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Judgment: approved by the Court for handing down | *Delivered:* **9/1/04**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

TREVOR McCANDLESS

———

THE QUEEN

v

STEPHEN ANTHONY JOHNSTON

———

THE QUEEN

v

PAUL JAMES JOHNSTON

———

THE QUEEN

v

SAMUEL ANDERSON

———

THE QUEEN

v

KENNETH JOHN SCOTT

———

Before: Carswell LCJ, Nicholson LJ and Kerr J

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CARSWELL LCJ

[1] The matters before the court consist of two appeals against sentence and three applications for leave to appeal against sentence. Each of the appellants and applicants was sentenced to imprisonment for life and an order was made by the court in each case under Article 5 of the Life Sentences (Northern Ireland) Order 2001 (the 2001 Order) fixing the minimum term which the offender was to serve before the release provisions were to apply to him. In the case of one of the offenders, Kenneth John Scott, the court imposed a discretionary life sentence, and in the case of the other four, each of whom was convicted of murder, the life sentence was mandatory. Each has submitted to the court that the term fixed was manifestly excessive and should be reduced. We ordered that these appeals and applications should be heard together, so that we could review the level of sentencing in life sentence cases and determine the principles upon which sentencers should act when fixing minimum terms.

[2] When a defendant in a criminal matter is sentenced to imprisonment for life, that does not in practice mean that he will be detained for the whole of the rest of his life, save in a few very exceptional cases. He will ordinarily be released after a period has elapsed which is regarded as appropriate to reflect the elements of retribution and deterrence, provided it is no longer necessary for the protection of the public to detain him. The factual background of murder cases is infinitely variable and the culpability of individual offenders covers a very wide spectrum. Reflecting this variation, the terms for which persons convicted of murder have actually been detained in custody have accordingly varied from a relatively few years to very long periods, even enduring in a few cases to the rest of the offender's life. The statutory provisions and practice relating to the fixing of minimum terms have changed very rapidly over the last few years, largely to reflect the requirements of the European Convention on Human Rights as interpreted by the European Court of Human Rights in their decisions.

[3] Before the 2001 Order came into force the date of release of a prisoner serving a life sentence in Northern Ireland was determined by the Secretary of State. He consulted the Lord Chief Justice and the trial judge, if the latter was available, pursuant to the provisions of section 1(3) of the Northern Ireland (Emergency Provisions) Act 1973, and they advised him about the length of term appropriate for retribution and deterrence. He was also advised by an extra-statutory body known as the Life Sentence Review Board on the issue of safety of release, and made his decision on the basis of this consultation and advice. This corresponded to some extent with the practice in England and Wales, in which the trial judge and the Lord Chief Justice sent their recommendations for a minimum term shortly after trial to the Home Secretary and he took them into account in fixing a minimum term, then commonly known as the "tariff".

[4] The 2001 Order now provides for the fixing by the trial court of the minimum term which a prisoner sentenced to imprisonment for life must serve before he is considered by the Life Sentence Review Commissioners for release from prison. The material portions for present purposes are paragraphs (1) and (2):

> **"5.** - (1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.
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> (2) The part of a sentence specified in an order under paragraph (1) 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."

Paragraph (3) deals with "whole life tariffs", where the court considers that the offender should be detained for the remainder of his life and so does not set a minimum term. We need not consider these in the present judgment. When the minimum term has elapsed (or in practice shortly before it is completed) the Secretary of State refers the prisoner's case to the Commissioners under Article 6 of the 2001 Order. By Article 6(4)(b) the Commissioners must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined, and if they are so satisfied they will then direct his release, pursuant to Article 6(3)(b), whereupon it is the duty of the Secretary of State to release him. We are satisfied that an appeal lies to this court under section 8 of the Criminal Appeal (Northern Ireland) Act 1980 against the judge's decision fixing the length of the minimum term. Such a decision in our opinion constitutes a sentence within the meaning of that section, since it is determined by the court and not the Secretary of State and the length of the term so determined is not fixed by law. This is sufficient to distinguish such decisions from recommendations made by trial judges under the procedure formerly obtaining, as to which see *R v Aitken* [1966] 2 All ER 453.

[5] Following the decision of the ECtHR in *T v UK* (2000) 30 EHRR 121, it was provided by section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 that minimum terms in the case of juveniles sentenced to be detained during Her Majesty's Pleasure (the equivalent of a life sentence in the case of

an adult) were thenceforth to be fixed by a judicial decision of the sentencer given in open court. Lord Woolf CJ then issued a *Practice Note* (reported in [2000] 4 All ER 831), in which he stated that under the existing approach the starting point for fixing a minimum term in the case of adults was 14 years. That figure was then increased or decreased to allow for aggravating or mitigating factors.

[6] On 13 November 2001 the Sentencing Advisory Panel in England and Wales published a consultation paper entitled "Tariffs in Murder Cases". The panel proposed dividing such cases into three groups, a central group representing what might be regarded as a standard case, with higher and lower groups of cases lying in a bracket significantly varying above or below the central group in culpability. The proposed middle tariff was 12 years, rather than the term of 14 years thitherto regarded as the starting point. The lower tariff was put at eight or nine years and the higher tariff at 15 or 16 years. Where a case fell within any of these brackets, aggravating or mitigating factors could then be taken into account to vary the term within the bracket.

[7] The Sentencing Advisory Panel published its advice to the Court of Appeal on 15 March 2002. Differing views had been expressed during the consultation process and opinion was to some extent divided among the members of the Panel. The Panel recommended adherence to its three-tier framework, the majority recommending the terms propounded in the consultation paper, while the minority preferred a figure for the middle group of 14 years, with a lower starting point of 10 or 11 years and a higher starting point of 17 or 18 years.

[8] It was against this background that Lord Woolf CJ on 31 May 2002 issued a *Practice Statement*, reported at [2002] 3 All ER 412, in which he dealt in more detail with the appropriate minimum terms for both adult and young offenders. It replaced the previous normal starting point of 14 years by substituting a higher and a normal starting point of respectively 16 and 12 years, rather than adopting the Panel's recommendation of three groups. These starting points then have to be varied upwards or downwards by taking account of aggravating or mitigating factors. We think it important to emphasise that the process is not to be regarded as one of fixing each case into one of two rigidly defined categories, in respect of which the length of term is firmly fixed. Rather 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.

[9] The *Practice Statement* set out the approach to be adopted in respect of adult offenders in paragraphs 10 to 19:

> *"The normal starting point of 12 years*
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> 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.
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> 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).
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> *The higher starting point of 15/16 years*
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> 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 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.
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> 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."

[10] In a number of decisions given when imposing life sentences and fixing minimum terms, including those the subject of the present appeals and applications, judges in the Crown Court have taken account of the principles espoused by the Sentencing Advisory Panel and by Lord Woolf CJ in his *Practice Statement* and have fixed terms in accordance with those principles and on a comparable level with the terms suggested in them. We consider that they were correct to do so. We have given careful consideration to the level of minimum terms which in our view represent a just and fair level of punishment to reflect the elements of retribution and deterrence. We are not unmindful of the mandatory minimum terms prescribed in England and Wales for certain classes of case by the Criminal Justice Act 2003, but we consider that the levels laid down in the *Practice Statement,* which accord broadly with those which have been adopted for many years in this jurisdiction, continue to be appropriate for our society.

[11] We turn then to consider the individual appeals and applications.

[12] Trevor McCandless

The applicant Trevor McCandless, now aged 40 years, was tried by a jury at Belfast Crown Court in October 2001 of the murder of his wife Zara on 14 May 1998. He was prepared to plead guilty to manslaughter, but the Crown was not prepared to accept the plea and the trial proceeded. On 26 October 2001 he was convicted of murder, and on 21 December 2001 the trial judge McCollum LJ sentenced him to life imprisonment, fixing the minimum term at 15 years. He had previously been tried for this offence at Ballymena Crown Court and convicted on 6 May 1999. He appealed to this court and in a written judgment given on 9 March 2001 and reported at [2001] NI 86 we allowed the appeal on grounds relating to the defence of provocation and

ordered a new trial. McCandless applied for leave to appeal against conviction and sentence, but leave was refused by the single judge. He renewed his application for leave to appeal against conviction to this court, but by a written judgment given on 18 October 2002 we dismissed the application. His application for leave to appeal against sentence was adjourned and formed part of the group of cases now under consideration.

