

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

ALAN NORMAN FOSTER

TREACY J

Introduction

[1] Alan Norman Foster, you have pleaded guilty to the murder of Pauline Carmichael. I have already sentenced you to the only sentence permitted by law for the crime of murder, namely life imprisonment. It is now my responsibility to determine the period that you will have to serve before you become eligible to have your case considered by the Parole Commissioners, which body will thereafter have the responsibility of determining when, if at all, you will be released.

[2] There is an important point, which I want to emphasise to you, and through the Press to the general public, and that is that the period I shall fix will not qualify for any remission. Consequently, you will be required to serve, in its entirety the tariff period that I determine.

Background to the Offence

[3] At the hearing the prosecution outlined in detail the background to the offence. Accordingly I will not rehearse all of the facts but provide a brief summary.

[4] On Tuesday 24 February 2015, just before 6.00 pm the police received a report from Paula Graffin that she was worried about her neighbour, Pauline Carmichael, who lived in the flat next door. She said that on the previous evening she had seen Pauline's step-son, the defendant, leaving No. 47 Hillside carrying Pauline over his shoulder and that she had not seen her since.

[5] On Monday 23 February 2015, following a 999 call, the police attended

47 Hillside at about 9.30 pm requesting that the defendant be removed from the flat. The police went to the flat and met the defendant. There were two females present. Pauline Carmichael was in a bedroom and police spoke to her. Following discussion police asked Foster and his 2 female friends to leave the flat. They did so and the flat was locked.

[6] On Monday 23 February Paula Graffin was returning from the gym at about 9.30 pm. The police were at the neighbour's house. Her door was knocked and she opened it to see the defendant with two females. They wanted to come in. She let them into the house. She heard the defendant say, "I'll take her f.ing phone and my da's and that'll stop her ringing the peelers." Another man arrived at the house a short time later. They stayed 10 to 15 minutes.

[7] The defendant left when the police had gone. He went back to 47 Hillside and stayed for 5 or 10 minutes. The witness then heard Pauline Carmichael, whom she knew, screaming, "At least let me get my other shoe". She looked out and saw the defendant walking past her front door with Pauline Carmichael wrapped around his shoulders. He walked towards a tunnel that runs under the Belmont Road.

[8] Pauline Carmichael was wearing a pink fleecy pyjama top and white printed bottoms. Ms Graffin went to bed at about 11.45 pm at which stage she heard a knock on the door. She answered and found the defendant standing there. He asked for milk for his Dad. He said his Dad was in bed and then said, "She is gone, her and the dog are away to Ballyclare. She's away to Toots". He then left.

[9] Ms Graffin in a further account to the police made on 24 February 2015 said she could see that when the defendant was carrying Pauline she looked red and puffy around her eyes like she had been crying or had been hit. She seemed to be 'out of it' and was mumbling to herself.

[10] When the defendant asked for some milk for his father, he said "By the way, she is gone" [referring to Pauline Carmichael] "and taken the dog to Toots in Ballyclare". 'I knew she had a friend named Toots in Ballyclare. Overnight I heard her dog barking which I thought was strange as it was supposed to have gone with her.' 'A short time after the police left Alan Foster came to my flat, about 6.45 p.m. He said the police had been looking for Pauline and that she had disappeared.'

[11] Following the report made by Paula Graffin, Constable Lisa Mallon attended the scene and spoke with the defendant and his father, David Foster, at 47 Hillside. The defendant informed her that Pauline Carmichael was in Ballyclare but that he had not seen her leave as he was asleep. Her visit was just before 6.00 pm.

[12] Subsequently Constable Mallon returned to 47 Hillside at just after 10.30 pm that evening and arrested the defendant on suspicion of kidnapping.

[13] The police made contact with a man called Mark Strange who was not associated with the defendant or his family but who happened to be driving in the area.

