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*(subject to editorial corrections)**

IN THE CROWN COURT SITTING IN NORTHERN IRELAND

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THE QUEEN

-v-

TROY McAULEY

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McLAUGHLIN J

[1] The defendant has pleaded guilty to the murder of Kenneth Raymond Nicholl at Herbert Avenue, Larne, on the night of 1-2 November 2008. The deceased was 29 years old at the time. The accused was arraigned on 30 October 2009 when he pleaded not guilty, but on the first day of the trial at Coleraine, on 12 January 2011, he applied to be re-arraigned and pleaded guilty at that stage.

Background

[2] The deceased lived with his partner at No. 19 Herbert Avenue and the defendant at No. 13. This is a typical terrace of houses where the front doors abut the street. To the rear there is an alleyway which gives access to each of the houses through entry doorways. The houses typically have an open yard to the rear from which access to the entry is gained. Behind this terrace, and beyond the alleyway, is a similar terrace of houses known as Lower Waterloo Road. Both streets therefore share the alleyway. Directly opposite the rear of the defendant's house is No. 18 Lower Waterloo Road which is a Chinese restaurant.

[3] Investigations revealed that the deceased had spent most of Saturday 1 November 2008 at the races at Down Royal. At about 6.00 pm he arrived at Checkers Wine Bar, Larne, and he there met up with his partner Ms Lynda Cash. After some time he left her to go to the Royal British Legion Club; she later joined him there. They were together at about 10.00 pm when the deceased decided to leave the British Legion to go home. She remained on in the premises. She was aware that he did not have a key to their house, offered him one but he refused to take it. It is known that at about 10.00-10.15 pm he visited Harry's shop where he bought cigarettes and that he phoned his father asking to be collected. His father drove to the shop, collected him

and took him to No. 19. During that time he told his father he did not have a key and would kick the door open. His father dropped him off and then left.

[4] Around this time neighbours became aware of considerable noise and disturbance at No. 19 Herbert Avenue. The disturbance consisted of what appeared to be a man kicking and rapping a door and rattling of windows could be heard. A man was also seen sitting on a car. This went on for some time and it is almost certain that this disturbance was being caused by the deceased who was heavily intoxicated.

[5] At 22.42 hours a Ms Weir reported this disturbance to the police and said it had been going on for about 20 minutes or so. At 22.49 the police arrived in the area but all was quiet and they could not find anyone responsible for the earlier disturbance. Very soon after that two people reported seeing the deceased enter the alleyway behind Herbert Avenue and it was thought that he was urinating. His presence in the alleyway may explain why the police missed him.

[6] At 23.30 Ms Cash returned to their home at No. 19 but there was no sign of the deceased about the premises at that time. She assumed he was at his parents home and she left again soon afterwards. She returned at 1.30, entered the house but again there was no sign of the deceased. She went to bed at 4.00 am.

[7] A Mr Brownlow reported hearing banging at the front of the houses and he also stated that some time afterwards he was in his bathroom, which overlooks the alleyway, and he heard a thud and clatter from there.

[8] The body of the deceased was found later that morning lying in the alleyway to the rear of No. 20 Lower Waterloo Road.

[9] The explanation as to what had befallen the deceased comes essentially from the defendant. It seems that later on the Sunday he went to his mother's house. She lived there with her partner, a Mr Bell, and after they had completed their Sunday dinner she prepared a food parcel for the defendant. Initially Mr Bell overheard a conversation the gist of which appeared to focus on the fact that there had been a person found murdered in Herbert Avenue. He then heard the defendant say "He was in the UDA", meaning the deceased. At a later stage the conversation became much more specific and he reported the accused speaking along the following lines. He was asked by his mother if he knew the person who had been killed in Herbert Avenue and the accused then replied "Yes, it was me. I stuck him". When his mother asked why he had done that he described the deceased entering his house, that there had been noise at the back of the house which went on for hours, that the deceased had been kicking at his gate whilst he was upstairs. He then went downstairs and, as someone had entered by the back, he hid in the

dining room. The person then came on into the house so he stuck him. He then recognised the bloke who was in the UDA and he had to put him out of a bar where he worked. The man was still alive but he could not let him live so he stabbed him again (and established that he was dead). He said that he took the body out into the alley later when the Chinese restaurant had closed, he then set about cleaning up the house, dumped bloodstained clothes in the tide and buried the knife.

