

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

v

AARON CAVANA WALLACE AND CHRISTOPHER FRANCIS KERR

WEATHERUP J

[1] On 10 April 2013 the defendants pleaded guilty to the murder of Michael McIlveen on 8 May 2006. On a conviction for murder the sentence is prescribed by law as being life imprisonment.

[2] I must now determine whether to impose a minimum term of imprisonment to be served before the defendants can be considered for release. The present procedure was introduced by the Life Sentences (Northern Ireland) Order 2001, which came into force on 8 October 2001. Where a Court passes a life sentence the Court may specify a part of the sentence to be served before the prisoner can be considered for release. This period may be described as the tariff or the minimum term.

[3] It should be emphasised that the Court, in specifying the part of the sentence to be served, is not setting a release date. The procedure under the 2001 Order is that –

- (i) The Court shall specify the part of the sentence to be served before the release provisions apply. The Court has the option of not specifying any part of the sentence and the release provisions will not apply. In effect the Court determines the future date, if any, on which the person convicted of murder will be considered for release on licence.

(ii) The part of the sentence specified by the Court “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.” The minimum term is intended to reflect the seriousness of the offence, rather than the risk posed by the offender.

(iii) The minimum term, unlike other determinate sentences, is not subject to normal remission rules where prisoners may receive remission of one half of the stated sentence. A minimum term of say 12 years specified in respect of a life sentence is the equivalent of a determinate sentence of 24 years on which full remission is earned.

(iv) After the specified part of the sentence has been served the Parole Commissioners will direct release if “satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined”. Accordingly, future risk to the public determines the release date, if any, after completion of the minimum term served for retribution and deterrence.

(v) Any order for release will be on licence for the remainder of the life of the prisoner, who may be recalled to prison if they do not comply with the terms of the licence.

The Framework for Minimum Terms

[4] In 2004 the Court of Appeal in Northern Ireland adopted the Practice Statement (Crime – Life Sentences) [2002] 3 All ER 412 as the approach to setting minimum terms for those sentenced to life imprisonment for murder in Northern Ireland. The Practice Statement offers “guidance” to Judges, although they retained discretion to depart from the guidance if that was considered necessary in the circumstances of an individual case (see R v McCandless [2004] NI 269).

[5] The approach of the Practice Statement is 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: (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 failure 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.

Very serious cases

18. A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's

eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.

19. Among the categories of case referred to in para 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime or the offence was a terrorist or sexual or sadistic murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate.

Young offenders

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24. In the case of young offenders the judge should always start from the normal 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 5 years.

[6] The Practice Statement has been designed as a multi tier system. The normal starting point of 12 years may, exceptionally, be reduced where culpability is significantly reduced. The higher starting point of 15/16 years will be applied where the crime is especially serious. The highest minimum terms will be applied to very serious cases. The Court may also set a whole life tariff. These possibilities reflect the gradations in the seriousness of the crime of murder and admit of the flexibility that is necessary in completing the exercise of determining a minimum term on the basis of retribution and deterrence having regard to the seriousness of the offence.

[7] The Court of Appeal in Northern Ireland has also addressed the manner in which the sentencing Judge should approach the application of the Practice Statement. The approach should recognise that the Practice Statement prescribes a sequence to be followed, first in selecting a starting point, then in considering variation of the starting point by reference to the aggravating and mitigating factors, next in considering whether no minimum term should be selected at all and ultimately in determining the appropriate minimum term having regard to the seriousness of the offence - see Kerr LCJ in R v Hamilton [2008] NIJB 222 at [32] and Hart J in R v Morrin [2011] NICA 24 .

The Minimum term for the principal offender.

[8] Michael McIlveen died as a result of a sectarian attack on 8 May 2006. The principal offender was Mervyn Moon who struck the deceased with a baseball bat. After pleading guilty to murder he was sentenced by Treacy J on 1 May 2009 to life imprisonment and given a minimum term of 10 years.

