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IN THE CROWN COURT IN NORTHERN IRELAND

_____

THE QUEEN

-v-

BARRY MICHAEL McCARNEY

_____

STEPHENS J

Introduction

[1] Barry Michael McCarney on 4 December 2012 by a unanimous jury verdict and after an 8 week trial you were found guilty:

(a) on count 1 of murder on 10 December 2009 of Millie Martin ("Millie");

(b) on count 4 of causing Millie grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861; and

(c) on count 7 of sexual assault of Millie, a child, under 13, contrary to Article 14(1) of the Sexual Offences (Northern Ireland) Order 2008.

[2] In relation to the offence of murder and on 4 December 2012, I imposed a life sentence. It is now my responsibility, in relation to that offence and in accordance with Article 5 of the Life Sentence (Northern Ireland) Order 2001, to determine the length of the minimum term that you will be required to serve in prison before you will first become eligible to be released on licence by the Parole Commission. The minimum term is fixed by reference to retribution and deterrence. The risk that you pose is a matter for the Parole Commission it being for that Commission to consider whether, and if so when, you are to be released on licence based on their consideration of risk.

[3] When you are released on licence you will for the remainder of your life be liable to be recalled to prison if at any time you do not comply with the terms of that licence.

[4] A minimum term is not the same as a fixed term of imprisonment. A fixed term of imprisonment may, if a prisoner is of good behaviour, attract remission. You will receive no remission for any part of the minimum term that I am now about to determine.

[5] It is also now my responsibility to sentence you in respect of the offence on Count 4 of causing grievous bodily harm with intent to Millie and in respect of the offence on Count 7 of sexual assault of Millie, a child under 13, contrary to Article 14(1) of the Sexual Offences (Northern Ireland) Order 2008.

Legal principles as to whether evidence at trial of other offences is relevant to sentencing for the offences of which you have been convicted and/or whether such evidence is admissible in relation to the issue of your dangerousness

[6] At your trial one of the circumstances sought to be established in evidence by the prosecution and relied on by them to establish your guilt of the offences of which you have been convicted was that Millie was uninjured and thriving in the care of her mother, Ms Martin, until you became a member of the household and that thereafter Millie sustained a whole series of non-accidental injuries. In short that there was an association in time between Millie being assaulted and you becoming a part of her household. It is clear that Millie did sustain a whole series of injuries after you became a part of her household and over the period October to December 2009. Those assaults would have amounted to separate offences. You were not charged with those offences nor were you convicted of them. For instance Millie sustained 21 rib fractures during that period. You were charged with and convicted of inflicting 7 of those fractures. You were not charged with any offence in relation to the remaining 14 rib fractures. Millie also sustained an awful bruise to her right ear, two bruises to the centre of her forehead, multiple bruises to her body, a significant burn injury to her right index finger, and serious internal abdominal injuries. You were not charged with any offences in relation to any of these injuries.

[7] In relation to sentence the prosecution submit that I should take into account not only the injuries which were the subject of the offences of which you have been convicted but in addition all the other non-accidental injuries which Millie sustained over the period October to December 2009. On that basis the prosecution contend that there is present in your case the aggravating feature that:

> "the murder was the culmination of cruel and violent behaviour by the offender over a period of time."

It is submitted on your behalf by Ms McDermott QC and Mr Sayers that it would be inappropriate to do so. Reliance was placed on the decision in *R v Oakes and others* [2012] EWCA Crim 2435. At paragraph [84] Lord Judge LCJ stated that:

> "The principle is clear. Even when evidence which serves to establish the defendant's guilt of an offence charged on the indictment is deployed as similar fact evidence, the sentencing decision cannot proceed on the basis that he is guilty of a distinct and separate offence of which he has not been convicted and which he denies. Although we sympathise with the judge's approach, it was inconsistent with what is now an axiomatic principle that, subject to considerations like those identified in para 79 the ambit of the sentencing decision cannot extend to reflect a specific, distinct offence of which the offender has not been convicted"

[8] Paragraph [84] is qualified by considerations like those identified in paragraph [79] which I also set out:

> "Dealing with it generally, it is axiomatic that, provided the verdict returned by the jury or the plea accepted by the Crown has been loyally respected, the sentencing judge is not merely entitled, but required to reflect on and balance all the relevant aggravating and mitigating features of the offence or offences of which the defendant has been convicted. This includes any features of aggravation or mitigation which have emerged during the course of the trial, including the judge's assessment of the personality, character, maturity and attitude of the defendant to the offence. This will often include making findings of fact on disputed points. Such findings may well include, for example, that in the course of the offence of which he has been convicted, the defendant committed other offences; the indictment is not required to be overloaded with charges. Where for example the conviction is for an offence of conspiracy, the judge may need to make findings for the purpose of sentence about which of the overt acts the defendant has been shown to have committed. There will be other situations in which it is conceded that sentence should be passed which reflects offences beyond those charged; the indictment may contain charges which have been treated by consent as samples of a course of conduct, or the defendant may ask the court to take into consideration other specific offences. However, it is equally axiomatic that, situations such as these apart, a defendant cannot simply be sentenced for offences of which he has not

> been convicted, or on the basis that he has in fact committed them. The ability of the judge to make findings that other offences have been committed does not extend to reaching a non-jury verdict about allegations put before the jury by way of similar fact evidence, at least unless the jury must have been satisfied that they were proved, or unless the defendant has been convicted of them in the past."

[9] The prosecution did not contend that the jury by their verdicts in your case in and in the charges of which they unanimously acquitted Ms Martin must have been satisfied that it had been proved that you inflicted all these other injuries to Millie which were not comprised in the charges.

