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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **24/11/11**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

STEPHEN LESLIE BROWN (ALSO KNOWN AS STEPHEN LESLIE REVELS)

APPEAL AGAINST SENTENCE

Before: Morgan LCJ, Higgins LJ and McCloskey J

MORGAN LCJ

[1] The appellant was convicted on 3 March 2009 by Gillen J sitting without a jury of the murders of David McIlwaine and Andrew Robb on 19 February 2000. The learned trial judge fixed a tariff of thirty years under Article 5(1) of the Life Sentences (Northern Ireland) Order 2001 which means that the appellant must serve a period of thirty years in custody before he can be considered for release by the Parole Commissioners. We dismissed the appellant's appeal against conviction on 24 May 2011 and this judgment deals with his appeal against the length of the tariff.

[2] We have already set out the full circumstances of these horrific killings in the appeal against conviction but it is necessary to refer to some of those circumstances in connection with our decision on this appeal. In the early hours of 19 February 2000 the appellant, Noel Dillon, now deceased, and Mark Burcombe were in the appellant's home at Tandragee. The two deceased were looking for a party and were invited into the home. At some stage during the conversation the memory of a recently deceased UVF leader, Richard Jameson, was insulted by Andrew Robb. Jameson was a friend of the appellant and Dillon. Shortly thereafter the appellant and Dillon hatched their murderous enterprise.

[3] Shortly thereafter, on the pretext that they were going to a party, the appellant drove all five occupants of the house into the countryside. The vehicle was stopped and everyone was ordered out of the car. The appellant and Dillon went off with Robb. There is no direct evidence of what occurred in relation to that deceased but he was found with a cut throat injury which alone would have been responsible for his death and four penetrating wounds in or about his abdomen. There were no defensive injuries.

[4] After this murder the appellant and Dillon came swaggering back down the hill with "a hard man's walk". The appellant then launched a sudden attack on McIlwaine who tried to run away. The appellant brought him to the ground and assaulted him by kicking and stamping on him. Dillon then crouched over McIlwaine and cut his throat being exhorted to do so by the appellant. The appellant, Dillon and Burcombe then returned to the appellant's motor vehicle. As they were driving towards McIlwaine the appellant shouted that he was going to run over McIlwaine's head but was told by Dillon not to do so. McIlwaine was still making breathing sounds. The appellant got out of the car having taken the knife from Dillon and repeatedly plunged the knife into McIlwaine's stomach and directly through his eye. McIlwaine sustained a cut throat injury and seven penetrating wounds to the stomach as well as the direct knife injury to the eye.

[5] As he drove off the appellant rejoiced at what he had done. Sometime later he stopped his car near a derelict house where he disposed of the knife which has never been recovered. When they returned to the appellant's home he said that the killing had given him such a buzz that he had forgotten what it was like to kill. He said the two bastards deserved it and that he had done the stomachs and Dillon had done the throats. He threatened Burcombe that if he talked he would cut Burcombe's throat or would get someone in his family.

[6] At the time of the murder the appellant was a 19 year old single man. He has one brother five years his senior with whom he has no contact. Shortly after the appellant was born his mother died in a house fire at the family home and his father was subsequently convicted of her murder. The appellant was cared for initially by his maternal grandparents but was then placed in foster care. He had behavioural issues at school although he attained some GCSE qualifications. He returned to live with his grandparents after leaving school. The pre-sentence report noted his troubled childhood and transient lifestyle in adulthood. He had demonstrated a strong work ethic and capacity to support himself financially. He had eight previous convictions for disorderly behaviour, criminal damage and no insurance but no conviction for offences of violence.

[7] In his sentencing remarks the learned trial judge set out the relevant portions of the Practice Statement issued by Lord Woolf and approved by this court in R v McCandless [2004] NICA 1. This remains the relevant guidance for the

determination of minimum terms in life sentence cases under the 2001 Order and we set out for convenience the relevant portions below:

"The normal starting point of 12 years

10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary,

robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty.

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."

[8] These factors are not, of course, intended to be comprehensive. They are intended to assist sentencers in assessing the culpability of the offender and the degree of harm caused by the offence. They are not to be applied mechanically or to be interpreted strictly as if they were a statute. In this case the learned trial judge found that two of the paragraph 12 features were present in that there was evidence

of sadism or gratuitous violence before the killing and extensive and/or multiple injuries were inflicted on the victim before death. It was contended on behalf of the appellant that this involved a degree of double counting since the same evidence was being used in relation to each factor. It was further submitted that evidence of sadism or gratuitous violence was intended to catch those cases where there had been a prolonged period of infliction of injury leading up to the death.

[9] We do not accept either of these submissions. It is plain from the record of injuries which we have set out above that there were multiple and extensive injuries inflicted on both victims. We consider, however, that the additional feature present in this case is the fact that the evidence indicates that the appellant took pleasure in the infliction of injuries upon the deceased. Each of these factors bear on the court's assessment of the appellant's culpability and it is that culpable aspect of the appellant's behaviour that is properly represented by the reference to sadism and gratuitous violence. We consider, therefore, that these were two separate and important aspects of the culpability of the offender in this case.

