Neutral Citation No. [2002] NICC 13 | *Ref:* **MCLC3825**

Judgment: approved by the Court for handing down | *Delivered:* **11.12.2002**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

v

NEIL GORDON GRAHAM

McLAUGHLIN J

[1] Neil Gordon Graham was convicted at Belfast Crown Court on 14 November 2002 of the murder of Ernest Paul Gault by the unanimous verdict of the jury following a trial lasting approximately eight weeks. The evidence given at the trial proved that Mr Gault was murdered in the bedroom of his own home by someone wielding a heavy weapon, almost certainly the hockey stick which featured as an exhibit in the case, and that his death was due to the infliction of severe head injuries by his attacker. In his evidence at the trial, Dr Curtis, Assistant State Pathologist for Northern Ireland, summarised his findings as follows:

> "At post mortem examination this man was seen to have suffered a catastrophic head injury with a compound comminuted skull fracture involving calvaria and base. There was associated severe brain injury. There were severe lacerations on the scalp. These injuries would be consistent with having been inflicted with a hard solid implement. A minimum of three blows would have been inflicted. There was no evidence of any natural disease which would have contributed to, or hastened, his demise.
>
> In addition, he had blunt force trauma to the left hand with fractures to two metacarpal bones. This may represent a defence-type injury.

> At the conclusion of the post mortem examination death was attributed to head injury."

[2] Dr Curtis stated also that whilst the very severe and extensive injury to the roof of the skull could have been caused by a single blow from the point of the hockey stick, it was "more probable that it was caused by a multiplicity of blows". Mr Spiers of the Forensic Science Agency of Northern Ireland carried out an analysis of the pattern and distribution of blood in the bedroom where the body of Mr Gault was found and it was his opinion that the death of Mr Gault was caused by the infliction of ten blows or more. Taken together the evidence of Dr Curtis and of Mr Spiers satisfies me beyond doubt that there was a series of blows, perhaps as many as ten in number, inflicted upon Mr Gault which caused his death. By any description he was killed in a most brutal and merciless fashion.

[3] Following the conviction of the accused by the jury I imposed upon him a sentence of life imprisonment, that being the only sentence available to this court. Since the coming into force on 8 October 2001 of the Life Sentences (NI) Order 2001 this court now has an additional task to perform. By Article 5(1) of the Order it is provided that:

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

[4] I am not of the opinion that it is necessary to make an order under Article 5(3) and therefore the court must now determine when the release provisions shall apply to him. That means in effect that I must set a minimum term of imprisonment which he must serve before he may even be considered for release. It goes without saying that at the expiration of that period that he will not be released necessarily. You will have to go through the procedures laid down in the release provisions and it shall be for the Life Sentence Review Commissioners to consider the matter and to decide whether to direct his release under the terms of the Order.

[5] It is also important to record at this stage that should the defendant be released he will remain a life sentence prisoner and he will be subject to supervision and the risk of recall to the prison for the rest of his natural life. A life sentence will operate upon him therefore for the whole of his life and, whilst he may not be confined within a prison, he shall never be free of that sentence.

[6] By the terms of Article 5(2) of the Order the part of the sentence which I shall specify, which is sometimes referred to as a "tariff" or a "minimum period of imprisonment", must be such as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. It is no part of my function to consider whether or not he might pose a risk to any member of the public either now or in the future and that cannot be reflected in the period of years of imprisonment which I must stipulate.

[7] The question of setting of a tariff or minimum period of imprisonment has commanded much attention recently. The legislative provisions dealing with mandatory life sentence prisoners in Northern Ireland are not replicated in England and Wales, although Scotland does have similar provisions. Following upon the decision of the European Court of Human Rights on 16 December 1999 in the case of V v United Kingdom (2000) 30 EHRR 121, a Practice Statement (Practice Statement (Juveniles: Murder Tariff) [2002] 1 WLR 1655) was issued by the Lord Chief Justice of England and Wales, dated 27 July 2000, in which he indicated the approach to be adopted when setting the minimum period in respect of persons sentenced as juveniles. In the Practice Statement he said:

> "I will take as my starting point the existing approach adopted in the case of adults sentenced to a mandatory life sentence. In the case of adults the usual length of tariff, or punitive term (which means the amount of time actually to be served by a person convicted of murder in order to meet the requirements of retribution and general deterrence) will be a period of 14 years before the possibility of release arises for consideration at all."

