

Tariff certified by the Secretary of State under Life Sentences (NI) Order 2001 on 19-01-07

THE QUEEN v JOHN HUGH BRADY

DECISION ON TARIFF

Ruling by Kerr LCJ

KERR LCJ

Introduction

1. At Belfast Crown Court on 25 July 1991, John Hugh Brady was sentenced on a number of charges including murder. The murder charge arose from the killing on 27 June 1989 of David Black, a member of the Royal Ulster Constabulary Reserve, by the detonation of a booby-trap device which had been placed under his car at his home in Strabane. The prisoner had initially pleaded not guilty but was re-arraigned on 7 May 1991 when he pleaded guilty to Constable Black's murder and to a number of associated offences. He was sentenced to life imprisonment on the murder charge. Concurrent custodial sentences were imposed in relation to the other offences, the longest of which was 14 years for causing an explosion. The prisoner appealed against sentence; however the appeal was abandoned and was formally dismissed on 22 November 1991.

2. The prisoner was committed to custody on 16 April 1990. On 7 October 1998, after having served 8 years and 5 months, he was released under the Northern Ireland (Sentences) Act 1998. The Sentence Review Commissioners determined that, in accordance with the provisions of the 1998 Act, a period of 12 years would satisfy retribution and deterrence.

3. On 13 November 2003 the prisoner's licence was suspended and he was returned to custody on the life sentence. He has now served 16 years and 5 months of his life sentence; the period of 5 years during which he was at liberty on licence under the 1998 Act is not deductible from this period for the purposes of calculating his release date once the minimum term is fixed.

4. On 18 October 2006 I sat to hear oral submissions on the tariff to be set under Article 11 of the Life Sentences (Northern Ireland) 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

5. During the early hours of Tuesday 27 June 1989, the prisoner took the keys of his father's Ford Fiesta car and drove to a pre-arranged venue where he collected two other members of an active service unit of the Provisional Irish Republican Army. They had with them an under-car booby device. They drove to a spot near the home of Reserve Constable David John Black in Strabane. Brady was to return to pick up the other two after they had planted the bomb. Some time after dropping them off, however, he noticed an army mobile patrol in the area. He tried to steal a car but was unable to do so and then made off on foot to the border with the Irish Republic. He eventually secured a lift from some people he met and subsequently made his way to Lifford in the Irish Republic.

6. At approximately 10.30pm on the same day Reserve Constable Black returned home. He spent a few moments in brief conversation with his wife and then went to the family car. He got into the vehicle intending to drive the short distance to his mother's home. When he started the car a bomb placed below the vehicle exploded. Neighbours who pulled Mr Black's body from the car, which was engulfed in flames, rendered first aid. They could not save him and life was pronounced extinct at 10.55 pm as Mr Black was being conveyed by ambulance to Altnagelvin hospital.

7. The prisoner 'went on the run' until 16 April 1990. He then gave himself up at a police checkpoint because, he said, his mother and brother had been arrested for offences connected with the murder of Constable Black. He was then interviewed by police. He freely admitted being involved in the

murder and being engaged in other IRA activities such as moving guns and throwing a drogue bomb at a landrover. He gave detailed information on IRA membership in Strabane, Donegal, Sion Mills and Castlederg.

8. When asked whether he ever felt remorse he replied: -

“To be honest with you boys I never felt any remorse. He was a member of the security forces. I was brought up a Republican and after you have been harassed by the security forces you soon learn. To be honest I don't think about it. At the end of the day they have boys in the IRA to help you think about it.”

In a written statement which was submitted to the trial court, however, he stated that he felt sorry that Constable Black's child had been deprived of its father.

Antecedents

9. The prisoner was convicted of eight terrorist offences at Belfast Crown Court on 2 December 1987, arising out of a single incident. The offences included hijacking, arson, throwing a petrol bomb, possession of a firearm with intent and belonging to a proscribed organisation. He was sentenced to 2 years and 364 days imprisonment, to run concurrently.

Judge's sentencing remarks

10. In imposing the sentence of life imprisonment on the murder charge, the judge said: -

“John Hugh Brady, you have pleaded guilty to a large number of terrorist offences, including the cowardly murder of Reserve Constable Black. I do not propose to say a good deal to you either about yourself or the offences you have committed. It has struck me, both from reading the papers, and from observing you in court, that you are quite an inadequate individual and you have considerably less than average intelligence. Your attitude and comportment in court had been quite

inappropriate at the time of which you appeared to be smiling, finding the proceedings amusing in some way. But I put that down to your extremely limited intelligence which indeed has been shown in the course of the matters which you have discussed with the police officers. And I have no doubt at all that you have been brain washed by members of the IRA, and that your failure to make a proper judgment of what is important in your own life and what matters in the community, has lead you and other members of your family being quite cynically exploited by members of the IRA.