[14] On 23 February 2015 – 10.30 pm he was driving along Dublin Road, Antrim. He:

“Noticed a male standing with his back to the road on the footpath to my right. He was wearing a red tracksuit top with a white loop around the stomach. I saw a male standing on the path to my right about 10 m from the junction. The male appeared to have someone over his shoulder in a fireman’s lift. As I drove on I saw the male throw the person over the metal barrier. I think he was wearing Timberland style desert boots. As I passed by him he was directly to my right”.

[15] Laura Dundee was in a similar position to Mark Strange. She says she:

“Came off the second exit at the Dublin Road/Belmont Road roundabout. I saw a male standing on the right hand side of the road – in the middle of the bridge on the opposite of the road to which I was travelling. I could clearly see him. He was standing with his back to the road and his front facing down in the direction of the river. As I was driving past this male I looked out my driver’s window towards this male and I saw a movement. The movement started at the middle of his body and then passed down towards the river. I could see the movement of an object falling towards the river as there are gaps in the railings of the bridge.”

[16] The police also spoke to William Smith and Katherine McAllister who described an altercation inside Barney’s Bar in Antrim between Pauline Carmichael, David Foster and the defendant at about 6.00pm on the evening of Monday 23 February 2015.

[17] The witnesses describe Pauline Carmichael and David Foster drinking in the bar and the defendant coming into the bar. The defendant was shouting in an aggressive way at them and it appeared to relate to money. The defendant was asked to leave the bar by William Smith and following this Pauline Carmichael was slapped in the face by David Foster. The incident was recorded on CCTV. This, it is accepted by the prosecution, might account in part for some injury found upon Pauline Carmichael.

[18] Stephen Maine, a taxi driver, collected a female in his car in High Street, Antrim, at about 7.00 pm on Monday 23 February. He didn't know her name but noticed that she had red marks below her eyes and recognised her as having been in his taxi on previous occasions. She said she didn't want to go home as her son was there with girls partying and that she would go to Mickey Quinn's flat. This female was Pauline Carmichael. He then drove to the area of Hillside and carried the female's shopping bag to the front door of Mickey Quinn's flat. The female knocked the door and shouted through the letter box as well as ringing Mickey Quinn's number on both her and Mr Maine's mobile phones but there was no answer.

[19] Michael Quinn (known as Mickey) is a neighbour of Pauline Carmichael and knew her for some time. He was telephoned by Pauline Carmichael between 5 and 6.00pm on 23 February 2015 and she asked if she and David Foster could come to his house. About an hour after this he observed uniformed police outside her flat. On arriving he observed three persons outside and one of them was shouting "That effing auld B in there, she got the police for me". He recognised the voice as that of the defendant.

Post Arrest

[20] Following the arrest of the defendant enquiries continued in relation to the whereabouts of Pauline Carmichael.

[21] Kevin Scott went to Hillside, Antrim. He parked at the Marina on the Loughshore where there were boats moored. He walked down the towpath towards the lough itself and saw a dog interested in something in the water. It was at this time that the body was found. David Fitzgerald a freelance photographer was also present. The location of the body was then identified by the police.

[22] Subsequently a post mortem examination was carried out by Dr Peter Ingram, the Assistant State Pathologist for Northern Ireland on 26 February 2016. The cause of death was found to be drowning in fresh water. He carried out a detailed examination of the body. Pauline Carmichael weighed 8 stone 7 pounds and was 5 feet 1½ inches in height. She had been physically quite healthy. Death was due to drowning in fresh water. She was alive when she entered the water. However, Dr Ingram indicates that before having drowned she had been the victim of a serious assault. He outlines a number of injuries.