[13] In paragraphs 2 to 10 of our judgment of 18 October 2002 we summarised the facts of the case in terms which we would repeat here:

> "**[2]** The applicant and his wife (to whom we shall refer in this judgment as Zara) had been married for some years, but following some difficulties in the marriage had separated for a few weeks. Zara continued to live in the matrimonial home 5 Riversdale Crescent, Coleraine, with their children, and the applicant was staying with his mother. He had been drinking during the afternoon and evening of 13 May 1999, and at some time in the early hours of 14 May he called at his mother's house but did not stay there. Instead he took his set of keys to 5 Riversdale Crescent and went to that house. He let himself in through the garage, intending, according to his account given in evidence, to sleep in the family room next to the garage. Instead of staying in that room, however, he decided to go upstairs to look at the children, who were in bed asleep.
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> **[3]** Zara had seen or heard his approach to the house and telephoned the police at 4.30 am, asking them to come to the house and informing them that she and her husband were separated and that the applicant had just tried to break in. The applicant recounted in evidence that when he was upstairs Zara shouted "What are you doing here, you bastard?"
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> **[4]** The applicant then followed Zara downstairs, and, as he stated in his evidence, sat down in the dining room. He said that he wanted to stay and she would not agree. They got into a confrontation and Zara told the applicant to get out of the house. She went to telephone the police again, but the applicant pulled the telephone cord out of the wall. She dashed upstairs, apparently to use the extension telephone, but the applicant pulled out the plug of that

instrument as well. He said in his evidence that when he came downstairs again she came dashing out of the kitchen with a red-handled knife in her hand. He engaged in a struggle with her and took the knife from her. At some stage he sustained a cut on the hand, which he attributed to this part of the encounter, although the pathologist expressed some doubt whether the particular laceration could have been caused by grabbing a knife blade. The applicant said that he recollected the knife falling on the ground, and professed to remember nothing more of the ensuing events until the police arrived.

[5] It was not in dispute that in the course of those events the applicant fatally stabbed Zara, inflicting a total of 33 or possibly 35 wounds. When the police arrived she was lying on the front path, covered in blood and with her nightshirt pulled up above her waist. There was no sign of life and she was pronounced dead by a doctor at 5.25 am.

[6] Neighbours who saw or heard parts of the episode gave evidence about the attack. Mrs Sharon Rankin stated that she saw the applicant standing in front of Zara, apparently holding her against her will. The witness ran outside and shouted at him "You're mad, you're fuckin mad, you bastard." Zara shouted to her to get the police and the ambulance. Mrs Rankin said that she saw the applicant raise his right hand, holding a carving knife, and stab his wife. She ran to call an ambulance and when she returned she heard him say "You'll not torment me again", whereupon he stuck the knife into Zara's side. She then saw Zara lying on the ground, while the applicant stabbed down at her a number of times, each blow making a squelching noise. Ms Lily McKinney saw Zara pressed tight against the wall, with blood on her, while the applicant had a knife in his hand. She said that the applicant stated to her "She pushed me over the edge."

[7] Mr Vincent McGuigan said that when he spoke to the applicant after the attack he said something like "I just lost it". He asked him what had happened or what had he done, to which the applicant replied to the effect that he did not know, he just went berserk.

Mr Warnock Peters, an off-duty police officer said that the applicant asked him in a cool, collected manner "Is she dead?", then added "I just flipped" and said "Warnock, help me." When the police came the applicant said to them "It was me, I done it." He repeated remarks to the effect that he had "gone berserk" or "flipped". In the police station he asked the medical examiner for assistance to commit suicide. Because of this and his statement that he had been drinking heavily the doctor advised that interviewing be postponed.

[8] Forensic examination of the scene revealed a red knife handle in the roadway and a knife blade by Zara's body. When the police arrived the applicant had been holding the knife handle and a tea towel in his hand. A white-handled knife was in the kitchen sink. There were two knife blocks in the kitchen, containing a number of knives, from which five in all were missing. There were heavy bloodstains on the front path and the front wall of the house. There were more bloodstains inside the house, with some blood from Zara and some from the applicant on the mixer spout of the kitchen tap. It was difficult to piece together any coherent account of the course of the attack from the evidence available.

[9] In interview the applicant maintained that he could remember nothing about the incident after the point when Zara took out the knife. He said that when he got a rage in him he would have a blank, and that he had been in a rage because she would not sit and listen. He claimed that he had been so drunk that he could not bite his finger. He firmly denied that he had gone to the house with the intention of causing injury to her, claiming that he only wanted to talk to her.

[10] The defences raised on behalf of the applicant were lack of intention, provocation and diminished responsibility. Dr FWA Browne, a consultant forensic psychiatrist, was called to give evidence on his behalf. The jury rejected these defences and found the applicant guilty of murder."

[14] When sentencing McCollum LJ had before him reports from two consultant forensic psychiatrists, Dr FWA Browne on behalf of the defence and Dr B Fleming on behalf of the Crown, together with a pre-sentence report.

[15] In paragraphs 12 to 15 of our judgment given on 18 October 2002 we summarised Dr Browne's opinion as follows:

> **"[12]** Dr Browne examined the applicant on four occasions between 12 June and 30 August 2001, the interviews totalling some seven hours in all. He also spoke to the applicant's brother Roy and studied the case papers. He had access to the prison medical records and the applicant's GP's notes and records. His medical history indicated a number of symptoms related to anxiety, depression and alcohol abuse. He had suffered from irritable bowel symptoms and alcoholic gastritis. There were a couple of entries describing uncontrollable temper at times, secondary to frustration. He complained at times of stress at work and of anxiety and feelings of anger, stress and irritability. In 1988 a question was raised whether he was suicidal. He regularly drank heavily, and around 1996-7 increased the frequency from week-end drinking to including weekdays. He sometimes drank alcohol in the mornings. He experienced alcohol-related shakes in the mornings, blackouts, sweating and craving for drink. He had a pattern of depression, involving difficulty in concentration, lack of energy and withdrawal from people. He said that he tended to bottle up his feelings and would deal with these by walking away from situations or going for a drink.
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> **[13]** Dr Browne said that the applicant had recounted to him his feelings of inadequacy, because Zara had a better job and that he felt a failure and that he had been letting her down. He started to feel insecure and concerned lest he might lose her. When the separation began a couple of weeks before the incident he could not accept that his relationship with his wife was over. He gave his account of Zara's death in an emotionally detached fashion.
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> **[14]** Dr Browne's conclusion was that the available information was consistent with the applicant's

suffering from alcohol dependence syndrome, personality disorder and depression. He considered that his thoughts, feelings and behaviour were consistent with a diagnosis of dependent personality disorder and that he was suffering from that in 1998 as well as on examination in 2001. Such a disorder, being a specific personality disorder, came within the classification system for mental disorders known as ICD10, the 10th edition of Natural Classifications of Diseases, published by the World Health Organisation:

> '(A) Specific Personality Disorder is a severe disturbance in the characteriological constitution and behavioural tendency of the individual, usually involving several areas of the personality and nearly always associated with considerable personal and social disruption.'

It therefore constituted an abnormality of mind for the purposes of the statutory definition of diminished responsibility. He also suffered significant depressive symptoms, depression being an abnormality of mind.

[15] Dr Browne regarded the attack on Zara as being frenzied in nature. He was prepared to accept that the applicant's inability to remember the stabbing was genuine, being a phenomenon of psychogenic amnesia. He also considered that a person with his personal characteristics would be more likely to be provoked into losing his self-control and that his mental abnormalities would have diminished or reduced his ability to exercise self-control."

Dr Fleming's report was a commentary on Dr Browne's opinion and we need not refer to it for present purposes.

