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Tariff certified by the Secretary of State under Life Sentences (NI) Order 2001 on 31-01-05 **Date: 31/12/04**

THE QUEEN v DAVID ANTHONY PATRICK CONWAY

DECISION ON TARIFF

Before Kerr LCJ and Nicholson LJ

KERR LCJ

Introduction

[1] On 7 May 1999, the prisoner was convicted at Downpatrick Crown Court of the murder of his girlfriend, Belinda Hart. Nicholson LJ sentenced the prisoner to life imprisonment. Counts of possession of a firearm with intent and under suspicious circumstances were left on the books with an order that they were not to be proceeded with except with the leave of the Crown Court or the Court of Appeal. At the time of her death on 8 November 1997 the victim was 20 years old. The prisoner was then 27 years old. He is now 33. He has been in custody since 9 November 1997, his application for leave to appeal against conviction having been refused on 6 June 2000.

[2] On 28 June 2004 Nicholson LJ 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] At 12.25am on Sunday 9 November 1997, acting on information obtained from the prisoner, police forced entry to the deceased's flat at 14E North Street Flats, Newry, where they found her lying dead on a lounge chair. She had been shot in the face. A number of ornaments were overturned in the flat. It was unclear when the deceased had died, but the trial judge was of the view that it was probably between 9.30 and 10pm on 8 November 1997.

[4] At some time before 11pm on Saturday 8 November 1997 the prisoner's solicitor, Mr Deery, was contacted by telephone. He was told that the prisoner had been involved in a fatal shooting and wished to attend a police station. Mr Deery then set off to meet Conway having first told police where he was going. Police officers observed him arrive at the flat in Lisburn to which he had been directed. Mr Deery spoke to the prisoner. He then told police who arrived at the flat that Conway intended to hand himself in for the fatal shooting of his girlfriend. The prisoner was arrested and was said to be in a distressed state. On early information received from the prisoner a holdall, containing a shotgun broken into 3 pieces and ammunition in a sock, was recovered at 9.10am on 9 November 1997. This was the murder weapon.

[5] Claire O'Hare, who was 14 at the time of the killing, gave evidence on the prisoner's trial that she had been staying with the prisoner and the deceased at the deceased's flat for 3 weeks prior to the murder. On the evening of the murder at about 8 or 9pm she and the deceased had come across the prisoner near the deceased's flat as they returned after a day out. He was carrying a holdall, and swore at the deceased. She told Ms O'Hare to return to the flat alone. When she got there she found that the door had been forced. The deceased then arrived back at the flat. Shouts were exchanged between the deceased and the prisoner who was at this stage outside. He was telling her to get Ms O'Hare out of the flat. Ms O'Hare left the flat but later returned twice and received no answer at the door. Nobody saw the deceased alive after Ms O'Hare left the flat.

[6] A number of witnesses observed the prisoner carrying the holdall (both in the flat and on the street) on the evening of the murder. Claire O'Hare contended in evidence that she had seen a shotgun intact in the bedroom of the flat in the early hours of the morning of the killing. The accused denied having had a holdall in his possession that night.

[7] In a series of police interviews the prisoner maintained that on the evening of 8 November he had returned to the flat with the deceased and that Ms O'Hare had then left. He said that there had been no argument. The shotgun was kept on the floor beside the bed. It had been in the flat for a week and a half as the prisoner and other members of his family were under paramilitary threat. He had brought the shotgun downstairs into the living room due to the threats. The prisoner told police that the gun was sitting by the television and as he picked it up to take it upstairs it discharged and the deceased had been shot. He maintained that he had never previously used a shotgun. The prisoner said that he had panicked after the shooting and could not remember what had happened next.

[8] The prisoner maintained during interviews that he had no intention of hurting the deceased. He was not in a temper and there had been no argument. He said that he had carried the gun about the flat with him because he was worried about paramilitaries. He claimed that after the shooting he ran out of the house and intended to kill himself. As he ran towards town he threw the gun (in a holdall)

over a wall. He had no knowledge of the gun being broken up into separate parts in the holdall. The prisoner denied carrying a holdall at any time prior to the shooting. He telephoned his brother who gave him a lift to Banbridge, from where he got another lift to Lisburn. From there Mr Deery was contacted and he came round to the flat and was told what had happened. Mr Deery had telephoned the police before travelling to the flat as he thought the prisoner was suicidal. The prisoner maintained that he loved the deceased, expressed his regard for her and his regret that he had left a child without a mother. He said that he suffered from nervous disorder and had received treatment for ecstasy, cocaine and heroin addiction.

