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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

v

ROBERT JAMES SHAW RODGERS

HORNER J

[1] The defendant was convicted of the murder of Eileen Doherty which took place on 30 September 1973, some 40 years ago. He received a life sentence which I was required to impose under Article 5(1) of the Life Sentences (NI) Order 2001 ("the Order"). Under Article 5(2) of the Order the minimum term to be served is the period 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".

[2] In R v McCandless & Ors [2004] NI 264 the Court of Appeal directed judges in Northern Ireland to follow the guidance laid down by Lord Woolf CJ in his Practice Statement (reported at [2002] 3 All ER 417) in May 2002. This provides that the minimum term in the case of adult offenders shall be selected by having regard to a normal starting point of 12 years or a higher starting point of 15/16 years, as can be seen from the relevant extracts of the Practice Statement:

> *"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."

[3] The Practice Statement also makes clear that regard must be paid to mitigating factors (such as an early plea) and aggravating factors. In all cases of murder, when fixing the appropriate minimum term judges should follow the guidance given by the Court of Appeal in R v Morrin [2011] NICA 24 at paragraphs 14 and 15:

"[14] It may be of assistance to judges engaged in the difficult exercise of assessing the appropriate minimum term in such cases if we indicate that it may be helpful if judges were to consider the various factors in stages, first of all identifying which is the appropriate starting point, and explaining why that starting point has been chosen. The judge should then proceed to the second stage when he should consider whether the appropriate starting point should be varied upwards or downwards to take account of any aggravating or mitigating factors. Thirdly, and particularly in those cases where the aggravating factors are such that a minimum term in excess of 15 or 16 years is appropriate, judges should bear in mind the comments of Carswell LCJ to which we have already referred that the court's `duty is to end up at a figure which properly represents the minimum term for which the perpetrator of the crime should be detained before his release can be considered'.

[15] As Carswell LCJ observed in R v W *Northern Ireland Sentencing Guidelines* Vol.1, 2.44 when considering the application of sentencing guidelines laid down, or approved, by this Court, guidelines

> `…do not provide a tariff to be applied in a mechanistic manner like logarithm tables. They are rather an avenue along which the sentencer may proceed in his consideration of the case with which he is dealing. He then has to reach a conclusion appropriate in all the circumstances of the case, and it need hardly be said that these will vary infinitely.'

In R v Milberry [2003] 2 Cr. App. R. (S.) at p. 155 Lord Woolf CJ emphasised that

> `…it is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double counting must be avoided and can be the result of guidelines if they are applied indiscriminately.'

Whilst Milberry was concerned with the application of sentencing guidelines in rape cases, the need for the judge

> to stand back and look at the overall sentence applies to all offences, and that process should form the fourth stage of the process of deciding what is the appropriate minimum term where the court is fixing a minimum term where the offender has been sentenced to life imprisonment."

[4] In McCandless Carswell LCJ also emphasised that the starting points are:

> "as the term indicates, points at which the sentencer may start on his journey towards the goal of deciding upon a right and appropriate sentence for the instant case."

He further emphasised this point at paragraph 31 of his judgment when he said that in relation to the higher starting points:

> "It is to be remembered that the figure of 15 of 16 years is only a starting point for the consideration of the court, and that having commenced from there its duty is to end up at a figure which probably represents a minimum period for which the perpetrator of the crime should be detained before his release can be considered. Assessing the heinousness of the factors which bring the case into the higher bracket the court is not double counting, merely determining the seriousness of the crime."

[5] In AG's Ref No 6 of 2004 (Doyle) Kerr LCJ emphasised that the examples which are given in the Practice Statement are illustrations, and not rigid categories in which the facts of different cases should be forced.

> " **[23]** There is a temptation to try to strain the words of the *Practice Statement* in order to fit a particular case into a specific category or species of case instanced in the statement in pursuit of the aim of consistency. This should be firmly resisted, not least because of the infinite variety of murder cases and the facts that give rise to them. Moreover, Lord Woolf was careful to make clear that the examples that he gave to illustrate the broad categories were precisely that, examples rather than an exhaustive list of all those cases that might be classified in one group or the other. This approach characterises both the selection of the normal or higher starting point and the identification of aggravating or mitigating factors that may warrant a variation of the starting point selected.

> **[24]** What the *Practice Statement* does is to provide a broad structure for the manner in which the minimum sentence should be chosen. We agree with the submission of Mr McCloskey QC, counsel for the Attorney General, that in the vast majority of cases the sentencer should be able to decide which of the starting points is appropriate to the particular case that he or she is dealing with. The facts of an individual case may not precisely mirror those outlined in the statement but, as we have said, the categories in the *Practice Statement* should be regarded as illustrative rather than comprehensive. Once the starting point has been chosen, the facts of the case should be examined in order to identify those factors that may give rise to a variation of the starting point. Once more, the aggravating and mitigating matters outlined in the *Practice Statement* must be regarded for this purpose merely as examples."

[6] This is a case in which both the Crown and the defence acknowledge that the higher starting point of 15/16 years will apply.

[7] The aggravating factors are:

(i) The killing was planned and premeditated. It is clear that the defendant and his fellow accomplice went to Atlas Taxis on the Ormeau Road with the deliberate intent of killing a Roman Catholic.

