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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF A REFERENCE BY THE DIRECTOR OF PUBLIC PROSECUTIONS

_____

THE KING

v

SHARYAR ALI

_____

Rick Weir KC and Ms Suzanne Gallagher (instructed by the Public Prosecution Service) for the Director of Public Prosecutions
Charles MacCreanor KC and Mr Aaron Thompson (instructed by Madden & Finucane Solicitors) for the Respondent

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Before: Keegan LCJ, Treacy LJ, O'Hara J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is a reference brought by the Director of Public Prosecutions for Northern Ireland ("DPP") under section 36 of the Criminal Justice Act 1988 as amended by section 41 of the Justice (Northern Ireland) Act 2002.

[2] The sentence referred to this court is one imposed on the respondent by McFarland J ("the trial judge") on 22 October 2022 for murder. Having imposed the mandatory sentence of life imprisonment the judge set a tariff of 13 years following a "*Rooney*" indication and after a plea of guilty. The Public Prosecution Service ("PPS") maintain that this tariff is unduly lenient on the facts of this case.

The nature of a reference

[3] The reference procedure does not provide the prosecution with a general right of appeal against sentence. *Taylor on Criminal Appeals* (3rd ed, 2022), helpfully summarises the applicable legal principles as follows:

> "13.51 As to the nature of the test for granting leave in a reference application the approach of the Court of Appeal Criminal Division (CACD) can be summarized as follows:
>
> (l) The court may only increase a sentence that is unduly lenient and not merely because it is of the opinion that the original sentence is less than that court would have imposed, unless the disagreement results from a manifest error.
>
> (2) Leave should only be granted in exceptional circumstances and not in borderline cases.
>
> (3) Section 36 was not intended to confer a general right of appeal on the prosecution. The purpose of the regime has been stated as being to allay widespread public concern arising from what appears to be an unduly lenient sentence. A sentence will be unduly lenient where, in the absence of it being altered, it would affect public confidence or the public perception of the administration of justice.
>
> (4) The procedure for referring cases ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.
>
> (5) It has been held that a sentence is unduly lenient 'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'
>
> (6) The CACD will ask: was the judge entitled, acting reasonably, to pass the sentence that they did? Did the judge give full reasons for doing so? Was the reasoning and conclusion open to the judge?
>
> (7) The CACD will pay due deference to the advantage of the sentencing judge. The court has noted that sentencing is an art and not a science and that the trial

> judge is well placed to assess the weight to be given to various competing considerations.
>
> (8) Leniency of itself is not a vice. The demands of justice may sometimes call for mercy."

[4] It follows from the above that there is a high and exacting threshold for a reference to succeed. The Court of Appeal when considering a reference must first decide whether to grant leave. The court must also decide whether a sentence is unduly lenient not simply lenient. Finally, even if a court decides that a sentence is unduly lenient the court retains a discretion whether to interfere with a sentence in the circumstances of a particular case and in some instances where double jeopardy is in play.

[5] In this jurisdiction the Court of Appeal has also given guidance on the principles to be applied in reviews of sentencing over many years following the decision in *Attorney General's Reference (No 1 of 1989)* [1989] NI 245. This case followed *Attorney General's Reference Number 4 of 1989* [1990] 1 WLR 41 where Lord Lane CJ described the parameters of a reference at para [45] as follows:

> "The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased — with all the anxiety that this naturally gives rise to — merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.
>
> [2] The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive

> definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.
>
> 3. Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence"

Summary of the facts

[6] The victim in this case is Hunter McGleenon who was born on 21 December 2018. He was therefore only 11 months old when he was murdered on the night of 25/26 November 2019. At that time Hunter lived with his mother in Keady who was in a relationship with the respondent who is not the biological father of the child. On 25/26 November 2019 when the murder occurred the respondent had sole care of Hunter.

[7] The respondent is a native of Pakistan. He entered the UK on a Tier 4 student visa in October 2010. This was due to expire in 2013, however, at that stage the respondent applied for further leave to remain. This was initially granted but subsequently found to be bogus. Around this time the respondent married a Ms Malik in England. Upon his leave to remain in the UK being removed he left to reside in the Republic of Ireland, settling in Monaghan where it appears he was involved in running a mobile telephone business with his wife Ms Malik.

[8] The respondent met Ms McGleenon when she was pregnant with Hunter in 2018. After Hunter was born a relationship developed to the point where the respondent began spending time with Ms McGleenon and Hunter and staying over in the home in Keady.