He then went on to set out features which might aggravate or mitigate the offence and therefore increase or reduce the time to be served.

[8] His approach was based on that applied by him and other judges when establishing the tariff period to be recommended to the Home Secretary in the case of all mandatory sentences for murder (ie where the sentence is life imprisonment in the case of an adult defendant). Since that time there have been further developments in this field.

[9] The Sentencing Advisory Panel, established under the terms of the Crime and Disorder Act 1998, is an independent advisory and consultative body set up to provide advice to the Court of Appeal of England and Wales to assist the court when it frames or revises sentencing guidelines, the aim being to promote greater consistency in sentencing. There is no equivalent

institution in Northern Ireland. The panel stated on 13 November 2001 that it had decided to offer advice to the Court of Appeal on the setting of the tariff in murder cases and issued a detailed consultation paper. The tariff for an adult mandatory life sentence prisoner in England and Wales was, at least until the House of Lords reviewed the procedure in R v Secretary of State for the Home Department, ex parte Anderson [2002] 3 WLR 1800, set by the Home Secretary, assisted by recommendations from the trial judge and the Lord Chief Justice. This differs from the procedure put in place by section 82A of the Powers of Criminal Courts (Sentencing) Act 2000, following V v United Kingdom, whereby the tariff in cases involving offenders aged under 18 at the time of the offence is to be set by the trial judge in open court and is therefore subject to appeal. That procedure for under 18 year olds in England and Wales is akin to the task facing the courts in Northern Ireland when any offender is sentenced to a life term. The consultation paper envisaged a three stage tariff system, referred to as the higher, middle and lower tariffs which would apply in different types of murder and their application would depend on the degree of seriousness of the individual crime.

[10] The advice of the Sentencing Advisory Panel to the Court of Appeal was published in April 2002. In the light of the consultation process it recommended the adoption of the three tier approach, suggested originally in the consultation paper, and then listed in the following terms the various aggravating and mitigating features which it advised might be taken into account when considering the proper minimum term to be served by a mandatory life sentence prisoner.

> "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 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 guilt."

[11] It then indicated that in the view of the majority of the panel there should be a return to 12 years as the appropriate figure for the middle starting point, the lower starting point could then be set at 8 or 9 years with the higher starting point at 15 or 16 years. The panel recognised however, and I assume this was the minority view, that there were arguments for retaining the current norm of 14 years as the `middle starting point', in particular the risk that any perceived reduction in the overall level of minimum terms currently set for murder might tend to undermine public confidence in the criminal justice system. With 14 years as the middle starting point, the `lower starting point' would be either 10 or 11 years and the `higher starting point' either 17 or 18 years. It was recognised of course that some cases would be so exceptional that they would not fall within this tripartite scheme.

[12] Following the publication of the report of the panel the Lord Chief Justice of England and Wales published a "Practice Statement as to Life Sentences" on 31 May 2002. By its terms it replaced the earlier Statement of 27 July 2000 and, in addition to young offenders, dealt with adult mandatory life sentence prisoners. Its primary purpose was to give effect to the advice of the Sentencing Advisory Panel contained in its report published in April 2002 (the actual advice to the Court of Appeal being dated 15 March 2002). Paragraph 9 of that statement contained the following declaration:

> "9. This statement replaces the previous single normal tariff of 14 years by substituting; a higher and a normal starting point of respectively 16 (comparable to 32 years) and 12 years (comparable to 24 years). These starting points have then to be increased or reduced because of aggravating or

> mitigating factors such as those referred to in paragraphs 10-18 below. It is emphasised that they are no more than starting points."

