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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

ORHAN KOCA

_____

Before: McCloskey LJ, McFarland J and Rooney J

_____

Representation

Appellant: Mr Kevin Magill, of counsel, (instructed by R Gillen solicitor)
Respondent: Mr Charles MacCreanor QC and Ms Rosie Walsh, of counsel, (instructed by the PPS)

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McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Orhan Koca ("the appellant") renews his applications to this court for leave to appeal against his conviction of murder and ensuing sentence of life imprisonment with a minimum term of 14 years and to extend time for appealing, leave to appeal having been refused by the single judge. The appeal was heard on 23 March 2022. The court has derived much assistance from counsels' written and oral submissions.

Appeal History

[2] The material events in the Crown Court unfolded in March and May 2017. The notice of appeal is dated 1 October 2020. The appellant had no legal representation in this court until, on 21 January 2022, this court exercised its power under article 26(1) of the Access to Justice (NI) Order 2003 (formerly section 19(1) of the Criminal Appeal (NI) Act 1980) appointing solicitor and counsel to represent him at public expense. The court considered it appropriate to exercise this power mainly because, following several remote review listings, it had become clear that the appellant was struggling to represent himself adequately, with the result that

the appointment was necessary in fulfilment of his common law right to a fair hearing. The court further took into account that during the intervening period of approximately 15 months the appellant's several efforts to secure legal representation had been fruitless.

[3] The co-operation of the Public Prosecution Service ("PPS") in the matter of preparing the hearing bundles and other materials has been exemplary. As a result of insistence on a strict timetable it has proved possible to conduct a substantive listing within two months of the aforementioned appointment.

The Prosecution Case

[4] The following resume is distilled from the formal document presented by the prosecution in the Crown Court.

[5] The deceased was a student and a promising young boxer. He was stabbed to death at around 2.30am on 30 May 2015 in the area of Summerhill Drive/Summerhill Park, Belfast. Before his death he had been in the home of his girlfriend (married to the appellant, with three children of the relationship) at 23 Summerhill Drive. Having stepped outside the premises to check for a pizza delivery he was attacked, stabbed repeatedly and killed. The cause of death was multiple stab wounds.

[6] The prosecution case was that the appellant murdered the deceased because of the aforementioned relationship. The person described as the girlfriend of the deceased was married to the appellant. They had three young children. At the material time they had been estranged for a period of some few months. The deceased and the appellant's wife had been together in the family home immediately prior to the fatal attack. The appellant no longer lived in the family home. The prosecution case was that the appellant is an aggressive person who was very possessive of his wife and committed the murder actuated by jealously.

[7] There was evidence that prior to their physical separation the appellant had begun checking up on the conduct and whereabouts of his wife. He did this particularly via Facebook, utilising a false identity. This gave him access to the Facebook pages of his wife, her friends and the deceased. He accused her of having an affair with her employer and threatened that he would kill this person some four weeks prior to the murder. He accessed photographs of his wife and the deceased and questioned her about this. He saved these photographs to his mobile phone.

[8] On the morning of 29 May 2015 the appellant visited the family home for the purpose of bringing the children to school. On this occasion he questioned his wife about her relationship with the deceased. She responded that she did not love the appellant anymore and was in love with another person, unidentified, in a relationship of some three months' duration. The killing occurred less than 24 hours later.

[9] Following the aforementioned confrontation the appellant, having escorted the children to school, went to work at a barber's shop. He also had employment in a bar to which he went for an evening shift later that day. At around 10.15/10.45pm the appellant had an encounter with a family relative ("PM"). As on previous occasions their conversation included the topic of whether his wife was in a relationship with another man. The deceased and the Facebook photographs featured in this conversation.

[10] Later the appellant, having completed his shift, changed his clothes and left the bar. Sometime later, the killing having occurred, he returned to the bar. There he concealed the trousers into which he had previously changed and put on the trousers he had been wearing beforehand. He slept in the bar that night. Less than two days later a police search of the bar uncovered a pair of blue jeans, with splattered blood, in a concealed place. Following forensic testing the DNA of the appellant was found in certain parts of this garment. Furthermore, forensic testing of the splattered blood matched the DNA of the deceased. One of three new knives recently purchased by the proprietor of the bar was missing.

