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(subject to editorial corrections)*

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THE QUEEN v STEPHEN HENRY McPARLAND

DECISION ON TARIFF

Before Kerr LCJ and Coghlin J

KERR LCJ

Introduction

1. On 16 March 1998, having been found guilty by a jury of the murder, on 31 January 1997, of a 33 year old man, Gary Alexander McKimm, the prisoner was sentenced to life imprisonment by Coghlin J at Belfast Crown Court. He was refused leave to appeal in February 1999. The prisoner has been in custody since 1 February 1997.

2. On 17 May 2004 Coghlin J and I sat to hear oral submissions on the tariff to be set under Article 11 of the Life Sentences (NI) Order 2001. The tariff represents the appropriate sentence for retribution and deterrence and is the length of time the prisoner will serve before his case is sent to the Life Sentence Review Commissioners who will assess suitability for release on the basis of risk.

Factual background

3. Shortly after 4.00pm on 31 January 1997 a local woman returning from the shops observed the prisoner violently assaulting the deceased in an alleyway between Titania Street and Wilowhome Parade off Cregagh Road, Belfast. The deceased was lying face down on the ground when the prisoner, who had been standing about two feet away talking to another man, walked to the deceased, lifted his foot and stamped three times on his head. The prisoner was said to have been laughing throughout. The witness ran to a local shop and the police and an ambulance were called. When witnesses returned to the scene the

deceased was found alone and he displayed very weak vital signs. Despite the efforts of police and paramedics Mr McKimm could not be revived. Life was pronounced extinct at 5.15pm. Enquiries were made and Mr McKimm's identity was established. The police were made aware that the deceased had a problem with alcohol and that he would habitually drink with the prisoner and another man, Thomas Boyd.

4. Boyd was arrested on the evening of the murder and made a statement to police implicating the prisoner. He said that the three had spent much of the 31 January drinking. They travelled from the Castlereaugh area to the DHSS office in Knockbreda where a dispute arose between the prisoner and the deceased regarding £20 that was owed by one to the other. The deceased was drunk at this stage and Boyd recalled that he was "mouthing off" at the prisoner. The prisoner was angered at his failure to obtain money from the DHSS. The deceased was agitated that the prisoner had cashed a giro cheque belonging to a friend and accused the prisoner of fraud. The three caught a bus to the Cregagh Road. Boyd's statement continued:

"While the bus was going Gary and Steve were at each other in a slagging match and they were getting louder as they went on ... Gary and Steve [were] still nagging and mouthing off at each other. We went into the entry behind the bank and then up the other entry that leads off it... all the time Gary is still giving off about his £20 and the giro that was stolen. At this time Steve said to Gary 'If you don't shut up I'll give you another two black eyes'...he was referring to a time two weeks previous when him and Gary had a fight up at the DHSS...Gary was still going on about the money and suddenly Steve just drew back and punch[ed] him in the face. I would say he punched him about 4 times really hard. At this Gary just slumped back against the wall in the entry but he was still on his feet. When that happened I ran over to Steve and grabbed him and pulled him off Gary. Steve broke free from me and went back at Gary again. At this time I saw a wee woman passing across the bottom of the entry where we had come in. She looked down at us but didn't stop. Steve again went over to Gary and was again punching him in the face. I again go over and pull Steve off and he says to me 'If you don't fucking watch yourself you'll get the same done to you and you know what I'm talking

about". By this time the blood was coming from Gary's mouth and nose where he had been punched and he was down on his hunkers probably on his backside still with his back against the wall. By this time Steve was just like a zombie there was spit and foam round his mouth he just seemed to have gone crazy although he had not been drinking very much he had been keeping himself straight. He said 'I wish I could find a breezeblock to kill this fucking bastard'. He then took a run at Gary and started to lob big kicks at him. He started off kicking Gary about the legs and body and then kicking him on the head and face. I said 'Look enough that[s] enough I'm getting out of here' and I started to walk away. As I walked away I looked back and by this time Gary had started to fall over onto his side. I then saw Steve standing over Gary when he was lying on the ground and all I could see was Steve's leg going up and down where he was stamping on Gary's head. He was just laughing and sort of shouting at Gary 'Die, die, die you bastard'. There was no sound from Gary and I was at the end of the entry and could still hear Steve shouting 'Die you bastard'. I walked on out of the entry onto the Cregagh Road, crossed the road and walked along towards the Woodstock. I should say I didn't see Steve with any weapons he just used his hands and feet but I did see him pulling one of the wheelie bins over to Gary when he was lying on the ground. I don't know what he did with the bin or where he put it."