[14] Cases falling within the normal starting point were envisaged as including the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. Such a case would be absent the characteristics set out in paragraph 12 (which described cases that would fall into the higher category). Provision was made for exceptional cases which might attract a lower starting point. The higher starting point would attract sentences of 15 to 16 years and such cases were specified in this way:

> "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."

This scheme therefore is more bipartite than the tripartite one recommended by the Sentencing Advisory Panel.

[15] This Practice Statement was reissued in, the "Consolidated Criminal Practice Direction" of 8 July 2002 but there are no distinctions material to this case between it and the earlier document dated 31 May 2002.

[16] These documents are of enormous significance and undoubtedly have influenced the approach taken by a number of judges in this jurisdiction. It is worth recording however that:

i) These documents all relate to sentencing practice in England and Wales.
ii) That Northern Ireland is a separate jurisdiction with its own values and priorities and what is acceptable or recommended in England and Wales does not necessarily apply in this jurisdiction - see the comments of Sir Brian Hutton LCJ, as he then was, in R v McDonald [1989] NI 37 and of Lord Lowry LCJ in Simpson v Harland & Wolff plc [1988] 13 NIJB 1.
iii) The practice statements contain guidelines for judges not rules to be applied by them.
iv) They recommend that the use of the word "tariff" be dropped and substituted with the expression "minimum term". I note however that in the 2001 Order the exercise to be carried out by the court is described as the "determination of tariffs".
v) There are no guidelines of a similar nature in Northern Ireland governing the imposition of a tariff under Part III of the 2001 Order. There are however a number of cases which have been heard since those statutory provisions came into force which provide considerable assistance to other judges in carrying out this task. I refer in particular to the judgments in:

(i) R v Shaw (Crown Court of Northern Ireland dated 14/12/01 – Sheil J);
(ii) R v McCandless (Crown Court of Northern Ireland dated 21/12/01 – McCollum LJ);
(iii) R v Hayes (Crown Court of Northern Ireland dated 8/3/02 – Weatherup J);
(iv) R v Johnston & Johnston (Crown Court of Northern Ireland dated 27/3/02 – Higgins J);
(v) R v McCrory (Crown Court of Northern Ireland dated 1/5/02 – Higgins J).

[17] The case of R v Shaw was decided after the publication of the consultation paper by the Sentencing Advisory Panel but prior to publication of any of the other documents. At that stage Sheil J adopted the approach suggested in the consultation paper and said (at page 3 of his ruling) that "this court considers that the tariff may be divided into three categories …. depending upon the seriousness and the circumstances of the case" and he

then set out what is in effect the categorisation of offences suggested in the consultation paper followed by indication of the factors which would aggravate or mitigate the offence or the offender. Sheil J considered the application of various aspects of the guidelines and, taking into account mitigating and aggravating features, sentenced the accused to a minimum period of 16 years imprisonment.

[18] The ruling of McCollum LJ in R v McCandless is dated just one week later. He indicated that "the principles applicable have been set out admirably in the sentencing remarks of Mr Justice Sheil in the case of James Shaw on 14 December last". He then proceeded to approach the matter on the basis that he would apply the higher tariff referred to by Sheil J, took into account mitigating circumstances and imposed a 15 year term.

[19] In the case of R v Hayes Weatherup J also adopted the same approach to the setting of the tariff as Sheil J. In that case both counsel agreed that it fell into the higher tariff and taking account of the various factors he imposed a sentence of 17 years.

[20] Higgins J dealt with the cases of R v Johnston and Johnston on a similar basis to the learned trial judges in the three earlier cases adopting in general terms the approach outlined by Lord Wolff in the Practice Statement of 27 July 2000. He considered that the circumstances of the offence and each offender attracted the higher tariff and after considering factors in mitigation and aggravation sentenced them to 21 years and 19 years respectively.

