Judicial Communications Office

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COURT INCREASES SENTENCE FOR MURDER OF BABY

Summary of Judgment

The Court of Appeal[1] today increased the tariff to be served by Sharyar Ali for the murder of an 11-month-old baby following an unduly lenient sentence reference brought by the Director of Public Prosecutions.

On 22 October 2022, Sharyar Ali ("the respondent") was sentenced to life imprisonment and ordered to serve a tariff of 13 years after he pleaded guilty to the murder of baby Hunter McGleenan in November 2019. The plea was entered after a "*Rooney*" hearing[2] where, at the request of the defence, the trial judge gave an indication as to the sentence he would impose on the respondent if he entered a plea to the charge of murder. The respondent referred to the events leading to the child's death as "an accident" claiming that he found the child unresponsive having fallen off the sofa, that as part of resuscitation attempts, he had slapped and shaken him, but gave no further detail or explanation for Hunter's condition and the injuries he sustained. That remains the position meaning there is no explanation as to how the baby came to his death. Medical evidence described the child as having suffered a range of significant injuries including haemorrhages which were typical of severe trauma to the head, rib fractures and bruising.

The DPP referred the sentence on the following points:

- The trial judge did not afford sufficient weight to aggravating factors;
- The trial judge afforded too much weight to mitigating factors;
- The reduction of three years or 19% for the guilty plea was too generous.

The Rooney hearing

Following the *Rooney* hearing the judge indicated that the maximum sentence would be 13 years. That indication is binding upon the judge. The *Rooney* hearing was conducted on a factual basis which was agreed between the prosecution and the defence. The Court of Appeal ("the court") had some concerns about the agreed facts. First, the document setting out the agreed facts was handed to the trial judge during the *Rooney* hearing and was not provided in advance. The court also had reservations about whether the agreed facts truly captured the circumstances of this offence. It said it was not permissible for the court to rewrite it or proceed on a basis of plea which differed from that put before the trial judge: "The Court of Appeal will only consider a reference on the facts proved or admitted. It will not constitute itself as a court of first instance. In addition, it is not open to the Director of Public Prosecutions to assert that the judge proceeded on a wrong factual basis where the prosecution agreed the basis of plea."

An appellate court can entertain a DPP's reference after an indication or a *Rooney* hearing. The court said two core questions must be asked: the extent of the accused's reliance on the indication

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[1] The constitution of the court was Keegan LCJ, Treacy LJ and O'Hara J. Keegan LCJ delivered the judgment of the court.

[2] *Attorney General's Reference (Nos 6-10 of 2005) (Rooney and others)* [2005] NICA 44

and whether the prosecution effectively acquiesced in the approach taken by the judge. Where an indication of sentence is sought the prosecution must advise the judge and the defence that the sentence is referrable. The court said that, unfortunately, that did not happen in this case. In addition, there are certain obligations upon the defence to advise any person who avails of a *Rooney* indication: namely that he should only plead guilty if the plea is voluntary and he is free from any improper pressure; that the DPP will remain entitled to refer an unduly lenient sentence; that any indication given by the trial judge is effective only in relation to the facts as they are known and agreed; and if a guilty plea is not tendered after a reasonable opportunity to consider it, the indication ceases to have effect.

Murder tariffs

The law in relation to fixing of the tariff in murder cases is established in this jurisdiction in the case of *R v McCandless*[3]. The court said there was no issue that the facts of this case brought it within the higher starting point bracket attracting 15/16 years. In addition, this was a case which was especially grave to attract a higher term as it involved a young child. The court said this case could be approached either way so long as aggravating and mitigating factors are properly taken into account.

In examining the three points relied upon by the DPP, the court said it bore in mind that the trial judge is experienced in criminal cases; that sentencing must accord a trial judge flexibility and should not be approached by way of a mechanistic or formulaic approach; and that any sentence must also avoid double counting. It noted there is flexibility in a particular case to raise the starting point depending on the circumstances of a particular case. The court said there were three factors that would bring this case into the 15/16 year category:

- the victim was a child or was otherwise vulnerable;
- there was evidence of gratuitous violence; and
- extensive and/or multiple injuries were inflicted on the victim before death.