[9] At his trial the prisoner said that he was receiving treatment for nervous disorder and substance addiction. He gave evidence that he and the deceased had met in September 1997, that they regularly stayed together and had been discussing marriage. There had been some disagreements but no domestic violence. He had no reason to harm the deceased. The prisoner said that he was under threat from the IRA and had been attacked on a number of occasions in Newry and Warrenpoint. He gave evidence that he had been told earlier in the week of the shooting that the IRA intended to kill him. The prisoner claimed that he had acquired the shotgun from another man who had brought it to the flat and assembled it about a week and a half before the shooting. He had the weapon for his own protection and would not have used it unless under attack from paramilitaries. The gun was usually stored in the bedroom but he kept it with him at all times even downstairs unless other people were in the flat.

[10] The prisoner said that on the evening of the shooting he had gained entry to the flat by forcing the door, which he later set about repairing. He called to the deceased's sister's home to see where she was and on his return met the deceased and Ms O'Hare. He denied that there had been any disagreement between him and the deceased or that he had instructed her to evict Ms O'Hare from the flat. He claimed that after he had encountered the deceased and Ms O'Hare, he and the deceased went to the flat and Ms O'Hare went to her father's house. When they returned to the flat the prisoner brought the gun downstairs. It was when he lifted it to take it upstairs that it discharged and shot the deceased. He panicked. He claimed that he had no recollection of breaking up the gun. He knew that he had thrown it into an orchard before making his way to Lisburn. He maintained that the shooting was an accident.

[11] The prisoner gave evidence that he knew the gun was loaded, cocked and ready to fire, as that was the position it had been left in by the person who had deposited the weapon. He had not done anything further to the gun. He claimed that he had never broken down the gun but accepted in cross-examination that he must have done so on this occasion. He told the jury that he could not recall or explain the holdall, but that it was not his. The prisoner said that he did not think of dialling for the emergency services.

[12] The recovered weapon was a sawn off shotgun, accompanied by 9 shotgun cartridges. A forensic scientist gave evidence that his opinion was that this was a shooting at close range, in all probability the range of fire being 2 inches from the face.

[13] Evidence was given on the prisoner's behalf about his anxiety level, which (it was suggested) might have made him focus on getting away after such an incident. It was said that the prisoner's tears would have been difficult to feign and that he may have wanted rid of the gun because he did not want to see the weapon that had caused the deceased's death. The psychologist's written report indicated that the prisoner was of average intelligence and normal personality, but that he experienced abnormally high levels of anxiety. It continued:

> "There is evidence to suggest that Mr Conway would have been likely to have been experiencing high levels of anxiety prior to the shooting. He claims to have heard on the day of the shooting…that his older brother had been beaten up by paramilitaries the previous evening… Mr Conway claims to have believed that the paramilitaries were intending to kill him. Both the test evidence … and Mr Conway's circumstances at the time suggest that he would have been likely to have been in a state of heightened emotional arousal (anxiety) before the shooting occurred and that would have had the effect of enhancing the panic he claims to have experienced when the gun discharged and killed Belinda."

[14] Forensic examination of the prisoner's clothing indicated that he had been in close proximity to a source of medium to high velocity projected blood. No alcohol was found in samples taken from either the prisoner or the deceased. Cannabis and Temazepam were found in the prisoner's system.

[15] The State Pathologist, Professor Jack Crane, performed a post mortem examination on the afternoon of 9 November 1997. He concluded that the cause of death was a shotgun wound to the head. The deceased was 14 weeks pregnant at the time of her death.[1] Professor Crane's report concluded:

> "The discharge had gone backwards, marginally upwards and to the right into the cranial cavity fracturing the facial bones and the base and vault of the skull. The brain had been badly lacerated and within it were numerous lead pellets and two portions of an expended plastic wad. The injury to the brain would have caused very rapid death. There was scorching and sooty blackening of the margins of the entrance wound indicating that when the weapon was discharged the

> muzzle must have been very close, possibly less than 8 centimetre (3 inches), from the skin surface…Apart from the shotgun wound there were no other serious marks of violence…."

[16] Professor Crane was cross examined and accepted as a possibility the thesis that the shotgun was up against the wall and was lifted up and swung round to the left to get it out of a confined space, and the gun then accidentally discharged in the course of that operation with the muzzle close to the face of the deceased.