- (a) There was a large slightly abraded pink bruise on the left side of the forehead which merged with an area of bruising of the left upper and lower eyelids.
- (b) There was a bruise on the right side of the forehead which revealed, on internal examination of the scalp, six bruises on its under-surface. These facial injuries and some on the scalp had been sustained as a result of blunt force trauma, such as punching, or her head having

- been struck on a smooth surface such as a wall
- (c) There were numerous bruises overlying the lower jaw and on the neck.
 - (d) When the neck was examined internally there were 13 bruises in the soft tissues and muscular as well as a fracture of one of the bones of the voice box known as hyoid bone. These injuries were entirely consistent with her neck having been forcibly grasped.
 - (e) Some small bruises and lacerations of the lips are likely to have been sustained as a result of a hand or hands having been forcibly applied to the mouth.
 - (f) The pressure to her neck had not been applied for a sufficient period of time to cause her death or the formation of the pinhead size haemorrhages in the eyes which are seen in cases where death has resulted from strangulation.
 - (g) There was a multitude of bruises on all four limbs as well as some on the chest abdomen and back. Some of these could have occurred as a result of blows, such as punch. These injuries were not all recent and they were not directly responsible for her death.
 - (h) There were compression fractures of three of the bones of her spine in the chest and fractures of three of the left ribs. These injuries are most likely to have occurred when she struck the river bed.
 - (i) There was a clean cut laceration or incision on the left side of the back of the scalp. Most likely a laceration due to bruising between the wound. There was also a laceration on the left side of the scalp. These injuries could have been sustained during an assault but it seems more likely that they occurred when she struck the bed of the river.

[23] At the time of her death she had 253 mg per 100 ml of alcohol per 100 ml of blood which would have caused moderate intoxication.

Second Arrest

[24] Following discovery of the body of the deceased the defendant was re-arrested on suspicion of murder and interviewed in Antrim on 13 occasions between 25 and 26 February. During interviews he provided an exculpatory account and denied all involvement in the murder.

Defence Statement

[25] In his Defence Statement the defendant denied murdering Pauline Carmichael on a date unknown between 22 and 26 February 2016. He denied the act of murder. However, he went on at paragraph 10 to accept that he was staying at 47 Hillside. He asserted that both his father and the deceased were alcoholics and that the behaviour and conduct of both was at all material times contributed to and affected by their abuse of, and dependency on, alcohol. He then stated at paragraph 12:

“12. The Defendant states that on the 23rd of February, following the return of his father and the deceased – both of whom had been drinking heavily and were under the influence of alcohol – from Barney’s Bar, he, the Accused, had had to physically intervene to separate them in their bedroom during a fight in which David Foster had the deceased by the throat and he, the Defendant, pulled them apart and pushed her to get her away.

13. The Defendant asserts that on the said date Pauline Carmichael had repeatedly stated that she was going to jump off ‘the bridge’ and kill herself – she having previously been taken off a bridge on the nearby Belmont Road. He further states that, on his returning to number 47 Hillside after the police had left on the night of the 23rd, the deceased and his father were still rowing and fighting, and in response to her taunts about committing suicide, he eventually picked Ms. Carmichael up and openly carried her over his shoulder from the house via the nearby pedestrian underpass, pathway, then along the Dublin Road, and, on reaching Belmont Road, he there put her on the railing and pushed her off it. He later returned to look for her, and on being unable to find her, concluded that she had got up and left the area into which he had pushed her, and returned to number 47.

14. The Defendant denies that in doing the said acts he intended to kill or cause grievous bodily harm to the deceased.”

[26] It is clear that on the evening of Monday 23 February 2015 the defendant took Pauline Carmichael and carried her over his shoulder the relatively short distance to a nearby bridge. Prior to being thrown over the bridge she had been beaten around the face and body. He then dumped her body over the bridge. The river is 46 feet (14 m) wide with steep sides levelling out to a river bed of approximately 3 to 4 feet deep. The height of the Belmont Bridge is 40 feet from water level to the handrail which equates to several car lengths. It would be obvious to anyone that throwing someone over this bridge was likely to cause them serious bodily harm. He entered his plea on that basis. He threw a 62 year old injured and intoxicated woman over the bridge who then ended up in a moving river, 40 feet below, where she drowned and was washed away. This wicked act was perpetrated against a defenceless individual whom the defendant was apparently annoyed at for calling the police.