5. The prisoner caught up with Boyd on Woodstock Road and they went for a drink in a local bar. Later they went to the prisoner's former home where, after a dispute about the incident, the prisoner ran off. Boyd was later arrested. The prisoner was arrested on 1 February and charged on 2 February. Throughout police interviews he maintained his innocence, claiming that Mr McKimm had left him and Boyd after they disembarked the bus on Cregagh Road.

6. Forensic evidence strongly supported the conclusion that the prisoner was in close contact to the deceased while his blood was being shed. A bin at the scene was found to have the deceased's blood on its base, indicating that it was in close contact to him as he shed blood. The prisoner's fingerprints were found on the bin.

7. Dr Derek Carson, Deputy State Pathologist carried out a post mortem examination of the deceased on 31 January 1997. Dr Carson concluded that death was due to brain injury, subdural and subarachnoid haemorrhage and accumulation of blood in the airway due to multiple blows on the head and face with fractures of the nasal bones and lower jaw. At the time of death the deceased had alcohol in his blood that would have caused "at least moderate intoxication" together with a small concentration of a tranquilliser. The autopsy report contained the following passages: -

"Death was a consequence of multiple head injuries. These involved most of the left side of the head and also the face, nose and lower jaw, with two further injuries on the right side of the head. The injuries on the left side were virtually confluent covering a wide area of the scalp, with abrasion and bruising externally and extensive bruising on the under surface of the scalp. There were fractures of the nasal bones and a major fracture of the left side of the lower jaw. Patchy abrasions, some of linear type, covered most of the forehead and there was bruising of both eyes. Quite a severe laceration was seen on the right side of the head behind the ear and the upper part of the ear lobe was partly torn away from the scalp. There was also bruising and abrasion of both lips.

Internally there was swelling of the brain and blood and blood clot over its surface....Blood from the nose and the broken jaw had accumulated in the air passages and this together with the brain injury was the cause of death. The broken jaw could also have been an impediment to breathing since the jaw fracture was severe and complete. Death would not have been immediate but is not likely to have been long-delayed.

There were other injuries elsewhere but of much less significance, the principal ones being those on the back of the left forearm, wrist and hand.

Many of the injuries to the head could have been caused by kicks and stamping on the head. Some were of linear type suggesting a broad edge and

could have been made by a bin...It would seem that considerable force was used, however applied."

Sentencing remarks

8. The judge reviewed the prisoner's extensive criminal record and then said: -

"I am entirely satisfied that this was a merciless and ferocious attack upon an unfortunate drunk who did not have the ability to even attempt to defend himself. I think that there is much of the bully and coward in you, and I have no doubt that the sentence of life imprisonment is thoroughly justified in your case."

Antecedents

9. The prisoner had a poor criminal record consisting of 24 separate court appearances between 1982 and 1997. The record is dominated by offences of dishonesty (including handling, burglary, theft and deception) and relatively minor road traffic violations. But he was also convicted of an offence of violence in December 1985 when he was given a 3-year probation order in Belfast Crown Court for attempted murder.

Representations

10. The deceased's brother, four sisters and aunt have submitted representations. Stephen McKimm, the deceased's brother, has stated that his mother was diagnosed with cancer a month before the murder and that dealing with both events has had a long term impact upon him. Mr McKimm said that his father, who died recently, could not come to terms with the murder and was changed by it. He stated that his own promotion prospects and financial position were affected at the time, and that he faced extra pressure as the sole driver in the family during the funeral and trial periods.