[16] In the pre-sentence report dated 23 November 2001 the probation officer expressed the following opinion about the applicant:

> "Mr McCandless has been in custody since May 1998. He presents as a very complex individual who remains quite egocentric in his outlook. He is preoccupied with how he is perceived by others and

in particular has difficulty with seeing himself as a violent individual despite his conviction for fatally injuring his wife. Patterns of inadequacy, poor self esteem and dependence on others can be seen in his childhood, education, employment and particularly in his relationships. Consequently his feelings of resentment have increased as he has accepted his inadequacies. He appears to have found it difficult to settle in prison given the pending appeal process for the past year. Conversely he has adapted to the actual regime and established a structure in his daily routine. He is employed in the Braille department and had participated in courses in Anger Management and Alcohol Management. He continues to avail of counselling which focuses on addressing his issues of loss, alcoholism and self image. He has made two attempts at suicide and has clearly stated his intention to kill himself at a later stage in his sentence. This view appears prompted by his inability to envisage his future isolated from his children and a belief that capital punishment is an acceptable retribution for his offence.

CONCLUSION

Mr McCandless, a 38 year old man, has been convicted of murdering his wife in May 1998. There appear to be a number of factors occurring throughout his life which seem to have contributed to his involvement in the offence. These include:

- His negative comparison of himself with other ie his older brother, peers.
- His attachment problems in relationships and significant reliance on others for guidance and approval ie his father who helped him get jobs, his brothers while at school and latterly his wife.
- He has no experience of being able to live independently taking responsibility for his own life .
- His alcohol abuse and addiction and the contribution of this to the distortion in his thinking.
- His egocentric view and outlook on life.

- His resentment and anger at his wife's rejection of him.
- His inability to cope with stress and conflict in an acceptable manner.
- Previous incidences of domestic violence both in the relationship with his wife and also his former fiancée.
- His inability to secure and sustain employment.
- The consequential adverse effect upon family finances.

Clearly these areas need to be addressed in assessing risk and managing that risk on the defendant's eventual release into the community.

Mr McCandless acknowledges these areas need to be addressed and has indicated his willingness to engage in focusing on these factors throughout his life sentence."

[17] In his sentencing remarks McCollum LJ stated as follows:

"In determining the tariff I take into account the following factors.

(1) There has been a notable increase in fatal matrimonial violence in this community often involving the use of a knife.

The knife is also used far too often in other confrontations and disputes.

It is necessary for the courts to take a particularly strong line with those who resort to this kind of violence.

Those who injure with a knife must expect a long custodial sentence. Those who kill with a knife must expect a lengthy tariff so that the public may know that stabbing with a knife is regarded as a particularly heinous crime which will be severely punished.

(2) The manner of the attack which I have already mentioned is also a feature which calls for a high tariff.

To strike one blow or to stab once in anger or frustration may cause death, but does not cause the justifiable revulsion that is aroused by an attack such as that in which you engaged.

The bloodstains show that almost the entirety of the attack occurred outside the house in the full view of those neighbours who been aroused and in such a way as to attract attention.

To that extent you made a public spectacle of this cruel murder, not even being deterred by the presence of your young son. The fact that he was a witness would have added to the anguish of the victim.

There is some consolation in a death that is dignified and eased by the comfort of the company of loved ones.

You denied your wife any comfort or solace and made her death as harsh and cruel as it was in your power to do so, overshadowed by your hatred and malevolence.

(3) Moreover the fact that at a time when you were living apart from your wife you went to her home and entered it at that time of night is also an aggravating feature - you were the only one of the two who was seeking confrontation that night.

(4) Two Chaplains in the prison have written testimonials to your remorse and how genuine it is. I have no doubt that they are experienced in counselling and understanding offenders and I must and do take into account their views, which I respect.

It appears to me that when in their company you must be able to reach a state of genuine repentance and remorse and I am going to give you some credit for that. However, I have to say that in the course of the trial you displayed no remorse whatever.

You claimed to have forgotten the circumstances of your evil deed, a matter about which I was not impressed in spite of the evidence of Dr Browne, who

regrettably proved to be an unimpressive witness. In saying that you do not remember your actions you avoid confronting them or explaining them and avoid accepting moral responsibility for them.

I am satisfied that the account you gave in court about the matters you claimed to remember was untrue and that your sworn testimony about your wife's conduct in the last minutes of her life was a series of lies.

When invited to express remorse while in the witness box your response was to express regret for the consequences of what you had done, but no real recognition of how bad it was.

If I were to rely purely on the impression which you made on me I would not believe that you had a shred of remorse, but I allow for the possibility that your attitude during the trial may not have fully represented the extent of your true feelings and I give you credit therefore for the faith in you expressed by Reverend Mr Harron and Reverend Mr Neilly.

(4) I am satisfied from the medical records and the events of this case that you are an inadequate individual with serious personality problems and a tendency to try to assert yourself by serious outbursts of temper which you find extremely difficult to control.

This is an aspect of your character which I would recommend the Life Sentence Review Commissioners to bear in mind at the conclusion of the tariff period, but of itself it provides some grounds for recognition of the fact that you did have considerable difficulty in coping with the break-up of your marriage and that dwelling on your problems produced a tendency to violence that you did not have the moral strength to contrive.

For the reasons given I regard this as a case for the higher tariff referred to by Mr Justice Sheil, which I am prepared to mitigate to a limited extent because of the remorse you have conveyed to Reverend Mr Harron and Reverend Mr Neilly.

Taking all these matters into account I sentence you to imprisonment for life and order that the release provisions shall apply to you as soon as you have served 15 years of that sentence. That does not mean that you will be released at that time, but that is the earliest date on which the Commissioners will consider whether it is no longer necessary for the protection of the public from serious harm that you continue to be confined."

[18] The grounds of appeal against sentence propounded on behalf of the applicant were set out in a notice dated 10 January 2002:

> "1. In the circumstances the tariff sentence of 15 years set by the Learned Trial Judge was manifestly excessive and wrong in principle.
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> 2. In considering the requirements of retribution and deterrents [sic] under Article 5(2) of the Life Sentences (Northern Ireland) Order 2001 the Learned Trial Judge failed to give due weight to the numerous mitigating factors and gave undue weight to what he perceived to be the aggravating factors. In particular, he did not take sufficient account of:-
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> (a) the sub-normality or mental abnormality of the Applicant and especially insofar as there was considerable agreement about this between Dr Brown, the Consultant Psychiatrist called on behalf of the Accused and Dr Fleming, the Consultant Psychiatrist who provided a report on behalf of the Crown;
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> (b) the provocation or an excessive response to what the Applicant had perceived to be a personal threat by the Deceased;
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> (c) the borderline nature of the intention to kill;
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> (d) the spontaneity and lack of premeditation by the Applicant. The

Crown accepted that he had not gone to the Deceased's house with the intention of killing her;

(e) the plea of guilty to manslaughter and the acceptance throughout by the Applicant that he had been responsible for the death of his wife;

(f) the hard evidence of remorse and contrition by the Applicant, this was confirmed by reports from Prison Clergy; the Learned Trial Judge was reluctant to give full weight to this evidence of regret and remorse immediately after the killing.

(3) The Learned Trial Judge wrongly over emphasised and placed undue weight on the fact that the Applicant had used a knife in the attack on his wife. He used this as the basis for justifying a more severe deterrent sentence but failed to take into account the evidence of the fact that the Applicant's use of the knife was precipitated by his wife threatening with the knife in the first place."

A further notice of appeal dated 17 May 2002 was filed by the appellant's new solicitors, which we shall set out for the sake of completeness:

"1. By reasons of the coming into force of the provisions of Life Sentences (Northern Ireland) Order 2001 the Court after hearing evidence from Dr Carol Weir and a plea in mitigation on behalf of the Applicant fixed the tariff which is to apply in the present case as 14 years.

2. It is respectfully submitted that the Learned Trial Judge did not give sufficient credit for the mitigation factors in this particular case and that the tariff sentence of 14 years was too high.

3. The mitigating features which existed in this case were as follows:

a The Applicants pea to manslaughter and his acceptance of his responsibility for the killing of Joel Tymon.

b The only issue the Defence asking the jury to determine was his intention to kill or to cause grievous bodily harm.

c The Applicants degree of intoxication at the time of the commission of the offence as evidenced by the witnesses who testified to him being staggering, extremely drunk and highly intoxicated.

d His co-operation with the Police from Interview No. 2 where he gave a full account of what happened on the evening in question.

e His age.

f His addiction to drink and drugs.

g The fact that no weapon was brought to the flat."