Basis of Plea

[27] The Court was provided with a document signed by Senior Counsel on behalf of the Prosecution and the Defence dated 15 November 2016:

“Basis of Plea

1. It is agreed, between the prosecution and defence, that paragraph 10 of *R v McCandless* is the proper basis for determining the starting point.
2. The defendant intended to cause grievous bodily harm, not to kill.
3. The prosecution do not rely upon the evidence of Stephen Woodage or Charles Law.
4. It is agreed, that from the date of arraignment until the date of re-arraignment the defence could not properly and conclusively advise the defendant on the psychiatric aspects of this case as the psychiatric/psychological reports were not available.”

Fixing the Appropriate Tariff

[28] Carswell LCJ stated in *R v McCandless* [2004] NI 269:

“[9] The *Practice Statement* set out the approach to be adopted in respect of adult offenders ([2002] 3 All ER 412 at 413–415, [2002] 1 WLR 1789 at 1790–1792 (paras 10 to 19)):

‘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 para12. 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 case

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 para12, 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.”
[Emphasis added]

[29] R v McCandless remains the leading authority in this jurisdiction on the principles to be applied when the court is fixing the appropriate tariff in a life sentence case. The practice statement introduced by Woolf LJ and adopted by our Court of Appeal substituted a higher and normal starting point of respectively 16 and 12 years, these starting points to be varied upwards or downwards by taking account of aggravating and mitigating factors.

[30] The court in McCandless emphasised that the process is not one of fixing each case into one of two rigidly defined categories in respect of which the length of

the term is firmly fixed. Not only is the practice statement intended to be only guidance but the starting points are points at which the sentencer may start on his journey towards the ultimate goal of deciding upon a right and appropriate sentence.

[31] The multi-tier system thus requires the court to identify:

- (i) the starting point;
- (ii) the **aggravating** factors of the *offence*;
- (iii) the **aggravating** factors of the *offender*;
- (iv) the **mitigating** factors of the *offence*;
- (v) the **mitigating** factors of the *offender*.

[32] There are two other points that need to be borne in mind. First that the practice statement is intended to be only guidance and should not be mechanically or inflexibly applied. Secondly, the court must always stand back and ask itself whether the term that the process has first yielded is a just and fair level of punishment to reflect the elements of retribution and deterrents.

The Appropriate Starting Point

[33] As can be seen from the basis of plea document it is agreed between the prosecution and the defence that paragraph 10 of McCandless is the proper basis for determining the starting point. Accordingly the starting point in this case is one of **12 years**. Having selected a starting point, 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. Paragraph 14 of the Practice Statement in a non-prescriptive manner identifies aggravating factors which “can include” the factors adumbrated at paras (a)-(e).

Aggravating Factors of the Offence

[34] In the present case the prosecution submitted that in relation to this offence it is aggravated by the fact that there were other injuries occasioned to the deceased within a domestic setting prior to the cause of her death. The prosecution however accepted that these injuries could not be attributed to the defendant. However, she had undoubtedly been the victim of a serious assault suffering injury and it was in that injured and vulnerable state that she was carried by the defendant prior to being thrown over the metal barrier of the bridge. She was also vulnerable in the sense of being an intoxicated, lightly built 62 year old woman, although the prosecution acknowledge that she did not fall into the category of vulnerability as referred to in paragraph 12. I acknowledge the prosecution’s submission that the circumstances of the death are particularly callous since the defendant carried the deceased in that vulnerable state for several hundred metres before propelling her over the bridge resulting in her death by drowning. I regard these factors as aggravating the offence committed by the defendant.

Aggravating Factors of the Offender

[35] As far as aggravating features with regard to the offender are concerned the prosecution initially identified two features namely (i) the defendant's previous record; and (ii) his lack of remorse throughout his interviews. However, the prosecution acknowledged during the hearing that, given the nature of his previous record, that it was not particularly material. Accordingly, I do not propose to treat his previous record as a materially aggravating factor. As far as the defendant's lack of remorse was concerned during interviews the prosecution had contended in their skeleton argument that the defendant had suggested that this offence could have been carried out by the partner of the deceased i.e. his own father. They submitted that this had some similarities to the factors identified in R v Robinson [2006] NICA 29 where a defendant's attempts to mislead the authorities and put them on to a false trail was identified as an aggravating feature by Kerr LCJ at paragraph 9.