[10] The evidence of the other injuries and the association in time was evidence deployed as a circumstance to establish your guilt of these offences. Accordingly in relation to your case I agree that the sentencing decision cannot proceed on the basis that you are guilty of distinct and separate offences of which you have not been convicted and which you deny.

[11] However, the sentencing exercise in relation to counts four and seven requires the court to consider your dangerousness. In doing so and by virtue of Article 15 (2) of the Criminal Justice (Northern Ireland) Order 2008 the court has discretion to take into account:

> "(b) any information which is before it about any pattern of behaviour of which the offence forms part.
>
> (c) may take into account any information about the offender which is before it."

Accordingly it was contended on behalf of the prosecution that all the evidence that I heard during the trial may be taken into account if relevant to the issue of dangerousness in that you are the person who inflicted a pattern of injuries to Millie over a period of time and the offence forms a part of that pattern. Your counsel contended that just as it is not permissible for the court to take into account offences of which you have not been convicted in imposing sentence it is equally impermissible to do so in assessing dangerousness.

[12] In *R v Considine* [2008] 1 WLR 414 the Court of Appeal in England and Wales addressed the question as to whether a criminal conviction is a necessary pre-requisite to the admissibility of criminal behaviour in the assessment of dangerousness. The court noted that the English statutory provision equivalent to Article 15(2) of the Criminal Justice (Northern Ireland) Order 2008 refers to "information" as opposed to "evidence". That the breadth of the material which may be used to enable the court to make the assessment of dangerousness is

emphasised by reference to, for instance, the word "any". Accordingly, as a matter of statutory construction, relevant information bearing on the assessment of dangerousness may take the form of material adverse to the offender which is not substantiated or proved by criminal convictions. The Court of Appeal made it clear that it was permissible for a court in assessing dangerousness to rely for instance on bad character evidence introduced at trial tending to demonstrate to the jury that the defendant was guilty of the charge. However that a court should not rely on a disputed fact unless it could be resolved "fairly" to the defendant. The court also noted that what was prohibited was the introduction of a hybrid arrangement into the criminal justice system in effect the possibility of a conviction, or effective conviction, of a serious criminal offence after trial by judge alone in the course of a sentencing decision. The Court of Appeal declined to lay down any hard and fast rules about how the court should approach the resolution of disputed facts when making an assessment of dangerousness. It observed that:

> "In reality there will be few cases in which a fair analysis of all the information in the papers … should not provide the judge with sufficient appropriate information on which to form the necessary judgment in relation to dangerousness."

[13] I consider that if I have sufficient information on which to form a necessary judgment in relation to your dangerousness then in the exercise of discretion I consider it inappropriate to embark on the process of considering all the evidence properly relied on at trial as a circumstance tending to prove your guilt of the offences of which you were convicted to determine whether you were also guilty of a series of other offences. Such a process could result in you being effectively convicted of serious criminal charges. I have the benefit of a detailed pre-sentence report which concluded that you were dangerous. Your counsel did not dispute any of the contents of the pre-sentence report nor its conclusion calling it in aid as a reason why I should not embark on an analysis as to whether you did or did not inflict all the other non-accidental injuries to Millie. I consider that I have sufficient information to determine the question of dangerousness and accordingly decline in the exercise of discretion to embark on an analysis of other potential criminal offences. All the evidence given at trial in relation to those other injuries can be made available to the Parole Commissioners if they so request and it is a matter for that Commission to determine what if any use can be made of that evidence in determining risk. The Parole Commissioners may wish to take into account that the evidence given at trial was in the context of adversarial proceedings and that in their determination as to whether detention is no longer necessary for the protection of the public from serious harm they are entitled to take account of behaviour which they are satisfied on the balance of probabilities has occurred, but which has not been the subject of a criminal conviction, see *Re D (Secretary of State for NI Intervening)* [2008] UKHL 33.

Factual background to the offences

[14] Millie Martin was born on 5 September 2008. She was 15 months at the date of her death. Her parents are Rachael Martin and Brian Semple. They had been in a partnership for a period of some 5 years prior to her birth. That partnership came to an end either just before or just after Millie was born. Mr Brian Semple, Millie's father, played no part in her life.

[15] Millie's maternal grandmother is Mrs Margaret Graham and her maternal step-grandfather is Mr Noel Graham. Mr and Mrs Graham provided physical and emotional support to Rachael Martin and to Millie. After Millie was born both she and her mother lived with Mr and Mrs Graham in their house until in February 2009 they moved to 16 Glebe Park, Enniskillen. Rachael Martin worked two days per week in an office in her mother and stepfather's house in connection with their business and she maintained that employment after she and Millie had moved to 16 Glebe Park. This meant that between February 2009 and her death Millie would have accompanied her mother to her maternal grandmother's house on two days every week and she would have remained there during the day whilst her mother attended to her work in the office. Millie was well known to her maternal grandmother and had a particularly close relationship with her maternal step grandfather.

[16] At the end of August 2009 you were then living in the home of Edward Martin in Ballinamallard, Co Fermanagh. He is the father of Rachael Martin. It was at this time that you met and started a relationship with Rachael Martin. Millie's first birthday party was held at her maternal grandfather's home in Ballinamallard on 5 September 2009 and by that date you and Rachael Martin were a couple. Towards the end of September 2009 or at the start of October 2009 you moved into 16 Glebe Park in order to live with Rachael Martin and Millie.

[17] You gained the total trust of Rachael Martin. You appeared to her to be very good to Millie maintaining a routine for Millie, chatting to Millie and buying her presents. It was Rachael Martin's assessment that you couldn't have been nicer to Millie and that you were a doting father to Millie. You behaved in such a way that Rachael Martin had no concerns and accordingly she would leave Millie on her own with you on occasions at 16 Glebe Park, Enniskillen. You recounted to the police that you tried to be a dad to Millie. That you would play with her and that you would spoil her. However, you were asked by the police whether as time went on you became more involved with Millie and you replied:

> "Well not as much as from the very start. You know in the very start I was trying to impress Rachael and I was putting in the extra effort. Yes."

