

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

Delivered: 31/10/2003

31/10/2003

IN THE CROWN COURT IN NORTHERN IRELAND

R

-v-

NOEL GERARD KING
SEAN CHRISTOPHER KING
HUGH WILLIAM FOSTER

WEATHERUP J

[1] The three defendants were charged with the murder of Kenneth Kevin Paul Karl Oslon in Belfast on 3 August 2001. At arraignment Noel Gerard King pleaded not guilty to murder but guilty of manslaughter by reason of diminished responsibility but that plea was not accepted by the Crown. At the commencement of the trial before a jury on 12 May 2003 Noel King asked to be rearraigned and pleaded guilty to murder. Sean Christopher King and Hugh William Foster each pleaded not guilty to murder and after a trial commencing on 21 May 2003 each was convicted of murder by a jury on 13 June 2003.

[2] The sentence for murder is prescribed by law as a sentence of life imprisonment. However in respect of all defendants found guilty of murder the Court must determine whether there should be, and if so the length of, any minimum term of imprisonment specified to be served by each defendant before he can be considered for release.

[3] It should be emphasised that the Court, in specifying part of the sentence, is not setting a release date. The part of the sentence specified by the Court "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"

(Article 5(2) of the Life Sentences (Northern Ireland) Order 2001). After the specified part of the sentence has been served the Life Sentence Review Commissioners will direct the release of the prisoner only if "satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined" (Article 6(4) of the 2001 Order).

[4] In *R v McKeown* [2003] NICC 5 I set out the background to this procedure and my approach to fixing minimum terms, which was to adopt the approach of Lord Woolf in England and Wales on 31 May 2002 in Practice Statement (Crime – Life Sentences) [2002] 3 All ER 412. I adopt the same approach to the present cases.

[5] The approach of the Practice Statement to adult offenders is as follows -

“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 failure to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age, (b) clear evidence of remorse or contrition; (c) a timely plea of guilty.

Very serious cases

18. A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.

19. Among the categories of case referred to in para 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime or the offence was a terrorist or sexual or sadistic murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate."

[6] There are two matters that should be made clear. First, a minimum term is not the equivalent of a fixed sentence of imprisonment of the same length. A fixed term of imprisonment may attract 50% remission and there is no remission of any part of a minimum term. So the effect of imposing the normal starting point of 12 years as the minimum term is the equivalent of a fixed term of imprisonment of 24 years and the effect of imposing the higher starting point of 15 or 16 years as the minimum term is the equivalent of a fixed term of imprisonment of 30 or 32 years. Secondly at the end of the period served of a fixed term sentence the prisoner is released. At the end of a minimum term the prisoner is not entitled to be released until it is decided that he does not present a risk to the public, and even then he is on licence for the rest of his life and liable to be recalled to prison.

[7] It is not necessary to repeat in detail all the circumstances of this case that were examined by the jury at length. In summary the position was as follows. In the early evening of Friday 3 August 2001 the three defendants were in the region of Simpsons shop and Fisherwick Church on Malone Road Belfast. Unfortunately they had been leading aimless lives of street drinking and begging and squatting in vacant premises. Mr Oslon had a flat in the area and he too was affected by the habitual consumption of alcohol. There was some dispute as to the extent that each of the defendants knew Mr Oslon but he was also in the same area on that evening. For reasons that are not clear but may have been connected with the suggestion that Mr Oslon had given some information to the police

there was an altercation involving Mr Oslon that led to the three defendants accompanying him to a nearby entry. There he was attacked and died.

[8] Only the three of you know exactly what happened but the examination of the scene and the body have revealed some indication of events in the entry. The forensic evidence would indicate that the attack on Mr Oslon occurred at various points along the entry and culminated in an extensive attack at the blocked end of the entry, including repeated assaults while he was lying on the ground. A wooden plank and a brick were used as weapons in the attack. The evidence from the post mortem would indicate that the cause of death was blunt trauma to the head. This was a brutal killing in which the victim was beaten with a piece of wood and a brick and then an attempt was made to burn the body. This was an event marked not only by its brutality but by the almost casual manner in which it came about. You brought this man to a quiet alleyway and there events unfolded that culminated in the mutilation of a human life.