[11] The appellant, having slept at the bar, went to his employment at the barbers shop the following morning. It is there that he was arrested. His mobile phone was seized. Examination established that the photographs of his wife with the deceased which he had previously saved had been deleted. Evidence of frequent searches focused on his wife, the deceased and their friends was also recovered. Much of this evidence related to the month of May 2015. Finally, there was evidence that the appellant's account of his movements and whereabouts during the critical hours was false.

Conviction and Sentence

[12] In the Crown Court proceedings the appellant was represented by his solicitor, senior counsel and junior counsel. By the indictment, which is dated 19 February 2016, it was alleged that he had murdered Eamonn Magee ("the deceased") on 30 May 2015. Via the defence statement dated 23 February 2016, he pleaded his innocence. An aborted trial intervened and a new team of defence lawyers was instructed. On 14 March 2017 he pleaded guilty to murder. On 12 May 2017 he was sentenced to life imprisonment with a minimum term of 14 years. His notice of appeal is dated 1 October 2020.

Interlocutory and Procedural Orders

[13] This court made the following orders:

(i) The above mentioned legal representation order under section 19(1) of the 1980 Act.

(ii) An order that in light of the appellant's unequivocal waiver of privilege, considered in conjunction with subsequent submissions on his behalf, the written accounts of his previous legal representatives, as noted in paras [36] – [40] infra, be admitted in evidence.

(iii) An order permitting amendment of the original grounds of appeal.

Amended Grounds of Appeal

[14] The order of the court assigning publicly funded solicitor and counsel to the appellant had the effect of, inter alia, the formulation of amended grounds of appeal in the following terms:

Conviction:

> "The failure of the Appellant's legal representatives to ensure that an interpreter was present at his pre-trial consultation and re-arraignment resulted in [him] not fully and properly understanding the consultations with his solicitor and senior counsel, the 'indemnity' which he signed, nor the charge to which upon re-arraignment he pleaded guilty. The Appellant thus erroneously pleaded to a charge that he continued to deny and his plea is therefore equivocal."
>
> Thus the application for leave to appeal against conviction proceeds on the single ground of equivocal plea."

Sentence:

> "The sentence is manifestly excessive and sentencing judge [sic] erred:
>
> *(i)* In determining that this case fell within the 'higher starting point' in **McCandless and Others**.
>
> *(ii)* In unreasonably rejecting the possibility that the Appellant's account was truthful.

The Sole Ground of Appeal: Equivocal Plea of Guilty

[15] The starting point in the submissions of Mr Kevin Magill (of counsel) on behalf of the appellant entails an unqualified acceptance on behalf of his client of the accuracy of the following account of events in the pre-sentence report:

> "The Defendant admitted to leaving the bar later that night after his work at closing time around 2am for the purpose of giving his wife £170 for the children. … He believed the children's grandmother would have been awake … he was not carrying any weapons … when he arrived at [the family home] he saw a light on and what appeared to be a man in the house. He states that he felt afraid that the man might be an intruder who might harm his children and went round to the back garden. He states that he lifted a blade from broken garden shears stating as he did so the victim left the house and walked into the back garden. He states that he panicked and lunged towards the victim stabbing him once in the leg. At this point he claimed that he lost self-control and could not recall the subsequent sequence of events. He claims that he ran back to [the bar] discarding the blade nearby. He states that when he arrived at the bar he changed his clothes and went to sleep."

The appellant strenuously denied that this was a premeditated attack on the deceased. The author of the probation report, having commented on the implausibility and lack of rational foundation in the appellant's account, stated:

> "However, while there are obvious difficulties in determining some of the facts of this case it remains clear that by his own admission the Defendant engaged in an unprovoked violent attack using a blade against a 22 year old defenceless man which ultimately resulted in his death …
>
> The Defendant admitted to lying to the police in an attempt to avoid the consequences of his actions but also tended to attribute responsibility for this to advice given by his legal representative. **He stated that he eventually pleaded guilty to the offence when he saw the victim's family at court and felt sorry for them** ….
>
> **The Defendant acknowledged the devastating consequences of his actions upon the victim, his family and indeed his own family …**
>
> The Defendant claims that he regrets his actions that night and states that he wished he had died instead of the victim."
> [Emphasis added]

The author opined:

> "This appears to have been a premeditated and planned murder of a defenceless young man, which was both brutal and sustained and where the intention was to cause serious injury and where the Defendant was prepared to use extreme violence with a weapon, causing the loss of human life."