You used Millie as a tool to gain the affection of Ms Martin.

(a) Count four and fractures of seven of Millie's ribs

[18] Millie sustained 7 rib fractures which are the subject of Count 4. You caused these fractures by severe squeezing or gripping of her chest. That is a hand or two hands squeezing her rib cage. The forces required were the equivalent of those involved in a significant road traffic accident. These fractures were sustained some 3½ or 4½ weeks or at the very most five weeks prior to Millie's death. That when you inflicted these fractures Millie would have felt pain and would have let this be known by crying in a painful cry or by screaming for a period of minutes. Thereafter when handled Millie would have been unhappy**.** Her symptoms would have been non-specific being irritable and whingey. A carer who was unaware of the injury might attribute the symptoms to all sorts of things such as colic, a cold or teething. That after 3 months the rib fractures would have healed leaving no physical sign and no on-going symptoms.

(b) Count one Millie's fatal injuries and count seven the injuries to Millie's genitals

[19] On 10 December 2009 Millie was in a dreadful physical state throughout the day suffering from what was thought to be a bad dose of the flu. Millie was taken by Ms Martin to Mr and Mrs Graham's house during the day returning to 16 Glebe Park in the late afternoon. Millie was put to bed at about 8.00 pm by Ms Martin. You then said that you had a craving for a Kit Kat and you persuaded Ms Martin to go to a local shop to purchase one for you. This left you alone in the house with Millie. As Ms Martin was reversing her car out of the drive you were going up the stairs to abuse Millie. When you were upstairs you inflicted injuries to Millie's genitals and a fatal head injury.

[20] Millie sustained multiple bruises in the area of her genitals. Those areas included the mons pubis, the labia minora, the labia majora, bruising and swelling around the urethra, bruising to the vestibule and bruising over the perineal body. Millie also had a tear of her vaginal wall. Professor Crane was of the view that these injuries were -

> "Much more likely to have been caused by some form of direct sexual interference, an attempt for something to be inserted into the vagina".

However he accepted a reasonable possibility that Millie's vagina was not penetrated but rather that the injury was caused by blunt force trauma, that is a directed punch to that area with Millie's legs parted. On the basis that there was a reasonable doubt as to penetration I directed that, and you were acquitted of, the offence of sexual penetration of a child under 13. The jury convicted you on Count 7 of sexual assault of Millie on the basis of a sexual punch to Millie's genitals. In

relation to the timing of this assault I am sure that it occurred when you went upstairs after Ms Martin left the house to go to the local shop.

[21] In addition to inflicting these genital injuries you held Millie's head and impacted it against a hard surface possibly a wall or a floor. The movement of the brain inside Millie's skull caused diffuse severe swelling of her brain. This in turn caused coning, that is the deep structures of the brain were pushed and extruded through the small hole at the bottom of the skull. The deep structures control breathing and heart rate. The crushing of these vital structures is irretrievable and fatal. This proved to be so for Millie. The bruising to the back of Millie's head is potentially informative. Visible externally was an area of purple bruising 25 mm in diameter overlying the bony prominence at the back of the head and just to the right of the mid-line. On reflection of the scalp at post mortem the underlying area of bruising was 4cms in diameter. In addition when the scalp was reflected there was another area of purple black bruising approximately 7cms in diameter on the left side of the back of the head. 7cms in diameter is approximately 3 inches in diameter and for a child this was a very large area of bruising. It was the most significant injury in relation to the underlying brain injury. Accordingly there were two distinct and significant areas of bruising to the back of Millie's head. The question arises as to whether you impacted Millie's head twice. Professor Crane was of the opinion that Millie sustained –

> "a blunt force impact to the back of the head on at least one occasion".

In view of the equivocation in that evidence and despite the two distinct areas of bruising I sentence you on the basis that this was a single blow to the back of Millie's head causing two distinct areas of bruising.

[22] Millie was not crying but rather she was upstairs in her room lying quietly and placidly in her cot. This is not a case of a child trying the patience of an adult. This was a clandestine interference with Millie. The infliction of the head injury to Millie was either sadistic or a spontaneous response to Millie crying out with the pain of your sexual and sadistic assault on the very sensitive area of her genitals. I consider that it was the latter and accordingly that when you induced Ms Martin to leave the house and when you were going up the stairs as Ms Martin was reversing out of the driveway you had at that stage formed an intent in relation to a sadistic sexual assault on Millie but that you formed an intention to cause Millie really serious harm by impacting her head against a hard object as a spontaneous reaction to her response to the pain of your assault on her genitals. However that spontaneity has to be seen in the context that you had demonstrated in the past by fracturing 7 of Millie's ribs that you were prepared to and had inflicted really serious harm to Millie. Accordingly as you were going up those stairs you would have known that Millie was at risk from you of sustaining really serious harm and you were nonetheless quite prepared to continue to interfere with Millie. In short the

conduct that you planned and pre meditated encompassed an expectation on your part that you could cause grievous bodily harm to a fragile 15 month old child.

Your responses at police interview, personal circumstances and consideration of remorse.

[23] After you were arrested and during your police interviews you maintained your innocence falsely stating:

> "I cannot express this enough, I am sick, I am shocked, I am disgusted by the injuries that Millie had and I have told you before and I am telling you again I did not harm that child in any way."

During the trial it was your case that all the injuries to Millie and her death were caused by Ms Martin.