[10] In his sentencing remarks the learned trial judge concluded that two murders did not sufficiently capture the spirit of the phrase "multiple murders" as used in paragraph 12 of the Practice Statement. He then went on, however, to recognise that the brutal murder of two young teenagers carries a cumulative resonance of the illustration instanced in paragraph 12. Indeed the appellant's counsel, Mr McCrudden, accepted that the fact that two murders were committed was one of the aggravating factors which justified a higher starting point in this case. The other was the infliction of multiple injuries.

[11] We do not share the learned trial judge's reluctance to characterise two murders as coming within the term multiple murders. When assessing the appropriate tariff for such a crime the fact that a second murder was carried out in our view is a feature which makes the crime especially serious. Although the sentencing regime in England and Wales is different we consider that such a conclusion is consistent with the approach taken by the Court of Appeal in England and Wales in R v Malasi [2009] 1 Criminal Appeal Reports (S) 51. We do not consider that a great deal turns on the precise nomenclature in this case since it is clear that the learned trial judge took this into account as a material feature and the appellant accepts that it is a feature which makes the crime especially serious and thereby justifies the higher starting point of 15/16 years.

[12] The respondent submitted that the court should also take into account the fact that the victims were vulnerable. We accept that the execution of the plan to murder these victims involved taking both of them to a remote country road where they were to be overpowered. There was no prospect of them obtaining any assistance to prevent the attacks upon them. Both of the victims had consumed considerable amounts of alcohol and as appears from the circumstances were easily overpowered by the appellant and Dillon. They were clearly in relaxed and unsuspecting mood.

They were tricked and seduced by their killers. Neither would have anticipated any such attack as they were taken to the scene of the murders. It is clear that they were defenceless victims. We accept, therefore, that the execution of the plan involved rendering these victims vulnerable to attack and that this is a material aggravating feature within the spirit of the Practice Statement.

[13] The learned trial judge concluded that he could not be satisfied beyond reasonable doubt that McIlwaine was killed in order to defeat the ends of justice because he was a potential witness. He concluded, rather, that he should approach the case on the basis that it had always been the intention of the appellant and Dillon to kill both deceased. Mr McCrudden accepted that a killing to defeat the ends of justice was marginally more serious than a multiple murder but submitted that the learned trial judge could not rule out the possibility that the decision to kill McIlwaine was made at a much later stage. We can see nothing in the evidence to support such a possibility. It is plain that the appellant and Dillon planned how they were going to carry out the murders and McIlwaine's death was clearly either consequent upon the plan or because of his presence as a witness. We consider that no criticism can be made of the learned trial judge on this issue.

[14] We accept that there is no direct evidence that the appellant saw the knife which Dillon had on his person shortly before it was used in the attack on McIlwaine. We are satisfied, however, that the learned trial judge was correct to conclude that the appellant was aware of the knife. This inference was amply supported by the evidence. The appellant and Dillon had absented themselves from the company for a period and it is clear that they were engaged in planning these murders at that stage. The appellant as the driver of the vehicle drove the victims to the place where the murders could be carried out. The appellant's conduct immediately after the murder of Robb showed his approbation of the manner in which Robb had been killed. He urged Dillon to use the knife in the killing of McIlwaine and used it himself in the gruesome manner that we have already described. Mr McCrudden relied upon the finding that this was a joint enterprise case in relation to Robb but that does not undermine and indeed is consistent with the finding that the appellant was aware of the knife as part of the enterprise.

[15] It was submitted on behalf of the appellant that although the learned trial judge recognised his youth as a mitigating factor the tariff imposed made no allowance for it. It was also submitted that the appellant's family circumstances and lifestyle as noted in the pre-sentence report were also material mitigating factors. We consider that although age can be a mitigating factor where the offender has reached the age of 19 it is likely that any mitigation will be at best modest. In any event we agree with the learned trial judge that in the areas of retribution and deterrence the strength of such seriously aggravating features will significantly outweigh mitigating features relating to personal background.

[16] We are satisfied that this was a very serious case within the terms of the Practice Statement requiring a substantial upward adjustment of the tariff. These were planned murders involving the taking of these teenage boys to an isolated part of the countryside where they would be rendered vulnerable to attack. Multiple injuries were inflicted on each of them and as we have indicated sadistic and gratuitous violence was also used. The appellant and Dillon were armed in advance and carried out multiple murders. The appellant demonstrated triumphalism after these killings. He made significant efforts to escape detection and successfully managed to hide the murder weapon which has never been found. He threatened Burcombe that he would cut his throat if he disclosed what had occurred and then subsequently sought to persuade him to change his evidence when they were in a prison van coming from Newry Courthouse.

[17] We accept that there may be other cases in which the degree of planning involved in selecting a victim and subsequently setting about the execution of the murder may be more sophisticated especially where the accused is involved in organised crime. Looking at all the surrounding factors in this case, however, although we recognise that this was a stiff sentence we cannot say that the imposition of a tariff of 30 years was manifestly excessive. Accordingly we dismiss the appeal.