[36] The Defence broadly agreed with the outline of the facts, as set out in the Prosecution's skeleton argument. However they took issue with paragraph 36 of the Crown Skeleton repeated at paragraph 46(b) as an allegedly aggravating feature that the defendant had suggested that this offence could have been carried out by the partner of the deceased. They submitted that this was emphatically not the case and referred the court to pp913-916 of the interviews where the defendant stated that during a fight - in which he had intervened to separate them - between his father and the deceased in the bedroom, that his father had grabbed the deceased by the throat, whereafter, the following exchange occurs:

'Q. But **do you think .. your father drowned her?**

A. **No, I can't see him** ah my, my da gets drunk fair enough right f.....n (inaudible) he's in, he gets drunk and they fight and know what I mean, **they get on like f.....n two eejits, but he loves her like.know what I mean, this would break his heart'**
[Defendant's Emphasis]

In light of the defendant's interviews and the defence submission I am not persuaded that it has been reliably established that the defendant did suggest that this offence could have been carried out by the partner of the deceased.

Mitigating Factors

[37] The defendant did not acknowledge his guilt during the course of his interviews, which would have been the most obvious and early statement of remorse. That will, however, be reflected in the reduced discount which the

defendant will be accorded on his plea on re-arraignment. The authorities recognise that the greatest discount for a plea will be accorded to those who have acknowledged their guilt during interview. I am however satisfied that the defendant has expressed genuine remorse for this crime. This is evidenced by (i) his plea of guilty in court which the prosecution accept was, in the circumstances, made at the earliest opportunity (see paragraph 4 of Basis of Plea); (ii) his statements made to the probation officer for the purpose of the pre-sentence report; and (iii) by the “complete and absolute apology” tendered on instruction by his Counsel that this was an “unjustified and despicable offence” and in which apology he expressed empathy and sympathy for the next of kin.

[38] Paragraph 16 of the Practice Statement recognises that mitigating factors relating to an offence will include an intention to cause grievous bodily harm rather than to kill. As the Basis of Plea document records it is common case that the defendant intended to cause grievous bodily harm, not to kill. Accordingly, this is a mitigating factor which I propose to take into account.

[39] In reliance on paragraph 11(b) of the Practice Statement the defence contended that the defendant’s culpability was significantly reduced because of the opinion of Professor Davidson, Clinical Psychologist, which suggested that post traumatic stress disorder (PTSD) was present here as a result of a series of traumas from the defendant’s time in the army. Professor Davidson’s report did not include any expert’s declaration. In evidence he said that the explanation for this was that the report was more rushed than he would have liked and he would normally include that declaration and indicated that he could include it in a supplementary report. The absence of this declaration is quite unacceptable.

[40] The defence drew my attention to a number of circumstances which I will summarise here:

- At the material time, the defendant had consumed alcohol, and was suffering from well documented, combat stress inflicted PTSD;
- He had been brought up the child of separated parents in a broken home in Antrim; he had seen little of his father, who had spent most of his son’s formative years in prison.
- In his mid teens, following a short lived succession of menial jobs, the defendant had joined the general services overseas battalion of the Royal Irish Regiment in 1994 at the age of 16, and was thereafter to spend a decade of service overseas, including in Iraq and Bosnia, and also in security duties in Northern Ireland.
- During his service, he attained the rank of full corporal and also became a military instructor. Mr McCrudden argued that unfortunately “the horrors that he was thereby exposed to were ultimately to destroy him”.