[24] You are 33 having been born on 27 September 1979. You are the oldest in a family of three brothers. Your parents separated when you were approximately 5 years old. You left school at the age of 15 years with no formal qualifications. For a period of time you attended the training centre in Enniskillen on a Mechanical Engineering Course but you left for full time employment as a welder before being employed in the construction industry as a skilled labourer. You say that you worked consistently for various employers until 2008. You were unemployed for approximately one year and in receipt of benefits until you secured employment in December 2009.

[25] You have a complicated relationship history. One relationship was on an intermittent basis. It lasted some ten years. That partner obtained two non-molestation orders against you. You had two other relationships during that 10 year relationship and you admit that within one of those other relationships you once grabbed that girlfriend by the throat and on two occasions caused damage to her vehicle.

[26] In the past you have abused alcohol and have taken cocaine and amphetamines.

[27] You maintain that you are innocent of the offences of which you have been convicted. You have expressed no remorse.

The impact of the killing and the other offences on Millie's family

[28] I have been provided with comprehensive statements from Rachel Martin, Margaret Graham, Noel Graham and Edward Martin as to the impact that Millie's death and the other two offences has had on them. No one could fail to be moved by

their palpable anguish, their heartfelt loss and the enduring emotional scars which you have caused and all of which have been described so sensitively in those eloquent statements. I am not going to add to their distress by placing their private thoughts and experiences in the wider public domain. They are of course free to do so if they wish. However I am satisfied that the consequences for the entire family is of a marked and enduring character. Indeed they do not have the consolation of an honest explanation from you. They do not have your acceptance of responsibility together with expressions of remorse for what you did. You continue immune to their suffering.

Legal principles relating to setting the appropriate minimum term in relation to count 1 of murder

[29] In fixing the minimum term I seek to apply the material portions of the Life Sentences (Northern Ireland) Order 2001 including Articles 5(1) and 5(2). In *R v McCandless & Ors* [2004] NICA 1 and *Attorney General's Reference No 6 of 2004 (Connor Gerard Doyle)* [2004] NICA 33 the Court of Appeal in Northern Ireland ruled that the Practice Statement issued by Lord Woolf CJ on 31 May 2002 should be taken into account when fixing the minimum term. The Practice Statement is reported at [2002] 3 All ER 412.

[30] I set out paragraphs 10-19 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 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. (a) the fact that the killing was planned; (b) the use of Aggravating factors relating to the offence can include: 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 paragraph 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."

[31] As can be seen from paragraph 16 of the practice statement 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 (emphasis added). This reflects the fact that a murder committed with the intent to kill is more grave and serious than one committed with intent to cause grievous bodily harm. In England and Wales and since the Criminal Justice Act 2003 it is made expressly clear

that the absence of intent to kill is not necessarily a mitigating factor. Schedule 21, paragraph 11(a) to the Criminal Justice Act 2003 provides that:

> "Mitigating factors that *may* be relevant to the offence of murder include—
>
> (a) an intention to cause serious bodily harm rather than to kill,
>
> (b) lack of premeditation,
>
> (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,
>
> (d) the fact that the offender was provoked (for example, by prolonged stress),
>
> (e) the fact that the offender acted to any extent in self-defence or in fear of violence,
>
> (f) a belief by the offender that the murder was an act of mercy, and
>
> (g) the age of the offender." (emphasis added)

In *R v Peters* [2005] 2 Cr App R (S) 1 the Court of Appeal in England and Wales held that by virtue of the provisions of paragraph 11(a) that the lack of an intention to kill *may* be as opposed to *will* be a mitigating factor. In that case, three appellants appealed against minimum terms imposed in relation to mandatory life sentences. A linked feature of the cases was the absence of an intention to kill. The Court held that Schedule 21, paragraph 11(a) to the Criminal Justice Act 2003 identified an intention to cause serious bodily harm rather than to kill as a potential mitigating factor. Paragraph 11(a) underlined that the intention to cause grievous bodily harm might provide mitigation, but not necessarily. There were cases in which death, even if unintended, was a possible or likely consequence of the offender's premeditated conduct. An example might be where a child was kidnapped and tortured to encourage a parent to pay a ransom. In the course of the torture the child might die. The Court doubted that much if any allowance would normally be made in mitigation for the fact that the death of the child was an unintended consequence of the deliberate infliction of bodily harm. Providing judgment, Lord Justice Judge stated:

> "We have sufficiently demonstrated that it cannot be assumed that the absence of an intention to kill necessarily provides any or very much mitigation. It

> does not automatically do so. That said, in many cases, particularly in cases where the violence resulting in death has erupted suddenly and unexpectedly, it will probably do so, and it is more likely to do so, and the level of mitigation may be greater, if the injuries causing death were not inflicted with a weapon"

[32] In Northern Ireland the practice statement is not to be applied in a mechanistic fashion. I consider that despite the use of the word "will" in paragraph 16 of the practice statement that there is discretion in Northern Ireland as to whether there is mitigation where there is an intention to cause grievous bodily harm rather than an intention to kill.

Legal principles relating to setting the appropriate minimum term in England and Wales

[33] In *R v McConville & Wooton* and on 24 May 2012 Girvan LJ stated:

> "The decision in *R v McCandless* is based on an English Practice Direction which is no longer applied in that jurisdiction having been replaced by a separate statutory framework which does not apply in Northern Ireland and which provides for considerably longer tariffs. The question whether it is appropriate in current circumstances to continue to follow and apply the 2000 English Practice Direction is a question which it may well be appropriate for the Court of Appeal to revisit in the light of current conditions. However, such a review can only be carried out by the Court of Appeal not a trial judge at first instance."

