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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOHN PAUL WOOTTON AND BRENDAN McCONVILLE

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBERS 2 & 3 of 2012)

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] Brendan McConville and John Paul Wootton were convicted by Girvan LJ, sitting in the Crown Court without a jury, of the murder of Constable Stephen Carroll on 9 March 2009 and possession of a firearm with intent to endanger life. Wootton was further convicted of attempting to collect information likely to be of use to terrorists. For their parts in the murder, the learned trial judge sentenced McConville to life imprisonment with a minimum term of 25 years and sentenced Wootton, due to his age, to detention at Her Majesty's pleasure with a minimum term of 14 years. In a judgment handed down on 29 May 2014 ([2014] NICA 41) this court dismissed each of the offender's appeals against conviction. The Director of Public Prosecutions now seeks leave to refer the sentences to the Court of Appeal pursuant to section 36 of the Criminal Justice Act 1988 on the grounds they are each unduly lenient. Mr McGrory QC appeared with Mr Russell, Mr Macdonald QC appeared with Mr Devine for McConville and Mr Harvey QC appeared with Mr Fox for Wootton. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] A full summary of the evidence upon which the two appellants were convicted is contained in this court's judgment on the conviction appeal. At 8:41pm on 9 March 2009 police received a 999 call reporting that a brick had been thrown through the window of a house at 33 Lismore Manor, Lurgan. Two police cars attended, one of which was being driven by Constable Carroll. Shortly after arriving, and before Constable Carroll had alighted from his vehicle, two shots were fired from a high velocity rifle at the police car. One of these shots struck Constable Carroll in the head. He was taken to hospital but pronounced dead at 10:28pm.

[3] An investigation of the scene discovered cartridge cases approximately 50 m from where the deceased had been positioned and this established the firing point. McConville was identified by Witness M as being present with others in the vicinity of the firing point on two occasions in the period leading up to the shooting. McConville and Wootton were associates. They were seen together prior to the shooting and at 7 am on the morning after the shooting a passenger in Wootton's car used a bank card at an ATM in Lurgan withdrawing cash from an account held by McConville.

[4] Wootton's car had been parked prior to the shooting at a point less than 300 yards from the firing point. The location was close to the house from which the bags covering the weapon, when it was found some days after the shooting, were taken. His car left the scene approximately 10 minutes after the shooting and travelled close to the address at which McConville resided. It was contaminated with gunshot residue from firearms other than those used in this shooting. In the back of the vehicle was a jacket of which McConville was the habitual wearer which had substantial numbers of gunshot residue particles indicative of the type of Mercury fulminate ammunition used in this attack. A jacket of the same make and size found in McConville's house had particles of the same type.

[5] Wootton was also convicted of attempting to collect information likely to be useful to terrorists. He had asked Witness E whether he was going out with a policeman's daughter and then demanded to know her address. It was of some considerable significance in relation to Wootton that he was actively seeking to obtain information with a view to causing harm to another police officer. The learned trial judge concluded that these factors, together with other circumstances, raised a compelling circumstantial case indicating that each offender was intimately involved in the murder. No specific role was attributed to either of them and it was the prosecution case that neither was the shooter.

The Sentencing Remarks of the Learned Trial Judge

[6] The learned trial judge noted the immense impact of the murder on Constable Carroll's widow. Both appellants refused to co-operate with the compiling of pre-

sentence reports and he considered this to confirm their lack of remorse for their crime. The learned judge considered the sentencing guidance in R v McCandless [2004] NICA 1 and each of the starting points there set out. He considered that the example of the murder of a prison officer as especially grave was equally applicable to police officers and other members of the security forces where the offence is committed in the context of terrorism. He further considered the sentencing regime in England under the Criminal Justice Act 2003 ("the 2003 Act") referred to in R v Hamilton [2008] NICA 27 in which this court stated that whilst the 2003 Act was not applicable that did not mean it could not be taken into account.

[7] In relation to McConville, the learned judge noted that he was made subject to a suspended sentence in 2008 for possession of a firearm and ammunition in suspicious circumstances. He found that it was an aggravating factor that the murder was committed during this suspension period. The learned trial judge considered the sentence which had been handed down in R v Shivers [2012] NICC 4, a case involving the murder of soldiers by Republican terrorists, in which the conviction was subsequently set aside, and said he would follow that case and impose a minimum term of 25 years.