[10] Mr Bell reported that at that point his partner Eleanor, mother of the defendant, was distraught. The defendant said they had driven him to it and Mr Bell thought that was a reference to the fact that he had been having trouble due to the fact that he had put UDA men out of the bar at some point.

[11] The accused was arrested on Wednesday 5 November and charged on 9 November at 21.00 hours. At interview he denied involvement in the murder. By that stage the police had searched his house and found an array of knives and hammers hidden in different parts. He told the police they were there for his protection and claimed that he had suffered persistent problems of abuse, threats, intimidation and harassment from the UDA/criminal elements. He explained to the police that he had reported these facts to representatives of the Northern Ireland Housing Executive and the Oakley Housing Association who had attended his house following a request from him for a transfer away from the area.

[12] Follow up police searches found many traces of blood and DNA profiles recovered from these matched that of the deceased. Blood was found on a DVD player in the living room. Fibres of the carpet in the defendant's house matched fibres found on the clothing of the deceased. There was no sign of a forced entry to the defendant's house.

[13] The deceased was found to have suffered a total of eleven stab wounds affecting the upper body area – the chest and shoulders particularly. The wounds also included what could be described as "defensive injuries". Analysis of the blood of the deceased showed that he had 294 mgs per 100 ml of blood and a measurement of 375 mgs per 100 ml in the urine. These readings confirm that he was heavily intoxicated at the time of his death.

[14] The defendant continued to maintain a denial of responsibility until March 2010 when a formal admission was made by him that he had killed Mr Nicholl, however he did not indicate an intent to plead guilty to murder until re-arraigned on 10 January 2011. It is important to note the reasons for the delay in proffering his plea; these reasons were accepted by the prosecution.

[15] The defendant had examinations carried out by both Dr Bownes, on his own behalf, and by Dr Fred Brown on behalf of the prosecution. The latter

was asked to see him in view of findings relating to the accused's mental state and personality profile explained by Dr Bownes. Dr Brown therefore saw him on 25 March, 8 April and 15 December 2010. He was not able to produce a final report until 30 December 2010. The very detailed assessment is explained by the fact that Dr Brown became aware of a family history of Huntington's Disease in the defendant's background. He was anxious that the accused might be exhibiting early signs of the disease, which is a rare condition and inevitably terminal. As a result of these observations the accused was referred to the Neurology Department of the Royal Victoria Hospital and a necessary and time consuming series of investigations, counselling sessions, etc. then had to be initiated. These enquiries were not completed until December 2010 when, fortunately for the defendant, the tests for Huntington's Disease proved negative. This enabled Dr Brown to complete his report by the end of 2010. This was then made available to the defence, it was of course the Christmas vacation at that time, and so it was not possible to proffer a plea at any stage prior to the first day of the trial. I, like the prosecution, have no problem in accepting the genuineness of the explanation for the delay in him accepting final responsibility for the murder of the deceased, not just his death, until the opening of the trial.

[16] Having been convicted of the offence of murder the sentence I must pass is fixed by law, namely a sentence of life imprisonment, and I did so at the end of the trial. At this stage my task is to fix the so called tariff. The judgment of the Court of Appeal in R v. McCandless and others [2004] NICA 1 provides guidance to this court as to how that should be done.