The Director of Public Prosecutions has applied for leave to make a reference to the Court of Appeal under section 36 of the Criminal Justice Act 1988 to review the sentences imposed on *Brendan McConville* and on *John Paul Wooton* though the application has not as yet been heard. I am obliged to and do apply the practice statement rather than the sentencing principles introduced in England and Wales by the Criminal Justice Act 2003. I will refer briefly to the sentencing principles in England and Wales only to illustrate the significant difference in the starting points applicable in that jurisdiction as opposed to Northern Ireland in respect of the murder of a child involving sexual or sadistic motivation.

[34] Section 269 and Schedule 21 to the Criminal Justice Act 2003 require the courts in England and Wales to apply specified sentencing principles to anyone convicted of murder who is being sentenced on or after December 2003. The Court must select one of the starting points under the Act which will depend on the seriousness of the offence and the age of the offender. In contrast to the two starting points in Northern Ireland of 12 years or 15/16 years the legislation in England & Wales requires the court to give consideration to the imposition of a whole life tariff if the offender was aged 21 or older at the time of the offence and the case includes the murder of a child involving sexual or sadistic motivation. The imposition of such a whole life tariff in England & Wales is of course discretionary, see *R v Randall* [2007] EWCA Crim 2257, [2008] 1 Cr App R (S) 93, *R v Jones* [2006] 2 Cr App R (S) 19 and *R v Oakes and others* [2012] EWCA Crim 2435. Thereafter the next starting point is one of 30 years if the offender is aged 18 or older and the case is a murder involving sexual or sadistic conduct. In short there are significant differences between the sentencing principles in England and Wales and those that are applicable in Northern Ireland.

Legal principles relating to the offence under section 18: Grievous bodily harm with intent

[35] The sentencing range is a determinate prison sentence of 7 – 15 years in respect of conviction following trial.

[36] The section 18 offence comes within the provisions of the Criminal Justice (Northern Ireland) Order 2008. It is both a serious offence within Schedule 1, paragraph 7 to the Criminal Justice (Northern Ireland) Order 2008 and a specified violent offence within Schedule 2, paragraph 6 to that Order. Accordingly under Article 13(1)(b) of the Criminal Justice (Northern Ireland) Order 2008 I have to consider the predictive risk that is whether there is a significant risk to members of the public of serious harm occasioned by the commission by you of further specified offences.

[37] In relation to the predictive risk I emphasise that a significant risk must be shown in relation to two matters; first, the commission of further specified (but not necessarily serious) offences, and secondly, the causing thereby of serious harm to members of the public. In assessing whether there is a significant risk in your case I take into account the matters set out in Article 15(2) of the Criminal Justice (Northern Ireland) Order 2008 and seek to apply the approach set out by the Court of Appeal in *R v William Wong* [2012] NICA 54, that is carefully analysing the relevant facts in the case. The enquiry and determination is in relation to future risk and the future protection of the public. However in relation to the predictive test set out in the equivalent statutory provision in England and Wales (section 225(1)(b) of the Criminal Justice Act 2003) which is in the same terms as Article 13(1)(b) of the Criminal Justice (Northern Ireland) Order 2008 and in *R. v Nicholas Smith* [2011] UKSC 37 Lord Phillips said:

> "Rather it is implicit that the question posed by section 225(1)(b) must be answered on the premise that the defendant is at large. It is at the moment that he imposes the sentence that the judge must decide whether, on that premise, the defendant poses a significant risk of causing serious harm to members of the public."

In *R v Ryan Leslie* [2011] NICC 13 I suggested at paragraphs [36] and [38] that the prediction of dangerousness was at the future date when the court was contemplating the release of the offender from prison. That is not so. The prediction of risk is at the moment sentence is imposed but on the premise that the defendant is at large.

[38] Subject to what I set out in paragraphs [39] and [40] if there is a predictive risk then in accordance with the provisions of Article 13(2) if, in this case, the condition in Article 13(2)(b) is met, that is the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a life sentence, then I have to impose such a sentence. In that respect I seek to follow the guidance of the Court of Appeal in England and Wales for instance as to the distinction between a life sentence and an indeterminate custodial sentence see *R v Wilkinson* [2009] EWCA Crim 1925. In that case it was stated that:

> "In our judgment it is clear that as a matter of principle the discretionary life sentence under section 225 (which is the equivalent to Article 13(2)) should continue to be reserved for offences of the utmost gravity. Without being prescriptive, we suggest that the sentence should come into contemplation when the judgment of the court is that the seriousness is such that the life sentence would have what Lord Bingham observed in Lichniak [2003] 1 AC 903, would be a 'denunciatory' value, reflective of public abhorrence of the offence, and where, because of its seriousness, the notional determinate sentence would be very long, measured in very many years."

[39] I set out what I then considered to be the applicable principles in *R v Ryan Leslie* at paragraphs [31] to [43]. I incorporate those paragraphs as part of this judgment. Since that decision the Supreme Court gave judgment in *R. v Nicholas Smith* [2011] UKSC 37. In that case it was held that there was discretion to impose the equivalent of an indeterminate custodial sentence or an extended custodial sentence in circumstances where the offender was already subject to a life sentence and therefore could not be released until the Parole Commissioners were satisfied in relation to risk. In relation to discretion Lord Phillips giving the judgment of the Supreme Court stated:

> "17. It was originally the appellant's case that to impose an IPP sentence on a prisoner who was already serving a life sentence would not merely have no benefit, but would have adverse procedural consequences. These would result from a perceived conflict between, or overlap of, the Parole Board's review requirements in respect of a life sentence and in respect of an IPP. Mr Barnes now accepts that there will be no such conflict or overlap as a result of the sentence imposed on the appellant. The procedural position is exactly the same as if the appellant had been given a determinate sentence of 12 years' imprisonment. He will have to serve a minimum term of six years and, thereafter, will have to satisfy the Parole Board that he does not pose a risk to the public in order to secure his release from prison.
>
> 18. In these circumstances Mr Barnes' case on discretion is simply that the IPP sentence achieved no benefit. The result is the same as if a determinate sentence of 12 years had been imposed. There was thus no point in exercising the power to impose a sentence of IPP and, as a matter of good sentencing practice, a determinate sentence should have been imposed.
>
> 19. We have some sympathy with this submission. It is not sensible to impose a sentence of IPP in circumstances where it will achieve no benefit. We would not, however, condemn the sentence imposed in this case. Maurice Kay LJ remarked at para 11 of his judgment that a determinate sentence would not "contain within its terms the finding of the sentencing judge on the most recent occasion, that the appellant does in fact satisfy the dangerousness provisions of the 2003 Act as at 10 October 2008." The Parole Board had released the appellant on licence having been persuaded that he did not pose a risk of serious harm to the public. The judge cannot be criticised for imposing a sentence that demonstrated that the contrary was the case."

Accordingly it was submitted on your behalf that as there is no need in your case to correct an assessment by the Parole Commissioners that it would not be sensible to impose an indeterminate sentence or an extended sentence and the court should not

exercise discretion to do so but rather that I should impose a determinate sentence in relation to counts four and seven.

[40] I consider that the court does have discretion to impose an indeterminate custodial sentence or an extended custodial sentence in circumstances where a life sentence has already been imposed. That the court could set out its views as to dangerousness to be taken into account by the Parole Commissioners or alternatively depending on the courts assessment of the degree of dangerousness emphasise to the Parole Commissioners the court's views by exercising discretion to impose such a sentence rather than a determinate sentence.

Legal principles relating to the offence of sexual assault of Millie, a child, under 13, contrary to Article 14(1) of the Sexual Offences (Northern Ireland) Order 2008.

[41] The offence of sexual assault of a child under 13 contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008 carries a maximum sentence of 14 years. The offence is both a serious offence within Schedule 1, paragraph 31A to the Criminal Justice (Northern Ireland) Order 2008 (as amended by Schedule 1, paragraph 35 to the Sexual Offences (NI) Order 2008) and a specified sexual offence within Schedule 2, Part 2, paragraph 14A to that Order (again as amended by Schedule 1, paragraph 35 of the Sexual Offences (NI) Order 2008). Accordingly again I have to consider the predictive risk that is whether there is a significant risk to members of the public of serious harm occasioned by the commission by you of further specified offences. However the offence is not one in respect of which the offender would apart from Article 13 be liable to a life sentence and accordingly Article 13(2) does not apply in relation to this offence. A life sentence cannot be imposed.

[42] If there is a predictive risk then in accordance with the provisions of Article 13(3) if the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by you of further specified offences, the court shall—

(a) impose an indeterminate custodial sentence; and

(b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period 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.

I consider that where there is a choice between an indeterminate custodial sentence and an extended custodial sentence then the latter should be chosen where it would achieve appropriate protection for the public against the risk posed by the offender, see paragraph [20] of the decision of the Court of Appeal in England and Wales in *Attorney General's Reference (No 55 of 2008) (R v C)* [2009] 2 Cr. App. R. (S) 22. At that

paragraph with amendments in brackets to refer to the terminology used in the Criminal Justice (Northern Ireland) Order 2008 Lord Judge CJ stated:

> "Dr Thomas identified two particular features of potential importance. The first is the difficult problem of identifying the dividing line between (an indeterminate custodial sentence) and an (extended custodial sentence) for a violent or sexual offence. The short and deceptively simple answer is provided by our earlier reasoning. As we have emphasised, (an indeterminate custodial sentence) is the last but one resort when dealing with a dangerous offender and, subject to the discretionary life sentence, is the most onerous of the protective provisions. In short, therefore, if an (extended custodial sentence), with if required the additional support of other orders, can achieve appropriate public protection against the risk posed by the individual offender, the (extended custodial sentence) rather than (an indeterminate custodial sentence) should be ordered. That is a fact specific decision. …"

The starting point in relation to setting the appropriate minimum term in respect of count 1 of murder

[43] The prosecution submit that the higher starting point of 15/16 years applies in your case on the basis that the following features are present:

(f) The victim was a child who was otherwise vulnerable. I consider that this feature is present. Millie was particularly young. She was totally helpless and completely vulnerable. You can have been in no doubt whatsoever as to the fragility and defencelessness of Millie.

(i) There was evidence of sadism, gratuitous violence or sexual maltreatment … of the victim before the killing. I consider that this feature is present.

I apply the higher staring point of 15/16 years.

Aggravating and mitigating features in relation to count one the offence of murder

[44] The *Practice Statement* continues at paragraph 13 to provide that it may be appropriate for the trial judge to vary the starting point upwards or downwards to take account of aggravating or mitigating features which relate to either the offence or the offender in the particular case.

Aggravating features in relation to the offence of murder

[45] Paragraph 19 of the practice statement provides that:

> "among the categories of case referred to in paragraph 12, some offences may be especially grave. These include cases in which … the offence … involved a young child. In such a case, a term of 20 years and upwards could be appropriate."

In considering paragraph 19 I emphasise that I do not double count as this is a factor taken into account under paragraph 12(f) in selecting the higher starting point. Rather the practice statement emphasises that consideration should be given to the seriousness on the particular facts of your case of this factor which has already been identified as attracting the higher starting point. That the sentencer should of course appreciate that there should be an allowance for the fact that the factor has already been taken into account in fixing the higher starting point.

[46] The trust reposed in you by both Millie and by her mother which trust you breached. I again emphasise that in most cases involving the murder of a child there will be a strong element of breach of trust and that the court should guard against double counting aggravating features.