(ii) It was a naked sectarian murder although I cannot say on the evidence before me that it was committed on the promptings of some loyalist paramilitary gang.

(iii) Eileen Doherty was killed solely because she was a Roman Catholic who happened to be in the wrong place at the wrong time. She was entirely innocent, having done nothing to contribute to her demise. Her murder was brutal and unprovoked. She was hunted down by the defendant and his accomplice. When they caught their prey, a vulnerable young girl, she must have been scared witless before she was brutally shot at point blank range.

(iv) The murder of Eileen Doherty has had a devastating effect on her immediate family and close friends. This can be an aggravating feature: see R v Smith [2008] NICC 34 paragraphs 25-27 where Hart J says:

> "[25] It is self evident that in almost every murder case the deceased will be survived by relatives who will be greatly affected by his death and the manner of his death. The Practice Statement does not refer to this as an

aggravating factor, but in principle where the circumstances surrounding the death of a loved one have had a particularly severe effect on a significant number of people, I can see no reason why that should not be regarded as an aggravating feature of the case. There are no authorities directly in point, but the principles governing sentences in cases of causing death by dangerous driving provide an appropriate analogy. In Attorney General for Northern Ireland's Reference (Nos 2, 6, 7 and 8 of 2003) [2004] NI 50 at [9] the Court of Appeal referred to the advice given by the sentencing advisory panel in such cases and stated that

> `The synthesis adopted by the panel is that the outcome of the offence, including the number of people killed, is relevant to the sentence.'

[26] The Court then referred to the seminal judgement of the Court of Appeal in England in R v Cooksley, part of which is in the following terms.

> `Where death does result, often the effects of the offence will cause grave distress to the family of the deceased. The impact on the family is a matter which the courts can and should take into account. However, as was pointed out by Lord Taylor CJ in R v Shepherd [1994] 2 All ER 242 at 245,
>
> `We wish to stress that human life cannot be restored, nor can its loss be measured by the length of a prison sentence. We recognise that no term of months or years imposed on the offender can reconcile the family of a deceased victim to their loss, nor will it cure their anguish'.

[27] I consider that the grave effect which the death of Stiofan Loughran has had upon his mother, his father, his widow and the four children of the family, remembering that several of his immediate family witnessed the attack on him, or what were to all intents his death throes, should be taken into account and treated as an aggravating factor."

[8] I have had the opportunity to consider the moving and detailed account of the effect Eileen's murder has had on her family from her sister Linda Marsden. It describes a young girl so full of life without a bigoted bone in her body with so much to look forward to, marriage, a family, a career, who was gunned down in her prime. The murder has left a bitter and lasting legacy for those who remained behind. Her father visited her grave at least on a daily basis unable to cope with the loss of his beloved daughter withdrawing into himself until he died 2 years ago. His wife had to shoulder the burden of bringing up Eileen's siblings. On 30 September 1973 the lives of all the members of the Doherty family changed utterly. They were never to be the same again. Eileen's father died, denied the satisfaction of seeing one of her murderer arrested, put on trial and convicted.

[9] There are no mitigating circumstances arising out of the way in which this murder was planned and executed. The defendant was the driver of the car and not the gunman. But when he drove the car back round to the Annadale Embankment where Eileen was, he knew there could be but only one outcome.

[10] The defendant has shown no remorse for what he did as is evidenced by:

(a) His decision to contest the charge of murder when he knew that to do so would bring further pain and upset to the surviving members of the Doherty family who had already suffered enormously.

(b) His refusal to co-operate with the Probation Officer in the preparation of a pre-sentence report.

[11] I am told that he is committed to the peace process, he has worked hard for his community and that he has changed since he was let out of prison following his conviction in 1975 for another sectarian murder committed in 1974. It is said that actions speak louder than words. Certainly the actions of the defendant during this trial belie the claim that he is a changed man.

[12] I do take into account:

(a) His youth when this offence was committed. He was in his late teens;

(b) The fact that he has been sentenced to life imprisonment for another sectarian murder committed in 1974 and did serve a sentence of imprisonment. It is suggested that something akin to the principle of totality applies. I do not accept that. The defendant chose not to admit his responsibility for this killing in 1974 when arrested for another murder. Instead he took a chance that he would not have to answer for what he did in 1973. His gamble failed. However, I do accept that I must weigh in the balance that he has already served a substantial period of imprisonment for a murder committed a year after he shot Eileen Doherty in determining what should be the minimum term. I do not take into account the Early Release Scheme under the Good

Friday Agreement. The remarks of Weir J in R v Barrett [2004] NICC 28 at paragraph 16 are apposite:

> "Finally, I wish to make it clear that in passing these sentences I am not unaware that under the Northern Ireland (Sentences) Act 1998 passed following the Belfast Agreement certain prisoners may apply to the Sentence Review Commissioners for declaration of eligibility for release under the provisions of that Act. Such applications are entirely outside the control of the Criminal Courts and therefore my decisions on sentence in your case must of necessity be made without reference to how, if at all, the provisions of the 1998 Act might affect your position."

[13] Taking all the relevant factors into account, I have concluded that the minimum term in this case is 16 years, this will include any time spent by the offender in custody on remand.