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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE CROWN COURT IN NORTHERN IRELAND
(Bill Number 18/071341)

BELFAST CROWN COURT

THE QUEEN

-v-

KENNETH COWAN

His Honour Judge McFarland
Recorder of Belfast
1st February 2019

- [1] Kenneth Cowan has pleaded guilty to the murder of Brian Burke. The only sentence permissible under law for the crime of murder is life imprisonment, and I imposed that sentence on him on the 14th December 2018. It remains for me to determine the minimum term of imprisonment that Cowan must serve before he can be considered for release by the Parole Commissioners. Article 5(2) of the Life Sentences (Northern Ireland) Order 2001 prescribes that the minimum term must be the period the court considers appropriate –

“To satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or the combination of the offence and one or more offences associated with it”.

I am also required by paragraph 25 of Schedule 1 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 to inform Cowan that the Independent Barring Board will include him on the barred list relating to adults by virtue of his conviction.

- [2] Kenneth Cowan and Brian Burke appear to have had a mutual friend and the three had been in each other’s company at the friend’s home on the 7th April

2018. Cowan was also living in this house at the time. It had all the hallmarks of a relaxing afternoon and evening, with them listening to music, and drinking beer. Some cannabis was also smoked by Cowan, but not by Brian Burke (as has been confirmed by the toxicology report). A toxicology screening was carried out on Cowan 14 ½ hours after the incident. No alcohol was detected, but the sample contained cannabinoids, although there is no way of determining when the cannabis was consumed, or the amount. The level of alcohol in Brian Burke at the time of his death was recorded as 190 milligrams per 100 millilitres, about 2 ½ times the legal limit for driving. As Cowan had been in Brian Burke's company for most of the day it is likely that Cowan had consumed a quantity of alcohol, although it is impossible to be certain about how much. The evidence from the friend and from Cowan's own memory, would indicate that alcohol was consumed by Cowan, although the evidence from the emergency personnel receiving the 999 telephone call and those arriving at the scene did not indicate that he was in an intoxicated state.

- [3] During the evening an argument appears to have developed between Cowan and Brian Burke, the reason for which is not recorded, and there was a degree of wrestling in a bedroom, which the friend described as horseplay. This ended by Cowan leaving the bedroom, going downstairs to the kitchen to arm himself with a knife and then returning upstairs using the knife to stab Brian Burke once to the chest. During this episode, Cowan describes, in his words, "the red mist" descending resulting in him getting up and arming himself with the knife.
- [4] The wound was to have catastrophic consequences. According to the opinion of Dr. Jack Crane, the pathologist who conducted the autopsy, no more than moderate force was used to deliver the stab wound, which entered the left side of the front of the chest, punctured the lung and then entered the heart. The blade remained embedded within the chest. There was extensive bleeding and the effects of the bleeding resulted in fairly rapid death.
- [5] Cowan attempted to provide assistance to Brian Burke and rang the 999 emergency number. He remained at the scene until such time as the police arrived and he was arrested. During his first interview with the police he made a full confession to being responsible for the death of Brian Burke, although he did, incorrectly, assume that he had used a work implement – a parcel opening knife, as opposed to a kitchen utensil. When he was arraigned before this court he entered a plea of not guilty, but it was indicated that he accepted all the evidence and circumstances as set out in the prosecution papers, but as he was undergoing psychiatric assessment which may have given rise to the possibility of raising the issue of diminished responsibility, a partial defence to the charge of murder, his legal representatives required further time to be able to advise him. The trial was

fixed for the 7th January 2019, and Cowan pleaded guilty on the 14th December 2018.

