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Judgment: approved by the Court for handing down
(subject to editorial corrections) | *Delivered:* **23/06/06**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ANDREW ROBINSON

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an application by Andrew Robinson for leave to appeal against the minimum term of twenty years' imprisonment imposed on 9 April 2003 by Nicholson LJ following the applicant's conviction on 9 December 2002 of the murder of his former partner, Julie-Anne Osborne. The application for leave to appeal is made under section 8 of the Criminal Appeal (Northern Ireland) Act 1980.

Factual background

[2] The applicant is now almost 28 years old, having been born on 9 July 1978. The deceased was born on 18 July 1978. They met in 1995 and started living together shortly afterwards. On 21 April 1999, a daughter, Melissa, was born of that relationship. In July 2000 they went on holiday to Tenerife. On the day of their return the applicant's father died. It is claimed that the applicant was affected deeply by that event and that he became increasingly fearful that if his relationship with Julie-Anne ended, he would not see Melissa, to whom, it is said, he was devoted. Whatever may be the truth of these claims, it is clear that from the time that they returned from Tenerife, violence, which had long been a feature of their relationship, intensified.

[3] Mr Donaldson QC, who appeared with Mr Doran for the applicant, accepted that he assaulted Julie-Anne on a number of occasions. He pointed

out, however, that she too had been observed assaulting the applicant, in particular pulling his hair. From the evidence presented on the trial and such other material as is available to us, we find no reason to conclude that Julie-Ann inflicted any significant violence on the applicant. (She was a slight young woman who weighed only some 48 kilograms at the time of her death.) There is substantial cause to believe, however, and evidence from a number of witnesses, that he was regularly and viciously violent to her. Evidence of his brutality in the form of significant facial bruising was apparent on at least one earlier occasion. We consider that the trial judge was entirely correct in concluding that the murder was the culmination of violent and threatening behaviour by the applicant over a period of time and that Julie-Anne lived in fear of him. For reasons that we will discuss presently this was a significant finding in relation to the selection of the appropriate minimum period.

[4] It is clear that the applicant engaged in a certain amount of planning for the attack on his victim and that he sought to conceal his involvement in the crime, engaging in an elaborate charade of pretending to find the body and claiming preposterously that Julie-Anne had been murdered by an intruder. In fact he had attacked her in a savage and sustained way, repeatedly stabbing her. The planning of the murder and the infliction of extensive multiple injuries are highly relevant also in selecting the appropriate tariff.

The Practice Statement

[5] In *R v McCandless & others* [2004] NICA 1 the Court of Appeal held that the *Practice Statement* issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 should be applied by sentencers in this jurisdiction who were required to fix tariffs under the 2001 Order. The relevant parts of the *Practice Statement* for the purpose of this case are as follows: -

> *"The higher starting point of 15/16 years*
>
> 12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim

was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

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

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

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."

Application of the Practice Statement to the present case

[6] The selection of the higher starting point was inevitable in this case. The victim was especially vulnerable to the violence of the applicant in view of her previous relationship with him and extensive, multiple injuries were inflicted on her. She was attacked in her bed in the early hours of the morning. She was no match for the superior strength of the applicant. The applicant suffered the following injuries: 1. a stab wound that penetrated the right eyeball; 2. a stab wound above the right ear which had penetrated the skull and the surface of the brain; 3. two deep incisions that divided the right jugular vein, the right carotid artery, the thyroid gland and the voice box; and 4. thirteen wounds on the chest and twenty eight wounds on the back some of which passed completely through the trunk.

[7] Both the victim's vulnerability and the infliction of so many injuries are aspects that feature in paragraph 12 of the *Practice Statement* as factors that individually would justify the adoption of that starting point. It should be stressed, however, that these factors are not exhaustive of the circumstances where the selection of the higher starting point will be justified. Both the *Practice Statement* itself and the judgment in *McCandless* emphasise that the factors outlined in the various paragraphs of the statement are designed to be illustrative rather than prescriptive of the circumstances in which the various outcomes that are suggested may arise.

[8] Factors identified as aggravating features in paragraph 14 of the statement may also be considered as justifying the selection of the higher starting point. We have particularly in mind domestic murders. In view of the incidence of this type of crime in our community, we consider that where domestic murder occurs as "the culmination of cruel and violent behaviour by the offender over a period of time", this will normally warrant the selection of the

higher starting point. Consideration of this issue should not be confined to its significance as an aggravating feature giving rise to an increase on whatever starting point is selected.

[9] Another factor that would justify, in our opinion, the selection of the higher starting point was the pretence in which the applicant engaged after he had murdered Julie-Anne to throw suspicion away from him. It is quite clear that he engineered the presence of the partner of Julie-Anne's mother so as to make it appear that he had discovered the body. He threatened to kill those responsible for her death and "their families". He kept up this ludicrous sham when his own mother and various members of Julie-Anne's family came on the scene and even when the police arrived. Engaging in this type of pretence is not referred to specifically in the *Practice Statement* as a factor that justifies the selection of a higher starting point but its omission does not preclude that result. We consider that this is a substantial aggravating feature that makes the culpability of the applicant significantly greater. As paragraph 12 of the statement makes clear, the selection of the higher starting point is warranted where the culpability of the offender is exceptionally high. Any factor tending to have that effect, even if not mentioned in the paragraph, should nevertheless be taken into account in deciding whether the higher starting point is appropriate.

[10] In our judgment there are at least four factors present in this case, any one of which would have justified the selection of the higher starting point. In light of that, paragraph 18 of the *Practice Statement* must be considered. It suggests that a substantial upward adjustment – even to the level of thirty years – may be suitable where this situation obtains. That consideration more than amply demonstrates the futility of this application for leave to appeal but that does not necessarily dispose of all the issues that arise. We must also examine whether this analysis requires us to increase the minimum term. We are satisfied that not only does this court have power to do so, but that we are obliged by section 10 (3) of the Criminal Appeal (Northern Ireland) Act 1980 to consider whether this should be the outcome. Section 10 (3) provides: -

> "(3) On an appeal to the Court [of Appeal] against sentence under section 8 or 9 of this Act the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the Crown Court.

[11] The applicant's application for leave to appeal against the minimum term imposed by the learned trial judge is made under section 8 of the 1980 Act which provides that a person convicted on indictment may appeal to the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law. A sentence of life imprisonment for murder is one fixed by law but the imposition of a minimum term under article 11 of the Life Sentences (Northern Ireland) Order 2001 is not – see *McCandless* paragraph [4]. The restriction specified in section 10 (3) that a sentence should not be increased on account of evidence not given before the Crown Court does not arise in this case because there is nothing that might prompt such a course that was not canvassed before the trial judge. We are satisfied therefore that there is no constraint on the duty of this court to consider whether the minimum period should be increased.

[12] We have given very careful consideration to whether the minimum period in this case should be increased. As we have pointed out, the application of paragraph 18 of the *Practice Statement* would permit a more severe penalty. Having considered the question anxiously, however, we have decided that this course should not be followed in this instance. We should make it clear, however, that the possibility of an increase in the minimum period on an application for leave to appeal against a tariff is a real one and should be carefully considered by applicants and their legal representatives in future cases.

[13] The application for leave to appeal is dismissed.