[9] The respondent agreed to look after Hunter on 25 November 2019 as Ms McGleenon wanted to go to her grandmother's house as she was dying. The respondent spent the day with Hunter who was reported to be in good spirits when the mother left him around 2-3pm. Thereafter, the respondent drove to Monaghan and Dundalk, stopping at mobile phone stores. He also spent approximately two hours in a casino in Castleblayney, leaving Hunter in the car outside. It is reported that he drove back to Keady arriving about 10pm. He saw the mother, Ms McGleenon, briefly at this stage and then went home.

[10] Around 3-3:30am Ms McGleenon decided that she wanted to return home. She went to her house with her sister but could not gain entry notwithstanding the fact that the respondent's car was outside the house. At 4:53am the respondent's car

was recorded by cameras travelling from Keady to Castleblayney. Later at 9:49am a postman called at the house to deliver a parcel. The respondent answered the door and was described as gaunt with a blank expression.

[11] At approximately 10:30am the respondent drove with Hunter in the car to Ms McGleenon who was still with her family. The child was blue, freezing cold with visible bruising to his head. The respondent said, "wee Hunter fell off the sofa and hit his head and he is struggling to breathe." Emergency services were called, resuscitation was attempted by family and then paramedics and then at Craigavon Area Hospital however the child was dead.

History of court proceedings

[12] The respondent was charged with murder (count 1) and assault occasioning actual bodily harm (count 2). He was arraigned on 11 December 2020 and entered not guilty pleas. A trial set for 10 January 2022 was adjourned due to Covid-19 issues. The case was relisted for hearing on 25 April 2022. At that hearing a jury was sworn and legal argument was heard. A '*Rooney'* hearing then took place at the request of the defence. On 27 April 2022 after the judge had given an indication as to sentence the respondent pleaded guilty to murder. The second count was left on the books on the understanding that it could be an aggravating factor to the murder.

The respondent's interviews

[13] The respondent was arrested at Craigavon Hospital on 26 November 2019 and interviewed over the next four days. In summary, the respondent said that Hunter had woken at around 6am after which he lifted him and took him downstairs to change his nappy and feed him. He said when changing his nappy, he noticed rashes and a mark on his penis so he went upstairs to get cream. He said when he returned Hunter was lying on the floor unresponsive, having fallen off the sofa. He said he took him to the shower to wake him up and he was alright until after the position came when he noted the child was not breathing. Then he took the child to his mother and family.

[14] During interview the respondent accepted that he had left Hunter unattended for two hours while in the casino the night before in Castleblayney and when he went to Monaghan in the early hours of the morning. He said that trip was to check his post as he was expecting a driving licence. He left Hunter in his cot.

[15] He referred to events as "an accident." He said that as part of resuscitation attempts, he had slapped and shaken Hunter but no further detail or explanation was given for Hunter's condition and the injuries he sustained. The respondent maintained his account of the baby falling from the sofa to medics. That remains the current position which means that there is no explanation as to how this young child came to his death.

The medical evidence

[16] The substantial medical evidence is directly in contradiction of the respondent's account. It describes a child who was subjected to a forceful assault causing a range of significant injuries.

[17] Dr Christopher Johnson, Assistant State Pathologist for Northern Ireland, details the nature and extent of these injuries in a post-mortem report of 78 pages supplemented by a body map illustration. Dr Johnson's summary is found at para 31 of his report as follows:

> "31. Thus, in summary, Hunter McGleenon was an 11½ month old infant who was found in a state of cardiorespiratory arrest after being left in the sole custody of an adult care giver who claimed he had fallen from a sofa. He was found to have a significant head injury, characterised by subdural and subarachnoid haemorrhage associated with extensive retinal haemorrhages as well as widespread, multifocal bruises to the scalp. This severe head injury would be expected to have caused unconsciousness, and, would account for his clinical presentation and subsequent death. Neither a fall from a sofa and the attempts to rouse Hunter described by Mr Ali would be [not] expected to have caused such severe head injuries. When all of the features in this case are considered together, it is clear that the injuries sustained by Hunter McGleenon were non-accidental inflicted injuries that have arisen during the course of an assault. These injuries have either been caused as a result of excessive shaking associated with blunt impacts to the head, or from blunt impacts of the head alone."

[18] Further medical evidence supplements these conclusions in stark terms which we will briefly summarise. Consultant Paediatrician and Perinatal Pathologist, Dr Malcolmson, noted numerous (too many to count) bilateral, multilayer, preretinal, retinal and subretinal haemorrhages which the doctor said were "typical of severe trauma to the head", caused by a degree of force "towards or at upper end."