[17] The statutory provisions governing the imposition of the tariff are contained in the Life Sentences (NI) Order 2001. It is essential that I should emphasise that what I am doing at this stage is fixing a minimum term. The defendant cannot be released before that term expires, he may be released at some stage after that point but only if the Parole Board is satisfied that he does not pose a risk to the public. It is important to bear in mind that I do not at this stage take account of any future risk that he may pose as that will fall to the Parole Board to decide in due course. Article 5(2) of the 2001 Order states:-

> "(2) The part of a sentence specified in an order under paragraph (1) 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."

[18] As a result of the decision in R v McCandless the Court of Appeal has set out a template for the use of judges which is based on the Practice

Statement issued by Lord Wolff on 31 May 2002. The first task for me is to decide upon one of two starting points, a normal or a higher starting point, these in turn provide for a term of 12 or 16 years respectively. Once the starting point is decided upon the court then looks at a number of factors and the term is moved up or down accordingly.

[19] In this case the prosecution has suggested the normal starting point is appropriate and I have been urged to adopt that view by counsel for the defendant. I consider this to be appropriate. The Practice Statement indicates the normal starting point is appropriate in the following cases:-

> "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.
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> 11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because:
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> (a) the case came close to the borderline between murder and manslaughter; or
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> (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
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> (c) the offender was provoked (in a non technical sense), such as by prolonged and eventually unsupportable stress; or
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> (d) the case involved an over reaction in self defence; or
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> (e) the offence was a mercy killing.
>
> These factors could justify a reduction to 8/9 years …"

[20] The defendant has put particular emphasis on medical findings made by both Drs Bownes and Brown. It is particularly helpful from my perspective that there is such extensive agreement between the doctors on these important issues.

[21] Dr Brown's report is the more recent, simply because he was following up the issue of Huntington's Disease, and the report filed by him dated 30 December is of course relied upon by the defence as much as by the prosecution. I shall therefore refer to some of his remarks which are shared by Dr Bownes.

[22] Dr Brown has stated that in his opinion the available information indicates that Mr McAuley has substantial deficits in his personality. He referred to episodes in his childhood experiences which seem to have led him to attempt to compensate by developing physical fitness and demonstrating that he was a hard and powerful man in control of himself. In his opinion he concluded that Mr McAuley was suffering from "paranoid personality disorder as described at F60.0 of the ICD-10 Classification of Mental and Behavioural Disorders published by the World Health Organisation". In addition the defendant appears to have become increasingly anxious during the period leading up to the killing with marked sleep disturbance, irritability, social withdrawal and increased alertness and fearfulness. He considered whether Mr McAuley was suffering from a psychotic illness at the time of the killing but concluded he was not. He was not suffering from legal insanity or automatism at the time of the killing. In his opinion however the defendant's disorder of personality and the heightened state of anxiety during the period leading up to the killing are probably sufficient to be described as "mental abnormality" within the meaning of the Criminal Justice Act (NI) 1966. The issue then arose however whether the abnormality of mind was sufficient to substantially impair Mr McAuley's responsibility for the killing. He felt that would be a matter for the jury. He concluded:

> "I think it is reasonable to accept that at the moment Mr Nicholl entered Mr McAuley's house the combination of Mr McAuley's personality disorder and his heightened state of emotional arousal made him likely to react with extreme fear and that this fear would have been greater than that experienced by a normal individual. Of course, people may respond to fear in different ways and fortunately most individuals who experience acute fear do not kill. …
>
> In conclusion, taking account the nature and degree of Mr McAuley's mental disorder and the relevant circumstances, I do not consider that Mr McAuley was suffering from an abnormality of mind that

> substantially impaired his responsibility for the killing, although I respect this as ultimately a matter for the jury."

[23] The plea has been put before me on the basis that the defendant killed the deceased after he had entered the defendant's house as a trespasser against a background that the defendant had suffered persistent intimidation, harassment and threats over an extended period, superimposed on a paranoid personality disorder. The defendant in consequence was hyper-vigilant and fearful of an attack to the point where he had hidden away an array of weapons, rigged up a DIY alarm on the door leading from the alley. The alarm was needed to allow him to keep the door unsecured to facilitate a rapid exit. These facts are not in dispute as the police found the weapons hidden and the makeshift alarm when they searched the house. It is also correct that the defendant had told officials of the NIHE and Oakley Housing Association about the weapons and the "alarm system" which was activated by someone coming in from the entry. The defence also point out that the noise heard by one of the neighbours when in his bathroom, overlooking the alley, is entirely consistent with this alarm "having been activated".

