

**THE QUEEN v ANDREW VICTOR GEORGE MAWHINNEY**

**DECISION ON TARIFF**

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**Before Kerr LCJ and McLaughlin J**

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**KERR LCJ**

*Introduction*

1. On 12 June 2001 the prisoner was sentenced to life imprisonment by McLaughlin J at Ballymena Crown Court sitting at Coleraine, having been found guilty of the murder of his 33 year old neighbour, Robert McMullan, on 11 July 2000. The prisoner has been in custody since 13 July 2000. The conviction was unsuccessfully appealed.

2. On 24 May 2004 McLaughlin J and I sat to hear oral submissions on the tariff to be set under Article 11 of the Life Sentences (NI) Order 2001. The tariff represents the appropriate sentence for retribution and deterrence and is the length of time the prisoner will serve before his case is sent to the Life Sentence Review Commissioners who will assess suitability for release on the basis of risk.

*Factual background*

3. The prisoner and the deceased were neighbours, living next door to each other at 2 and 4 Kenbane Avenue, Ballysally with their girlfriends and children. On the afternoon of 11 July 2000 the deceased and his girlfriend, Rose Kelly, were with the prisoner and his girlfriend, Janice Wilson, at the prisoner's house, along with a house guest, Roberta Saunders. The two couples were drinking. By the late afternoon/early evening the two couples were said to be 'close to being drunk'. At about this time the atmosphere seems to have soured, possibly due to the deceased's suspicion that the prisoner was having a relationship with his girlfriend. The deceased asked Ms Kelly for their house keys but she refused to give them to him, berating

him constantly. Tired of listening to Ms Kelly chastise the deceased, Ms Wilson went to bed some time after 6.15pm feigning ill health. At about 7 pm Ms Kelly tried to talk to Ms Wilson through the bedroom door but she refused to allow her into the bedroom. The prisoner asked his neighbours to leave, but Ms Kelly refused to go without speaking to Ms Wilson. A verbal altercation took place between the deceased and Ms Kelly. Ms Wilson recalled Ms Kelly getting louder and louder until at around 7.15pm she got up, went downstairs, grabbed Ms Kelly by the hair and pulled her out of the house. The deceased tried to intervene but was prevented from doing so by the prisoner who in turn expelled the deceased from the house. In the course of the altercation the deceased is said to have grabbed Ms Wilson by the throat and to have said: "I'll kill you, you fucking bitch if you don't leave loose of her." When outside the house the deceased is reported to have said: "I'll get you put out...I'll burn you fucking out."

4. The prisoner rang 999 and asked for police assistance. Ms Wilson criticised him for taking that action and accused him of being cowardly. Soon after this the deceased and Ms Kelly were seen returning to the house. The deceased was carrying a plank of wood. He approached the front door with the plank slightly raised in his right hand. Ms Wilson opened the front door, told him that the police had been called and asked that there be no more trouble. The prisoner then ran past her and out to the deceased, who turned to run. Roberta Saunders described what happened after that. She stated,

"Vinnie [the prisoner] lost it, I seen him run out of the house; I seen he had a hatchet in his hand."

Ms Wilson also noticed that the prisoner was armed with an axe. He chased the deceased to a green area in front of the houses where the deceased stopped and swung the plank at him. Ms Wilson and Ms Saunders then saw the prisoner swinging the axe at the deceased, hitting him on the right side of the head and causing the axe head to come off. The deceased is said to have started to run, but the prisoner hit him from behind with the wooden axe handle, bringing the deceased to the ground. Ms Saunders observed the prisoner "kicking away at Robert (the deceased) as he lay on the ground." Ms Wilson shouted for the attack to stop. She recalled that the deceased said, "I have done him, now are you satisfied" to Ms Kelly after the incident. Ms Saunders recalls the prisoner shouting: "I've killed him; who's going to protect you now Rosie?"