[19] The grounds on which it was submitted that the term was excessive were further elaborated in the skeleton argument, supplemented by the oral arguments of Mr Donaldson QC and Mr Allister QC at the hearing before us. They may be encapsulated in the following propositions:

(a) The judge made too much of the applicant's use of a knife, which Zara had picked up and flourished against him.

(b) The applicant had not entertained any intention to kill when he came to the house, and the incident was to that extent spontaneous.

(c) It was a borderline case of provocation, which should reduce it in the scale of those described in the *Practice Statement.*

(d) The judge gave insufficient recognition to the applicant's psychiatric symptoms recounted by Dr Browne.

(e) The judge had not sufficiently taken into account the applicant's remorse or his willingness to plead guilty to manslaughter.

[20] We have taken account of all these submissions, which were fully and skilfully put before us, but we are not persuaded by them that the term fixed was in any way excessive, let alone manifestly excessive. We might say at this stage that we were referred to a number of decisions on minimum terms given by trial judges, but, as in most other sentencing appeals, we find such comparisons of limited assistance and we do not propose to set them out here. We consider that trial judges imposing life sentences in future and counsel advancing submissions to them will derive more assistance from the *Practice Statement* and this and future judgments of this court. In doing so they will doubtless bear in mind always that in dismissing an appeal against sentence an appellate court may only declare that the term was not excessive and is not necessarily approving it as an appropriate sentence, for it may well regard it is rather lower than that which its members would themselves have imposed.

[21] Crown counsel did not attempt to submit that the evidence established that the applicant had formed an intention to kill before he went to the house, although he pointed out that there had been an ongoing dispute between the applicant and his wife and that there was more to his visit than merely seeking a place to sleep. We are not prepared to accept that there was any behaviour on Zara's part which comes anywhere near furnishing a viable defence of provocation, and we are not surprised that two juries decisively rejected it. It is true, as the applicant's counsel submitted, that he had not himself brought the knife, nor has it been established that he purposely obtained it in the house. But once Zara picked it up and made for him – on the applicant's version, which is the only one we have – he took it from her and instead of removing it from the confrontation wielded it against her in a horrendous attack. We consider that the judge was fully justified in his remarks about the use of the knife. It use appears to us to demonstrate very clearly the applicant's traits of extreme and uncontrolled bad temper. The judge was of opinion that he had lied in his evidence about the important and central matters of his recollection and the sequence of events immediately before the stabbing. In our view the applicant is a dangerous, violent man who demonstrated little, if any, true remorse for his actions. The judge gave him credit for making expressions of remorse to the clergy in prison, which he was prepared – though not without some degree of scepticism – to accept as genuine. We do not think that any significant credit requires to be given for the applicant's willingness to plead guilty to manslaughter, for it was entirely obvious that he could not possibly contest such a charge.

[22] We are completely satisfied that the judge was right to place the case within the higher bracket of minimum terms. The horrific nature of the sustained attack on the victim would justify this without more, without resort to any other factor. More important, the overall circumstances of the offence emphatically call for a minimum term within that bracket, and it might well be regarded as coming quite high in the scale. Making such allowance as we

think fit for remorse, we cannot regard the sentence as being in the least excessive. We therefore dismiss McCandless' application for leave to appeal.

[23] Stephen Anthony Johnston and Paul James Johnston

We shall deal with these two applications together, since their conviction arose out of the same incident. Stephen Anthony Johnston (Stephen) is now aged 29 years, and was 25 years at the time of the offences. His younger brother Paul James Johnston (Paul), born on 28 January 1982, is almost 22 years now and was aged just under 18 years at that time. On 12 March 2002 both applicants were convicted by a jury at Belfast Crown Court of the murder of Sean May on 8 December 1999. On 22 March 2002 Stephen was sentenced by Higgins J to imprisonment for life, the minimum term being fixed at 21 years, and Paul was sentenced to be detained during the Secretary of State's pleasure, the minimum term being fixed at 19 years. Both sought leave to appeal against conviction and sentence, but leave was refused by the single judge in each case. Stephen's application for leave to appeal against conviction was dismissed by this court in a written judgment dated 30 June 2003, and his application for leave to appeal against sentence was adjourned. Paul, for reasons with which we shall deal, decided not to proceed with his application for leave to appeal against conviction and his application for leave to appeal against sentence was heard by us along with Stephen's on 1 and 2 December 2003. At the commencement of the hearing Paul's counsel Mr Orr QC and Mr Charles McCreanor informed us that their client did not wish them to present any arguments in favour of his application, but at our request they assisted the court by putting before us the matters which could be advanced on his behalf.

[24] The murder victim Sean May was a man of 58 years with learning difficulties who lived alone in a pensioner's bungalow in Moyard Park, Belfast. He returned home some time about midnight on the night of 2-3 December 1999. A neighbour gave evidence that she heard him moaning and groaning during the night for a period which she put at over half an hour, but it could not be established with any clarity at what time this was. About 6.30 am another neighbour smelt smoke and found May's house on fire.

[25] Fire officers found the body of the deceased lying on his bed, bearing very severe injuries. The cause of death was stab wounds, but there were in addition some 45 other stab wounds and multiple lacerations, abrasion and considerable bruising. There were 14 stab wounds in the upper left chest, of which one had pierced the sub-clavian artery with fatal effect and eight had pierced the left lung. Wounds, one of which was complex and severe, had been inflicted to his head with a wheel brace. Injuries had been caused to his eye sockets, one of which was a stab wound two and a half inches long which fractured the underlying skull. A stab wound, penetrating some six inches in depth, had been inflicted to the lower chest with a large carving knife, which

had been left in the body. As the judge said in his sentencing remarks, the impression that he was tormented, if not tortured, by his assailants for a period of time prior to the infliction of his fatal injuries had not been and could not be dispelled.

[26] At some stage during the night the Johnston brothers, who had been drinking and sniffing glue, brought two small knives into the deceased man's house and probably the large carving knife and the wheel brace as well. There were two other youths in the house at some stage as well as the Johnstons, but the judge found that there was no evidence that these youths had been involved in the attack upon the deceased and held that the applicants were solely responsible. Furniture was stacked up and a fire started in an attempt to destroy or seriously damage evidence. The applicants also made efforts to remove incriminating substances from their clothing after the murder in order to try to prevent detection. Neither applicant made any admissions on interview and neither gave evidence at trial.

[27] Both applicants have very bad criminal records. Stephen was convicted of a total of 90 previous offences, going back to 1987. His record includes many convictions for burglary and theft, two for robbery and one for malicious wounding. Paul has been convicted of 42 separate offences, including assaults and robbery. At the time of the murder of Sean May he was an absconder from the Young Offenders' Centre, having been given compassionate leave to visit another brother who was gravely ill in hospital following a road traffic accident. After the murder he evaded detection, using a false name and address, and escaped to Scotland, where he was eventually apprehended.

[28] No pre-sentence reports were available to the court and none appear to have been obtained. Two psychiatric reports on Paul were produced. The first, an undated report, was obtained from Dr FA O'Neill, a consultant psychiatrist, who examined him when he was in the YOC, apparently on remand before trial. Dr O'Neill stated that Paul has underlying personality difficulties and had episodes of depression and panic. He also has a history of long-term substance abuse and had post-traumatic stress symptoms following paramilitary-style beatings. The report from Dr Ian Bownes, a consultant forensic psychiatrist, dated 30 November 2003, set out his view that Paul's clinical picture was consistent with long-standing personality-based defects and attitudinal problems resulting in a relative lack of appropriate strategies for coping with negative emotional states and feelings and a limited capacity to recognise and relate to the wider consequences of his actions and the needs and feelings of other people. He claimed that his memory for the sequence of events leading to his arrest on the present charges was patchy and incomplete. He said to Dr Bownes that he was really sorry that he ever got involved and "that it ever happened." Mr Orr QC stated that Paul had

wished to abandon his appeal against sentence because of his feelings of guilt about having committed the offence.