[17] In his charge to the jury the trial judge dealt with the motivation alleged by the Crown in the following passage: -

> "There is evidence that he went out looking for her, and that he was therefore, the prosecution would invite you to say or would ask you to infer, that he was a person who was very obsessive of her; that he had been in the house waiting for her for some time; that he had been angry with her and perhaps been a bit suspicious about where she had been."

Sentencing remarks

[18] The trial judge told the prisoner that he had been found guilty of a "very brutal murder" but he did not recommend a minimum term.

Antecedents

[19] The prisoner had 13 prior appearances before the criminal courts between 1987 and 1998. While the bulk of his offending has been either road traffic or burglary related, the record reveals convictions for a number of serious violent offences, specifically:

2/9/94 Robbery: Kingston Crown Court - 2 ½ years' imprisonment

3/8/90 Assault occasioning actual bodily harm: Guildford Magistrates - £150 fine & costs

2/3/90 Assault occasioning grievous bodily harm: Kingston Crown Court -£250 fine & compensation

5/10/88 Robbery: Belfast Crown Court - 3 years' imprisonment

The NIO papers

[20] The deceased's family has not submitted a representation.

[21] The prisoner's solicitors, Deery, McGuinness & Co, submitted a handwritten letter from the prisoner together with papers prepared for his appeal, information as to courses undertaken by the prisoner at HMP Maghaberry and counsel's opinion as to tariff.

[22] In his letter the prisoner acknowledged the great loss and suffering that his actions have occasioned, not only to the deceased's family but also to his own. Notably the prisoner maintained that what happened was a "tragic accident". He stated that he was trying to use his time in prison productively and to identify the factors that led to his present situation.

[23] In papers prepared for the Court of Appeal the prisoner contended that the conviction was unsafe and that the circumstances pointed, at worst, to a case of manslaughter by gross negligence.

[24] The prisoner's solicitors also submitted two letters from prison officers at HMP Maghaberry testifying as to the prisoner's successful endeavours in both joinery and information technology training.

[25] An opinion as to tariff from Norman Hill BL asserted that the period fixed should be at the "lower end of the scale" and raised the following points:

a) the prisoner handed himself into police;

b) the prisoner was always prepared to plead to manslaughter, but discussions to this end were unsuccessful;

c) the prisoner expressed remorse throughout.

Practice Statement

[26] 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*
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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.

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

[27] It was suggested on the prisoner's behalf that this was a normal starting point case because it was a case of a quarrel or dispute between two people who were known to one another. The difficulty with that claim is that the prisoner continues to assert that the death of Ms Hart was the result of an accidental discharge of the shotgun. This claim is completely at odds with the finding of the jury and the rejection of the prisoner's appeal. It cannot form the basis for any finding as to the true circumstances of the killing.

[28] There is, moreover, reason to at least strongly suspect that this was a much more sinister killing than the prisoner claims. As the trial judge observed to the jury in the course of his charge, the prisoner may well have believed that on the day of the murder Belinda Hart had been visiting her former boyfriend (who was the father of her unborn child) in Warrenpoint.

[29] It is impossible to be sure exactly what happened in the flat on the fateful day other than that the killing was not the result of an accident as the prisoner continues to claim. It is therefore not possible to say whether this should be treated as a normal category or higher category case and we have concluded that it is not appropriate to assign the case to either grouping.

[30] There are clearly aggravating features about the circumstances of the killing. A weapon was used and the fact that the prisoner had this with him for some time suggests a degree of pre-planning. The finding of the jury can only be consistent with the conclusion that the prisoner had deliberately discharged the weapon at the deceased. In those circumstances he must clearly have intended to kill her and the

fact that he must have held the muzzle of the gun close to her face before discharging it we take to be a particularly horrific aspect of this murder that must be recognised as an aggravating feature. A further aggravating feature peculiar to the prisoner himself is his previous record for crimes of violence.

[31] It is somewhat to the prisoner's credit that he has always accepted that it was his act that caused the death of the deceased, although this is mitigated by his continued assertion that this was an accident. It was suggested that his 'genuine' remorse was a strong mitigating factor. We cannot accept this. The prisoner expresses remorse in an entirely different context from that which the jury has found to be the true circumstances of the killing. We have not left this entirely out of account but we cannot accord this factor the weight that it would have been due had it recognised the effect of the jury's verdict.

[32] Taking all these factors into account, including the submissions of counsel to which we have not made specific reference, we have concluded that the appropriate tariff in this case is fourteen years. This will include the time spent by the offender in custody on remand.

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[1] The prisoner knew that he was not the father of the child and said in his interview that she was no longer in contact with the father.