[21] The case of R v McCrory differs from each of the earlier cases as the defendant pleaded guilty. Higgins J referred to the consultation paper of 30 November 2001 and the advice of the Sentencing Panel to the Court of Appeal published in April 2002 saying that "both these documents are of assistance to the court". He specified a term of 15 years as the term to the served before the release provisions could be activated.

[22] Except for Higgins J in McCrory, which was a plea of guilty, none of the learned trial judges had the advantage of having available to him the advice of the Sentencing Advisory Panel and none had available the Practice Statements of 31 May and 8 July 2002. They would not have been aware that the views expressed in the consultation paper had been amended to some degree in the final recommendations of the Sentencing Advisory Panel and that these had not been adopted verbatim by the Lord Chief Justice of England and Wales. In particular the tripartite division had been replaced by a bipartite scheme and the advices of the Sentencing Advisory Panel were a majority view. As they were not unanimous in their advice the Panel gave clear recognition to the arguments that higher tariffs might be justifiable, particularly as it might be said that public confidence in the criminal justice system could be undermined if the 14 year tariff then in place should be

reduced to a 12 year starting point. This point was not discussed by Higgins J in R v McCrory.

[23] It is obvious that great weight must be accorded to the views of such distinguished authorities as the four judges of the Crown Court of Northern Ireland, the Lord Chief Justice of England and Wales and the Sentencing Advisory Panel. All of the Practice Statements emphasise however that they lay down guidelines, not rules. They are attempts to achieve a broadly consistent approach whilst ensuring sentencing and the fixing of the minimum period remains within the overall discretion of the individual judge who has tried the case. There are as yet no guidelines set for Northern Ireland to achieve that object. The 2001 Order places this exercise exclusively with the judiciary and it differs from the position obtaining in England and Wales at present as the minimum period in mandatory life sentences was still set ultimately by the Home Secretary until the decision of the House of Lord in ex parte Anderson.

[24] The Northern Ireland Court of Appeal may in due course have the opportunity to review minimum periods of imprisonment in life sentence cases arising under the 2001 Order and set such guidelines, if any, as are considered appropriate. In the meantime I conceive it as the task of individual judges to try to achieve consistency but where they hold views which differ from those expressed by other authorities they should state them.

[25] For my part I believe Northern Ireland should set suggested minimum periods which are significantly higher than those suggested in England and Wales in order to reflect the continuing sense of despair and revulsion voiced in the community by the families of victims whose lives have been destroyed by those who kill deliberately or do so as a result of inflicting grievous bodily harm on others. It is incumbent on the courts to recognise that for many families the death of a loved one at the hands of another creates pain and disruption to their well-being often for the remainder of their lives. The prospect, or reality, of seeing the killer freed, or seeing the freed killer, in 12/14 years in some cases is considered an affront and brings the criminal justice system into disrepute in many quarters. In my opinion the minority view referred to in the advice of the Sentencing Advisory Panel is to be preferred to that of the majority in the context of Northern Ireland and is more in tune with the expectations of the broad and responsible cross section of the community. I consider also that it is more likely to achieve a balance of justice, rights and duties between those who commit crimes and those who suffer their consequences. It is not out of place to remind oneself of the provisions of Article 2 of the European Convention on Human Rights which proclaims that "everyone's right to life shall be protected by law". In my view the court should take steps to protect the lives of the ordinary members of this community by making it clear that those who commit murder will

suffer severely in consequence not just to punish the offender but to protect the lives of the ordinary citizen by imposing sentences which serve as a real deterrent to others.