5. A number of witnesses, including the deceased's girlfriend, gave an account of the event that is rather more damaging for the prisoner. Ms Kelly told the police that the men fought outside and the deceased was brought to the ground. The prisoner then shouted at him: "You think you're some hard man, I'll get you. I'm getting a hammer. I'm going to kill you." He then returned to the house and came out to the deceased with a hatchet saying:

"I'm going to kill you, you bastard" and swung the implement at the deceased's head. Ms Kelly says that the prisoner then returned once more to the house and brought out a knife. He approached the deceased issuing more threats to kill and plunged the knife into him repeatedly while standing bent over the body. Ms Kelly contended that after the attack the prisoner put his hands in the air, clenched his fists and shouted, "I killed the bastard." It appears, however, that Ms Kelly did not repeat the assertion that the prisoner returned to the house in her oral evidence. Other witnesses recalled that the prisoner returned once to the house during the attack. The judge put it to the jury that only three witnesses had testified to having seen the prisoner return to the house and he warned them:

"...you might want to proceed on the assumption that the evidence about that couldn't enable you to be sure that he did go back to the house to get the knife, that he must have had the knife with him from the beginning."

6. Various witnesses told police that they saw the prisoner assault the deceased with a hatchet, a knife and a piece of broken fencing with protruding nails. He is also said to have kicked the deceased as he lay on the ground. Some recalled him acting deliberately and triumphantly. After the incident the prisoner walked over to a watching crowd, dropped the knife, fencing and hatchet handle, and asked whether he could wait with them for the police to arrive. When the police arrived the prisoner is said to have told them: "I didn't mean to do it, it just happened." Another officer recalled the prisoner saying: "Is he alright mate? It was me. I just lost my temper."

7. The deceased was taken by ambulance to Coleraine Hospital where, despite surgical intervention, he died at 10.30pm that same evening. Dr Alastair Bentley, Deputy State Pathologist, performed a post mortem examination on 12 July 2000. He concluded that the cause of death was multiple stab wounds of the chest. There were at least seven stab wounds of the front, back and left side of the chest. On the upper right of the front of the chest, the left side of the chest and on both sides of the upper back there were stab wounds that had penetrated the chest cavity and on the right side these had resulted in two stab wounds of the right lung. Such penetrating injuries of the chest cavity would have impaired breathing and caused heavy bleeding. On the upper back there were three further stab wounds that had passed through fat and muscle but had not penetrated any major organs or blood vessels. They would have bled freely. There was a solitary stab wound of the left thigh. Some of the stab wounds looked to have been made by a single edged knife. Only a moderate degree of force would have been required to cause these wounds if the weapon had a sharp point. On the scalp there were several lacerations, with abrasions and bruising suggestive of their having been inflicted by an acutely angled edge. There were no skull fractures or injury to

the brain. On the right side of the head curved linear abrasions were found that were consistent with contact with nail heads. There were no defensive injuries. There was a high concentration of alcohol in the blood, some three times over the legal driving limit.

8. The prisoner was too drunk to be interviewed after his arrest. In police interview the next morning he claimed not to have an exact recollection of the assault itself. He remembered the dispute during which the deceased was expelled from his home, and he recalled the deceased threatening to burn them out after which he telephoned the police. He initially claimed to have been working in the kitchen when the deceased returned to the house, and thought that he must have carried the knife out from there. He also remembered carrying an axe although he was unable to remember, he claimed, where he lifted it from. He suggested that the assault took place in one incident in the course of a struggle. Later police put to him the more damaging scenario in which he was said to have struggled with the deceased and put him to the ground before returning to his house to retrieve weapons, which he then used to murder the deceased. The prisoner said that he did not recollect that taking place.

9. The defence was based on provocation. The prisoner gave evidence in chief and was cross-examined for a time. Before counsel had completed his cross-examination, however, the prisoner refused to answer further questions and left the witness box. Dr Bownes (forensic psychiatrist) and Dr McCullough (consultant psychologist) gave evidence for the defence. Dr Bownes concluded that the prisoner suffered from a personality disorder that was characterised by mood swings, difficulty in coping with stress and difficulty with anger. He was found to have very limited coping mechanisms that might allow him to resolve problems like a normal person and his capacity for coping with provocation was 'greatly compromised'. He might act in a manner that was 'beyond the response of an ordinary person'. Dr McCullough gave evidence that he too found the prisoner to have a personality disorder. In his written report he said that the prisoner had borderline personality disorder and extremely low self-esteem. He concluded: "Mr Mawhinney is very psychologically unstable and at significant risk of self harm around the time of or immediately after his trial." The prosecution did not call evidence to challenge the medical evidence given on the prisoner's behalf.