[16] The commentary continues:

> "The Defendant's offending on this occasion is characterised by the following risk factors: intent to harm victim, premeditation and planning, extreme aggression and violence, propensity to use a weapon, distorted thinking, a lack of victim awareness or empathy at time of offence [and] absence of consequential thinking."

We record at this juncture, as did the author, that the appellant has no criminal record. He was assessed as posing a high risk of reoffending. He was further assessed as presenting a significant risk of serious harm to others.

[17] In the written submissions to this court it is suggested that the pre-sentence report "… did not record [the appellant's] account in full …" The elaboration which follows has no foundation in the extant evidence and is not the subject of any application to this court to receive fresh evidence (eg sworn testimony from the appellant). This observation applies to the assertions in counsel's written submissions, which are in effect pure hearsay, that the appellant was acting in self-defence and believed he was entering a plea of guilty to manslaughter rather than murder.

[18] Developing the single amended ground of appeal, Mr Magill reminded the court of two expert reports generated on behalf of the appellant prior to his plea of guilty. These reports were compiled by a chartered forensic psychologist and an educational psychologist respectively. Each contains an assessment that the appellant is a person of very low cognitive and intellectual ability, with a diagnosed moderate learning disability. They emphasise the need to communicate with the appellant in simple English, avoiding complicated language and technical terms. Based on this the following submission is advanced: it was remiss, to say at the least, that no interpreter was arranged for the appellant's pre-trial consultations and trial.

[19] By this route one reaches the core of this single ground of appeal. It is contended that the appellant's plea of guilty to murder was based on a specified belief. This is best expressed in his original grounds of appeal:

> "…. The prosecution already offered me a deal, if I take all responsibility they will give me ten years deal … [and] … in the court [my solicitor] didn't give the court or judge the ten year deal statement and he still has it."

This requires no elaboration.

[20] Developing his central submission, Mr Magill suggests that the appellant "had totally misunderstood" the discussions which he had with his previous legal team constituted by a different solicitor and different senior and junior counsel. Summarising, the cornerstone of the single ground of appeal is that the appellant claims to have misconstrued a without prejudice approach to the prosecution by his first team of legal representatives as a firm offer of a PPS deal.

[21] By the route chartered in the preceding paragraphs the contours of the single ground of appeal against conviction are clearly summarised in counsel's written submission:

> "The Appellant's continued protestations and insistence that he would never have willingly pleaded guilty to murder, combined with the compelling and uncontroverted expert evidence raising concerns about his understanding of complex issues and technical matters and [the former instructed solicitors] confirmation that the Appellant was misinterpreting events, ought to give real concern regarding the nature of his plea. It is submitted that there are clear grounds for concluding that the plea herein was indeed equivocal and thus unsafe."

Governing Legal Principles

[22] Summarising, the appellant's renewed application for leave to appeal against conviction engages the well-established legal principles bearing on (a) the test for intervention by the appellate court, (b) the conduct of a convicted person's legal representatives and (c) the issue of an ambiguous plea of guilty. We shall address each in turn.

[23] The unsafe conviction test is well established. The sole question for this court is whether the conviction is unsafe: *R v Pollock* [2004] NICA 34.

[24] In cases where an appeal against conviction entails an attack on the conduct of and professional services provided by a convicted person's legal representatives, certain principles are engaged. There are several decisions quoted in paragraph 7-83 of Archbold 2022 under the rubric "Conduct of Legal Representatives." In *R v Davies* [2018] EWCA Crim 327 one of the grounds of appeal related to a decision made by the appellant's trial counsel not to apply to discharge the jury. In rejecting

this ground the English Court of Appeal, at paras [48] – [49], described this decision variously as "tactical", "made in good faith" and "a view which could reasonably be taken." The same theme is identifiable in the summary at para [52]. Ultimately, the court applied the test of whether the conviction was unsafe. However, in our view, the touchstones, or criteria, which were applied en route thereto must always be treated with circumspection, as they run the run the risk of distracting from the overarching criterion of safety of conviction. The outcome of this discrete exercise was in effect a finding that trial counsel had not acted incompetently: see para [52]. We consider with respect that the correctness of this approach is doubtful.