[8] In relation to Wootton, the judge noted that the starting point given in McCandless for the tariff for an offender aged under 18 was 12 years. He noted that Wootton had a clear record and that his role in the murder was more peripheral than that of McConville. Whilst it could not be proved that he removed the gun, the evidence did show he co-operated in being the driver of a getaway car which had also been used in connection with other offences and showed that Wootton was committed to the terrorist campaign. The learned judge said that some allowance must be made for the fact that Wootton did play a more limited role. Although his age had to be taken into account, it was necessary to have regard to the gravity of the offence and his knowing and willing involvement in playing a role in helping to remove at least one key participant from the crime scene. In those circumstances the learned judge fixed the minimum term at 14 years.

[9] In respect of the firearms offence, the learned judge considered that a sentence of life imprisonment was appropriate and fixed minimum terms of 10 years and 5 years for McConville and Wootton, respectively. In relation to Wootton's offence of attempting to obtain information of use to terrorists, the learned judge considered that an extended custodial sentence would not be sufficient to protect the public and imposed an indeterminate custodial sentence with a minimum term of 6 years.

The DPP's submission

[10] Mr McGrory submitted that the aggravating factors present in the offence were, firstly, that the killing was planned and, secondly, that a firearm was used. He contended that the offence not only fell into the higher starting point in paragraph 16 of McCandless but also fell into the most serious cases in paragraph 18 and the

especially grave offences in paragraph 19. He referred to section 269 of, and Schedule 21 to, the 2003 Act which provided the structure and starting points for imposing sentences of life imprisonment in England and Wales and noted the comments of this court in R v Hamilton that although not applicable to Northern Ireland they can be taken into account.

[11] He submitted that the killing of a police officer acting in the course of his duty by those seeking to terrorise the community for their own political or ideological motives must come within the highest category and that a deterrent element should also be considered. That had been specifically accepted by the judge. In respect of McConville, the DPP argued that the starting point should be 30 years, given the presence of three of the five aggravating features mentioned in paragraph 14 of McCandless and the fact that Constable Carroll had been lured to the scene by a fictitious indication that a member of the public required assistance.

[12] In respect of Wootton, he contended that the only mitigating factor was his age. Whilst Wootton had a more peripheral role in the murder, the distinction between him and McConville was too great. Wootton's lack of criminal record was a neutral factor rather than a mitigating factor. Furthermore, the 12 years starting point is not definitive and can be varied upwards (R v Stokes [2010] NICC 9). In any event, once the starting point is determined, then the aggravating features are equally applicable to both Wootton and McConville. Any reduction of the effect of the aggravating features due to Wootton's age would be a form of double counting.

The submission on behalf of the offenders

[13] On behalf of McConville Mr Macdonald submitted that the learned trial judge had referred himself to the correct sentencing principles and identified this as a higher starting point case. He referred to all of the salient factual matters to which the DPP drew attention. The Director relied upon paragraph 19 of the Practice Statement but failed to recognise that paragraph 19 suggested that a term of 20 years and upwards could be appropriate. The tariff in this case was well above that.

[14] There were two recent examples which provided guidance as to the appropriate sentencing decisions. The first was R v Shivers where a tariff of 25 years was imposed for the murder of two soldiers and the attempted murder of several more. In R v Kearney [2013] NICC 33 a tariff of 20 years was imposed for the murder of a 25-year-old police constable in the car park of a hospital.

[15] The Director provided no rationale for the suggestion in the reference that the tariff should be 30 years.

[16] On behalf of Wootton Mr Harvey submitted that the learned trial judge was entirely correct to take a starting point of 12 years. Indeed he was required to do so by the McCandless guidance which stipulated that the starting point for a youth

should always be 12 years. He further noted that the 2003 Act itself excluded youths from the higher starting points and required a starting point of 12 years for persons under 18 at the time of committing the offence (see Schedule 21, paragraph 7 of the 2003 Act).

[17] Mr Harvey accepted that the sentence can move up or down from the 12 year starting point depending on aggravating and mitigating factors. He submitted that the aggravating features in the present case were (i) a planned killing, (ii) a firearm was used, and (iii) the firearm was brought to the scene in advance of the killing; and that the mitigating factors were (i) his limited role in the offence and (ii) his clear record.

[18] He further submitted that it had been a feature of the justice system for many years that young offenders should be treated leniently as recognised by international criminal standards (see R v CK [2009] NICA 17). The approach of the learned trial judge and the sentence were beyond reproach.