[29] In his sentencing remarks the judge set out the facts in detail and stated at pages 9-10:

> "The instant case was a cold blooded, brutal and callous murder of a harmless 58 year old man with learning difficulties. He did no-one any harm and there is nothing to indicate that he provoked either brother in this case or did either of them any harm. This is clearly a case which attracts a higher period before any consideration is given to aggravating and/or mitigating circumstances. Furthermore a higher period is justified in any case in which the offender's culpability is particularly high and where the victim is a person in a vulnerable position. Both of those factors are present in this case. An aggravating factor in this case is the use of not one but several weapons which included three knives. The prevalence of the use of knives in murder and other cases of serious assault over recent years is a factor to be taken into consideration. A further aggravating factor in this case is the prolonged gratuitous violence inflicted on Sean May that resulted in extensive and multiple injuries inflicted before death. The degree of violence from the nature of the injuries inflicted and the number of them was sadistic in nature and that is a further aggravating factor. Equally so is the attempted destruction of the scene of the crime by fire, which if successful might have consumed the body of the deceased. A further aggravating factor is that neither Stephen Johnston nor Paul Johnston has shown the slightest hint of remorse, contrition or regret. On the contrary both have exhibited extreme indifference. I find no mitigating factors in relation to the murder of Sean May."

He pointed out that although there was no direct evidence that the applicants went into the victim's house with a plan to kill him, it was clear that they or one of them obtained weapons and brought them in at some stage and that they then "acted with a grim determination". He concluded:

> "This court cannot and should not overlook the sheer viciousness of this murder and the complete lack of remorse and contrition displayed by its perpetrators.

> It is clear that both of them are very dangerous young men from whom the public requires to be protected for a very long period of time indeed."

[30] Mr PT McDonald QC for Stephen, while accepting that the facts brought the case into the higher bracket, submitted that there was insufficient evidence for the conclusion that the applicant had been guilty of torturing the deceased in a sadistic manner. He warned that a court should be cautious about the way in which it resorts to the aggravating factors in order to avoid double counting. He also submitted that in the final remarks of the judge which we have quoted he strayed into the area of risk, which will have to be considered in due course by the Life Sentence Review Commissioners, not by the court in determining the period appropriate for retribution and deterrence.

[31] It is incontestable that the case came into the higher category. No fewer than three of the criteria referred to by Lord Woolf CJ at paragraph 12 of the *Practice Statement* as examples of features which would bring cases into that category are to be found in the present case, vulnerability, sadism and multiple injuries. We cannot accept Mr McDonald's submission that the evidence fell short of establishing torture or sadism. We consider that there was ample evidence for the judge to reach such a conclusion, indeed he would have been over-scrupulous in favour of the applicants if he had been more cautious in accepting it when passing sentence. We do not think that the judge was dealing with irrelevant matters of risk in his remarks, which are quite apt and frequently used by courts in fixing determinate sentences. In our opinion the judge was fully justified in regarding this murder as one which attracted a term which went well into the higher bracket. It is to be remembered that the figure of 15 or 16 years is only a starting point for the consideration of the court, and that having commenced from there its duty is to end up at a figure which properly represents the minimum period for which the perpetrator of the crime should be detained before his release can be considered. In assessing the heinousness of the factors which bring the case into the higher bracket the court is not double counting, merely determining the seriousness of the crime. In the present case we are satisfied that the judge was not double counting, but performing a proper assessment of the level of seriousness of the murder. That level must be regarded as very high, for the injuries were horrific indeed and the circumstances barbaric and Stephen has never shown any hint of real remorse. In our opinion the judge was quite correct to impose a minimum term of 21 years and it should not be disturbed. Stephen's application for leave to appeal is therefore dismissed.

[32] Mr Orr QC submitted on behalf of Paul that the starting point in his case, as he was under 18 years of age, should be one of 12 years. He pointed to the first two sentences of paragraph 24 of the *Practice Statement,* in which Lord Woolf CJ said:

> "In the case of young offenders, the judge should always start from the starting point appropriate for an adult (12 years). The judge should then reduce the starting point to take into account the maturity and age of the offender."

Mr Orr suggested that by these remarks Lord Woolf intended that the starting point in the case of young offenders should invariably be 12 years, however heinous the crime and however clear it might be that it should be placed in the higher category. We are unable to accept that Lord Woolf so intended. It seems to us clear that he was dealing with the mechanics of the calculation of the minimum term in the case of young offenders. That is to be determined by commencing at the same place as in the case of an adult, then applying a reducing factor depending on the offender's age and maturity, before fixing on the starting point. In doing so he was focussing on the method of approach, not prescribing a starting point of 12 years for cases of every degree of heinousness.

[33] The judge drew no distinction between Stephen and Paul in terms of responsibility for and participation in the attack upon the deceased. If Paul had been an adult, accordingly, the appropriate minimum term would on his assessment of the two applicants have been the same as in Stephen's case. He reduced the minimum term by two years in Paul's case to reflect his youth, which in our view was a proper discount. He did, however, regard Paul as equally lacking in remorse, a conclusion which at that time appears to have been justified. Subsequent events have now shown that Paul has, belatedly perhaps but apparently genuinely, evinced real remorse for his actions by giving instructions that his counsel were not to pursue his appeal against either conviction or sentence. In our opinion this is a factor of some weight and we should take account of it now, even if the applicant did not himself seek that. We consider that there should be a further reduction to reflect it and that the minimum term in Paul's case should be fixed at 16 years. We accordingly grant leave to appeal, allow the appeal and vary the minimum term fixed in his case to 16 years.

[34] Samuel Anderson

The appellant Samuel Anderson, now aged 24 years, was on 14 March 2002 convicted at Ballymena Crown Court after a trial before Girvan J and a jury of the murder of Joel Robert Tymon. The judge sentenced him to imprisonment for life and fixed the minimum term at 14 years. He sought leave to appeal and was refused leave by the single judge to appeal against conviction but granted leave to appeal against sentence. On 7 April 2003 this court dismissed his application to leave against conviction and adjourned his appeal against sentence.

[35] The basic facts of the murder were set out in paragraphs 3 to 7 of the judgment which we gave in dismissing the application for leave to appeal against conviction:

> **"[3]** On the night of 26-27 November 2000 about midnight or just after it the applicant and Campbell pushed their way into a flat at 6A Stirling Street, Antrim occupied by David Rolston (or Ralston). They were described by several witnesses as being very drunk. The only person in the flat at the time was Joel Tymon, whom Rolston had recently permitted to stay there. The applicant and Campbell demanded to know the whereabouts of Rolston, to whom they wished to give a beating. Tymon could not or would not tell them where he was, whereupon the applicant commenced to assault him in an attempt to force him to do so. He punched Tymon in the face a number of times, causing him to fall back on a seat. He picked up a paint scraper and deeply lacerated his face with it. He ended by stabbing him a number of times in the thigh and knee with a large kitchen knife. The evidence was that the events in the flat occupied a period of ten to fifteen minutes. The two men then left the flat, leaving Tymon lying bleeding. One of the stab wounds had severed the femoral vein and artery, causing Tymon to bleed to death.
>
> **[4]** About 12.40 am the men went to the house of the applicant's cousin Joanne Kerr. They stayed for a while and discussed what had taken place. The applicant stated that he had beaten a wee fellow up the street and had stabbed him two or three times in the legs. He said that he did not know the wee fellow, but hit him because he was Rolston's friend. He said that he had turned the music up to drown his cries and that he had used a knife from the kitchen.
>
> **[5]** The knife used in the attack was found by the police in a gutter at 12 Orkney Drive, Antrim, after the applicant had told them where he had thrown it away. It was a cook's knife with an eight-inch (19 cm) blade. One of the issues in the case was whether the applicant went into the kitchen and fetched the knife from there, leading to the inference that he obtained it deliberately for the purpose of attacking Tymon, or

> whether, as he asserted in interview, he found it lying in the sitting room. One fact which the prosecution relied on as showing that he had been in the kitchen was that the scraper was found on top of the fridge-freezer in that room. Moreover, in interview the applicant used the phrase "I walked in with the knife".
>
> **[6]** The pathologist's evidence established that there were four stab wounds to the legs. The fatal wound was a penetrating wound over the medial, or inner, side of the middle third of the left thigh. The opening was approximately 2.7 cm in length and it penetrated some 9 cm into the tissues. The second wound was to the back of the left thigh, and also was 9 cm deep. The third, which was 8 cm deep, was on the front of the left lower leg. The fourth was behind the right knee, being some 4.5 cm in depth. The first wound had severed muscle and caused complete transection of the left femoral artery and vein. This led to a fatal arterial haemorrhage, which was also evidenced by the splashes of spurting blood found on Tymon's legs, a nearby lamp and on the wall. Dr Curtis, the forensic pathologist who carried out the post mortem examination, agreed in cross-examination that some at least of the stab wounds could have been inflicted when the victim was in a defensive position, lying back with his legs drawn up to protect himself.
>
> **[7]** In the course of his police interviews the applicant stated that his intention had been to give Rolston a hiding. He admitted that he had assaulted Tymon and stabbed him in the legs, but repeatedly said that he had not intended to kill him. He also admitted using a wallpaper scraper to scrape him on the face."