- [6] Cowan was born on the 29th December 1988 and is now 30 years of age. He attained good results during his schooling and has spent his adult life in various locations, including Spain and Finland, and throughout this period has been able to maintain a reasonable record of employment. He has three criminal convictions (one in this country and two in Finland). The convictions are all drug related and I would not regard them as significant. He has a partner and child who live in Finland. Financial constraints had forced their temporary separation, although it was, and still remains, their intention to re-unite. His partner, who has known him for about ten years now, described the incident as an insane act of violence which she never expected from him. I have received a letter from her, as well as from both his parents, his sister and two friends. All speak highly of him, and express their shock at his conduct and all regarded it as completely out of character. They also speak of his genuine and heart felt remorse as to the consequences of his action.
- [7] I have received a victim impact report in respect of Mr Burke's mother and statements and letters from his brother and a cousin, and from four friends. Each, in their own way, have described in simple and moving terms, and with eloquence the loss of their son, brother, cousin and friend. The loss has been most keenly felt by the family, and in particular by his mother. The report I have received from Dr Paterson sets out in detail how her son's death has impacted on her. In this public hearing I do not propose to set this out in detail. I do accept the diagnosis of a persistent complex bereavement disorder. This was a senseless taking of life of a young man, and it is natural that family and friends will struggle to rationalise what has happened.
- [8] In R v McCandless [2004] NI 269 and more recently in R -v- Morrin [2011] NICA 24, the Court of Appeal directed courts in this jurisdiction to adopt the approach prescribed by Lord Woolf CJ in the Practice Statement [2002] 3 All ER 412 when fixing the minimum term to be served by an offender convicted of murder. The Practice Statement provides for two starting points. It states -

"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."

[9] The reference in the Practice Direction of 8 to 9 years being the equivalent to 16 to 18 years reflects the notional reduction that judges make to take into account the 50% remission or reduction in actual time to be served in prison, such remission or reduction being built in to the statutory scheme for determinate sentences.

[10] There are three aggravating factors in this case. Cowan armed himself with a knife and used it to kill Brian Burke, at the time he had consumed alcohol and drugs, although the level of his intoxication is unknown, and the impact of the crime on Brian Burke's family and in particular his mother.

[11] The mitigating factors in this case are -

- First, Cowan, is a man aged 30 years and appears before the court with a very limited criminal record.
- Second, although Cowan armed himself with a knife, the attack was largely spontaneous in nature and was a single stab delivered with modest force.
- Third, Cowan did not intend to kill Brian Burke, but rather to cause him really serious injury. I have considered the Crown submission on this point, but taking all the circumstances into account particularly the moderate nature of the single thrust with the knife and a failure to repeat the thrust, I am of the view that there was not an intention to kill.
- Fourth, Cowan has expressed genuine remorse concerning his conduct and its consequences. This has been evident since the immediate aftermath when he sought to provide assistance to the deceased and called the emergency services and obvious from his interaction with the police and Probation Service. I do consider that his reference to using his work

knife acquired from an upstairs bedroom is not a lying account, but more likely to have arisen from his genuine confusion about what had happened.

- Fifth, he accepted his guilt at a very early stage, and although he did not enter his plea at the first opportunity, it had been indicated at an early stage of the proceedings that the factual background had been accepted. He will not receive the full credit because of the delay in his plea. The court takes into account all the relevant circumstances including the impact of any delay on the deceased's family, and on witnesses who had been required to prepare for the giving of their oral testimony.

[12] I have considered the various reports on Cowan's mental health, and I do not consider that there are any significant issues raised by them that would indicate that his state of mental health is such that it could be regarded as a mitigating factor.

[13] I consider that the nature of the murder puts this case in the category with a starting point of 12 years. It is important to understand that what I am describing is the minimum tariff to be served. The sentence of the court is a life sentence. The periods that I will be stating are minimum terms of imprisonment that must be served before the Parole Commissioners can consider if it is appropriate to release Cowan back into the community on licence. The impact of the crime on the victim's family, the consumption of alcohol and drugs and the use of the knife are aggravating factors. It is not a case of Cowan carrying a knife and then using it. However, it must be understood that those who would arm themselves with weapons such as knives to somehow give themselves an advantage in any scuffle or fight or to frighten their opponent, must expect to receive additional punishment. The use of weapons, particularly knives, will always significantly increase the risk of serious or fatal injury.

[14] Taking into account the starting point, the aggravating factors and the mitigating factors (without the plea of guilty), the appropriate minimum term would be 13 years, which I will reduce to 10 years to take into account his plea.

[15] This is the minimum term that Cowan will serve, less any period spent on remand in custody. After he has served that period, it will be for the Parole Commissioners to determine when he is to be released, if at all, back into the community to serve out the remainder of his life sentence on licence.