Sentencing Guidance on Tariffs

[19] All of the parties in this case accepted that guidance on the appropriate tariff in murder cases in this jurisdiction was contained in R v McCandless [2004] NICA 1 and none of the parties submitted that any modification to that guidance was necessary. In that case this court adopted the Practice Statement issued by Lord Woolf LCJ and reported at [2002] 3 All ER 412. The appropriate starting points are considered at paragraph 10 of the Practice Statement and following:

> "**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).

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.

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.

Young offenders

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> 24. In the case of young offenders, the judge should always start from the normal 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. Some children are more, and others less, mature for their age and the reduction that is appropriate in order to achieve the correct starting point will very much depend on the stage of the development of the individual offender. A mechanistic approach is never appropriate. The sort of reduction from the 12-year starting point which can be used as a rough check, is about one year for each year that the offender's age is below 18. So, for a child of ten, the judge should be considering a starting point in the region of five years.
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> 25. Having arrived at the starting point the judge should then take account of the aggravating and mitigating factors in the particular case, which will take the prescribed minimum term above or below the starting point. The sliding scale proposed is intended to recognise the greater degree of understanding and capacity for normal reasoning which develops in adolescents over time as well as the fact that young offenders are likely to have the greatest capacity for change. It cannot take into account the individual offender's responsibility for, and understanding of, the crime."

[20] Carswell LCJ emphasised in McCandless that the Practice Statement was intended to be guidance only and the starting points were intended as aids in finding the right and appropriate sentence for the particular case. We also accept that the sentencing regime under the 2003 Act can be taken into account as stated in R v Hamilton. Where, however, the Practice Statement has made provision for the type of case in which the sentence is being imposed the 2003 Act is likely to be of limited value.

Consideration

McConville

[21] The murder of Constable Stephen Carroll was a carefully planned terrorist operation. McConville participated in that operation although it is not possible to identify his particular role. The prosecution case is that he did not fire the shot which killed the deceased and there is no evidence as to his being involved in the planning

and preparation of the offence. It can be said, however, that he was close to the firing point in the period leading up to the shooting.

[22] By virtue of McConville's participation in this terrorist murder the learned trial judge correctly identified this case as one falling within paragraph 19 where a tariff of 20 years and upwards could be appropriate. In examining the aggravating factors surrounding the offence it is important to ensure that there is no double counting once this case is placed in the "very serious" bracket. The nature of terrorist offences is that there is some degree of political motivation, they involve a great deal of planning and the use of a firearm is common. Such aggravating factors will not normally add significantly to the tariff although these will be material in terrorist offences not involving the imposition of a life sentence tariff.

[23] In this case, however, there is the significant aggravating factor that this terrorist offence involved the killing of a police officer in the course of his duties. Paragraph 12 of the Practice Statement recognises that where the victim is a public servant that, of itself, would move the case into the higher starting point. The reason for that approach is not because the lives of public servants are more valuable than other lives but because public servants should be protected by way of deterrence having regard to the obligations and risks which they take on for the benefit of the community.

[24] The issue of deterrence is also plainly involved at paragraph 19 where there is specific reference to the murder of a person performing his duties as a prison officer. That provision is designed to ensure that anyone who would consider harming those charged with managing dangerous offenders realises that they will be severely dealt with when made amenable. We consider that there is no material distinction between the position of prison officers who manage dangerous offenders and police officers who investigate serious crime and bring offenders to justice. Their roles may be different but the need for deterrence in each case is plain.

[25] For those reasons we consider that the tariff in this case required an uplift beyond 20 years because it was both a terrorist offence and an attack on a police officer. We consider that the learned trial judge was entitled to take into account as a further aggravating factor that this offence was committed during the period of McConville's suspended sentence for possession of a firearm and ammunition in suspicious circumstances.

[26] In considering the extent of the appropriate uplift beyond 20 years the learned trial judge took into account the tariff of 25 years imposed in R v Shivers. That was a case in which there were multiple murders of soldiers and injuries to others. It had a terrorist background and the same argument on deterrence in relation to the soldiers was appropriate. The accused, who was subsequently acquitted on retrial, was alleged to have participated by assisting in the disposal of a vehicle after the

commission of the offence. He was not, therefore, allegedly directly involved in the events surrounding the commission of the offence.

[27] We considered that the learned trial judge properly took into account that this was a terrorist offence, that it was aggravated by the fact that a police officer was the victim and further by the fact that this man was serving a suspended sentence for firearms offences at the time of the commission of this murder. We concluded that a tariff of in or about 25 years was appropriate and that the sentence was not unduly lenient. Accordingly we refused leave at the oral hearing.