It was common case that the appellant did not form an intention to kill the victim and the case was approached as one in which the *mens rea* was an intention to inflict grievous bodily harm.

[36] The judge did not obtain a pre-sentence report, but had the benefit of a psychological report from Dr Carol Weir. She found the appellant to be of average intelligence in matters not dependent on verbal ability, at which his performance was markedly deficient. He was out of control as a boy and very disruptive and aggressive at school. He had one previous conviction for

assault occasioning actual bodily harm, for which he was sentenced to community service, and a number for disorderly behaviour. Prior to the offence he was accustomed to abuse alcohol and drugs. Dr Weir expressed her conclusions as follows:

> "Anderson is a man who seemingly has interpersonal problems and has increasingly expressed himself with people, including peers, by being aggressive. Over the years from the age of 11 this aggression has increased especially following alcohol ingestion and cannabis. It is not possible to say that contribution each played but certain features of each drug played a part. His behaviour is further compounded by his poor level of verbal expression and comprehension which results in poor common sense or social judgement. Overall, however, he is of 'average intelligence' and it is his poor attitude and motivation that has lead to his low education level. I am of the opinion that he did not intend or expect that stabbing someone's legs would lead to death."

[37] In his sentencing remarks the judge stated as follows:

> "In the present case the defendant's conduct on the night in question was quite appalling. He went to the flat where the crime was committed with the criminal intent of assaulting a person who assaulted a friend of his. When the defendant got there he burst into the flat and failing to find the person he intended to assault, he viciously attacked an innocent young man considerably smaller and weaker than himself. He punched him, hit him, threatened him, slashed his face with paint stripper and then, I am satisfied on the evidence, he went to find a long sharp kitchen knife to further threaten and then use against his victim.
>
> He then stabbed him viciously four times on the legs. He knew that the victim was in pain because he was squealing. He then put the music up to drown out the sounds of his victim. While he may not have intended the death of the victim he did intend to terrorise him and cause severe pain. He left him bleeding profusely and he tried to dispose of the knife and washed away the blood.

> I am satisfied that the defendant acted sadistically with gratuitous violence, causing multiple injuries to an innocent victim who he did not know, and who said and did nothing to invite such an attack. I take into account the fact that it wasn't pre-meditated by any lengthy prior deliberation and I am prepared to accept that on the jury's conclusions he was convicted on the basis that he intended to cause grievous bodily harm rather than intend to kill. Those mitigating factors must be considered in the light of extreme cruelty and the element of deliberation involved, and the finding of the weapon and covering up of the sound of the squeals of pain. The defendant admitted that he carried out the attack. I find it difficult to accept what he said showed any real degree of remorse. What he said to his cousin didn't show much remorse. The defendant says that he is now remorseful. He should have deep remorse."

He expressed the view that the case did not fall within the middle tariff, but came somewhere in the higher tariff, which, as it covers such a range of circumstances, he regarded as the roughest of guides. He concluded that in all the circumstances of the case the minimum term should be 14 years.

[38] In his grounds of appeal against sentence the appellant relied on a number of mitigating factors:

> "3. The mitigating features which existed in this case were as follows:
>
> a The Applicants plea to manslaughter and his acceptance of his responsibility for the killing of Joel Tymon.
>
> b The only issue the Defence asking the jury to determine was his intention to kill or to cause grievous bodily harm.
>
> c The Applicants degree of intoxication at the time of the commission of the offence as evidenced by the witnesses who testified to him being staggering, extremely drunk and highly intoxicated.

d His co-operation with the Police from Interview No. 2 where he gave a full account of what happened on the evening in question.

e His age.

f His addiction to drink and drugs.

g The fact that no weapon was brought to the flat."

These grounds were supplemented in argument by Mr Philip Mooney QC on behalf of the appellant.

[39] We are unable to agree with Mr Mooney's submission that the starting point in this case should be the normal one of 12 years. We consider that the aggravating factors, consisting of the multiplicity of wounds and the degree of sadism involved in the attack upon the victim, take it into or close to the higher range. Counsel submitted that it had not been established on the facts that this was a case of deliberate taking delight in inflicting pain on the victim, the proper definition of sadism. We need not become involved in semantics, however, for it seems to us that the facts demonstrate that it was a case of extreme and unpleasant brutality, going well beyond the type of injury one might associate with the appellant's professed intention of obtaining information from the victim. We therefore consider that the judge was justified in taking those factors into account in fixing the term.

[40] It is clear, however, that a proven intention to cause grievous bodily harm rather than to kill is a mitigating factor which should be taken into account: see the *Practice Statement*, paragraph 16. We consider that a larger deduction should be allowed for this factor than the judge made, for it is a powerful indicator of culpability. We have therefore concluded that the appropriate minimum term in the present case would be one of 12 years. We allow the appeal and amend the term to that figure.

[41] Kenneth John Scott

This appeal involves quite different issues from those in murder cases, which attract a mandatory life sentence and to which Lord Woolf's *Practice Statement* is applicable. We included it in the present batch of appeals in order to have an example of a discretionary life sentence and to give assistance to sentencers in their approach to such cases.

[42] The appellant, now aged 30 years, pleaded guilty to two charges of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861. On 5 February 2003 he was

sentenced at Belfast Crown Court by His Honour Judge Hart QC, the Recorder of Belfast, to imprisonment for life, the minimum term being fixed at eight years. He appealed with the leave of the single judge against this sentence.

[43] The material facts were summarised by the judge in paragraphs 2 to 6 of his admirably full and careful sentencing remarks:

> "[2] His victims, Jill Robinson and Andrea Adams, had been drinking with friends and had gone to White's Tavern with some of their party. Whilst they were attempting to persuade the door staff to admit them, the defendant appeared in the entry. There was an altercation, Miss Robinson alleging that the defendant deliberately touched her on her bottom, although one of the doormen said that the defendant fiddled with her hair. In any event, the ladies told him in no uncertain terms to cease his behaviour and the defendant then left the scene.
>
> [3] Miss Robinson and Miss Adams remained in the entry, and it would seem that a few minutes elapsed before the defendant reappeared. Without any warning he pushed Miss Robinson against the shutter of the pub door and stabbed her once in the back, inflicting a 7cm deep stab wound near her lumbar spine in an oblique direction, the wound being approximately 4cm to the left of the T12 region, as may be seen in photograph 11 of Exhibit 9.
>
> [4] He then attacked Miss Adams, stabbing her repeatedly. Such was the ferocity of his attack that the casualty officer's report lists many lacerations to her scalp, back, chest, abdomen, right arm and right palm. Most of these wounds were 2-3cm deep, although two were larger, a 7cm laceration over the temporal region of her scalp and a 4 cm deep wound to one of her breasts.
>
> [5] The defendant was arrested nearby soon afterwards. When questioned he claimed to be unable to remember anything about the incident, saying that he had been drinking heavily and taking strong painkillers at the same time. A knife was found in a pocket of his fleece, the blade of which was some 2 ¾ inches long. I would describe this knife as a

clasp knife rather than a penknife. The defendant admitted to the police during interview that he had been carrying the knife for some months.