[47] The killing was not planned but there was an element of planning in that you planned to be left alone in the house with Millie so that you could physically and sexually abuse her. That planning is to be seen in the context that you knew that you had previously inflicted really serious harm to Millie.

Mitigating factors in relation to the offence of murder

[48] You intended to cause grievous bodily harm rather than to kill. However the degree of mitigation is to be kept in proportion given the thin line between an intention to kill and an intention to cause grievous bodily harm in the context of Millie's age and frailty and in the context of the degree of violence involved.

[49] The offence of murder was not planned but rather it was committed spontaneously. However the degree of mitigation is to be kept in proportion as you planned to interfere with Millie in circumstances where you knew that you had previously squeezed her rib cage with considerable force.

Mitigating features in relation to the offender

[50] There is evidence that you had a degree of personality disorder.

[51] I have set out and taken into account your personal circumstances but in doing so I bear in mind that in cases of this gravity your personal circumstances are of limited effect in the choice of sentence, see *Attorney General's Reference (No 7 of 2004) (Gary Edward Holmes)* 2004 NICA 42 and *Attorney General's Reference (No. 6 of 2004) (Conor Gerard Doyle)* [2004] NICA 33.

Aggravating features in relation to the offender

[52] You have 19 previous convictions including:

a) convictions in the Crown Court on 20 March 2002 for two assaults occasioning actual bodily harm, for possessing an offensive weapon in a public place, and possessing ammunition without a certificate. For these offences you received concurrent two year prison sentences suspended for two years.

b) On 22 June 2006, again in the Crown Court, you were convicted of three offences of criminal damage and one offence of disorderly behaviour. Probation orders and community service orders were imposed in relation to two of the offences of criminal damage. The remaining offences of criminal damage and the offence of disorderly behaviour were dealt with by the imposition of concurrent nine month and four month prison sentences suspended for three years.

c) On 7 April 2008 in Fermanagh Magistrates Court you were convicted of criminal damage and disorderly behaviour. You were sentenced to 9 months and 4 months imprisonment respectively both sentences being concurrent and suspended for 3 years.

These offences whilst relevant are of an entirely different level of seriousness than the offences before this court. They are an aggravating feature in respect of deterrence but the degree of aggravation is to be kept in proportion.

Balance of aggravating and mitigating features in respect of the offence of murder

[53] This is a most serious case in which there should be a substantial upward adjustment from the higher starting point.

Conclusion in relation to count one of murder

[54] I have determined in relation to the offence of murder on count one that the appropriate minimum term of imprisonment that you will be required to serve before the release provisions will apply to your case is one of 25 years. This will include the time spent by you on remand. What if any further period you will spend in prison thereafter will be for the Parole Commission to determine. I direct that it is to receive a copy of these sentencing remarks.

Risk of harm to the public and likelihood of re offending, consideration of a life sentence in relation to count four and consideration of an extended custodial sentence or an indeterminate custodial sentence in relation to count seven

[55] As I have indicated in relation to count one of murder the risk that you pose is a matter for the Parole Commission. Risk plays no part in fixing the minimum term in respect of that count.

[56] However, the risk that you pose is relevant to the sentencing exercise in relation to counts four and seven. I have the benefit of a pre-sentence report dated 9 January 2013 from Selina Carty and David Young, probation officers. They considered that there is a high likelihood of you re-offending. They convened a Risk Management Meeting which was held on 3 January 2013 and which was attended by both of them together with the area manager of the Probation Board of Northern Ireland, the psychologist of the Probation Board of Northern Ireland, the public protection unit, police and the services manager of the Western Health and Social Care Trust. It was the conclusion of that meeting and also the assessment contained in their report that you present as posing a significant risk of serious harm. I agree with both of those assessments.

[57] My assessment is that you are a deeply manipulative individual devoid of any regard for social norms, for the ordinary human obligations to a vulnerable child, for the consequences for Millie's mother who you pretended to love or for the consequences for Millie's extended family. Rather you perceived Millie to be yours to abuse when the opportunity presented. You obtained personal gratification including in the event sexual gratification by inflicting physical abuse on Millie. You have no insight and no remorse. You have demonstrated that you are a seriously violent individual. Based on my assessment of you and on the report of the probation officers I consider that there is a significant risk that you will commit further specified offences and that there is a significant risk of serious harm to members of the public. In view of the degree of your dangerousness and to emphasise my views to the Parole Commissioners I have exercised discretion to impose appropriate indeterminate sentences on counts four and seven.

[58] Applying the test in *R v Wilkinson* I consider that the determinate sentence for count four and the associated offences in count one and count seven would be very long, measured in very many years. I also consider that these three offences taken together, or alternatively the offences in count one and count four taken together clearly call for denunciation reflective of public abhorrence of them. Accordingly I impose a life sentence on count four.

[59] An extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of the appropriate custodial term and a further period ("the extension period") for which the offender is to be subject to a licence and which is of such a length as the court considers necessary for the purpose of

protecting the public from serious harm occasioned by the commission by the offender of further specified offences. The extension period in the case of a specified sexual offence shall not exceed 8 years. In view of the risks that you pose I do not consider that an 8 year extension period is sufficient for the purpose of protecting the public from serious harm occasioned by the commission by you of further specified offences regardless of any other protective measures that have been put in place. Accordingly I impose an indeterminate custodial sentence in respect of Count 7.

Conclusion in relation to counts four and seven.

[60] I have determined in relation to the offence in count four that the appropriate minimum term of imprisonment that you will be required to serve before the release provisions will apply to your case is one of 6 years. This will include the time spent by you on remand. The minimum term in count four is concurrent to that imposed on counts one and seven.