[19] Rib fractures were also noted. Whilst the medical evidence concluded that some of these fractures could have been caused by CPR, there were two anterior rib fractures and 12 posterior rib fractures caused 2-5 days before the death and two left sided older posterior rib fractures said to be 1-3 weeks old. Consultant Paediatrician, Dr Deborah Stalker, commented that rib fractures in infants are rare and have a high specificity for physical abuse and require significant force.

[20] Bruising to the face and scalp is also noted as is graphically illustrated on the body map. The child clearly presented with a myriad of visible and extensive bruising. This bruising was said to be caused by multiple blunt blows.

[21] Hunter's penis was also swollen and red. There was a bruise to the right side of the scrotum and bruising to the perineum. No natural explanation was found for this series of injuries.

[22] Finally, abnormal injuries were found.

[23] All of the medical reports were commissioned and served by the prosecution. There was no contrary evidence obtained by the respondent and so the prosecution case was effectively unchallenged.

The pre-sentence report

[24] This is dated 26 May 2022. The report describes the respondent as 34 years of age with no adverse background circumstances. In the report the respondent stated that he played an active parenting role in the victim's life from when he was born often staying with his partner in Keady. He asserted that he was the main carer, providing up to 16 hours care for him each day which involved taking him to work with him.

[25] The respondent has no criminal convictions. The pre-sentence report also refers to a psychological report which concludes that the respondent shows borderline verbal comprehension, evidence of mild learning disability and traits of autistic spectrum disorder which would merit further assessment.

[26] The report states:

> "Mr Ali is aware the court may view his account with a degree of scepticism given the injuries sustained by the victim were horrific and various medical experts have concluded that the fatal injury suffered by the child was non-accidental. In relation to the defendant's attitudes, while he reports to be remorseful, at times, he appeared more focused on the impact of his actions upon himself, evidencing limited victim empathy."

[27] The probation officer assessed the respondent as meeting the threshold of posing a significant risk of serious harm to the public at this time, particularly, with regards children.

Victim Impact

[28] We have read the report of Dr Michael Patterson regarding the effects of this murder upon Ms McGleenon. Also, victim impact statements were provided from her sister and mother. These are very impressive statements from which it is evident that the loss of this much-loved child has had a devastating and lifechanging impact on the mother of the deceased child and the wider family.

Reasons for the reference

[29] From the written reference three points emerge as follows:

(i) That the judge did not afford sufficient weight to aggravating factors.

(ii) That the judge afforded too much weight to mitigating factors.

(iii) The reduction of three years or 19% for the guilty plea was too generous.

In addition, during the hearing Mr Weir KC maintained that the judge effectively chose the wrong starting point. He said that as this was a serious case involving a very young child, he should have started at 20 years.

The Rooney hearing

[30] There is a particular context to this case as the tariff was fixed by the judge after a guilty plea which followed a *Rooney* hearing during which the judge gave an indication of sentence in accordance with the guidance provided in *Attorney General's Reference (Nos 6-10 of 2005) (Rooney and others)* [2005] NICA 44. Following the *Rooney* hearing the judge indicated that the tariff would be 13 years. That indication is binding upon the judge. As a result of this indication the respondent pleaded guilty the same day and was sentenced approximately 6 months later.

[31] The *Rooney* hearing was conducted as required on a factual basis which was agreed between the prosecution and the defence and is set below:

> "The background facts are outlined in detail in the medical reports before the Court.
>
> The plea to murder would be accepted on the basis that the Prosecution are unlikely to be able to prove the intent to kill.
>
> The separate assault charge is being left on the books but the injury to the penis falls (to be) considered in the murder case as an aggravating feature.

> There is no evidence that before the death of the child the defendant showed any aggression or animosity towards the child, he was seen as caring and loving towards the child. He was the boyfriend of the mother.
>
> The offence has occurred in circumstances of the defendant being left to care for the child for a full day and night when the mother was attending to the family situation of her grandmother dying.
>
> The evidence does not support prolonged or separate applications of violent force towards this child causing the head and chest injuries and could have occurred in a loss of temper.
>
> The injuries to the scrotum and penis are indicative of a separate assault.
>
> The addendum report of Dr Malcolmson, at page 492, describes the degree of force required to cause the injuries noted would be associated with "at least severe force."
>
> The Prosecution do not gainsay that the defendant did try as he could to resuscitate the child however, he failed to obtain medical assistance in time."

