

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **08/12/2011**

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

ROBERT BLACK

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WEATHERUP J

[1] Robert Black, on 27 October 2011 you were convicted by a jury of the kidnapping and murder of Jennifer Cardy on 12 August 1981. On a conviction for murder the sentence is prescribed by law as being life imprisonment.

[2] I must now determine whether to impose a minimum term of imprisonment to be served before you can be considered for release. The present procedure was introduced by the Life Sentences (Northern Ireland) Order 2001, which came into force on 8 October 2001. Where a Court passes a life sentence the Court may specify a part of the sentence to be served before the prisoner can be considered for release. This period may be described as the tariff or the minimum term.

[3] It should be emphasised that the Court, in specifying the part of the sentence to be served, is not setting a release date. The procedure under the 2001 Order is that –

(i) The Court shall specify the part of the sentence to be served before the release provisions apply. The Court has the option of not specifying any part of the sentence and the release provisions will not apply. In effect the Court determines the future date, if any, on which the person convicted of murder will be considered for release on licence.

(ii) The part of the sentence specified by the Court “shall be such part as the court considers appropriate to satisfy the

requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it." The minimum term is intended to reflect the seriousness of the offence, rather than the risk posed by the offender.

(iii) The minimum term, unlike other determinate sentences, is not subject to normal remission rules where prisoners may receive remission of one half of the stated sentence. A minimum term of say 12 years specified in respect of a life sentence is the equivalent of a determinate sentence of 24 years on which full remission is earned.

(iv) After the specified part of the sentence has been served the Parole Commissioners will direct release if "satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined". Accordingly, future risk to the public determines the release date, if any, after completion of the minimum term served for retribution and deterrence.

(v) Any order for release will be on licence for the remainder of the life of the prisoner, who may be recalled to prison if they do not comply with the terms of the licence.

The Framework for Minimum Terms

[4] After a similar regime was introduced in England and Wales, Practice Statement (Crime - Life Sentences) [2002] 3 All ER 412 was introduced on 31 May 2002. The Practice Statement offered "guidance" to Judges, although they retained discretion to depart from the guidance if that was considered necessary in the circumstances of an individual case. The application of this Practice Statement in Northern Ireland was approved by the Court of Appeal in R v McCandless [2004] NI 269 and again more recently in R v Morrin [2011] NICA 24.

[5] The approach of the Practice Statement to adult offenders is as follows
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"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 paragraph 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) 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 failure 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.”

[6] The Practice Statement has been designed as a multi tier system. The normal starting point of 12 years may, exceptionally, be reduced where culpability is significantly reduced. The higher starting point of 15/16 years will be applied where the crime is especially serious. The highest minimum terms will be applied to very serious cases. The Court may also set a whole life tariff. These possibilities reflect the gradations in the seriousness of the crime of murder and admit of the flexibility that is necessary in completing the exercise of determining a minimum term on the basis of retribution and deterrence having regard to the seriousness of the offence.

[7] The Court of Appeal in Northern Ireland has also addressed the manner in which the sentencing Judge should approach the application of the Practice Statement. The approach should recognise that the Practice Statement prescribes a sequence to be followed, first in selecting a starting point, then in considering variation of the starting point by reference to the aggravating and mitigating factors, next in considering whether no minimum term should be selected at all and ultimately in determining the appropriate minimum term having regard to the seriousness of the offence - see Kerr LCJ in R v Hamilton [2008] NIJB 222 at [32] and Hart J in R v Morrin [2011] NICA 24 .

The Starting Point

[8] Robert Black, your crime was particularly serious. On 12 August 1981 you abducted a 9 year old girl from near her home. This was an act of sexual predation. Whether you sexually assaulted Jennifer has been a matter of some debate but there can be no doubt that the abduction was intended to further a sexual purpose. Within hours of that abduction Jennifer had died by drowning as a result of your actions in placing her in water. You subjected a vulnerable child to unpardonable terror and took away her life. By the manner of that loss you also wounded forever a family that treasured that child. It was a wicked deed.

[9] Victim Impact statements have been provided by Jennifer's father and her brother Philip. Her father speaks poignantly about Jennifer, of the family awareness of Jennifer's absence from all family occasions and of the harrowing revelations in the course of the trial. Jennifer's brother was a 6 year old who lost his sister. He speaks of fear and dread, of a child's nightmare of the family being targeted again, of dreams of what Jennifer's last words were and how she would have struggled in her final hour alive. Taking a life of a family member takes away parts of the lives of many others.