And on this particular occasion you were told to use your family's car, to transport your fellow murderers to the scene of Reserve Constable Black's murder and that not only increased the chance, of course, of your discovery as being part of this criminal group but it also implicated other members of your family.

You were previously involved with the IRA and you were treated with consideration by the court which has dealt with you, no doubt in view of your age, however, once you got out of prison you became re-involved. I do not accept the reasons given by you in your statement for your involvement, I think you were pretty easily flattered into being brought back into IRA activity by the local manipulators of young people in that area. It seems to me that the involvement of you shows the IRA in the Strabane area is scraping the bottom of the barrel in its recruitment of young men to carry out its dreadful crimes but that really is no excuse for you.

You willingly became involved in this murder and knowing that the murder was going to take place, you took full part in the operation. It was not a particularly well executed operation from the point of view of those who carried it out but the cruel

irony is that it was successful and that a brave man like Reserve Constable Black was murdered simply because people of your ilk had at your disposal very sophisticated murderous devices which enabled you, without putting your safety in any great risk, to murder by stealth a man that you could never have faced up to openly."

Representations made on behalf of the prisoner

11. The prisoner's solicitors made written submissions on his behalf in which the following representations were made: -

- The prisoner had pleaded guilty.
- He had a limited role in the offence, confined to the acquisition of a vehicle and to driving the individuals who placed the explosive device to the vicinity of the home of the victim.
- Whilst he left the jurisdiction before the offence occurred, he returned within days and voluntarily produced himself at a local Police Station in connection with the offence.
- The trial judge was in no doubt that the prisoner had been effectively brainwashed and cynically exploited by members of the IRA and "that the IRA in the Strabane area is scraping the bottom of the barrel in its recruitment of young men."
- The prisoner served custodial sentences for offences committed in 1987, "but these were not on the same level of seriousness as the present matter". The prisoner was released from prison on 15 October 1988 after serving 18 months of a 3 year sentence for possession of arms and PIRA membership.
- The Sentence Review Commissioners considered that by 16 April 1998 the prisoner had been in custody for approximately two thirds of the period that he would have been required to serve under the sentence.

12. Three documents were also submitted. These were: -

- A character reference, dated 25 October 2004 from the prisoner's employer (during his period of release), Adria Ltd, which stated that the prisoner was a highly motivated and flexible employee who was willing to help cover other shifts if called upon.

- A character reference, dated 9 August 2005, from the Catholic chaplain at Maghaberry Prison, Father Bannon, which stated the chaplain's belief that the prisoner has severed all links with any groupings or organisations outside prison. The prisoner had asked to be moved from a separated wing at Maghaberry Prison to Magilligan Prison. Father Bannon also made the following point: -

“The political map outside of the prison has changed with recent events and in particular the statement made by the PIRA. As the charges for which Mr Brady was originally sentenced and is being held on at present were deemed to be actions of this organisation, and given the recent declaration by them, I would see Mr Brady as being of no danger to society.”

- A statement the prisoner submitted to the trial court. In this statement he said that after his release from prison in 1988 he had no intention of ever joining the IRA again but became re-involved about six months after leaving prison when he was slapped about the face and private parts by a British soldier. In this statement he admitted being involved in the movement of a bomb in Strabane; acting as look-out in a “drogue” bomb attack at Strabane Barracks when the bomb failed to go off; and throwing a “drogue” bomb at a police landrover travelling on the Melmount Road. This bomb missed its target. In relation to the murder of Mr Black the prisoner wrote that he knew very little about the plan as his only task was to drive. He said, however, that he knew that the target was a member of the security forces and that a time had been arranged for the prisoner to pick up the other men and a bomb and a gun. He also said that he had been told that the car they had used on dummy runs could not be driven on this occasion because of a mechanical fault and that he was told by his officer commanding to take his father's car. He took the keys of his father's car at about 12.45am when his father, mother and brother were in bed. After dropping “the boys” off he took the car to a place that he had been shown earlier and he parked the car there. He saw no sign of the others returning and when he saw two army landrovers coming down the hill he then knew that something was wrong. He made for the border on foot and ended up in Lifford. The next night he heard that the bomb had gone off and killed the policeman. In his statement he claimed that this was the first time he

knew the police officer was married and had a child. He finished by writing "I feel sorry that this child has been deprived of its father."