[9] In his sentencing remarks [2009] NICC 33 Treacy J stated in relation to Moon that the prosecution and the defence accepted that the higher starting point was appropriate because of the sectarian nature of the crime; that the arming with the baseball bat was an aggravating feature; that the significant mitigating factors were the intention to cause grievous bodily harm rather than to kill, spontaneity and lack of premeditation, his age at 17 at the time, clear evidence of remorse, a timely plea of guilty and account was also taken of his clear record and good family background.

[10] The prosecutions of Wallace and Kerr have given rise to legal disputes about the concept of “joint enterprise” and the responsibility of those whose actions are not directly causative of the death but who have participated in the events with others.

Agreed facts on which pleas of guilty were entered.

[11] The defendants entered their pleas of guilty on the basis of facts agreed between the prosecution and each defendant. The agreed facts were that Wallace was 18 years old and Kerr 19 years old at the time of the commission of the offence on 6 May 2006. In the course of that evening a group of protestant male and female youths including Wallace and Kerr gathered in the vicinity of the swimming pool at Seven Towers Leisure Centre, Ballymena. Wallace and Kerr had consumed alcohol in the course of the day. A group that comprised three catholic youths including Michael McIlveen walked into the area where the group of protestant youths had gathered. At least one of the catholic youths, Michael McIlveen, was known to members of the group of protestant youths. A member of the group of protestant youths

challenged the catholic youths to a fight. Following a short period during which comments were directed towards the catholic youths, the catholic youths began to make their way away from the swimming pool area up an incline towards Trostan Avenue. At some point two of the youths including Michael McIlveen began to run as they were followed by a group of protestant youths. That group included Moon and Wallace and Kerr. The route took the youths along Tardree Grove into Glenshesk Drive. Kerr broke away from the chasing group to go to his grandmother's house where he retrieved a baseball bat that was in his bedroom. He then left the home and made his way across an adjoining field through Glenravel Drive. Wallace had ceased following and was returning in the direction of the cinema when he passed the principal prosecution witness going in the opposite direction. The witness asked Wallace where the others had gone and Wallace pointed the witness in the direction of Cameron's car park. The witness then walked off in that direction.

A short time later Wallace turned and went back towards the car park. He had seen Kerr coming out of his grandmother's house carrying a baseball bat. He then went down Granville Drive heading towards Chrissie Graham's hut which is at the bottom of an alleyway. At the entrance to the alleyway Moon took the baseball bat from Kerr and then ran up the alleyway followed by Kerr and others. Wallace also went up the alley in the direction of Graham's. It was not possible to see what was happening outside Graham's house where a fight was going on between one of the protestant group and Michael McIlveen. On arrival at the scene of the fight Moon immediately struck Michael McIlveen on the head with the baseball bat, felled him and struck him while he was lying on the ground. Michael McIlveen's death was due to injuries suffered by him solely as a consequence of the blows issued by Moon with the baseball bat. The prosecution evidence was that Michael McIlveen was kicked by other members of the group of protestant youths including Wallace and Kerr. There is no evidence that any kick administered was causative in any way of the death of Michael McIlveen or caused any serious injury.

Following the conclusion of the attack on Michael McIlveen a gate in the alleyway was then damaged by some members of the group of protestant youths. At some point during this period the baseball bat was passed from Moon to another member of the group. The evidence of the chief prosecution witness was to be that Wallace was the first to leave. The group dispersed when a number of local female residents came out and shouted at the group and they all dispersed. The baseball bat was returned to Kerr who then hid the baseball bat in shrubbery in Tardree Grove. Some members of the group reassembled back in the area of the swimming pool. They went and bought some Chinese food. Thereafter Kerr and Wallace went to a local park. They then went to Wallace's home for a short period before Kerr returned to his grandmother's house at approximately 1.30 am. On his way back from

Wallace's house Kerr retrieved the baseball bat from the shrubbery and placed it back in his bedroom. Wallace and Kerr handed themselves into police later that evening.

