Neutral Citation No: [2019] NICC 26 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **COL11122** ***Delivered:*** **20/12/2019**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

R

-v-

MICHAEL GERARD OWENS

_____

SENTENCING REMARKS

_____

COLTON J

[1] The defendant has pleaded guilty to two counts on the indictment namely:

(i) murder, contrary to common law with the particulars being that he murdered Robert Flowerday between 27 January 2018 and 30 January 2018; and

(ii) burglary with intent to steal with the particulars being that on a date unknown between 27 day of January 2018 and 30 day of January 2018 he entered as a trespasser a dwelling namely 36 Mill Road, Crumlin, with intent to steal therein.

[2] He pleaded not guilty at arraignment in respect of both counts on 7 June 2019.

[3] On his application he was re-arraigned on 3 October 2019, well in advance of his trial which was listed for 13 January 2020.

[4] Having pleaded guilty, the court imposed upon the defendant the only sentence permitted by law for that offence, one of life imprisonment. It is now the responsibility of the court in accordance with Article 5 of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order") to determine the length of the minimum term the defendant is required to serve in prison before he will first become eligible to have his case referred to the Parole Commissioners for consideration by them as to whether, and if so, when he is to be released on licence. I make it clear that if and when he is released on licence he, for the remainder of his life will be liable to be recalled to prison if at any time he does not comply with the terms of that licence.

[5] In considering the appropriate tariff I should impose I am grateful for the helpful submissions I have received from counsel in this case. Mr David McDowell QC led Mr Michael Chambers on behalf of the prosecution. Mr John McCrudden QC led Mr Michael Duffy for the defendant. Mr McDowell presented the case on behalf of the prosecution comprehensively and fairly. The factual background set out below was taken from his opening. Mr McCrudden entered an able and sensitive plea in this difficult case on behalf of the defendant.

Background

[6] The deceased Robert Flowerday was a 64 year old retired teacher who lived alone at 36 Mill Road which is situated along a laneway on the outskirts of Crumlin. He was not married and had no children. Since his retirement he had worked on a casual basis as a part-time tutor.

[7] On Sunday 28 January 2018 at approximately 9.20 pm police received a report expressing concern for the safety of Mr Flowerday. He had failed to turn up for a pre-arranged tutoring session and this was considered to be out of character for him.

[8] As a result, the parents of the tutee had gone to Mr Flowerday's home and observed an unknown male in the property. When he had knocked the door of the property, no one had answered and the lights within the house were turned off.

[9] Police attended the property at 9.50 pm. They entered the property which they found to be unlocked. When inside they observed a yellow handled axe had been propped up against the rear door. There was extensive blood splatter and other bloodstaining on various surfaces, suggesting that a violent assault had occurred. They found Mr Flowerday's body sitting in an armchair, covered by a duvet and a cushion. There was cement dust to the left side of his head and in his ear, suggesting that his body had been moved into that position. The police observed that Mr Flowerday was dead and had suffered significant head injuries. He was only partially clothed, wearing only his underpants and one sock on his lower half. A poker with several bloodstains along its length was found at the feet of the deceased. In the porch, there was a claw hammer which had heavy bloodstaining to the underside of the claws, and between them. The blood was Mr Flowerday's. A post mortem examination was carried out on the body of Mr Flowerday by Dr Christopher Johnston. Dr Johnston found 18 separate lacerations to Mr Flowerday's scalp, face and neck. These included a wound to the neck which had penetrated into the base of the skull and transected the left jugular vein and carotid artery. Mr Flowerday also had numerous abrasions. He had over 20 bruises on his hands, arms, legs and torso.

[10] Mr Flowerday was discovered to have sustained very significant injuries to the bones of his head. His nose and jaw were broken and his skull was fractured in five places.

[11] Dr Brian Herron, a neuropathologist found that Mr Flowerday had a subarachnoid haemorrhage together with the constusional injury to his brain, which indicated that he had suffered these injuries when alive. His brain was also significantly swollen. The neuropathological evidence suggested that there had been a period of survival of 30 minutes or more, albeit the victim would have been unconscious.