[32] We pause at this point to record some concerns about the agreed facts. First, we note that this document was handed to the trial judge during the *Rooney* hearing and was not provided in advance. In addition, members of this court have reservations about whether the agreed facts truly captured the circumstances of this offence. It is not permissible for us to rewrite it or proceed on a basis of plea which differs 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. See *R v Haimes* [2010] EWCA Crim 87.

[33] As part of the *Rooney* hearing the trial judge also had the benefit of legal submissions by the prosecution and defence. In the submissions filed both prosecution and defence counsel drew the judge's attention to relevant cases. The prosecution clearly stated that the higher starting point in *McCandless* was applicable. Also, reference was made to *R v McCarney* [2013] NICC 1, *R v Baird* [2004] NILST 19, *Attorney General's Reference No 11 of 2014* [2014] EWCA Crim 843, *Attorney General's Reference [2016]* EWCA Crim 2018, *Attorney Generals Reference* [2018] EWCA Crim 1712 and *R v Smith* [2017] EWCA Crim 1174.

[34] All counsel agreed that an appellate court can entertain a reference after an indication or a *Rooney* hearing. Whilst not a bar the indication is obviously an important factor to be taken into account. In addition, how the *Rooney* hearing was conducted is highly relevant. In that regard two core questions must be asked namely the extent of the accused's reliance on the indication and whether the prosecution effectively acquiesced in the approach taken by the judge.

[35] In *R v Anderson* [2021] NICA 28 the Court of Appeal considered the issue applying *R v Robinson* [1997] 1 Cr App R(S) 357 and *R v Goodyear* [2005] EWCA Crim 888 which are authorities from England & Wales. At para [50] of *Anderson* the court reiterated that where an indication of sentence is sought the prosecution must advise the judge and the defence that the sentence is referrable. Unfortunately, that did not happen here.

[36] The effect of this omission is discussed in *Anderson* applying *Attorney General's Ref No.8 of 2004* (*Dawson & others*) [2005] NICA 18. The court stated as follows:

> "We do not consider, however, that the failure of the prosecution to inform the judge of those authorities or to make submissions as to their effect precludes the Attorney General from making an application under section 36. The omission of counsel cannot be allowed to impede the proper functioning of that provision where justice demands that the sentence be reviewed. But, as Lord Bingham has said, where a judge has given an indication as to sentencing, this is an important matter to be taken into account – not as a matter that would preclude an application being made but as a factor that should influence the exercise of our discretion whether to accede to the application."

[37] In addition, there are obligations upon the defence to advise any person who avails of a *Rooney* indication. Mr MacCreanor KC accepted in writing and in oral submission that these obligations had been complied with. Specifically, the written submission for the trial judge refers to the defence obligations derived from *Rooney* as follows:

> "9. The advocate who appears for the defendant is responsible for ensuring that his client is fully advised one the following matters:
>
> (a) He should only plead guilty if the plea is voluntary and he is free from any improper pressure;

(b) the Attorney General will remain entitled to refer an unduly lenient sentence to the Court of Appeal;

(c) any indication given by the judge is effective only in relation to the facts as they are known and agreed; and

(d) if a guilty plea is not tendered after a reasonable opportunity to consider it, the indication ceases to have effect."

[38] We bear these principles in mind when deciding whether to accede to this reference.

Murder tariffs

[39] The law in relation to fixing of the tariffs in murder cases is established in this jurisdiction in the case of *R v McCandless* [2004] NICA 1. Para [9] adopts the Practice Statement from England & Wales [2002] 3 All ER 412 and sets out the approach to be adopted in respect of adult offenders in paras [10] to [19]:

"***The normal starting point of 12 years***

10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) 6 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.

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."

[40] There is no issue that the facts of this case bring it within the higher starting point bracket attracting 15/16 years. In addition, it may be said that this was a case which was especially grave to attract a higher term in accordance with para [19] as it involved a young child. The case can be approached either way so long as aggravating and mitigating factors are properly taken into account.

Discussion

[41] The prosecution position is set out at para [60] of the reference. To our mind the reference is clear in that it refers to three points namely the trial judge's failure to give adequate weight to aggravating factors, over reliance on the mitigation and overly generous reduction for the plea. The additional argument that the wrong starting point was used is mentioned although not specifically highlighted in the reference. Upon analysis this makes no material difference for reasons which will become apparent. However, we point out that it is impermissible for the DPP to attempt to run a point not specifically made before the trial judge or in the written reference.