The prosecution and defence agreed that Wallace and Kerr fell to be sentenced as secondary parties on the basis of joint enterprise to the murder of Michael McIlveen. Wallace accepted that he saw Kerr in possession of a baseball bat and consequently he foresaw that the bat could be used by another to inflict serious bodily injury. With that foresight he proceeded to the area of the alleyway where he knew that a fight may take place. He continued to participate in the joint venture by his continued presence. Kerr accepted that at the time that he fetched the baseball bat and brought it to the scene of the confrontation in the alleyway, he foresaw that the bat could be used by another to inflict serious bodily injury. With that foresight he proceeded to the area of the alleyway where he knew that fight might take place. Further, Kerr accepted that when Moon took the baseball bat from him he foresaw that Moon might inflict serious bodily injury. He continued to participate in the joint venture by his continued presence and by the concealment of the baseball bat in the aftermath of the attack.

In the course of an earlier trial Moon accepted through his plea that he acted as principal in the murder of Michael McIlveen by inflicting fatal injuries in circumstances where he intended only to cause serious bodily injury not death. The prosecution accepted his plea on that basis. It was accepted by the prosecution and the defence that Wallace and Kerr played a secondary role in the murder of Michael McIlveen.

Defence Applications for the Court to give advance indications of likely tariff.

[12] Having agreed facts with the prosecution, on the basis of which the defendants might plead guilty, the defendants made an application to the Court for advance indications of the minimum terms that might be set by the Court in the event of a plea of guilty on the agreed facts. This process, known as a 'Rooney hearing' was established by the Court of Appeal in Attorney General's Application (No 1 of 2005) (Rooney and Others) [2006] NI 218.

[13] The Court of Appeal applied the following rules of practice to Rooney hearings-

1. The judge should only give advance indication of sentence when this has been requested by the defendant. He should not otherwise offer such an indication but he may, where he is satisfied that to do so would not create pressure on the defendant, remind counsel in open

court of the defendant's entitlement to seek an advance indication of sentence.

2. All applications for advance indication of sentence, if they do not take place in open court, should be conducted in court in an 'in chambers' hearing with the defendant and advocates for the prosecution and the defence present.
3. The judge may refuse to give an indication of sentence and should refuse if he considers that to do so would create pressure on the defendant to plead guilty. Alternatively, he may postpone the giving of an indication until such time as he considers it appropriate to do so.
4. The judge should not indicate his view of the maximum possible level of sentence following conviction by the jury.
5. An indication should only be given where there is an agreed factual basis on which the plea of guilty is to be made. The judge should not give an indication on a basis of hypothetical facts. Where there has been a dispute on the facts, the judge should refrain from giving an indication until that dispute is resolved and an agreed, written basis of plea has been furnished. If relevant material that might affect the judge's decision as to the advance indication is outstanding the judge should postpone giving an indication until that information has been obtained.
6. The judge should treat the application for a sentence indication as a request to indicate the maximum sentence to be passed on the defendant if he were to plead guilty at the stage that the application is made.
7. An indication, once given, will be binding on the judge who gives it or on another judge who carries out the sentencing exercise provided that there has not been a material change in circumstances between the time of giving the indication and the time that sentence is to be passed. In this context a material change in circumstances would arise, for example, by the receipt of information which alters the basis on which the indication was given. Generally, this should not happen (see 6 above). The judge who gives the indication will also be the sentencing judge unless exceptional circumstances arise.
8. If a defendant is given a sentencing indication and fails to enter a plea of guilty after a reasonable opportunity to consider his position in the light of the indication, it will cease to have effect. In any event where, after the indication has been given, it is not acted upon before the trial resumes, it will no longer have effect.

9. The advocate who appears for the defendant is responsible for ensuring that his client is fully advised on the following issues: (a) he should only plead guilty if the plea is voluntary and he is free from any improper pressure; (b) the Attorney General will remain entitled to refer an unduly lenient sentence to the Court of Appeal; (c) any indication given by the judge is effective only in relation to the facts as they are then known and agreed; (d) if a 'guilty plea' is not tendered after a reasonable opportunity to consider it, the indication ceases to have effect.
10. It is the duty of the prosecutor to ensure that the judge is in possession of all material necessary for him to give a properly informed indication. If there is a dispute as to the basis on which the proposed plea is to be made, the prosecutor should make the judge aware of this.
11. The prosecutor should draw to the judge's attention any relevant guideline cases and, where they exist, any minimum or mandatory statutory sentencing requirements.
12. Where an advance indication has been given by a judge, he should provide a summary of the application in his sentencing remarks.