[12] Dr Johnston concluded that Mr Flowerday had been subjected to a "*sustained assault that was concentrated to his head and neck and that the brain injuries were sufficient to have caused his death*". The majority of the lacerations to the scalp had a linear profile indicating multiple forceful blows with a weapon with a sharp or semi-sharp cutting edge, such as an axe or hatchet.

[13] One of the injuries had transected the left ear and cut deeply into the strong, thick base of the skull, amputating the mastoid process (a bony projection at the base of the skull). The injury reached to the level of the spinal canal and had transected the left jugular vein and carotid artery. It is unlikely that this injury occurred at the same time as the other injuries to the head (as there would not have been a period of survival). Rather, it is likely to have occurred when Mr Flowerday was dead or dying, supporting the view that the assault was prolonged.

[14] Dr Johnston considered that the injuries to Mr Flowerday's hands, wrist and arms were suggestive of injuries sustained while he was trying to defend himself against an attack.

[15] On 29 January 2018, police were approached by a Terence McManus who provided them with an account. Mr McManus informed police that he had met with Mr Owens in the afternoon of 28 January in Crumlin Glen car park. He said that Mr Owens appeared to be drunk.

[16] Mr Owens stated that he intended to go and burgle Mr Flowerday's house and asked Mr McManus to come with him. Mr McManus refused. Mr Owens then consumed a bottle of rose wine and placed a plastic bag over his head as a makeshift balaclava.

[17] Mr Owens then made off in the direction of Mr Flowerday's house. Mr McManus subsequently phoned Mr Owens at 6.00 pm. Mr Owens answered the call. Mr McManus could hear sobbing in the background. Mr Owens told him: "*fuck off, I am doing a job, leave me alone*". Mr McManus told him to get out of the house and Mr Owens refused.

[18] Mr Owens was next seen in Crumlin village at 10.45 pm. He was picked up on CCTV. Mr Owens encountered a man called Colin Toner who was out collecting a Chinese meal. Mr Owens then purchased food from a Chinese restaurant as well. Mr Toner agreed to give Mr Owens a lift.

[19] Mr Toner noted that Mr Owens appeared to be really dirty and that he had a cut to the palm of his hand. The two men heard a helicopter in the air and Mr Toner jokingly asked Mr Owens whether the helicopter was out looking for him. Mr Owens replied; "*Not this time but would you put it past me*". Mr Owens then said "*I am just going to the river to dump these clothes"* before he got out of the car. The clothes that Mr Owens was wearing on the night he committed the murder have never been found.

[20] Mr Owens then travelled to Mr McManus's house and asked to borrow an old phone that Mr McManus had.

[21] When Mr McManus was handing over the old phone to Mr Owens he asked him what had happened and Mr Owens then told Mr McManus: "*I think I've done the cunt, I think I killed him I used a hatchet*".

Arrest and interview

[22] Mr Owens was arrested on the evening of 29 January 2019 and answered "*no comment*" to all questions put to him.

Subsequent enquiries

[23] The police found the deceased's house in disarray. This was in contrast to their findings when they visited Mr Flowerday's home in early December 2017 when the house was observed to be in a tidy state.

[24] Police found the bag that Mr Owens had used as a makeshift balaclava and his DNA was found in the mouth area. This was found within Mr Flowerday's property.

[25] Although police have never recovered the clothing worn by Mr Owens when he committed the murder, they did find a belt in his house which had a spot of Mr Flowerday's blood on it.

[26] Fingernail scrapings taken from Mr Owens yielded the DNA of the deceased.

The relevant legal principles

[27] As indicated earlier, the task for the court is to fix the minimum term the defendant must serve before the Parole Commissioners will consider whether it is safe to release him on licence.

[28] Article 5(2) of the 2001 Order provides that the minimum term:

> *"… shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."*

[29] The legal principles that the court should apply in fixing the minimum term are well settled.

[30] In **R v McCandless & Ors** [2004] NICA 1 the Court of Appeal held that the Practice Statement issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 should be applied by sentencers in this jurisdiction who are required to fix tariffs under the 2001 Order.

[31] The Practice Statement identifies a normal starting point of 12 years in paragraph 10. In paragraph 11 factors are identified which might justify reducing the normal starting point.