[42] In examining the three points relied upon by the prosecution we bear in mind that the trial judge is experienced in criminal cases. We also acknowledge that sentencing must accord a trial judge flexibility and should not be approached by way of a mechanistic or formulaic approach. Any sentence must also avoid double counting. The prosecution within its written submission acknowledges that in the setting of the tariff it was evident the judge was very familiar with the *McCandless* judgment and the Practice Statement contained within.

[43] One of the main features of the Practice Statement is that it is not overly prescriptive. It does not embody a series of inflexible instructions to sentencing judges. In many places its language, as we have observed above, is open textured. This is illustrated by the interrelationship between paras [12] and [19]. Para [19] specifically refers back to para [12] and simply states that some circumstances which are particularly grave may call for a higher sentence.

[44] Properly analysed para [19] does not suggest another additional starting point but rather alerts a judge to the fact that especially grave or aggravated cases falling within the higher starting point bracket in para [12] may demand higher sentences. We are not convinced that even when the circumstances set out in para [19] prevail that a 20 year starting point is automatic. That view is supported by use of the word "may" within the text of para [12]. It is also supported by the Criminal Practice Direction 2015 in England and Wales.

[45] Thus, it is more accurate to say that there is flexibility in a particular case to raise the starting point depending on the circumstances of a particular case.

[46] There are three factors that would bring the case against this respondent into the 15/16 year category, and these are:

(i) that the victim was a child or was otherwise vulnerable;

(ii) that there was evidence of gratuitous violence; and

(iii) extensive and/or multiple injuries were inflicted on the victim before death.

[47] The fact that one of these is sufficient to bring the case to the 15/16 year starting point demonstrates the weight that each of these factors carries individually. It is submitted that logically, therefore, where there are three standalone factors, these should act to significantly elevate the starting point. The trial judge said so in his sentencing remarks.

[48] The trial judge did acknowledge that the victim would be categorised as 'very young.' By virtue of the Practice Statement this fact specifically distinguishes an infant of Hunter's age from a 'child' more generally and must act to shift the starting point above 15/16 years. Returning to the aggravating factors the extensive nature

of the injuries, whether they are separate assaults or multiple injury sites, is an obvious aggravating factor. In addition, there was the penis injury which all accepted was a distinct aggravating factor. Whilst the prosecution did not use the term gratuitous violence during the *Rooney* hearing, nor was specific reference made to this as an aggravating factor we think given the constellation of injuries and the specific injury that this case may be characterised by gratuitous violence. This assessment of the murder is readily validated by the body map imaging which vividly displays the many injuries sustained by the child.

[49] There is always a danger of double counting referred to recently by this court in *R v Hutchison* [2023] NICA 3. However, 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.

[50] In terms of victim impact the trial judge adopted a position of presuming a devastating impact. This is an unimpeachable approach and so no point can made that the judge did not take into account victim impact at the *Rooney* hearing.

[51] We note that the tariff hearing took place some six months after the *Rooney* hearing. As to be expected this was a substantial hearing with written and oral submissions from both sides. The respondent submits that what the papers show is that care was being taken by the prosecution, defence, and the court in the conduct of the tariff hearing. We agree. We are also alive to the point that much lies within a judge's sentencing discretion. However, that is not to say that a judge can fall into error in assessing aggravating and mitigating factors. In our view errors have been made as we will explain.

Aggravating and mitigating factors

[52] The aggravating factors over and above the fact that this case involved a very young child, are as follows:

(i) The number of injuries.

(ii) The specific assault to the penis which brought this case into gratuitous violence.

(iii) The failure to obtain medical assistance.

(iv) Failure to give an account.

[53] The trial judge did not refer to (iii) and (iv) above as specific aggravating factors. Therefore, we consider that he has underestimated the aggravating factors in this case. To our mind factor (iii) is 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.

[54] In addition, we do not think that 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.

[55] Of further high significance to us as an aggravating factor is the fact that the respondent has not explained how this child died. Indeed, we go so far as to say that any court is entitled to be highly sceptical of the accounts given by the respondent. These include the respondent saying that he left the house and child on the night in question and travelled to Monaghan to check his post.