[26] I come now to deal with the application of these principles to the case of Neil Gordon Graham. Mr Donaldson QC agreed in his plea that this case fell within the higher range of sentences referred to by the Sentencing Advisory Panel in the consultation paper and suggested 16 years as the appropriate tariff period. The facts of this case demonstrate that the killing of Mr Gault was carried out without mercy. It was motivated by a desire to remove Paul Gault as an obstacle to his winning Lesley Gault and was therefore carried out for gain (albeit of a non financial type). The evidence of Dr Curtis shows that the deceased was subjected to an attack of the utmost savagery. Mr Gault was felled by the first blow which struck his head and he was doomed in consequence. Notwithstanding that the attack continued and he was struck by a series of vicious cruel blows which had the effect of finishing him off and leaving the roof of his skull and his brain more akin to pulp than human tissue and bone. In my assessment Mr Gault was subject to gratuitous violence of the grossest degree and this may be classified also as a series of extensive injuries. Therefore, whether by reference to the categorisation of the Sentencing Advisory Panel, or the Practice Statement issued by the Lord Chief Justice of England and Wales, he fits into the top category and so the concession of counsel was properly made.

[27] In the view of the Lord Chief Justice of England and Wales, the majority of the Sentencing Advisory Panel and of the three judges of this jurisdiction to whose judgments I have referred, that means that the starting point for calculating his sentence is 15 or 16 years whereas in the alternative view voiced by the Sentencing Advisory Panel, which I personally prefer, the starting point should be 17 or 18 years. In deference to the views of my colleagues, the majority of the Sentencing Advisory Panel, of the Lord Chief Justice of England and Wales and in the absence of direct guidelines in this jurisdiction, I consider that I should take the starting point in this case as 16 years.

[28] That is merely the starting point however. The term of years must be varied upwards or downwards to reflect any aggravating or mitigating features. In this case it should be increased to reflect the degree of planning that went into the execution of this murder and which clearly took place over a number of days at least, the setting up of a false crime scene in order to deflect the police inquiry from his potential guilt and the use of a heavy weapon which, although he did not bring to the scene, he knew to be available. These factors must add substantially to the starting point of 16 years.

[29] I have set out earlier the mitigating factors which ought to be taken into account in relation to the offence and the offender. There is nothing in the age of the defendant which may be taken by way of mitigation. He is a mature man who is blessed with intelligence and many gifts. All of that combines to make it more difficult to understand how he could ever have come to this point. The question of remorse or contrition does not arise. He has maintained his stance that he is not guilty of this offence from the initial approach made to him by the police, through interviews and throughout the trial and Mr Donaldson has told me that he intends to appeal against the decision of the jury, so there was no plea of guilty. I am prepared to take into account in mitigation the fact that he is a man of previously unblemished character who received praise and admiration from his work colleagues and friends. I have re-read my notes which I made during the trial of the character evidence given on his behalf by Samuel McIntyre, Alistair James Moorcroft, William Alexander Clarke and Steven John Clarke. I have also taken account of what was said of him by some of the Crown witnesses, who were also colleagues, in particular Mr Craig, Mr Withers and Mr Finlay. I have had regard to the fact that he had given 20 years of service to the community as a fireman and, finally, I recognise the dreadful impact his imprisonment will have upon him, his wife, children, mother and wider family.

[30] The only true and permanent victim of all of this however cannot be present because the defendant killed him. It is arguable that someone given so many of life's gifts and who commits such a crime should pay an even higher price for his misdeeds. He put Paul Gault to death because he coveted his wife. His pitiless execution of him demands punishment and retribution at a level that will uphold the value and sanctity of life and deter anyone else who might think as he did. He has been sentenced already to life imprisonment and I order that the release provisions in the 2001 Order will not begin to operate for 20 years. That period will be calculated so as to take account of his periods on remand and since his conviction by the jury on 14 November 2002. That minimum period is a reflection of the categorisation of this offence at the higher starting point coupled with the aggravating features to which I have referred.

[31] Before I conclude I wish to put on record my commendation of the entire detective team who have carried out this inquiry in the most painstaking and professional manner. That team was lead overall by Detective Chief Superintendent Wright and the day to day control of the operation was under the command of Detective Chief Inspector McCombe. They and the team of officers at their disposal have carried out their duties so that no stone has been left unturned in their quest to uncover the truth and each of them is a credit to the Police Service of Northern Ireland.