point.

[39] The facts also point to provocation in a non-technical sense by virtue of the attack by the deceased and Coleman immediately before the murder. Again, the judge has not been clear in his assessment of this issue. The judge refers to this as a revenge attack, however the revenge element may have emanated from the deceased's relative being attacked a few weeks previously. The judge's reference to revenge on the part of the applicants may therefore be something of an overestimate. However, this does not invalidate the starting point as no further reduction was warranted by virtue of the circumstances of this offending. Although the applicants were attacked themselves by the deceased and another man immediately preceding the murder, they armed themselves with knives to go after their attackers and embarked on a sustained attack. Therefore, it cannot be said that this case falls below the normal starting point into a low culpability bracket which is now defined by *Whitla*, see paras [27]-[30] herein.

[40] Overall, we find that the judge was entitled to place this murder within the 15/16-year category in relation to both applicants. He should have specifically dealt with the two features of the case we discuss above (intention and provocation) in his sentencing remarks. However, this failing does not invalidate the starting points settled on by the judge which were at the lower end of the normal range. If these features had not been present it follows that the starting points should have been higher. Incidentally, we find there is no traction in the point that the judge erred by choosing 16 rather than 15 years.

Ground 2: Consideration of aggravation and mitigation

[41] The judge was entitled to lift the 16-year starting point figure he had settled on given what we see as three strong aggravating factors in this case namely the presence of two knives, the fact that this was a group attack and the sustained nature of the attack. Therefore, 17-18 years was an appropriate point to reach before mitigation was taken into account.

[42] To our mind the other factors that the judge considered to be aggravation are really encompassed in the starting point, namely the number of injuries and the vulnerability of the victim, and there is danger of double counting. However, we do not consider that the judge's repetition of factors in his sentencing remarks in terms

of the articulation of aggravation, has any material effect. Having considered the matter carefully, on the basis that this was a group attack which was sustained and on the basis of the use of two knives, we think that the judge was right in both cases to find that the 16 years should increase.

[43] The mitigation for each applicant is somewhat different. In both cases age was properly a mitigating factor. In Sean Anderson's case, we think, that it was open to the judge to consider that there was less mitigation than in Gary Anderson's case. That is really on the basis of in Gary Anderson's case, his clear remorse and he also did not decide to appeal his case.

[44] Obviously, Gary Anderson has a clear record, but this is a neutral factor rather than mitigation. Another mitigating factor which the judge allows for is in relation to his role. We are not convinced that this was entirely correct. That is because if you consider the sentencing remarks, the judge quite clearly sentenced on the basis of joint enterprise and no issue is taken with that on this appeal. True it is, that Sean Anderson was quicker off the mark in running after the deceased. However, Gary Anderson was part of the attack and was sighted on the use of knives and so in a joint enterprise no distinction should really be made. That said, the personal circumstances and particularly the remorse evident in Gary Anderson's case clearly allowed for a lesser sentence in his case. Either way we do not consider the sentence in either applicant's case was manifestly excessive after consideration of the aggravating and mitigating factors.

Ground 3: Delay

[45] A delay point has belatedly been made based on a recent decision of this court in *R v Michael McGinley* [2025] NICA 11. In that case, the court refined the previous guidance on delay from paras [62]-[77]. At para [73], the court said as follows:

> "[73] Significant delays can and do occur in serious cases. Hopefully, the criminal cases in which article 6 ECHR delay is established are not numerous. The category of cases identified in *R v Jack* as effectively not justifying a reduction in penalty includes some of the most serious offences and offenders. If the courts are not seen to take the delay in those cases as seriously as it does in other cases criminal justice stakeholders may be emboldened to take a similar approach. We therefore take this opportunity to clarify the position regarding delay against the obiter comments in *R v Jack*. As a matter of principle our approach should now be applied."

[46] The correct method for assessing delay is also explained at para [67], where the court said:

> "[67] We agree that it is not appropriate for this court to set out prescriptive guidance. The qualification in the passage above about 'hardened recidivists' has no application to this appellant who had a minor record and none for violence. Accordingly, it is strictly unnecessary to go further. Nonetheless, we observe that the analysis, if correct and one by which we are bound, is alarming. It envisages a scenario where the court, when confronted with a breach of the article 6 reasonable time guarantee, will respond differently depending on whether the defendant falls within one of the undeserving classes of offender identified by the court in the passage just quoted or within the deserving class. Such a two-tier system discriminating between these two classes is difficult, if not impossible, to justify."

[47] Furthermore, the court stated at para [64]:

> "[64] The Court of Appeal in Northern Ireland has addressed the issue of delay in the case of *R v Dunlop* [2019] NICA 72 and *R v Ferris* [2020] NICA 60. The judge properly recognised that there had been culpable delay in this case. The appellant submits that the delay in this case was inordinate and the remedy for the breach ought to have been greater than the five months' reduction applied by the judge."

[48] Applied to the facts there is no merit in this ground of appeal. This was an opportunistic point which fails to appreciate that *McGinley* reiterates well-known principles that in any case for fair trial rights to be compromised by delay there must be culpable delay. In this case, the trial did take some time to come on for hearing but that was during the Covid-19 pandemic. Neither applicant's counsel could point to any culpable delay. The delay between conviction and sentencing was due to the defence obtaining reports and so cannot be relied on to obtain a reduction in sentence for delay.

Conclusion

[49] Therefore, having assessed this case in the round and cognisant that an appellate court must apply restraint whenever a trial judge has heard all of the evidence which went before the jury, we are not satisfied that the sentences imposed were wrong in principle or manifestly excessive. The preamble to this murder cannot detract from the fact that the applicants armed themselves with knives and engaged in a sustained attack causing multiple injuries to the deceased who was defenceless on the ground.

[50] We wish to commend both Mr Toal and Mr Mallon for the diligent way they prepared this case and for their economical and frank submissions to this court. They have convinced us that leave should be granted in the appeals based on the non-technical provocation argument and the argument as to intention. These are important matters for sentencing courts to consider going forward. We will, therefore, grant leave but dismiss the appeals on grounds one and two. The third appeal point raised in relation to delay is entirely without merit. We refuse leave on that ground and dismiss that aspect of the appeals.

[51] Accordingly, we dismiss both appeals against sentence on all grounds for the reasons we have given.