[32] Paragraph 12 identifies a higher starting point of 15 to 16 years. The higher starting point would apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. The paragraph goes on to identify features which might make a crime especially serious.

[33] The Practice Direction recognises that starting points can be varied upwards or downwards and identifies aggravating and mitigating factors which relate to either the offence or the offender in the particular case.

[34] Those features or factors are set out in paragraphs 14 to 17.

[35] Paragraphs 18 and 19 deal with particularly grave cases which would justify a term of 20 years and upwards.

The appropriate tariff

[36] In considering the appropriate tariff I should impose I have fully considered the submissions made by counsel and I will deal with the matters they raised in the course of this determination.

[37] Before coming to that determination it is essential that I highlight the victim impact statements that I have received from the deceased's family.

[38] I have received compelling and moving statements from relatives and friends of the deceased including Alan and Heather Flowerday, Jacqueline McKay, Pat Flowerday and Fred and Agnes Flowerday. It is abundantly clear to this court that Robert's murder has had a devastating impact on family members and friends. It has interfered with their health and their quality of life to a huge degree.

[39] What emerges from these victim impact statements is a brother who was dearly loved and valued.

[40] That love and value was not confined to family members. It is clear from demonstrations of support from members of the community living in the Crumlin area that they too were shocked and appalled at Robert's murder. They have expressed their support for the family in very public ways through vigils and personal demonstrations of sympathy and support. Former students have taken to social media to express their appreciation for Mr Flowerday.

[41] The picture that emerges is of a man who lived a blameless and worthy life. He was someone who made a valuable contribution to the community which is understandably shocked and appalled at his brutal death.

[42] The sense of shock and loss felt by family members and friends will endure. The statements I have received bring home fully to me the impact that Mr Flowerday's murder has had. I take that impact fully into account when setting the appropriate tariff. In doing so I recognise that the loss of Mr Flowerday's life cannot be measured by the length of the tariff that I impose.

[43] It is the responsibility of the court to impose a tariff on the defendant in accordance with the legal principles. I do so fully cognizant of the impact of Mr Flowerday's death, so movingly expressed in the victim impact statements I have read.

Pre-sentence report

[44] In addition to the victim impact statements I have received a pre-sentence report from the Probation Service of Northern Ireland.

[45] The report provides an insight into the defendant's personal background. He was born on 2 April 1984 and is now aged 35.

[46] After a period of employment ended in 2009 his lifestyle became characterised by the excessive consumption of alcohol and the misuse of illegal drugs, something which escalated after a family tragedy involving his sister about six years ago. This substance misuse has resulted in criminal convictions in the intervening years and has culminated in the awful crime to which he has pleaded guilty.

[47] It is clear from his account of the murder that at the time of its commission he had been drinking heavily and consumed significant quantities of cocaine.

[48] The report contains, for the first time, an account of his version of events. It makes sorry reading. What appears to have been a mean attempt to steal money by entering the deceased's house escalated into a vicious assault as the deceased sought to protect his property and defend himself. That assault involved the use of

weapons including a hammer, a hatchet and a poker. It involved prolonged and repeated violent assaults on a defenceless man in his own home. After killing Mr Flowerday he moved his body to the living room so that it could not be seen in the front porch and took steps to conceal his involvement in the crime.

[49] The report records that the defendant accepts full responsibility for his actions and has been overwhelmed by a sense of shame since the offence.

[50] The Probation Service has come to the conclusion that he presents a high likelihood of re-offending. Although not strictly relevant for the purposes of this sentencing exercise the PBNI do not assess the defendant as presenting a significant risk of serious harm at this time. This is essentially based on his limited history of offending. Mr Owens does have a number of convictions but none which would suggest he is prone to the type of violence used in this case. He does have two previous convictions for burglary and theft, one of a non-dwelling house and the other of a vacant property. However, these are of some vintage having been dealt with in the Magistrates' Court in 1999 and 2009.