[10] The prosecution contend that the circumstances of this case are such that the Court should impose a whole life tariff. Alternatively the prosecution contend that the higher starting point of 15 or 16 years is appropriate, which should then be varied upwards to reflect certain aggravating factors. The defence have made no submissions and acknowledge that there is no mitigation.

[11] The normal starting point for a minimum term is 12 years. The normal starting point does not apply where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position so as to warrant the higher starting point of 15 or 16 years. This is such a case where your culpability is exceptionally high and the victim was particularly vulnerable. The crime was especially serious as Jennifer was a vulnerable child. In addition there was evidence of maltreatment for a sexual purpose and of degradation by taking Jennifer into a van and applying a ligature to her neck. The higher starting point applies.

The Aggravating and Mitigating Factors

[12] Having determined the starting point it is necessary to consider whether it should be varied upwards or downwards to take account of aggravating or mitigating factors which relate to either the offence or the offender.

[13] Aggravating factors relating to the offence include concealment of the body. You placed Jennifer's body in McKee's dam which was an attempt to conceal the evidence of your crime. The prosecution contend that this was a planned killing. I am satisfied that you had planned to take advantage of any opportunity that presented itself to commit a crime of this nature and by sad mischance Jennifer Cardy became a victim. This is an additional aggravating factor.

[14] Aggravating factors relating to the offender include a previous criminal record. At Grennock Juvenile Court in Scotland on 25 June 1963 you were convicted of assault and lewd and libidinous practices and on sentence being deferred for a year you were admonished. At Oban Sheriff Court in Scotland on 22 March 1967 you were convicted on three counts of indecent

assault on a female under 14 and given borstal training. At Selkirk Sheriff Court in Scotland on 10 August 1990 you were convicted of assault and abduction for a sexual offence on a female. At Newcastle upon Tyne Crown Court in England on 19 May 1994 you were convicted of kidnapping and murder of Susan Maxwell, Caroline Hogg and Sarah Harper and the false imprisonment of Teresa Thornhill, in respect of which offences you are presently serving life sentences with minimum terms of 35 years extending to 2029.

[15] The present offences took place on 14 August 1981 and occurred before the offences that led to the convictions in Selkirk in 1990 and in Newcastle in 1994. The prosecution contend that those convictions should be taken into account so that an offender is not advantaged by the sequence in which the courts are able to deal with offenders. I do not take into account as aggravating factors the convictions at Selkirk Sheriff Court in 1990 or the convictions at Newcastle Crown Court in 1994 as the offences were committed after the present offences. It is recognised that an offender who is convicted in a different order to that in which offences were committed, as in the present case, may not be treated as having previous convictions in either case. However this should not operate to the advantage of an offender as the subsequent sentence for the earlier offence will commence at the date of the later sentence.

[16] Mitigating factors relating to the offence include spontaneity and lack of premeditation. I am satisfied from the content of the police interviews that the predatory nature of your crime was such that your presence in the area at the time was to take advantage of any opportunity to engage in sexual predation. Accordingly there was no element of spontaneity or lack of premeditation in the commission of this crime. There are no mitigating factors in relation to the offence.

[17] Mitigating factors in relation to the offender include the age of the offender, which may concern either the youth of the offender or the old age of the offender. In this case you are 64 years old and committed this crime 30 years ago, so this is not a crime where youth at the date of commission of the crime could be a factor. Nor is old age at the date of sentencing a factor, although it is noted that you will be 82 years old when the existing minimum term expires. You denied responsibility for this murder and continue to do so. There are no mitigating factors relating to the offender.

Very Serious Cases

[18] Paragraph 18 of the Practice Statement indicates that a substantial upward adjustment may be appropriate in the most serious cases, for example where there are several factors identified as attracting a higher

starting point. That is this case as the victim was a vulnerable child and there was evidence of maltreatment for sexual purposes and of degradation.