13. At the oral hearing Mr Treacy QC submitted on behalf of the prisoner that the effect of the decision of the Court of Appeal in *Re Colin King* [2003] NI 43 was that the tariff fixing exercise must now be conducted on the basis of what would have been the approach at the time of sentencing. He argued that I was bound to choose such minimum period as would have been selected if that exercise had been carried out in 1991. He suggested that had the tariff been determined then, it is inevitable that it would have been of the order of twelve years.

14. If Mr Treacy's arguments on this were correct, it would follow that the *Practice Statement* issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 and which our Court of Appeal in *R v McCandless & others* [2004] NICA 1 held should be applied by sentencers in this jurisdiction would not apply. For reasons that I will give presently I do not accept Mr Treacy's submissions on this issue and I consider that the *Practice Statement* applies to the tariff fixing exercise in this prisoner's case.

The Practice Statement

15. For the purposes of this case the relevant parts of the *Practice Statement* 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.

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.”

Re King

16. In the case of *King* the appellant, who had been convicted of murder and sentenced to imprisonment at the Secretary of State’s pleasure, applied for judicial review of the decision to provide materials to the trial judge and the Lord Chief Justice for the purpose of fixing his minimum term of imprisonment under the Life Sentences (Northern Ireland) Order 2001. The appellant contended that no materials which came into existence after the date of his sentencing should be read by the trial judge or the Lord Chief Justice when they were considering the fixing of the minimum period.

17. The Court of Appeal held that the 2001 Order required that the minimum term be determined as if fixed by the sentencing court at the time at which the prisoner was originally sentenced. Materials placed before the judiciary should be limited to those which were available to the court at that date or which could have been made available upon any reasonable inquiry at that date. Mr Treacy argued that these findings necessarily required the *post hoc* tariff fixing exercise to be based on the approach that would have applied at the time that the life sentence was passed.

18. It is important to note, however, that while the Court of Appeal found that the tariff was to be determined as if chosen by the court at the time of sentencing, it also found that the fixing of the minimum term had to be *in accordance with the statutory scheme*. As Nicholson LJ pointed out, (in

paragraph [76] of the judgment) the Order is deemed to have been in force at the time of sentencing. It follows that the approach to the determination of the minimum term must be that which is required by the Order and, on the binding authority of *McCandless* this requires the application of the *Practice Statement*.

R v Flynn and others

19. The fact that the tariff fixing exercise must be in accordance with the statutory scheme does not mean that the view expressed by the Sentence Review Commissioners that a period of 12 years would satisfy retribution and deterrence is irrelevant to my determination of the minimum period to be served in this case.

20. In *R v Flynn and others* each of the appellants had been notified of a date on which their cases would be considered by the Parole Board for Scotland and each therefore could, in the words of Lord Bingham of Cornhill, “hope, realistically, that he might be considered safe to release” at that time. Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, as amended by Convention Rights (Compliance) (Scotland) Act 2001, and Schedule 1 to the 2001 Act swept away the previous regime whereby a prisoner sentenced to life imprisonment had his tariff fixed by a minister, after receiving advice from the Parole Board. The punitive part of the life sentence was to be fixed by a judge in open court and would be subject to appeal in the normal way.

21. The introduction of these changes had the consequence that prisoners who had already received an indication that their cases were to be considered by the Parole Board could no longer expect that their release would depend on a favourable indication by that body. The Privy Council held the High Court, when specifying the punishment part of the life sentence to be served by each of the appellants, could take account of and give appropriate weight to the Parole Board hearing dates formally notified to them.

22. *A fortiori* it appears to me that I must take into account the indication given to this prisoner by the Sentence Review Commissioners. I am not bound to fix the minimum period at that level but I must give due weight to the fact that the prisoner considered that this was the period that he would be required to serve to satisfy the requirements of retribution and deterrence.

Conclusions

23. The murder for which the prisoner was sentenced to life imprisonment was self evidently a terrorist crime. The *Practice Statement* suggests that a tariff of twenty years and upwards is appropriate for this type of killing. It is clear, however, that the prisoner in this case was exploited by more sinister and hardened terrorists. His involvement in this crime, though wholly reprehensible and culpable, is not as deserving of condign punishment as those who were principally responsible for planning and carrying out the murder of the police officer.

24. It is also relevant that the prisoner gave himself up, confessed his role to the police and pleaded guilty to the murder. While there is no clear evidence of remorse, this approach to his involvement in this dreadful crime must be reflected in the choice of tariff.

25. Taking into account these factors and the prisoner's expectation based on the Sentence Review Commissioners' determination, I have concluded that the minimum term under article 11 of the 2001 Order should be fixed at fifteen years. This will include the period spent by the prisoner on remand for the offences for which he was sentenced on 25 July 1991.