Medical evidence

[51] I received a medical report in relation to Mr Owens from Dr Gerry Loughrey, consultant psychiatrist. Dr Loughrey had access to Mr Owens's medical notes and records including his mental health records. He also had access to the pre-sentence report. He examined Mr Owens in prison on 7 November 2019. It was Dr Loughrey's expert opinion that Mr Owens suffers from a mixed personality disorder with features of emotionally unstable personality disorder and sociopathic personality disorder. The report repeats Mr Owens expressed remorse and recognition of the impact of what he has done. These disorders have accounted for self-harming behaviours in the past. Dr Loughrey also describes other salient features including a degree of psychological dependence on alcohol and drugs. Dr Loughrey does not think that Mr Owens had true paranoid thinking. In the report Mr Owens confirms that at the time of the offence he owed a significant sum of money arising from his abuse of cocaine in particular. It was this debt that motivated his decision to "do a burglary". In terms of future treatment Dr Loughrey endorsed the recommendation of the pre-sentence report that Mr Owens' sentence plan should include: an engagement with psychology in the prison and participation in all appropriate assessments to ascertain suitability for specific programmes; engagement in alcohol and substance misuse intervention; engagement in an enhanced thinking programme and engagement with the mental health service in the prison to monitor his mental health.

Application of the principles

[52] In applying the practice statement I bear in mind that it is not to be interpreted as a straitjacket designed to create a rigid, compartmentalised structure

into which each case must be shoe horned. As the Court of Appeal said in **McCandless**:

> *"… The sentencing framework is, as Weatherup J described it in paragraph 11 of his sentencing remarks in* ***R v McKeown*** *[2003] NICC 5, a multi-tier system. Not only is the* ***Practice Statement*** *intended to be only guidance, but the starting points are, as the term indicates, points at which the sentencer may start on his journey towards the goal of deciding upon a right and appropriate sentence for the instant case."*

[53] Thus, the selection of a starting point is not a mechanistic or formulaic exercise. The guidelines are there to assist the court to proceed to, what in the circumstances of the case, it considers is a just and proportionate sentence having regard to the guidelines. In the words of the statute the tariff should "*be appropriate to satisfy the requirements of retribution and deterrence*".

[54] I have no hesitation in saying that the seriousness of this offence clearly places this case in the higher starting point range of 15/16 years referred to in **McCandless**.

[55] The offender's culpability was exceptionally high. A number of the features identified in paragraph [12] of **McCandless** which justify the higher starting point are clearly present in this case. The murder was done in the course of a burglary. I consider that the victim was vulnerable. He was attacked within his own home. There was evidence that gratuitous violence was used during the course of the murder which was committed using multiple weapons including a hammer and a hatchet. As a result extensive and multiple injuries were inflicted on the deceased before death. Any one of these features could justify a starting point of 15/16 years. The presence of so many of the features in my view clearly justifies a tariff well in excess of the starting point suggested. I bear in mind of course that I should be careful not to "*double count*" by including factors as aggravating features which are already built into the starting point I choose. Mr McCrudden in his forensic legal analysis of the appropriate sentencing principles encapsulates the gravamen of the offence as "a gratuitously violent weaponised attack inflicting multiple injuries on the deceased". However, I repeat that I am not engaged in a formulaic exercise. As indicated the presence of multiple features set out in paragraph [12] can properly lead to a higher starting point whether they are built into that starting point or treated as separate aggravating features.

[56] In addition to the matters to which I have referred the attempts made by the defendant to dispose of his clothing after the murder and the steps he took to concealed the deceased's body are also capable of constituting aggravating features. The defendant does have a criminal record and whilst I take this into account it is not a significant aggravating factor.

[57] In terms of mitigating factors, these are difficult to find. In terms of the offence it is correct to say that the defendant did not go to the house armed. Nonetheless, he chose to arm himself when Mr Flowerday sought to defend himself. Mr Owens had ample opportunity to desist from the assault and spare Mr Flowerday's life. In terms of the offender Mr McCrudden points to what he says are genuine expressions of remorse and shame, expressed in the pre-sentence report and in the course of the plea on his client's instructions. The report records:

> *"Mr Owens describes his actions as 'disgraceful' and he says he has been overwhelmed with a sense of shame since the offence. Mr Owens also noted the vulnerability of the victim and the brutal nature of the offence during interview and he expresses a clear awareness of the impact of his actions on the victim's family as well as his own family."*

[58] In addition to his expressions of shame and remorse the defendant gives a very full and harrowing account of his actions on the night in question in the report. I accept Mr McCrudden's submissions that such a frank and fulsome account is rare.