[61] Having imposed an indeterminate custodial sentence on count seven I am required by Article 13(3)(b) of the Criminal Justice (Northern Ireland) Order 2008 to specify a period of at least 2 years as the minimum period which you must serve in respect of this offence, being such period 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. I have determined in relation to the offence in count seven in combination with the offences in count one and count four that the appropriate minimum period of imprisonment that you will be required to serve before the release provisions will apply to your case in respect of this offence is one of 2 years. This will include the time spent by you on remand. The minimum term in count seven is concurrent to that imposed on counts one and four.

Suspended sentence

[62] There is then the matter of the suspended sentences. These offences were committed during the operational period of concurrent suspended 9 and 4 month prison sentences. The power to activate a suspended sentence is contained in section 19 of the Treatment of Offenders Act (Northern Ireland) 1968 with the substitutions effected by Article 9 of the Treatment of Offenders (Northern Ireland) Order 1989. I order that the suspended sentences of imprisonment shall take effect with the original terms of 9 and 4 months concurrent unaltered. The general rule is that the terms of 9 and 4 months should be consecutive to the sentences which I have imposed in relation to these offences. However bearing in mind the totality principle and as an exception to that general rule I make those sentences concurrent to the sentences on counts one, four and seven.

Ancillary orders

[63] **A notification order requiring information to be entered on the Sex Offenders Register**. The offence contained in Count 7 of sexual assault on Millie a child under 13 contrary to Article 14(1) of the Sexual Offences (Northern Ireland) Order 2008 is listed at paragraph 92E of Schedule 3 to the Sexual Offences Act 2003 as an offence subject to the notification requirements in Part II of that Act provided that the offender was 18 or over or is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months. You are over 18 and have been so sentenced in respect of count 7. You are subject to the notification requirements. I have made a notification order. The notification period is for an indefinite period beginning with the date of your conviction for that offence given that I have imposed an indeterminate custodial sentence in respect of it - see section 82 of the Sexual Offences Act 2003. You will be guilty of an offence if you do not comply with the notification requirements.

[64] **A Sexual Offences Prevention Order.** The offences of murder and causing grievous bodily harm with intent are listed in Schedule 5 to the Sexual Offences Act 2003 (at paragraph 112 and 120). The offence of sexual assault of a child under 13 is listed in Schedule 3 to that Act at paragraph 92E. Accordingly by virtue of sections 104(1)(b) and 104(2) of the 2003 Act I may make a sexual offences prevention order in respect of Counts 1, 4 and 7 if I am satisfied that it is necessary for the purpose of protecting the public or any particular members thereof from serious sexual harm from you. I am so satisfied. I make the following order in relation to each of those counts prohibiting you until further order:

a) from having contact or communication with any child under the age of 18 other than contact or communication which is inadvertent and not reasonably avoidable in the course of lawful daily life, unless with prior approval of your designated risk manager in writing

b) from residing or staying overnight at any place without prior written approval from your designated risk manager

c) from entering into any relationship or friendship with a female whether intimate or casual without first having given a verifiable disclosure of your offending history to that female.

[65] **A Disqualification Order under the Children and Vulnerable Adults (Northern Ireland) Order 2003**. The legislation that applies is still the 2003 Order. The Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 provides in Article 60 and Schedule 8 for the repeal of the whole of the 2003 Order but the repeal has not yet been brought into force.

[66] Article 23 of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 provides that where an individual is convicted on indictment of an offence against a child committed when he was aged 18 or over, and a qualifying sentence is imposed by the court in respect of the conviction then unless the court is satisfied, having regard to all the circumstances, that it is unlikely that the individual will commit any further offence against a child then the court must order the individual to be disqualified from working with children. A qualifying sentence includes a sentence of imprisonment for a term of 12 months or more. The sentences which I have imposed are clearly qualifying sentences. You have committed the following offences against a child namely:

(a) Murder, see paragraph 2 (a) of the schedule to the Order,

(b) Grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861 see paragraph 2(f) of the Schedule to the Order,

(c) Sexual assault of a child under 13, see Schedule 2, paragraph 2(1) to the Sexual Offences (NI) Order 2008.

[67] In respect of counts one, four and seven I make a disqualification order under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003. The effect of such an order is that it makes it a criminal offence for you to work, offer to work or to apply to work with children. It is not time bound but you can apply to a Social Care Tribunal for a review of the order.

[68] **A Compensation Order**. Under Article 14 of the Criminal Justice (Northern Ireland) Order 1994, I may order you to make payments for funeral expenses or bereavement in respect of a death resulting from your offence. The court is required to give reasons, on passing sentence, if it does not make such an order in a case where it is empowered to do so. I made a specific enquiry of the prosecution as to whether the relevant persons had been informed as to the potential for a compensation order and in consequence enquiries were made. I understand that it was suggested on behalf of the prosecution to those persons that they should obtain legal advice. I adjourn any potential application for a compensation order.

[69] **An Offender Levy order under sections 1 – 6 of the Justice Act (Northern Ireland) 2011**. Section 1 provides that where a court dealing with an offender for one or more offences imposes a sentence which, inter alia, is or includes a sentence of imprisonment then unless for instance the offender is an individual under the age of 18 or the court considers that it would be appropriate to make a compensation order under Article 14 of the Criminal Justice (Northern Ireland) Order 1994 but that the offender has insufficient means to pay both the offender levy and appropriate compensation, then the court must, in addition, order the offender to pay an amount ("the offender levy") determined under section 6. The Justice (2011 Act) (Commencement No.4 and Transitory Provision) Order (Northern Ireland) 2012

provided for the commencement of the Offender Levy provisions in respect of offences committed on or after 6 June 2012. The offences with which I am dealing were committed prior to 6 June 2012 and accordingly I make no offender levy order in your case.