[6] When questioned the defendant said that he had been drinking and had taken Kapake, a strong painkiller. Whilst he admitted carrying the knife he said he could not remember the attack. However, Miss Robinson subsequently picked him out at an identification parade."

[44] The effects of the attack on the victims have been serious. We refer again to the judge's sentencing remarks, where he set out in paragraphs 8 to 12 a summary of the physical and psychological effects upon them:

"[8] These attacks were very serious, and it is only by great good fortune that the consequences were not very grave, indeed fatal. Whilst Miss Robinson was only the victim of a single stab wound, it was deep and in a part of her back that might have had very serious consequences for her. The report of Mr McGovern of May 2002 predicted that whilst there should be further maturation in the appearance of the scar, it would nevertheless be permanent and the source of some embarrassment to her. She also suffered bruising and swelling around her right thumb in the incident. I have been informed that she was off work for some five weeks after this attack, and it would seem that she has not resumed a part-time job which she had previously held when she worked one night a week.

[9] I have also had the benefit of a psychiatric report prepared by Dr Fleming on Miss Robinson in December 2002. He describes how her general practitioner treated Miss Robinson in the aftermath of this attack, including the prescription of hypnotics and referral to a Community Psychiatric Nurse. Having described the effect of the attack upon Miss Robinson, Dr Fleming gave his opinion as to how she would recover in the following passage from his report.

'This 29 year old woman gave an account of an unprovoked attack and stabbing just over a year ago. Just prior

> to it there had been an attempted sexual assault but she seems to have dismissed that fairly well and she doesn't believe that that part of the incident affected her in any significant way. However, the knife attack was clearly a very frightening experience for her and her account would leave little doubt that it constituted a severe psychological trauma.
>
> She described a range of psychological symptoms in the aftermath with emotional disturbance characterised by quite high levels of anxiety and associated insomnia and a range of re-enactment symptoms in the form of both distressing, intrusive ruminations of her experience and also vivid images of it (so-called flashbacks). The clinical presentation is consistent with a severe Post Traumatic Anxiety State, which has had a considerable impact on this young woman's social functioning over the course of the past thirteen months. There has been some mild functional impairment at work due to poor concentration over the early months but this has substantially repaired. She still has significant levels of residual anxiety at this time. The majority of cases of Post Traumatic Neuroses of this type substantially repair within a two-year time scale and I would expect the improvement which she has experienced over the past year to continue with a good improvement in her symptoms over the course of the next year. Nonetheless, she is likely to be left with feelings of vulnerability and mild apprehension in certain situations for quite a few years to come.'

[10] Miss Adams has been left with thirteen scars to her head, left breast, abdomen, upper back, left upper arm, the back of her left thumb and the palm of her

left hand. It is clear from both the number and location of the wounds as shown in Mr Herbert's report that the defendant was determined to cause very serious injuries to his victim. Mr Herbert's opinion was that whilst the scars have settled quite well, and he expected them to become paler over the year following his report of May 2002, the scars will always be present and visible. The scars cannot be improved by surgery. I am satisfied that because of their number and location these scars constitute a significant and permanent cosmetic injury to Miss Adams.

[11] I also have the benefit of a psychiatric report upon her, although it is not as recent as that prepared for Miss Robinson as it was prepared by Dr Egan in April 2002. He reached a diagnosis that five months after the attack Miss Adams 'was presenting with acute post-traumatic stress disorder and there was a substantial depressive component'. Dr Egan expressed his opinion in the following terms.

> 'In view of the fact that the incident constituted an intensely distressing stimulus for Miss Adams it is far from surprising that she is having an intensely distressing psychological reaction to it still. Her symptoms are in their nature and timing consistent with stress reaction to the incident. There are some very positive traits in her basic personality but when one considers the physical and psychological trauma she has undergone it is far from surprising that she has not yet returned to work. I expect however that she will be aiming to ease herself back to work in the not too distant future.
>
> Her level of psychological suffering remains intense and certainly must have been appreciably worse earlier on particularly when sleep was being more problematic. It certainly is as well that she is having professional attention from a Community Psychiatric Nurse

and Zispin does seem to have been a useful antidepressant.

I think that even after she has returned to work some distressing symptoms are likely to continue at some level for a considerable time but hopefully not long after the first anniversary and by about the end of this year she will be gaining some confidence in association with an awareness that she is at last getting on top of what was still an intensely distressing psychological reaction when I saw her. The long term prospects for her mental health in the absence of further such experiences would be reasonably good but she certainly could have short term episodes of return of distressing symptoms in response to reminder stimuli – for a rather longer time.'

[12] Miss McColgan told the court that Miss Adams did not return to work until 16 September 2002. She was therefore off work for some 10 months. In addition she was still seeing her Community Psychiatric Nurse, and taking anti-depressants."

[45] The judge dealt with the appellant's record and his present propensity to offend in paragraphs 13 to 18 of his sentencing remarks:

[13] The defendant has a considerable record for both violent and sexual offences, as well as a conviction for arson, for which he was sentenced to 18 months imprisonment in July 1996. He had three court appearances for sexual offences. In November 1994 he was conditionally discharged for indecent assault committed in June 1985. He would have been 12 at the time of these offences, and the offences were committed against his younger sister. In chronological terms the next sexual offence was an indecent assault on a female committed on 15 June 1998, although this was not dealt with until February 2000. He was sentenced to 3 months imprisonment for what Miss McColgan described as a random incident where he approached a woman who was

putting money in a meter in a car park and touched her bottom. On 4 January 1999 he was sentenced to 10 months imprisonment by Nottingham Crown Court for indecent assault on a female child. The Pre Sentence Report says that the victim was the 14 year old child of his partner.

[14] The defendant has 7 convictions for various forms of assault between May 1989, when he was fined for common assault on a child, and November 1999 when he committed an assault occasioning actual bodily harm, for which he was sentenced to 18 months imprisonment. This was his third conviction for assault occasioning actual bodily harm. In July 1996 he was sentenced to 6 months imprisonment, and for the first in August 1990 (when he was 17) he received a suspended sentence of 6 months detention suspended for two years.

[15] Within the five years and five months prior to the present offences the defendant had therefore committed 1 arson, 2 indecent assaults and 4 assaults, 2 of which were for actual bodily harm. These offences demonstrate that the defendant's offending has been steadily becoming more frequent and more serious, and the present offences have to be viewed against that background. It is also significant that there is evidence that the defendant had boasted of his willingness to use the knife some days before, as can be seen from the statement of James McCoy.

[16] Dr Bownes prepared a very detailed report upon the defendant and gave evidence. He accepted that the defendant is a violent man. In view of the defendant's record and the very serious nature of his attack upon these two ladies I have no doubt that he presents a serious and continuing threat to others. Why this should be is unclear. Dr Bownes feels there are grounds for believing the defendant had a coronary episode in 2000, which might suggest some cognitive impairment. He also has a history of head injuries. However, the defendant was unwilling to undergo an EEG to allow this to be explored further. In his report Dr Bownes has recorded a long history of prolonged heavy drinking, use of illicit drugs and abuse of prescription drugs. In answer to my

> questions he expressed the view that the defendant 'is at risk of engaging in further violent behaviour especially when he has consumed alcohol and also in the absence of any structure or meaningful support on a daily basis when he is in the community'. Dr Bownes expressed the view that the prognosis is poor, and that the prospect of community supervision is not likely to be successful.
>
> [17] I consider that it is important to bear in mind that there are significant indications in the defendant's history that he has failed to comply with obligations imposed by courts, and has proved unwilling to co-operate with those who are attempting to help him. His criminal record contains 7 cases for failure to surrender to bail, 5 of which were between June 1999 and March 2000. In March 2000 he was sentenced to 3 months imprisonment for failure to provide information to police under the Sex Offenders Act. The Pre Sentence Report also records that on an unspecified occasion he failed to comply with prison licence requirements and was returned to prison, and refers to aggressive outbursts to statutory agencies.
>
> [18] His unwillingness to co-operate with others can be seen from his refusal to see Dr Bownes on two occasions last year, and again a few days before Dr Bownes gave evidence on 8 January or to undergo the EEG to which I have referred. The Pre Sentence Report refers to his unwillingness to disclose information about his background in two respects, namely his denial of having children and his refusal to discuss an episode of self-harm in 1996. These factors suggest that if released into the community it is highly probably that he will ignore any restrictions placed upon him, and will fail to co-operate with statutory agencies such as the Probation Service."