Whole Life Tariffs

[19] In England and Wales the framework for the setting of the minimum term became statutory with the enactment of the Criminal Justice Act 2003 which has applied to all mandatory life sentences for murder passed in England and Wales from 18 December 2003. No equivalent statutory provision has been introduced in Northern Ireland and the Practice Statement continues to provide the Northern Ireland framework. The prosecution, in contending for a whole life tariff, submit that this case would attract a whole life tariff under the 2003 Act and that had the 2003 Act been in force in 1994 when the convictions arose in Newcastle a whole life tariff would have been imposed.

[20] The 2003 Act provides for the setting of a minimum term by reference to the seriousness of the offence and in considering seriousness the Court must have regard to Schedule 21 of the Act. Paragraph 4 provides that if the Court considers the seriousness of the offence to be exceptionally high the appropriate starting point is a whole life tariff. Cases would normally fall into this category where they involve two or more murders involving abduction or sexual conduct, thus potentially applying to the Newcastle convictions had the Act been in force. Cases would also normally fall into this category if they concern the murder of a child involving the abduction of the child or sexual motivation, thus potentially applying in the present case if the Act operated in Northern Ireland.

[21] The 2003 Act reflects the will of Parliament as to how the Court should approach the task of setting a minimum term in England and Wales. The Act does not apply in Northern Ireland. There has been no legislative intervention in Northern Ireland beyond the provisions of the 2001 Order which states that the Court should set the minimum term without stating any basis on which the Court might approach that task. When the Practice Statement was adopted in Northern Ireland in R v McCandless [2004] NI 269 Carswell LCJ stated at paragraph [10] –

“We are not unmindful of the mandatory minimum terms prescribed in England and Wales for certain classes of case by the Criminal Justice Act 2003, but we consider that the levels laid down in the Practice Statement, which accord broadly with those which have been adopted for many years in this jurisdiction, continue to be appropriate for our society.”

[22] The Practice Statement continues to provide the framework for minimum terms in Northern Ireland. It is not in point to speculate how a different framework might be applied if it were in operation in Northern Ireland. Equally it is speculation to consider how a Court in England in 1994 might have applied the 2003 Act had it been in operation at that time.

[23] In applying the Practice Statement in the present case, as stated above, the higher starting point of 15 or 16 years applies, to be varied upwards by the aggravating factors referred to above and in this instance by a substantial upward adjustment as this falls in the category of a very serious case. It remains to consider whether no minimum term should apply. Kerr LCJ stated in R v Hamilton [2009] NIJB 222 at [32]-

“An overarching consideration will always be whether no minimum period should be selected at all but it appears to us that this is a question that will normally be addressed after the broad sequence of the Practice Statement has been applied.”

[24] In R v Hamilton the Court of Appeal, in considering a whole life tariff, adopted the approach of Lord Phillips CJ in R v Jones [2005] EWCA Crim 3115, that “The facts of the case, considered as a whole, will leave the Judge in no doubt that the offender must be kept in prison for the rest of his or her life.” Upon conviction in England in 1994 for a series of child abductions and murders a minimum term of 35 years was imposed. In the circumstances I do not consider that it would be appropriate that in respect of this conviction a whole life tariff should be imposed.

The Minimum Term

[25] Having proceeded along the course set out in the Practice Statement it is necessary to stand back and look at all the circumstances as a whole and impose a minimum term that is considered appropriate, in the words of the 2001 Order, to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.

[26] Taking account of all the above matters the minimum term will be fixed at 25 years before you can be considered for release, which term will commence on the date of conviction on 27 October 2011 when the life sentence was imposed. At the end of that period the Parole Commissioners will conduct hearings to determine whether you should be released.

[27] You were also convicted by the jury of the kidnapping of Jennifer Cardy on 12 August 1981. The sentence for kidnapping is at large. This was a very serious offence and you represent a serious danger to young girls. In all

the circumstances I impose a discretionary life sentence for kidnapping. Had a determinate sentence been imposed for the offence of kidnapping it would have been a sentence of 8 years imprisonment. As you would have been entitled to release after serving one half of the determinate sentence the matter would have been considered by the Parole Commissioners after 4 years. However this is all academic because you are serving the remainder of the minimum term fixed in Newcastle and are commencing a minimum term of 25 years in the present case.

[28] I am obliged by paragraph 25 of Schedule 1 of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 to inform you that the Independent Barring Board will include you in the barred list for children by virtue of these convictions.