[14] I acceded to the defence application for an advance indication. Having regard to the minimum term of 10 years applied to Moon, the principal offender, and on the basis of the agreed facts that Wallace and Kerr were engaged in a joint enterprise and were to be treated as secondary offenders, I gave the advance indication that the minimum terms imposed on Wallace and Kerr would not exceed the 10 year term applied to Moon. Having given that advance indication the defendants asked to be rearraigned and pleaded guilty.

[15] Family impact statements were submitted by the family of Michael McIveen. The statement submitted in the earlier trial spoke of Michael as a young man and of the trauma of the events of 8 May 2006. In a measured and moving statement, Michael's mother recorded that she found his death extremely difficult to deal with; how her health had suffered and there had been times when she had not been able to cope; that it had been extremely difficult trying to make any sense of what happened to Michael that night and how the desire to know what had happened had kept her coming to the court for the trial when it had been difficult to listen; that most of those charged in connection with Michael's death had chosen not to speak in court and how she really would have liked to hear what they personally had to say for themselves or for them to apologise or show any sign of remorse for at least being there when Michael was killed, never mind being involved in his death, no matter how small a part they considered they had played. The statement

expressed sympathy with the families of those connected with Michael's murder and thanks to those who had come forward to give evidence in court and thanks to many people for their support and kindness. I include these words to remind all that a young life has been taken away and to show the generosity of the family, despite their torment. A further Family Impact Statement by the family of Michael McIlveen prepared for the present court repeats the sentiments expressed earlier, including reference to the defendants' failure to apologise or to show any sign of remorse for at least being present when Michael sustained the injuries that led to his death.

[16] A Pre-sentence Report for Wallace was prepared by Mary Cavan of the Probation Board of Northern Ireland. The report sets out the defendant's background and an analysis of the offence. In the report it is stated that at the time of the murder Wallace was 18 years old and is now 25 years old, and has demonstrated insight into the traumatic experience of a 15 year old being chased by older youths. However, his willingness to take part in what is described as a 'feral chase' in which a boy was fatally injured was said to raise concern. Ms Cavan records that Wallace expressed regret and remorse for the death of Michael McIlveen. He acknowledged the pain and suffering caused to the victim and subsequently to his family. While accepting the murder was a sectarian attack and influenced by wider social/cultural factors he acknowledged it was an unjustified and unprovoked murder of a young 15 year old boy. The defendant accepted to a degree that alcohol consumption might have influenced his actions but denied these were problematic. He was assessed as a medium likelihood of re-offending and as posing a significant risk of serious harm to others. A risk management plan was required to address the defendant's consequential thinking, his victim awareness, his attitude to the offence and the influence of sectarian attitudes, his alcohol misuse and negative peer influences.

[17] A Pre-sentence Report on Kerr was prepared by Michael Winnington of the Probation Board for Northern Ireland. The report sets out Kerr's background and an analysis of the offence. The report states that Kerr spoke of his regret for the role which he played in Michael McIlveen's death and of his realisation of the hurt and long suffering by the victim's family. When asked by Mr Winnington to reflect on the incident Kerr stated that it was wrong and it should never have happened. Kerr was assessed as being at high likelihood of re-offending based on factors that included recent failed drugs tests and was assessed as a significant risk of serious harm to others. A risk management plan required to address the defendant's attitudes and beliefs in respect of sectarian/religious issues, his self-control and risk management skills, his consequential thinking and victim awareness and his alcohol/drug abuse and lack of positive structures in his lifestyle.

[18] The Court also received a clinical psychologist's report on Wallace from Professor Robin Davidson which included the comment that he was

struck by Wallace's remorse and noted a certain naivety in his presentation. A consultant clinical psychologist, Dr Mark Davies, also reported on Kerr, which report included the comment that Kerr's mental health had deteriorated.

The Starting Point.

[19] The normal starting point for a minimum term is 12 years. The normal starting point does not apply where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position so as to warrant the higher starting point of 15 or 16 years. The present case was especially serious because the victim was deliberately targeted because of his religion. The principal offender, Moon, was treated as attracting the higher starting point of 15/16 years. The same approach should apply to others convicted on the basis of a joint enterprise.