The court considered that one of these factors was sufficient to bring the case to the 15/16 year starting point demonstrating the weight that each of these factors carries individually. Where there are three standalone factors, these should act to significantly elevate the starting point, which was recognised by the trial judge: "When all the factors are considered in this case a court is entitled to elevate the higher starting point on the basis of the aggravating factors which are in play."

Aggravating and mitigating factors

The aggravating factors over and above the fact that this case involved a very young child, were:

(i) The number of injuries;
(ii) The specific assault to the penis evidenced by swelling and bruising which brought this case into gratuitous violence;
(iii) The failure to obtain medical assistance; and
(iv) Failure to give an account.

[3] *R v McCandless* [2004] NICA 1

The court noted that the trial judge did not refer to (iii) and (iv) above as specific aggravating factors. It considered he had therefore underestimated the aggravating factors in this case. It considered that factor (iii) was highly significant and was not given enough prominence by the trial judge:

> "On the respondent's own account, the child fell off the sofa around 6.00am and was distressed after that. Yet it was not until 10.30am that the respondent brought the child to where the mother was staying. By that stage the child was blue and cold and likely dead. The history represents an abject failure to care for a small and vulnerable child. The failure to obtain medical treatment is a significant aggravation."

In addition, the court did not think the trial judge was right when he referred to the child being unruly as a spur for events: "Such a view is simply not supported by the evidence." Of further high significance was the fact that the respondent has not explained how Hunter died and also that any court is entitled to be highly sceptical of the accounts he has given. In addition, the court considered that the trial judge overestimated mitigation in this case. It did not think that a lack of intention to kill was a mitigating factor of significant weight in this case. The court also considered that the respondent's personal circumstances added little to the consideration. It said his clear record was in his favour, however, was not of little moment in a murder case such as this. There was also no additional allowance to be made for remorse or provision of an explanation:

> "On our analysis the aggravation manifestly outweighed the mitigation in this case and so the trial judge's starting point of 16 years was clearly wrong. Therefore, after careful consideration, we consider that the sentence in this case falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. It is therefore not simply lenient but an unduly lenient sentence. In a case such as this the starting point should have risen prior to reduction for the plea from the 16 years to 20 years. We see no mitigation which would reduce it back down. We are bound to say that in cases where an accused has a prior criminal history or there is a pattern of abusive behaviour towards a child the starting point of 20 years would likely rise."

The appropriate reduction for a plea of guilty

Article 33 of the Criminal Justice (Northern Ireland) Order 1996 provides that, when determining what sentence to pass on an offender who has pleaded guilty to an offence, a court shall take into account the stage in the proceedings at which the offender indicated his intention to plead guilty, and the circumstances in which this indication was given. If, taking these factors into account, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so.

A plea of guilty is of value in a case such as this and supports the good administration of the justice system. The extent of any credit to be applied will depend upon the stage at which a plea is entered. In addition, the credit in a murder case is lower than that for other crimes because of the particular nature of murder. The court noted that the plea in this case was at a very late stage of proceedings, post-arraignment when the case was set up for trial. Therefore, the reduction for a plea should be about one sixth. The court said it could see nothing wrong with the trial judge's analysis on this issue in the circumstances of this case. Based on the revised tariff of 20 years the court considered a reduction of three years was appropriate. This would bring the final minimum

tariff to around 17 years: before considering the effect of the *Rooney* indication. The court said it was clear that had the trial judge been better assisted he would have reached the conclusion that it had come to.

Disposal

The court stated that the reference procedure does not provide the prosecution with a general right of appeal against sentence. For a reference to succeed it must also meet an exacting standard. The court noted that this case had the added factor of a *Rooney* indication having been given:

> "Where a judge has given an indication as to sentencing, this is an important matter to take into account – not as a matter that would preclude a reference being made but as a factor that should influence the exercise of our discretion whether to accede to the application and how to dispose of the application. We must take the fact of the indication that was given into account."