[24] It should be said that although the deceased was clearly a trespasser, in that he entered the defendant's house without any permission, it is highly unlikely that he bore personal malice towards the defendant at the time. Rather it would appear that his attempts to force his way into his own house at No. 19, which led to the commotion and disturbance heard by the neighbours, were simply misdirected to the alley door of No. 13. This would be explained by his highly intoxicated state, darkness and perhaps simply confusion or disorientation. The deceased was in the alleyway only rarely, it is clear from the photographs that it is not a means of everyday access to any of these premises and he and his partner had been living at No. 19 for only a short period as this was temporary accommodation whilst their house was being renovated.

[25] The prosecution in opening the case accepted that this was a case for the normal starting point although accepting that was ultimately a decision for me. Nevertheless the prosecution have formed a perfectly proper view of the circumstances.

[26] On behalf of the defendant Mr Patrick Lyttle QC, who appeared with Mr Barry Gibson, has argued on behalf of the defendant that I should apply the normal starting point. Although it is clear the parties were not friends, and may not have known each other particularly well, so that it is not a case presented as a fall out between friends or acquaintances, nevertheless it has resonances of that. I am satisfied this description of an example of the normal starting point is not intended to be exclusive. I am further satisfied the killing does not have any of the characteristics which activate the higher starting

point which are described in the Practice Statement. I shall proceed therefore upon the basis that the normal starting point of 12 years applies. I shall now consider whether there are relevant aggravating or mitigating circumstances relating to either the offender or the offence which would lead me to vary that upwards or downwards.

[27] On behalf of the defendant Mr Lyttle referred me to paragraphs 11(a)-(d) of the Practice Statement and urged on me that each of these, unusually, applies in his client's case. He has said that the case comes close to the borderline between murder and manslaughter. I am not entirely accepting of that. The defendant may have attacked the deceased in circumstances where an intrusion into his property was taking place and there may have been some initial intent simply to put him to flight, it is clear however from the description which he gave to his own mother that he in effect "finished off" the defendant as he could not let him live.

[28] There is no doubt the defendant suffers from a mental disorder and from a mental disability which to some degree lowered his criminal responsibility for the killing even though it would not amount to sufficient to reduce murder to manslaughter by virtue of diminished responsibility.

[29] It is equally clear that the offender had been "provoked" (in a non-technical sense) such as by prolonged and eventually unsupportable stress – but not by the defendant. This is amply supported by the background circumstances which are not contested by the prosecution and which are verified by officials of NIHE and Oakley Housing Association. I believe also it is fair to say that what took place was an over-reaction, in my opinion a very significant over-reaction, in what might have been considered circumstances where he was acting initially in self-defence. It is recognised in the Practice Statement that these factors may be capable of reducing the normal stating point to 8 or 9 years.

Aggravating factors

[30] Insofar as the offence is concerned I feel it necessary to make clear that the decision of the defendant to "finish off" the deceased evinces a clear intention to kill, rather than to cause grievous bodily harm. That is not in itself an aggravating factor however. It is the presence of an intent to cause grievous bodily harm only which is a mitigating factor, but the alternative intent to kill is not an aggravating factor, it is an essential part of the case against the defendant. On the other hand the attempts by the defendant to clean up the crime scene by removing blood traces, destroying and disposing of clothes and a knife and moving the body into the alleyway are aggravating factors. The presence of weapons throughout the house should not be regarded as a true aggravating factor however. The reasons for this have been explained and are taken into account in any event in the overall

intention to kill. Again it is not an aggravating factor, it simply answers any suggestion of acting in self-defence, that the defendant decided to attack the deceased rather than to flee; clearly he could have escaped out the front door of the house into the public street. Given that the deceased was unarmed and heavily intoxicated this could have been done.