[56] We also consider that the trial judge overestimated mitigation in this case. We do not think that a lack of intention to kill is a mitigating factor of significant weight in this case for the same reasons as those given by Stephens J in *R v McCarney*. Both cases involved the death of a young, defenceless infant. In such circumstances where there was a significant application of force to a young infant the difference between intention to kill and cause serious injury is negligible

[57] In our view the respondent's personal circumstances add little to the consideration ie his immigration status, lack of English and potential ASD. Dr Rehman's report adds nothing of significance which is unsurprising as it was commissioned to ensure that the respondent fully understood proceedings. In his favour is the respondent's clear record however that is of less moment in a murder case such as this. There is no additional allowance to be made for remorse or provision of an explanation.

[58] On our analysis the aggravation manifestly outweighed the mitigation in this case and so the trial judge's starting point of 16 years was 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.

[59] 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

[60] The 20 year sentence we have arrived at must be reduced for the plea. The relevant statutory provision touching on the reduction in sentence for a guilty plea in Northern Ireland is Article 33 of the Criminal Justice (Northern Ireland) Order 1996.This provides:

> "33(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account:
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given.
>
> (2) If, as a result of taking into account any matter referred to in paragraph (1), 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."

[61] A plea of guilty is of value in a case such as this and supports the good administration of our 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 for other crimes because of the particular nature of murder. In *R v William Turner and James Henry Turner* [2017] NICA 52, Morgan LCJ said this:

> "There are very few cases indeed which would be capable of attracting a discount close to one-third for a guilty plea in a murder case. … Each case clearly needs to be considered on its own facts but it seems to us that an offender who enters a not guilty plea at the first arraignment is unlikely to receive a discount for a plea on re-arraignment greater than one-sixth and that a discount for a plea in excess of five years would be wholly exceptional even in the case of a substantial tariff."

[62] 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. We 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 that we consider appropriate, we think that a reduction is of three years is appropriate. This brings the tariff to 17 years before considering the effect of the *Rooney* indication. We are clear

that had the trial judge been better assisted, he would have reached the conclusion that we have come to.

Disposal

[63] We repeat the fact 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. This case has the added factor of a *Rooney* indication having been given. As we have discussed above where a judge has given an indication as to sentencing, this is an important matter to be taken 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.

[64] In circumstances where a court considers that the sentence was unduly lenient that does not mean that 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 – see *Attorney General's Reference (No: 1/2006) Gary McDonald and others* [2006] NICA 4 at para [37].

[65] In exercising its discretion the court must be alert to abuse of process. In some of the cases we have read this has led to an appellate court refusing leave.For instance, in *Att-Gen's Refs Nos.80 and 81 (Thompson and Rodgers)* [2000] 2 Cr App R (S) 138 the Court of Appeal refused leave to refer notwithstanding that it was unduly lenient, on the ground that the sentencer had given an indication of the intended sentence before pleas were entered and the prosecution had not queried the propriety of the proposed sentence. Lord Bingham CJ also stated as follows:

> "Having regard to the unfortunate history of this case, we consider it almost, if not actually, abusive now to reopen these sentences to the potential detriment of the offenders. While therefore, we wish to make it as plain as we can that these were serious offences and not to be treated at all lightly by any sentencing court, we do not think it right to grant leave to the Attorney General."

[66] In this case the respondent clearly relied on the *Rooney* indication in order to plead guilty. For reasons that are not fully explained the prosecution failed to refer to the ability of the DPP to refer the sentence. That failure is not fatal but to our mind it points to a high degree of unanimity between the prosecution and defence as to the likely outcome in this case. Although the respondent 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 unstatisfactory.

[67] However, the task of this appellate court is to consider each case in the round and decide how the interests of justice should be served. 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 interests of justice would not be served.

[68] 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.

[69] This leads us to consideration of the appropriate disposal. In the highly unusual circumstances of this case we think that the principle of double jeopardy applies to some extent. A feature of particular importance and a factor which has considerable weight in this case is that the prosecution now resile from the *Rooney* indication having acquiesced in it. By this reference the prosecution is 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 taken occasioned some unfairness to the respondent.

[70] All of that said we must also take into account the countervailing interest in an appropriate sentence being passed on the respondent. 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 can 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.

[71] 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.

[72] 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 Commisioners to decide whether he is released at that stage.

Concluding remarks

[73] By this judgment we have identified various matters that should assist in any future sentencing exercises. Going forward, this case will serve as a guideline for appropriate setencing in cases involving the the murder of a young child.

[74] In light of what has happened in this particular case we query 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, we can 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 interests of the victims family to be kept fully informed particularly in a murder case where a tariff is being set.

[75] 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.