

**THE QUEEN v JOHN JAMES ANTHONY McALEESE**

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**DECISION ON TARIFF**

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**Before Kerr LCJ and Girvan J**

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**KERR LCJ**

*Introduction*

[1] On 1 July 1999, the prisoner was convicted at Coleraine Crown Court of the murder of Stephen William Kirk on 13 March 1998. Girvan J sentenced the prisoner to life imprisonment. Leave to appeal the conviction was refused on 21 June 2000. The prisoner was 25 years old at the time of the murder. His victim was six months younger.

[2] In June 2004 Girvan 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 facts set out below have been taken from the evidence given on trial and from the contents of statements contained in the committal papers.

[4] On the evening of Friday 13 March 1998 the deceased, Stephen Kirk, accompanied his friends Kathleen and William Ward to a karaoke night at

the Sportsman Bar, 71 Ballymoney Street, Ballymena. As they entered at around 11.30pm the prisoner's girlfriend is said to have waved across at the deceased and he is said to have waved back. A number of witnesses recall the prisoner approaching Mr Ward and asking him why he was sitting with "that black bastard", referring to the deceased. At one point the prisoner is said to have approached the group and started to remonstrate with the deceased either about the wave or about a song that he thought the deceased had sung to his girlfriend during a karaoke performance earlier in the evening. Others heard the prisoner express annoyance about the deceased and to say words to the effect of "I'm going to kill that bastard." The deceased was heard to say to the prisoner "Hit me if you want; I know you can beat me" to which the prisoner replied, "I wouldn't hit a drunk man." Mr Ward and another man intervened and the matter resolved with the deceased offering to buy the prisoner a drink. In a hallway outside the bar area, Mr Ward told the prisoner to leave the deceased alone to which the prisoner replied: "You're a Hun lover". Mr Ward took "Hun" to mean Protestant.

[5] A short time later, back in the bar, Mrs Ward alerted Mr Ward to the fact that the deceased had disappeared. Because of what had happened earlier, Mr Ward was anxious for his friend's welfare and went to look for him. He saw the prisoner entering the bar from the door leading to the back yard and noticed that he had blood on his hands and shirt. Other witnesses had earlier noticed the prisoner follow the deceased in the direction of the yard. The prisoner told Mr Ward, "Go out and check your mate he's not as big a man now when a man hits him back." Mr Ward asked him what he had done, to which the prisoner replied: "I hope the bastard's dead when you go out there." Another witness recalls the prisoner's demeanour at this time: "...he was strutting all cocky like he looked pleased with himself." Mr Ward went out to the yard and from there to the toilet where he found the deceased lying with his back against a wall, his head slumped over his right shoulder. He was unconscious and having trouble breathing. An ambulance was called. The prisoner is said to have entered the toilet and said: "Nobody go witness against me." When Mr Ward asked him why he had done it the prisoner is said to have stated: "Nobody seen nothing." A witness who saw the deceased slumped in the toilets and who asked what had happened recalled the prisoner telling him: "I've croaked Feeky [the deceased]." When challenged by the owner of the bar the prisoner is said to have remarked: "He deserved it."

[6] An ambulance arrived at 1.15am and the deceased was taken to casualty at Antrim Area Hospital. He was deeply unconscious on admission and was treated by ventilation. A CT scan of the deceased's head showed a severe brain injury. Over the next 36 hours his condition deteriorated and he was pronounced dead at 2.15pm on 15 March 1998. Dr Derek Carson, Deputy State Pathologist, performed a post mortem examination on the afternoon of 16 March 1998. Dr Carson concluded that the cause of death was brain injury, bilateral subdural haemorrhage, cerebral oedema and cerebral anoxia associated with fractures of the skull. The post mortem report recorded that there were minor abrasions on each cheek, considerable bruising of both upper and lower eyelids with bleeding over the right eyeball, very extensive bruising of the right side of the scalp and significant bruising on the left temple and forehead and on the under surface of the left side of the scalp. A blow on the abdomen might have caused changes in the pancreas, but there was no other evidence of that. The level of alcohol said to be in the deceased's body on his admission to hospital would have caused at least moderate, and possibly considerable, intoxication. Dr Carson stated:

“Internal examination revealed a complex fracture with secondary branches crossing the anterior part of the skull from side to side, considerable bleeding over the brain surface both subdural and subarachnoid in type, swelling of the brain substance, laceration of a part of the brain known as the corpus callosum, and extensive bleeding into the midbrain and pons. It was the brain damage and the bleeding and swelling which followed that caused his unconsciousness and death.... The bruising on each side of the scalp and the nature of the skull fractures indicated that the head injuries had been caused largely if not entirely by pressure and counter pressure applied to the sides of the head. These injuries could not have been caused by a fall, their most likely cause being stamping or kicking as the deceased lay with his head on the ground or floor.”

[7] Later on the morning of the assault the prisoner was arrested on suspicion of causing grievous bodily harm. In police interview he insisted that he had found the deceased badly beaten in the toilets and had tried to

give him assistance when others had entered and blamed him for the assault. He accepted that he had washed his clothing because items were bloodstained. Forensic examination found the deceased's blood on the prisoner's shoes. The prisoner claimed that earlier in the evening the deceased had challenged him to a fight, but that he had walked away. He claimed that the deceased told him that he was "out of his head" on crack. The co-defendant claimed in police interview that he was in the toilets when the deceased assaulted him. He blacked out and when he came round he saw the prisoner in the toilets and the deceased lying unconscious. He said that the prisoner had beaten the deceased because he had beaten the co-defendant. In a later interview the co-defendant withdrew the statement that the prisoner was in the toilet at all.