[31] I do however accept that it goes by way of mitigation that there was never any intention on the part of the defendant to confront the deceased, there was no personal animosity involved, the attack took place simply because the deceased came into his house in circumstances which were undoubtedly frightening.

[32] I shall now consider if there are aggravating or mitigating factors relating to the defendant himself. I have looked at all of the relevant factors put before me by the prosecution and I am satisfied that there are no factors relating to the defendant which could be considered "aggravating". This is explained by his own background which goes significantly in mitigation. The defendant comes before me as a person with a completely clear criminal record. That of course is most unusual in a case of this kind. He is also a person with a good work history over the years as he is a qualified welder, he also worked at times as a doorman in local bars. He was clearly well thought of by those who knew him and I have read the personal reference provided for him by Mr Armstrong, his former School Principal. The pre-sentence report confirms that he is well behaved in prison and speaks of a sense of remorse. The circumstances of the offence do contain elements of self-defence, provocation and diminished responsibility as specified earlier and I take these into account. I also take into account the history of harassment and intimidation and in that context it is in the defendant's favour that the deceased was in fact causing a very considerable disturbance in the street, and possibly in the alleyway, in the immediate lead up to the killing. Finally, there is the fact that the defendant has pleaded guilty. Considerable credit must be given for that fact. Whilst it may be little consolation for a grieving family, it nevertheless does remove one very considerable aggravating feature of many of these cases which causes the family to suffer frustration, perhaps even anger, that someone who is clearly "guilty" maintains a denial of responsibility, often to the point of the jury verdict. In this case the accused accepted as far back as Spring of 2010 that he had killed the deceased. The delay between then and the date of trial has been fully explained. I consider the defendant to have pleaded guilty at a very early stage in the proceedings and that deserves full recognition. It is also the case that his own confession, made to his mother, was pivotal in the prosecution evidence.

[33] Before I conclude I wish to say that I have read the very detailed Victim Impact Reports which have been put before me. These detail the reactions of the mother and father, sister and brother of the deceased following his murder. I have also had the benefit of similar reports in respect

of the deceased's partner, their son and her daughter who was treated as a child of the family by the deceased. It is clear that his death has had a most profound effect on all of them. It will be many years before they can begin to function at anything like a normal level, and some of them may not be able to do so. These reports have been very valuable to me and I have tried to give full weight to them as appropriate.

[34] It is my responsibility to fix a so-called "tariff". The defendant has already been sentenced to life imprisonment. As Sir Robert Carswell LCJ repeated in the leading case of R v Trevor McCandless and Others:

> "When a defendant in a criminal matter is sentenced to imprisonment for life, that does not in practice mean that he will be detained for the whole of the rest of his life, save in a few very exceptional cases. He will ordinarily be released after a period has elapsed which is regarded as appropriate to reflect the elements of retribution and deterrence, provided it is no longer necessary for the protection of the public to detain him. The factual background of murder cases is infinitely variable and the culpability of individual offenders covers a very wide spectrum. Reflecting this variation, the terms for which persons convicted of murder have actually been detained in custody have accordingly varied from a relatively few years to very long periods, even enduring in a few cases to the rest of the offender's life."

[35] It follows therefore that the tariff which I now have to fix represents only a minimum period during which the defendant must be kept in custody. It will prevent his release before the expiration of that date. It will only be after that period has expired that he may be considered for release, and he will not be released unless it is considered compatible with the overall safety of the public. It is important that members of the public should be conscious of that reality.

[36] Having regard to all the circumstances which I have outlined, the fact that I have decided the normal starting point of 12 years applies in this case, having regard to the various aggravating and mitigating factors specified, in particular the fact that the accused has no criminal record and has pleaded guilty at a very early stage, I have concluded that the minimum term which he must serve is one of 10 years.