- It was while on active service in the war in Bosnia that he was to be exposed to horrific scenes of slaughter at first hand – including seeing mutilated bodies, children being blown up and seeing, and later being haunted by, the smell of decomposing flesh and dead bodies.
- After a decade of service, the defendant left the army in 2004.
- Despite having come from a broken family, having been brought up in a tough housing estate, having been the son of an alcohol dependent father who had spent repeated periods in prison, and having left school without any formal qualifications – the defendant had weathered his teenage years and his twenties without acquiring any criminal record.
- On leaving the army - despite having thrived in that challenging and disciplined environment – it was there he was subjected to experiences which negatively impacted on his mental and emotional health, rendering him unable to adapt to civilian life, increasingly drinking to excess, abusing drugs, neglecting himself and eking out a nomadic, itinerant homeless life in England and Europe.
- His army service, it was claimed, had cost him dearly - long periods overseas had led to the collapse of his marriage, his mental health began to suffer very significantly, and with all that had gone before, he began to behave completely out of character and to accumulate a petty sessions criminal record.
- He found it difficult to settle into an ordered existence on his return to Northern Ireland in 2006 – moving between addresses in Antrim and Belfast, (a circumstance that was not helped having had his own flat burned out in Antrim).
- He had no regular income or accommodation, he suffered depression, began self medicating with alcohol and drugs, and progressively deteriorated into the commission of petty crime – from 2006 onwards committing offences of dishonesty, public disorder, assaults on police and minor road traffic offences – with respect to which the pre-sentence report observes:

“Lack of stable accommodation, poor capacity to adjust to civilian life, untreated mental health issues, financial difficulties, coupled with alcohol abuse were the main factors contributing to past offences”

- He was recorded as having suffered sleeplessness, recurring nightmares, flashbacks, paranoia, impulsivity, irritability and depression resulting in his being diagnosed as suffering from PTSD.
- Professor Davidson reviewed his medical records (including his military records). On psychometric testing, applying the Post Traumatic Stress Diagnostic scale Professor Davidson recorded scoring as would be expected for someone with a long term diagnosis of PTSD, which included a significantly higher than normal score on the Dissociative Experience scale – including poor memory for important events, failing to recognise family, and experiencing the feeling that one’s body does not belong to one. He further established that his ability to concentrate was particularly poor, which could in turn be responsible for his apparent short term memory impairment, and which can also be associated with PTSD.
- He found that the defendant was at the bottom of the average IQ range.
- He concluded that his clinical interview of the defendant, combined with the psychometrics and the diagnoses by Army medical staff suggested the presence of PTSD as a result of a series of traumas from his time in the Army.
- He further recorded his suspicion that much of this man’s behaviour was driven by anger and impaired impulse control – a feature of PTSD.
- Professor Davidson’s ultimate finding in relation to the section 5 statutory test for diminished responsibility - was to the effect that while the defendant was suffering from PTSD, it was not present to the extent that (as required by statute) it had substantially impaired his responsibility for the killing of the deceased, but nonetheless the PTSD had impacted on his impulse control.
- These conclusions chime with the PSR, (to which ‘PBNI Psychology’ contributed) which records the existence of the PTSD diagnosis, and specifically refer to the defendant’s poor impulse control.

[41] Professor Davidson was called to give oral evidence. Neither the prosecution nor the court was furnished with any supplementary report from Professor Davidson in advance of this development. In the event, he was permitted, without objection, due to the exigencies of the situation and in order to avoid further delay to give oral evidence. I directed a transcript of his oral evidence and set out below some of his material averments:

“Q. Now, I referred earlier to your use, not in this report but your use to me today of the concept of incremental post-traumatic stress disorder or complex post-traumatic stress disorder. Could you just indicate what those phrases mean and

how they are applicable in this case?

A. Essentially complex post-traumatic, typically post-traumatic stress disorder was defined, my Lord, as a single traumatic event which was threatening, life-threatening. More recently then in DSM-5 they have introduced the idea of complex post-traumatic stress disorder, essentially it is that a person who is exposed to a number of incremental stresses, they build up and so it is not necessarily one huge trauma, it is a number of incremental traumas can also lead to post-traumatic stress disorder.