Aggravating and Mitigating Factors

[20] Having determined the starting point it is necessary to consider whether it should be varied upwards or downwards to take account of aggravating or mitigating factors which relate to either the offence or the offender.

[21] Aggravating factors relating to the offence include arming with a weapon in advance. Kerr secured the baseball bat and secreted it afterwards. He did not use the baseball bat against the victim but his actions remain an aggravating factor against Kerr.

[22] Aggravating factors relating to the offender include a record of previous convictions. Kerr had previous convictions but as there was no record of violence I treat this as a minimal aggravating factor against Kerr.

[23] Mitigating factors relating to the offence include an intention to cause grievous bodily harm rather than to kill. This was a mitigating factor applied to Moon and must also extend to Wallace and Kerr.

[24] In addition I consider it appropriate at this stage to take into account the culpability of Wallace and Kerr as secondary parties convicted on a joint enterprise basis where that culpability is determined by foresight of action by another (Moon) rather than intention to injure on their part. This is an additional mitigating factor.

[25] A further mitigating factor in relation to the offence is spontaneity and lack of premeditation. I accept this factor in relation to Wallace. However Kerr

broke away from the group to secure the baseball bat and cannot claim spontaneity in relation to the fatal events.

[26] Mitigating factors in relation to the offender include the age of the offender. I take account of Wallace being 18 at the time of the offence and Kerr being 19 at the time of the offence.

[27] An additional factor is clear evidence of remorse or contrition. This has not been evident in the past. I recognise that this in part has arisen from a dispute by the defendants as to the nature of their involvement and their legal responsibility for the death on the basis of joint enterprise. The latest position is that stated in the Pre Sentence Reports to which I have referred. I accept that the defendants have been prepared to express their remorse now that there is an agreed basis for legal responsibility.

[28] An additional factor is a timely plea of guilty. It is regrettable that so many years have passed before pleas of guilty have been entered. I accept again that this in part has arisen from the dispute by the defendants as to the nature of their involvement and their legal responsibility for the death. Eventually an agreed basis for the acceptance of culpability was reached. The pleas of guilty were dependant on that stage being reached. I accept that credit should be given for the pleas entered.

[29] Counsel relied on delay as a mitigating factor. The defendants were originally convicted in 2009 and the convictions were quashed on appeal in 2012. Accordingly, seven years have passed since the commission of the offences. No explanation has been offered for the delay in completing the appeal. However, the Court of Appeal recognised the need for an early retrial and that was arranged.

[30] In Attorney General's Reference (No 2 of 2001) [2004] 1 All ER 1055 the House of Lords considered the reasonable time requirement under Article 6(1) of the European Convention on Human Rights. Lord Bingham at paragraph [24] stated:

"If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's convention right under art 6(1). For such breach there must be afforded such remedy as may be just and appropriate (s.8(1) of the Human Rights Act 1998) or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances including particularly the stage of the

proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail.

In Beck v Norway [2001] ECHR 26390/95 the Court found that there had been no violation where the length of the criminal proceedings had earned the applicant a reduction of sentence.

[31] In the present case I take account of the time that has elapsed since the offence was committed.

[32] It is necessary to consider whether no minimum term should apply. Kerr LCJ stated in R v Hamilton [2009] NIJB 222 at [32]-

“An overarching consideration will always be whether no minimum period should be selected at all but it appears to us that this is a question that will normally be addressed after the broad sequence of the Practice Statement has been applied.”

The present case is not such as suggests that a whole life tariff would be appropriate.

The Minimum Term

[33] Having proceeded along the course set out in the Practice Statement it is necessary to stand back and look at all the circumstances as a whole and impose a minimum term that is considered appropriate, in the words of the 2001 Order, 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.

[34] I am satisfied that the minimum term to be applied in each case should not in the present circumstances exceed that given to Mervyn Moon. Taking account of all the above matters the minimum term will be, in the case of Wallace, 8 years and in the case of Kerr, 9 years, in each case including time served in calculating the minimum term.

[35] I am obliged by paragraph 25 of Schedule 1 of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 to inform the defendants that the Independent Barring Board will include them in the barred list for children by virtue of these convictions.