[46] The appellant's solicitors arranged for him to be examined by the psychiatrist Dr Ian Bownes. The appellant refused on two occasions to see Dr Bownes and eventually agreed to initial interviews in the presence of his solicitor. Dr Bownes conducted these interviews in August 2002, and concluded that additional professional opinion and investigation were required for a proper assessment. The appellant failed to comply with the arrangements made for this, with the effect that Dr Bownes had to report on

an incomplete investigation and without access to the appellant's medical notes and records or his prison medical file.

[47] Dr Bownes expressed his opinion about the appellant's personality at page 7 of his report as follows:

> "In my opinion from the information contained in Mr Scott's criminal record, from his account of his personal history and functioning and from his presentation at the current interview it is likely that the primary diagnosis in the case is of long-standing attitudinal and personality based deficits and problems including 'neurotic' and 'dissocial' personality traits and a relative lack of personal resources and of appropriate coping skills. Personality-based mental health problems of the nature evident in Mr Scott's case reflect both inherent constitutional factors and environmental influences during childhood and adolescence, and once established can be extremely resistive to change."

He did not find any inherent negative beliefs or particularly pathological views on women in general. He considered, however, that if he failed to address his difficulties "further inappropriate and aggressive criminal acts are inevitable in circumstances where he has abused alcohol and drugs." He thought that his insight into his need to address his difficulties actively was still very limited. His conclusion was that the prognosis was poor unless on his release the appellant engaged in a substantial therapeutic programme. He ended his report by stating:

> "However it is clear that because of the difficulties inherent in this case are such that Mr Scott is likely to place very considerable demands on any professionals involved in his care and the success of any programme will inevitably depend to a very high degree upon the motivation and commitment of Mr Scott in achieving his goals."

[48] The probation officer who prepared the pre-sentence report found the appellant unco-operative and uncommunicative. She stated at page 3 of her report dated 26 November 2002:

> "Mr Scott presents as a very isolated and emotionally detached individual with no evidence of any support networks. He refused to discuss his previous convictions for sexual offences against female children and female adults. The defendant declined

to discuss any information about his sexual history nor his sexual interest in children. However in discussing his adolescent contact with girls the defendant appears to have experienced feelings of rejection. These experiences, illustrated in the response of the victims of the present offence, may have contributed to feelings of vengefulness towards women. It is however apparent that Mr Scott has limited awareness of the issue of consent. Similarly his inability to acknowledge the consequences of his aggression upon others may be a reflection of his egocentricity.

As indicated Mr Scott has previous convictions for sexual assaults on children (his sister in 1994 and the 14 year old daughter of his partner in 1999). He has a previous conviction for Indecent Assault on a female in 2000. The defendant also has several convictions for assaults on males and an arson charge. These offences illustrate the significant level of violence used by the defendant against a range of victims; agency records also indicate that there have been aggressive outbursts to statutory agencies. During the process of interviews Mr Scott acknowledged, to a limited degree, that he has a problem in controlling his temper. However in my opinion Mr Scott has a very limited understanding of his capacity for violence and the consequences of his actions upon others. Records indicate he failed to comply with Prison License requirements and was returned to prison in England."

She said at page 4:

"In initial interview for this report Mr Scott stated the offence were 'stupid' and 'totally out of character'. He was reticent in discussing any premeditative factors. Mr Scott denied any sexual motivation in his initial assault on the females who verbally rejected his physical contact. It would appear that his subsequent pursual of the young women may have been motivated by their rejection of him and his vengeful attitude to them. The victim's statements indicate that they received a number of stab wounds and were extremely distressed and frightened.

> Mr Scott's view that the offences were out of character indicates his inability to accept full responsibility for his actions. This is of particular concern given his pattern of sexual assaults. The defendant was unable or unwilling to express any understanding of the impact of his violence upon the victims. This lack of empathy, reflected in similar detachment from previous victims, highlights the significant risk posed by this defendant."

She therefore concluded that the appellant presented "a very real risk of harm to children, females and males."

[48] The judge turned at paragraph 19 of his sentencing remarks to deciding on the appropriate disposition. He reviewed the aggravating features of the case, the fact that there were two attacks, the use of a knife, the effect on the victims, the appellant's record and his readiness to use a knife a few days before he committed the instant offences. The only mitigating factor was his plea of guilty, which he regarded as attracting considerable credit, in that the victims were spared having to give evidence. He considered carefully whether a custody probation order would be suitable, correctly ruled out an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996 and decided that the supervision which will be necessary for the protection of the public upon the appellant's release could be best furnished by his imposing a life sentence. He examined the criteria for a life sentence and concluded that it was an appropriate disposition, stating in paragraph 25:

> "[25] Given the very high risk that the defendant poses to the public in the future unless the problems identified by Dr Bownes are satisfactorily addressed, I consider that the defendant should not be released until there is substantial evidence to suggest that he is successfully addressing his propensity to violence and his alcohol and drug abuse. In addition, given the high risk that the defendant will fail to comply with any requirements that may be imposed under the licence, a stringent level of supervision can be imposed upon release if that is considered necessary in the light of all of the information available to the authorities at that time. I am satisfied that these requirements are essential for the protection of the public and can only be met by a life sentence."

He fixed the minimum term at eight years.

[49] Mr Ramsey QC on behalf of the appellant presented two main submissions before us:

(a) the criteria for the imposition of a life sentence had not been satisfied;

(b) in fixing such a long minimum term the judge had incorrectly taken into account elements of risk.

[50] The criteria for imposing a sentence of indeterminate length were laid down in *R v Hodgson* (1967) 52 Cr App R 113 at 114, in terms approved and adopted by this court in *R v McDonald* [1989] NI 54:

> "When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

The application of this test received further explanation in *Attorney-General's Reference (No 32 of 1996) (Whittaker)* [1997] 1 Cr App R (S) 261, where the court emphasised that the two essentials are a crime of sufficient seriousness and good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be estimated at the time of sentencing. In the ordinary way a court will look for specific medical evidence to support the latter proposition, but it may be inferred from the evidence before the court. When the criteria as so understood are so applied, we are satisfied that the judge was quite justified in regarding the present case as one calling for a life sentence. He quite rightly considered other methods of disposition; some were not available to him and others he did not regard as sufficient to deal adequately with the case, and he therefore fixed on a life sentence as the one remaining method which would suffice.

[51] The minimum term fixed by the judge of eight years equates to a determinate sentence of 16 years. We note that he did not invite counsel for the appellant to address him on the length appropriate to the case, and it would have been preferable for him to do so. A sentence of 16 years in a case of grievous bodily harm represents a very high point on the scale of sentences on a plea of guilty in that type of offence. It would normally only be justified if the court were imposing a term, pursuant to Article 20(2)(b) of the Criminal Justice (Northern Ireland) Order 1996, which is longer than that which is

commensurate with the seriousness of the offence, in order to protect the public from serious harm from the offender. Where a life sentence is imposed, however, the protection of the public is achieved by the executive discretion over the time of his release after the minimum term has elapsed, since the offender will not be released if he still presents sufficient risk to the public. It is therefore unnecessary to extend the minimum term to a length which would afford that same protection. We accordingly are of opinion that the minimum term of eight years fixed in this case is longer than is required to reflect the elements of retribution and deterrence. We consider that a term of six years, which equates to a determinate sentence of twelve years, would suffice for this purpose. After that period has elapsed, it will fall to the Life Sentence Review Commissioners to assess the risk to the public presented by the appellant and determine whether he can safely be released.

[52] For the avoidance of doubt, we would make it clear that the minimum term which we have approved or fixed in each of the cases dealt with in this judgment will include the time spent by the applicant or appellant in custody on remand.