Q. Was that the case in this man's case?

A. I understand from the history and the records that he was subject, as you have outlined in your statement too, a series of traumatic events in Kosovo particularly.

Q. Now, having reached the conclusion that this did not constitute a substantial abnormality of mental functioning, how would you express the degree of impulse control, loss or failure to exercise impulse control in this man, if not a substantial abnormality of mental functioning which would impair his ability to form rational judgment or exercise self-control, how would you explain or define the degree on which the failure to control his impulses affected him in this case. And his Lordship earlier mentioned the definition, as I did, of 11A, 11B rather that 'the offender suffered from mental disorder or from a mental disability which lowered the degree of his criminal responsibility for the killing'. Now, could you indicate how you feel that the degree of impulse control loss which you and others found in this young man, how that, to what degree that affected him?

A. This, my Lord this is so difficult because I really find it difficult in the witness box to quantify legal terms like 'substantial' or 'moderately substantial' or 'not substantial' as a clinician and a scientist I think in terms of numbers but it is, I

don't want to start talking about 50% or 40% or something like that, my Lord, because it really over simplifies this. The only thing I could say, and I am not sure whether it would satisfy a legal mind is that if I was to look at a -

MR JUSTICE TREACY: Now, we don't want you to speculate obviously, we want you to give your expert opinion.

THE WITNESS: Yes. If I was to give an opinion if it was on a scale of negligible to substantial, negligible being obviously what it is and substantial, that the impact of the traumas that I understand this man suffered and the overriding agreement by everyone that he has post-traumatic stress disorder, the impulse control deficit is probably closer to substantial than negligible, that's all I could really say, my Lord. I don't want to start talking about numbers like 50% or 40% of something, it is probably closer to negligible than substantial.

MR McCRUDDEN: ...

THE WITNESS: Or substantial to negligible, sorry.

Cross-examination by Mr Murphy:

Q. Just very briefly. The defendant, when he carried out this killing was angry, is that right?

A. I think, from all accounts he was angry that night, yes.

Q. He knew what he was doing?

A. Absolutely.

Q. And he intended to do what he did?

A. I think from all accounts he did, yes."

[42] In light of the unchallenged evidence from Professor Davidson I am prepared to accept that the defendant's culpability is significantly reduced by reason of his condition (PTSD) which was a disability which lowered the degree of his criminal responsibility although not affording a defence of diminished responsibility (which

was the original purpose for which Professor Davidson prepared his report).

[43] It should be noted that in future if the defence intends to rely on a report to bring themselves within paragraph 11 of the Practice Statement then they must clearly signify this in advance and thereby give the prosecution a fair opportunity of considering this point to enable them to decide whether or not they wish to file a report or call evidence in rebuttal. This is a matter of some significance since the establishment of the factors adumbrated in paragraph 11 or analogous factors “could justify a reduction to a sentence of 8/9 years (equivalent to 16/18 years)” [see paragraph 11 of the Practice Statement]. No evidence in rebuttal was proffered.

[44] Having taken into account the aggravating and mitigating factors set out above (but disregarding for the moment his plea of guilty) I consider that the actual starting point in this case is one of 11 years. However the defendant is entitled to credit for his plea of guilty but he is not entitled to maximum credit since during interview he refused to provide any assistance to the police. He was initially arrested for kidnapping and provided no assistance in relation to the location of the deceased. When her body was ultimately recovered from the river he was then arrested for murder but continued to deny any involvement. It is however accepted that from the date of his arraignment until the date of his re-arraignment the defence could not properly and conclusively advise the defendant on the psychiatric aspects of his case as the psychiatric/psychological reports were not available. In that sense the prosecution accept that his plea of guilty was made at the earliest opportunity for which he is entitled to credit.

[45] I have also taken into account the victim impact reports that have been provided in this case.

Conclusion

[46] In all the circumstances and giving the defendant appropriate credit for his plea of guilty, I fix the minimum term that you must serve before you can ever be considered by the Parole Commissioners for release to be one of 9 years.