[9] At police interviews Noel King admitted involvement in the attack on Mr Oslon and Sean King and Hugh Foster admitted their presence at the scene of the crime but each denied involvement, an approach that was maintained in giving evidence to the Court.

[10] Noel King is now aged 25 years. At secondary level he attended a special school for children with emotional and behavioural difficulties before joining various YTP schemes. He has a verbal IQ of 76 which is in the 'below average' category and places him in the bottom 5% of the population. He has described to Drs Bownes, Browne and Weir a history of alcohol and substance abuse and has a severe alcohol dependency syndrome. His criminal record extends to offences of dishonesty, car-crime and assault and he has served periods of imprisonment. The pre-sentence report noted that Noel King's admission of culpability appeared quite limited although he expressed remorse for the death of Mr Oslon, as he has done from the time he was interviewed by the police.

[11] Sean King is the older brother of Noel King and is now aged 29 years. He too attended a special school and at the age of 15 he was removed to a Training School for 2 years. He too has a history of alcohol and substance abuse. His criminal record extends to disorder and dishonesty rather than violence. While in prison Sean King has certain educational attainments and for that he is to be commended.

[12] Hugh Foster is now aged 38 years. He attended a school for children with moderate learning difficulties but never engaged in any training and has never been employed. His verbal IQ is 64 which is in the 'extremely low' category and places him in the bottom 1% of the population. He has a history of alcohol abuse from his teenage years with established alcohol dependency and has also previously engaged in abusing prescription medication and illicit drugs. He has a criminal record extending to disorder and dishonesty but also violence in the

form of assault, possession of a petrol bomb and robbery with a firearm leading to periods of imprisonment.

[13] The first step is to determine the starting point for the minimum term that the offence should attract. In the present case the range is from the normal starting point of 12 years to the higher starting point of 15/16 years. Counsel for the defendants contend that the normal starting point of 12 years applies in this case. Reference is made to the statement in paragraph 10 of the Practice Statement that the normal starting point applies to the case of a quarrel or loss of temper between two adults known to each other. However paragraph 10 also provides that the case will not have the characteristics referred to in paragraph 12 which deals with the nature of a case attracting the higher starting point. The higher starting point applies where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Examples are given of the features that make the crime especially serious. Example (f) repeats the case where the victim was vulnerable. Counsel for the defendants contend that while the victim was an alcoholic he does not fall into the category of vulnerable people contemplated by the Practice Statement such as the young, the elderly or the disabled who could be said to be particularly vulnerable. I do not accept that this difference can be drawn between a drunken man and the other examples of vulnerability and consider that in the present case the victim was in a particularly vulnerable position because he was outnumbered by three attackers and he was under the influence of alcohol and could not have mounted any effective defence in the circumstances. Example (j) refers to extensive injuries being inflicted on the victim before death. Counsel for the defendants contended that this was not such a case and that this factor was intended to refer to a case where the victim had undergone extensive suffering, which it was contended did not apply as the victim would have been rendered unconscious at an early stage. I do not accept that this factor is limited to consideration of the suffering of the victim but extends to the added culpability of the offender arising from the action of inflicting extensive injuries. Whether the injuries can be described as extensive is a matter of fact and degree in each case and in the present case I am satisfied that there were such extensive injuries. Accordingly I would apply a starting point of 15 years to the present case.

[14] The defendants Counsel further contended that paragraph 11 of the Practice Statement applied to reduce the normal starting point where the offenders culpability was significantly reduced because the offender suffered from a mental disability that lowered the degree of criminal responsibility for the killing. Although I have not applied the normal starting point I consider the issue of the defendants lowered degree of criminal responsibility. The reports of Dr Bownes, Consultant Forensic Psychiatrist, on Noel King and Hugh Foster do indicate that each had reduced capacity to evaluate the potential consequences of their actions. However in each case Dr Bownes indicated that there was no evidence that either might not be consciously aware of his own actions or unable to determine that the behaviour alleged against the defendants was wrong. I do

not consider that the defendants suffered from a condition that lowered the degree of their criminal responsibility for the death.