[8] The prosecution case was conducted on the basis that the prisoner was the principal offender who dealt the blows. He did not give evidence, but through counsel, he put the case that he had separated the deceased and co-accused who were fighting in the toilet, that the deceased had struck out at the prisoner causing him to strike back in self-defence. The co-defendant gave evidence that he was frightened of the deceased and had been threatened by him on the evening of the assault. The co-defendant went to the toilet and the deceased is said to have confronted him there whereupon the prisoner entered and challenged the deceased both about what he was doing with the co-defendant and about dancing with his girlfriend earlier in the evening. He said that the deceased told the prisoner to "Fuck off" and that it was none of his business at which point the prisoner struck the deceased, causing him to fall to the ground where he was seen to stamp on the deceased's head. The co-defendant told the prisoner to desist. He asked him why he had beaten the deceased to which the prisoner replied that it was because the deceased had hit the co-defendant on an earlier occasion. The prisoner said "He'll be alright" and then hit the co-defendant on the face, knocking him to the ground, and instructed him to say that the deceased had inflicted the blow. The co-defendant gave evidence that the prisoner had used physical force and threats in an effort to get him to change his evidence.

*Judge's sentencing remarks*

[9] The trial judge said that the circumstances of Mr Kirk's death were "tragic, cruel and cowardly. It has been found that you effectively kicked to death a fellow human being in circumstances which can only be described as horrible." The judge also pointed out that because of the way

the prisoner dealt with the charge he had caused his co-accused to spend 15 inappropriate months in custody. A minimum term was not fixed.

#### *Antecedents*

[10] The prisoner has a relatively lengthy record for a young man. Between 1991 and 1998 he made seven separate appearances before criminal courts. The most serious offences were threats to kill and assault occasioning actual bodily harm which were dealt with by Belfast Crown Court in October 1997 when the prisoner was sentenced to 2 years' imprisonment. All other earlier convictions were in the Magistrates' Court. He also has convictions for common assault, disorderly behaviour, resisting police and criminal damage.

#### *Representations*

[11] No written representation has been submitted by the prisoner.

[12] Written representations have been received from the deceased's father, mother and brother. Mr David Kirk, the deceased's father, has said that his life has been ruined. He has experienced difficulty with his mental health to the extent that he has been prescribed anti depressants, received counselling and been referred to Holywell Hospital for assessment. He has suffered suicidal thoughts and says that he has lost the will to live. He has suggested that his personality has changed and that he no longer finds pleasure in anything. Mr Kirk has suffered angina which he has attributed to stress. He is anxious for the welfare of his other children when they go out. He also referred to the loss suffered by the deceased's own son, his grandchild.

[13] Mrs Doreen Kirk, the deceased's mother, has submitted a representation in which she has stated that she suffers nightmares each night and flashbacks during the day concerning the circumstances in which her son died and the fact that he may have cried out for help. She found going to court traumatic and has said that she has had to watch her family fall apart. Like her husband, Mrs Kirk referred to the loss suffered by the deceased's son.

[14] Mr Adrian Kirk, the deceased's brother, stated that the heart has been "ripped clean out" of his family. He notices a change in both his parents and he has said that his father's physical and mental health has suffered.

Mr Kirk has stated he now just devotes himself to work. He asked that the family be seen as victims of the murder and referred in particular to the deceased's son who will grow up without a father.

*Practice Statement*

[15] 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*

[21] For the prisoner Mr Barry Macdonald QC submitted that this was a "classic normal starting point" case because it was, he claimed, a typical case of a killing arising from a quarrel or loss of temper between two people known to each other. We do not accept this submission. A number of features about this case distinguish it from the situation contemplated in paragraph 10 of the Practice Statement. The prisoner had evinced an intention to attack the deceased for some time before the fatal assault took place. Secondly, the actual blows that caused the death were delivered after the prisoner had disabled his victim and when the deceased lay defenceless on the lavatory floor. Thirdly, unlike the situation that will usually obtain after a sudden quarrel with the unintended consequence of the death of one of the protagonists, here the prisoner displayed not a trace of regret for his actions in the immediate aftermath of the killing.

[22] We do not consider, therefore, that this case fits comfortably into either of the categories adumbrated in the Practice Statement and, bearing in mind, that the statement purports to offer general guidance only, we do not intend to assign the case to either category but rather to deal with it in the round, having regard to recent tariff rulings in this type of case.

[23] There is a particular aggravating feature about this case that should be recognised. The prisoner not only brazenly denied his guilt; he also sought to cast blame for the murder on his co-accused and even sought to



intimidate Quinn into giving evidence more favourable to him. As the trial judge remarked, this led to Quinn being remanded in prison for fifteen months when, in fact, he was innocent of the murder. It is also plainly indicative of the prisoner's attitude to his own involvement. That attitude is characterised by a complete absence of any objective evidence of remorse.

[24] There are no mitigating features of any consequence to be detected in the case. The prisoner's criminal record does not qualify on that account; if anything, it must rank as an aggravating feature. It has been claimed that he did not intend to kill but merely to inflict grievous bodily harm. That claim does not rest easily with his reported remarks after he had left his victim but we are prepared to accept that he may not have actually intended to kill at the time of the attack. It was suggested that there was a measure of provocation on the part of the deceased because of his conduct towards the prisoner's girlfriend. We do not accept that. The deceased's behaviour, taken at its height in favour of the prisoner, could not remotely qualify as provocation.

[25] Taking all these factors into account, including all that his counsel has urged on us, we consider that the appropriate tariff in this case is fourteen years. This will include the period spent by the prisoner on remand.