11. Deborah McKimm, the deceased's sister, said that since her brother's murder she has suffered panic attacks and weight loss. She is on anti-depressant medication. Ms McKimm is convinced that the death made matters worse for her mother who was suffering from cancer. She said that her father did not get over her brother's murder before his own death. Another sister, Kathleen McKimm, stated that she has suffered nightmares since her brother's murder. Violence on television causes her stress. She cannot go near the murder scene.

Ms McKimm is of the view that her mother and father lost interest in life when they learnt of the murder. She said that the family's heartache would remain with them for the rest of their lives. Another sister, Muriel McKimm, said that she has been on medication for panic attacks and anxiety since the murder and that she still suffers from nightmares. She says that her father was "tortured" by the death, which "broke his heart". She recalled the emotional difficulty in attending the prisoner's trial and states that he showed no remorse and waved to the deceased's family on being found guilty. Another sister, J McKimm, said that she was placed on medication after the murder. She blames the murder for her father's premature death.

12. The deceased lived with his aunt, Margaret Martin, for five years before his death. She has said that that he was "like a son" to her. She stated that the murder changed her life completely. She is being treated for depression and thinks about her nephew every day. She stated that life does not mean anything to her any longer and that her brother, the deceased's father, never recovered after the murder. She recalled that the prisoner "laughed and waved" at the deceased's family after he was sentenced.

13. Representations were received from the prisoner's solicitor, Stephen Tumelty, and from the prisoner himself. Mr Tumelty submitted that the prisoner had made genuine efforts to improve himself and has changed from the immature young man who committed the murder. He asked that the prisoner's good disciplinary record and courses attended while in prison be considered. The prisoner stated that the murder sprang from an argument after all involved had taken drink. He stated that he feels "deep regret" for all that has happened, that at times it weighs heavily on him and that he has voluntarily addressed his problems with alcohol and anger management. The prisoner said that he has maintained a clear disciplinary record while in prison, has attended education classes and attained certificates in various subjects. He wishes to do an Open University degree. The prisoner stated that he has attempted to give something back to society by contributing to the Braille unit while in prison.

14. On behalf of the offender Mr Farrell submitted that the attack on Mr McKimm was not pre-planned. It was the result of a drunken and pointless quarrel. He suggested that the case fell within the normal starting point category outlined by Lord Woolf CJ in his *Practice Statement*.

The Practice Statement

15. In *R v McCandless & others* [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 were required to fix

tariffs under the 2001 Order. The relevant parts of the *Practice Statement* for the purpose of this case are 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 unupportable 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."

Conclusions

16. We consider that this case should be treated as falling within the higher starting point category. The offender's culpability was exceptionally high. When he had disabled his victim by the initial attack he launched a prolonged,

merciless assault upon him with the plain intention of killing him. Although he had taken alcohol the available evidence suggests that he was not drunk. He resisted attempts to restrain him from a further murderous attack on Mr McKimm and was clearly intent on killing him. The deceased man was in a wholly vulnerable condition by the time that the fatal injuries were inflicted on him. Not only was he quite unable to defend himself, he was insensate and lying on the ground. The attack on him was not only senseless, it was remorseless and persistent. The attack was sadistic and extensive multiple injuries were inflicted. The need for a strong deterrent element in the tariff to be fixed is obvious and compelling.

17. In the prisoner's favour it should be recognised that he has made progress while in prison. He has recently enrolled in a journalism course with the Writers Bureau College of Journalism in Manchester and is actively engaged with Maghaberry's writer in residence, Carlo Gebler. The prison's education manager, Geoff Moore, describes him as a "good student" and a "great asset" who has gained certificates in English, maths, numeracy and Braille. The Reverend Stephen Neilly has written to the court to say that the prisoner attended a course run by the Presbyterian Chaplain and actively participated in it. David Johnston of the Braille Unit reports that the prisoner has been involved in the unit for 4 ½ years and is a "valued member". The prisoner is said to have advanced his education at every opportunity and is completing a course that will enable him to teach the subject.

18. Unfortunately, however, we have been quite unable to detect evidence of genuine remorse on his part or any real recognition of the enormity of his crime. He contested his guilt notwithstanding that the evidence against him was overwhelming. We have concluded, therefore, that the minimum tariff that can be imposed in his case is sixteen years. This will include the time spent by the offender in custody on remand.