[59] Whilst evidence of genuine remorse can be a mitigating factor, given the nature of the murder in this case I consider that any mitigation in this regard must be small, although I make some allowance for it.

[60] Mr McCrudden urges the court to take into account the fact that Mr Owens is suffering from a mental illness as personal mitigation. There is no doubt that Mr Owens does indeed suffer from a mental illness. I have considered the report of Dr Loughrey carefully and there is nothing in that report which significantly reduces the defendant's culpability at the time of committing the murder. There is nothing in the medical report that explains Mr Owens' conduct. Like the expressions of remorse I do take his mental illness into account but it is only of marginal benefit to him in terms of mitigation for this offence.

[61] In truth the only true mitigation is the fact that the defendant has pleaded guilty.

What then is the appropriate reduction, if any, for the guilty plea in this case?

[62] It is a long and firmly established practice in sentencing law in this jurisdiction that where an accused pleads guilty the sentencer should recognise that fact by imposing a lesser sentence than would otherwise be appropriate. The defendant is clearly entitled to a reduction for his guilty plea in this case.

[63] In considering the appropriate discount for a plea of guilty in a murder case it is necessary to take into account the guidance issued by the Court of Appeal in the case of **R v Turner and Turner** [2017] NICA 52.

[64] In that case the Court of Appeal considered the discount which was appropriate in tariffs in murder cases and came to the conclusion, at paragraph [40]:

> "*We consider, therefore, that there are likely to be very few cases indeed which would be capable of attracting a discount close to one-third for a guilty plea in a murder case. The circumstances of a mercy killing for example might possibly achieve that outcome. Each case clearly needs to be considered on its own facts but it seems to us that an offender who enters a not guilty plea at the first arraignment is unlikely to receive a discount for a plea on re-arraignment greater than one-sixth and that a discount for a plea in excess of 5 years would be wholly exceptional even in the case of a substantial tariff.*"

[65] The court however did go on state that:

> "*We have concluded, however, that it would be inappropriate to give any more prescriptive guidance in this area of highly fact sensitive discretionary judgement. Where, however, a discount of greater than one-sixth has been given for a plea in a murder case the judge should carefully set out the factors which justify it in such a case.*"

[66] In determining what the lesser sentence should be the court should look at all the circumstances in which the plea was entered.

[67] In this case the prosecution accept that the plea was "*a timely plea*". Whilst it was not at the first opportunity Mr Owens applied to be re-arraigned well in advance of his trial. That plea reinforces the remorse he has expressed and the very full account he has given of his conduct in the reports I have considered. As against that it must be borne in mind that the defendant gave a "no comment" interview, exercised his right to compel the main prosecution witness to give evidence and to be cross-examined at committal and pleaded not guilty on arraignment, notwithstanding that the initial date for the arraignment was adjourned.

[68] Taking into account the appropriate starting point, the aggravating and mitigating features prior to consideration of the discount for a plea I have come to the conclusion that the appropriate tariff would be one of 20 years imprisonment. That is the tariff I would have imposed in the event of a conviction after a contested trial. If the defendant is allowed a discount of one sixth for his plea that would result in a tariff of 16 years and 8 months. In light of his timely plea I consider that he is entitled to a one sixth discount and balancing all the circumstances in which the plea was entered I propose to reduce the tariff marginally from one of 16 years 8 months to one of 16 years and 6 months. Taking account of all the factors in this case

I consider that 16 years and 6 months is the right and appropriate tariff in accordance with the legal principles set out in **McCandless** and **Turner**.

[69] Mr Owens, a sentence of life imprisonment has already been imposed on you pursuant to your plea to the count of murder. Pursuant to Article 5 of the 2001 Order I determine the minimum term that you must serve in prison before you will first be eligible to have your case referred to the Parole Commissioners for consideration by them as to whether you should be released on licence is to be one of 16 years and 6 months. The tariff shall include a period of 537 days which is the period you have already served in custody on remand for this offence prior to the imposition of the life sentence on 3 October 2019.

[70] In respect of the second count I impose a sentence of 2 years imprisonment, which sentence shall be served concurrently with the tariff of 16 years and 6 months.