#### *Antecedents*

10. The prisoner has a lengthy criminal record consisting of eleven separate prior appearances before the criminal courts between 1986-1994. Five of these were in the Crown Court. The prisoner has a number of convictions for violence: in March 1994 he was imprisoned for 9 months for assault occasioning actual bodily harm; in March 1990 he was sentenced to

community service for conspiracy to assault occasioning actual bodily harm and possession of an offensive weapon; in November 1987 he was sentenced to 6 months (suspended for 18 months but later activated) in the Young Offenders' Centre for attempted intimidation; and in October 1987 he was sentenced to 3 months' detention (suspended for 2 years) for intimidation. The prisoner also has convictions for possession of class B drugs with intent, burglary and criminal damage.

11. The prisoner's solicitors, Gallery & Campbell, submitted a written representation in which they made the following points:

1. The case was close to the borderline with manslaughter;
2. The prisoner's actions were spontaneous and lacked premeditation;
3. The prisoner has a borderline personality disorder that lowered his criminal responsibility;
4. The prisoner was provoked: the deceased threatened him and his family and he was taunted with allegations of cowardice by his girlfriend;
5. The prisoner had made efforts to address his offending prior to the offence by moving to Coleraine and seeking medical help to deal with his temper. He had telephoned the police for assistance;
6. The prisoner was sorry for his actions and said so at the scene and to police. He voluntarily surrendered himself and made no attempt to conceal what had happened;
7. Although he pleaded not guilty the defence was very focused and concentrated on provocation.

We have taken all of these into account and all that was said by counsel on the prisoner's behalf.

#### *Practice Statement*

12. 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 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) 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."

### *Conclusions*

**13.** This case does not fit comfortably, in our opinion, into either the normal or the higher starting point category. It is not a typical case of a quarrel between two friends suddenly igniting and leading to an exchange of blows in which one is killed. Neither, however, can it be said to be a case where the victim was particularly vulnerable on account of some inherent condition or because of incapacity through alcohol. Indeed in the initial stages of the incident the deceased was the aggressor. But the prisoner deliberately rendered the victim incapable of resistance by the first attack and proceeded to rain massive blows on him with the clear intention of killing. We consider that the case falls somewhere between the two categories therefore. In this context we remind ourselves that the *Practice Statement* is not a straitjacket designed to create a rigid compartmentalised structure into which each case must be shoehorned. As the Court of Appeal said in *McCandless*: -

“... the sentencing framework is, as Weatherup J described it in paragraph 11 of his sentencing remarks in *R v McKeown* [2003] NICC 5, a multi-tier system. Not only is the *Practice Statement* intended to be only guidance, but the starting points are, as the term indicates, points at which the sentencer may start on his journey towards the goal of deciding upon a right and appropriate sentence for the instant case.”

**14.** A number of aggravating features are present. The prisoner armed himself with a hatchet and a knife. He delivered repeated blows well beyond anything required to disable his victim or assuage any sense of provocation. He has significant previous convictions.

**15.** There is little in the way of mitigating features. The prisoner was provoked to some extent although we think that the goading of his irresponsible girlfriend is likely to have played a greater part than any provocation in motivating him to murder. We have not detected in the material placed before us any compelling evidence of a profound sense of remorse. It is possible that, apprehending attack, he struck out first and got carried away but if this is the explanation it cannot begin to excuse the savagery of the assault on the deceased.

**16.** Taking all these factors into account and having due regard to all that has been said on his behalf we have concluded that the appropriate tariff is 14 years. This will include the time spent by the offender in custody on remand.