Wootton

[28] In the case of Wootton many of the same aggravating factors apply. He was a willing participant in the terrorist murder of a police officer. The precise nature of his role in the offence has not been established. There is no suggestion that he was the person who fired the weapon nor is there any evidence to indicate that he planned or organised the attack. Unlike McConville there is no evidence that he was at the firing point at any time before or after the shooting. The learned trial judge considered that this was a point of some limited distinction.

[29] He was also convicted of attempting to collect information likely to be of use to terrorists. The importance of that conviction lies in the fact that he was attempting to obtain details in relation to the address of a police officer. The strong inference, therefore, is that he was actively seeking information with a view to someone doing that police officer harm. There was also evidence of his participating in public in paramilitary dress and, more worryingly, evidence that he was connected to the discharge of firearms other than the firearms used in this murder.

[30] Having regard to the aggravating factors in this case, in the case of an adult who had fought the case against this background the appropriate tariff would have been over 20 years and close to 25 years. The issue is the extent to which the age of the offender should influence the appropriate tariff. Wootton was born on 15 May 1991 and was, therefore, just over two months short of his 18th birthday when this offence was committed.

[31] Paragraph 24 of the Practice Statement indicates that the judge should always start from the normal starting point appropriate for an adult, 12 years. Mr Harvey properly relied heavily on this statement. Paragraph 24 goes on to suggest that as a rough check the starting point should be reduced by one year for each year that the offender's age is below 18. Any such exercise should, of course, take into account the maturity of each young person but there is nothing in this case to suggest that Wootton's maturity was other than in accordance with his age. However, we strongly endorse the proposition that a mechanistic approach is never appropriate

[32] Paragraph 25 of the Practice Statement requires the judge to then take account of the aggravating and mitigating factors in the particular case. There are three significant aggravating factors in this case. The first is the fact that this was a terrorist murder, the second is that the victim was a police officer carrying out his duties and the third is that the offender was convicted of attempting to obtain information useful to terrorists in respect of another police officer. The Practice Statement as a whole indicates that the requirements of retribution and deterrence in relation to those aggravating factors would in this case have suggested a tariff of 20 years or more. The fact that the starting point is 12 years or less as adjusted for age does not in any way diminish the extent to which aggravating factors such as involvement in terrorism or the murder of police officers should substantially uplift the determination of the tariff. The only modification to paragraph 19 of the Practice Statement for age is the adjustment which is made by way of the sliding scale.

[33] We consider it appropriate to test this analysis against established sentencing principles. These were discussed in R v CK [2009] NICA 17 and R v Coyle [2010] NICA 48. R v CK was a case in which a 14-year-old was accused of offences including rape. He himself had been the subject of sexual abuse. The court concluded that the welfare of the child, including the rehabilitation of the offender, were better served by a Juvenile Justice Order. In R v Coyle the offender was convicted of manslaughter. The court concluded that rehabilitation again suggested that a sentence in a Young Offender's Centre was preferable to a period of imprisonment.

[34] The principles influencing these and other cases were set out at paragraph 25 of DPP's Reference (No 18 of 2013) R v Finnegan [2014] NICA 20.

> "The domestic and international provisions in relation to the sentencing of children are designed to ensure that where detention of young people is necessary it should be for the shortest appropriate time and the focus should be on rehabilitation away from recidivist offenders. It is for the court, however, to establish whether in accordance with sentencing principles such an outcome can be achieved in a particular case. In assessing the culpability of a young offender his age and emotional development are likely to be significant. The closer he is to the threshold of adulthood the more likely it is that the mitigation of youth will be diminished. That is consistent with the Sentencing Guidelines Council Definitive Guideline entitled "Overarching Principles – Sentencing Youths" at paragraph 5.2. We have said on numerous occasions that we often find assistance

> in the general factors taken into account in the compilation of these sentencing guidelines."

[35] We are satisfied, therefore, that the mitigation for youth in the case of a person who was approximately 2 months short of his 18th birthday at the time of the commission of a serious violent offence of this nature is limited. In our view the appropriate tariff in the case of Wootton was 20 years. We have to take into account the effect of double jeopardy arising from his exposure to this reference and in the circumstances we substitute a tariff of 18 years.

Conclusion

[36] We refuse leave in the case of McConville and grant leave and substitute a tariff of 18 years in the case of Wootton.