In circumstances where a court considers that the sentence was unduly lenient that does not mean it must be quashed. Rather even if it is decided that a sentence is unduly lenient there is discretion as to whether to quash the sentence. In exercising its discretion the court must be alert to abuse of process and in some cases this has led to an appellate court refusing leave. The court said that in this case the respondent clearly relied on the *Rooney* indication in order to plead guilty. For reasons that were not fully explained the prosecution failed to refer to the ability of the DPP to refer. The court noted that that failure was not fatal but pointed to a high degree of unanimity between the prosecution and defence as to the likely outcome in this case. Although the respondence was fully advised by the defence that the matter could be referred the prosecution did not comply with its quite separate duty to warn of a reference or in any way argue against the indication given by the judge on the date of the plea when an opportunity was provided or at the date of sentence six months later: "This is all highly unsatisfactory."

The court said, however, that the task of the appellate court is to consider each case in the round and decide how the interests of justice should be served. It added that in a serious case such as this mistakes made by prosecuting counsel cannot be absolutely determinative otherwise public confidence in the justice system would be undermined and the interest of justice not served:

> "We are not aware of any other case in which the specific issue we are dealing with has arisen. We have carefully considered all of the relevant factors in deciding how to exercise our discretion. This has not been an easy or straightforward exercise. We are highly critical of the prosecution approach however given the nature of the case we do not consider that this results in us refusing the application for leave."

The court then turned to consider the appropriate disposal. It said that in the highly unusual circumstances of this case, the principle of double jeopardy applied to some extent. A feature of particular importance and a factor which had considerable weight in this case was that the prosecution now resiled from the *Rooney* indication having acquiesced in it. The court noted that by this reference the prosecution was also seeking to advance a more robust case:

> "That is unfair to the respondent because it exposes him to the risk of a significantly greater sentence on a basis not properly advanced before the judge. It is also unfair to the judge who gave detailed consideration to the sentencing exercise as it was

> advanced before him without objection by the prosecution. The prosecution have the obligation to place before the trial judge any arguments or material that is relevant to the issue upon which the judge is called upon to make a decision. We consider that on the facts of this case the approach occasioned some unfairness to the respondent."

The court also took into account the countervailing interest in an appropriate sentence being passed on the respondent. It said this was a serious case of murder of a very young child where there was an overwhelming case against the respondent based on the medical evidence and the absence of any explanation as to how this child died:

> "This is not a case where it could be realistically argued that there was a viable defence. Therefore, the unfairness to the respondent is not as stark as in those cases where an accused is given an indication of a non-custodial sentence. This means that in the interests of justice we consider that the respondent's tariff will have to be increased. In all of the circumstances, taking into account the Rooney indication and the fault of the prosecution, we will substitute a tariff of 16 years. We therefore grant leave and allow the reference. We quash the sentence passed and replace it with a revised tariff. Our decision means that the respondent will as part of his sentence of life imprisonment have to serve a term of 16 years after which he becomes eligible for release on life licence if the Parole Commissioners determine that imprisonment is no longer necessary for the protection of the public from serious harm. It is for the Parole Commissioners to decide whether he is released at that stage."

Concluding remarks

The court said this case will serve as a guideline for appropriate sentencing in cases involving the murder of a young child. In light of what had happened in this particular case, it queried the utility of a *Rooney* hearing when the issue is the fixing of a tariff for murder. In other circumstances particularly where non-custodial options may be a possibility the court said it could see greater benefits:

> "Certainly if a *Rooney* hearing is contemplated it should be strictly within the guidance provided by that case which includes the obligation upon the prosecution to alert the judge to the fact that any sentence may be referred. In future, counsel need to be much more careful in the construction of the basis of any plea and to present agreed facts which clearly explain exactly what the aggravating and mitigating factors are. Finally, we highlight the need to consider the needs of the victim's family particularly in a murder case where a tariff is being set. We conclude this judgment by recognising the great loss Ms McGleenon and her family have suffered because of the murder of Hunter. No sentence will change that."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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