[15] The next step is to consider the variation of the starting point to take account of the aggravating and mitigating factors relating to the offence. The specified aggravating features include at (d) the destruction of the crime scene. I find that setting fire to the body after the death was an attempt to interfere with the crime scene so as to inhibit the proper investigation of the crime and that in the case of each defendant I proceed on the basis that your joint enterprise extended to that action of setting fire to the body and that accordingly each of you was responsible for that action.

[16] The specified mitigating factors in relation to the offence include at (b) spontaneity and lack of pre-meditation. I am satisfied that there was no pre-meditation on the part of any of you and that the events leading to the death were a spontaneous reaction to exchanges that took place shortly before the attack on the victim.

[17] A further specified mitigating factor is that the offenders had an intention to cause grievous bodily harm rather than to kill the victim. In the present case Counsel for the defendants contend that the evidence did not establish that there was an intention to kill. The prosecution dispute that contention. The case went to the jury on the basis that an intention to kill or to cause grievous bodily harm is sufficient for a conviction for murder. Of course the view of the jury on this issue is not known so how is the Court to determine whether the guilt of the defendants is based on an intention to kill or an intention to cause grievous bodily harm. In my view that can only be achieved if the Court forms its own view and can be satisfied beyond reasonable doubt on the basis of the evidence that the defendants had the intention to kill. The infliction of blows to the head of the victim while he was lying on the ground by the use of a plank of wood and a brick in the circumstances in which that occurred in the present case satisfy me beyond reasonable doubt that the perpetrator had an intention to kill the victim. While Noel King has admitted striking the victim on the head with a brick the actual perpetrator or perpetrators who struck any other blows to the head with wood or brick have not been identified. The convictions and the plea of guilty of the defendants establish that they acted as part of a joint enterprise that involved repeated blows to the head and each is responsible for the death. In all the circumstances I am satisfied that the participants intended to kill and that there can be no mitigation on the basis of the lesser intention to cause grievous bodily harm.

[18] Next, consideration must be given to the aggravating and mitigating factors in relation to each offender. The aggravating factors include the previous record and failures to respond to previous sentences, to the extent that that is relevant to culpability. Noel King has a significant record and the pre sentence

report comments that numerous periods in custody have failed to impact on reoffending and previous probation reports noted an ambivalent response to supervision. Sean King has a lesser record than his younger brother and without violent behaviour. Hugh Foster has a significant record including significant violence and the pre-sentence report comments that numerous periods in custody have had no deterrent effect and periods of statutory supervision have not had any constructive impact. Given the magnitude of this crime in comparison to previous offending and sentencing I would not propose to distinguish between the defendants in relation to the degree of aggravation arising from this factor and would accord no greater aggravation to the defendants whose records are more serious.

[19] The mitigating factors relating to the offender may include at (b) clear evidence of remorse and at (c) a timely plea of guilty. Noel King admitted involvement in the offence at interview by the police and has expressed his remorse to various parties. He pleaded guilty to manslaughter by reason of diminished responsibility at arraignment before pleading guilty to murder at the commencement of the trial. I treat his plea on arraignment as a timely admission of responsibility for the death of Mr Oslon subject to the issue of diminished responsibility. Noel King and Hugh Foster maintained their denial of responsibility for the death and that position was rejected by the jury. In addition a defendant's age is a mitigating factor. The defendants contend that allowance should be made for their development age, which in each case would be considerably lower than their actual age because of limited intellect and I take account of that factor. Further, although I have not assessed the mental condition of any defendant as affecting his criminal responsibility I do take account of their background and intellectual abilities.

[20] Taking all the considerations into account I propose to give a significant reduction in the minimum term in the case of Noel King to reflect the mitigating factors I have referred to above. In the case of Noel King I propose to specify a minimum term of 11 years. In the case of Sean King I propose to specify a minimum term of 16 years. In the case of Hugh Foster I propose to specify a minimum term of 16 Years. In each case the period required to complete the minimum term will include the period on remand in custody on this charge.

[21] Noel King, I sentence you to life imprisonment and specify a minimum term of 11 years before you are considered for release. Sean King, I sentence you to life imprisonment and specify a minimum term of 16 years before you are considered for release. Hugh Foster, I sentence you to life imprisonment and specify a minimum term of 16 years before you are considered for release.