[25] For the same reasons this court would have reservations about the decisions in *R v Farooqi* [2013] EWCA Crim 1649, *R v Sami* [2018] EWCA Crim 552 and *R v Goldfinch* [2019] EWCA Crim 878. In our estimation the correct approach in principle is that adopted in *R v Smith* [2005] 1 WLR 704, a decision of the House of Lords binding on this court. In that case defence counsel's assent to the course taken by the trial judge of formulating a robust direction to the jury rather than opting for their discharge, follow receipt of a troubling letter from a juror, was <u>not</u> assessed on appeal by reference to any of the criteria featuring in the aforementioned cases. Rather, the House emphasised that this constituted at most a factor to be taken into account. Lord Carswell, delivering the leading judgment, stated at para [23]:

> "The judge was entitled to be fortified in taking this course by the explicit assent and encouragement of the appellants' counsel. It is clear, however, that the ultimate responsibility was his to determine what course to take. Not only was he not bound to take the action which counsel agreed, but if he thought that another course was the correct one he was obliged to follow that, regardless of the urgings of counsel. It might perhaps be regarded as surprising that the law should permit a party to assent to one course, and indeed encourage the judge to take it, then to complain on appeal that he was incorrect to do so …
>
> The appellants' counsel met this by arguing before the House that the doctrine of waiver could not operate and that it was permissible for them now to contend that the judge had taken the wrong course. Mr Perry for the Crown, in my opinion quite rightly, did not attempt to argue that there had been any waiver. He confined his submission to the proposition, which I consider correct, that the assent of counsel was at most a relevant factor to be taken into account on appeal in considering the justification for the judge's choice of his course of action."

[26] Concluding on this discrete issue, we would advocate caution on the part of practitioners and judges in considering paragraph 7 – 83 of Archbold. The authors have packed a lot into relatively few words. As ever, there is no substitute for having detailed recourse to the cases cited and applying the doctrine of precedent scrupulously.

[27] One of the principles to be applied in the determination of this appeal is summarised in the recent decision of the English Court of Appeal, *R v Kakaei* [2021] EWCA Crim 503 at para 67:

> "Where a person has pleaded guilty following legal advice which deprived him of a defence which would probably have succeeded that is a proper ground for regarding the conviction as unsafe, see *R. v. Boal* [1992] 1 QB 591, which has been frequently applied: see for example the recent case of *R. v. P.B.L.* [2020] EWCA Crim 1445. The test for this approach to guilty pleas in this court is not the same as Chalkley. Chalkley requires a situation where the ruling on law means that the appellant has no defence even on the most favourable view of the facts from his or her point of view. If that ruling is wrong, then the conviction will probably be held to be unsafe even if the chances of the jury accepting that such a view of the facts was possible appear to the court to be low. Where the plea follows legal advice that advice may concern factual or legal issues, or commonly mixed issues of fact and law, but its effect must be to deprive the appellant of a defence which would probably have succeeded. No doubt the difference arises, at least in part, from the fact that a defendant is required to accept and follow the legal rulings of the trial judge, but has a choice as to whether to accept legal advice, and, indeed, whether to continue to retain the lawyer giving it. The reasons for choosing to accept advice may not always be capable of proof, and they may also involve many factors."

[28] Another principle which this appeal raises is that relating specifically to unsafe conviction based on an equivocal plea of guilty. This was clearly formulated by Deeny LJ in *R v Stronge* [2019] NICA 19 at [14](5) thus:

> "… a discretion to vacate an unequivocal plea would be exercised only very sparingly, particularly in a case on indictment or where the appellant was legally represented, two factors which apply here. It could be done when the accused had pleaded guilty due to

misrepresentation or where his will was overborne so that his plea was not entered voluntarily."

In *R v Nightingale* [2013] EWCA Crim 405, [2013] 2 Cr.App.R 7, a decision which this court has previously cited with approval, the Lord Chief Justice offered the following more comprehensive formulation of the principle in play:

> "10. ... It is axiomatic in our criminal justice system that a defendant charged with an offence is personally responsible for entering his plea, and that in exercising his personal responsibility he must be free to choose whether to plead guilty or not guilty. Ample authority, from R v Turner [1970] 2 QB 321 to R v Goodyear [2005] 1 WLR 2532, which amends and brings Turner up to date, underlines this immutable principle. The principle applies whether or not the court or counsel on either side think that the case against the defendant is a weak one or even if it is apparently unanswerable. In view of the conclusion that we have reached, we shall express no opinion whatever of our view of the strength of the case against the appellant.
>
> 11. What the principle does not mean and cannot mean is that the defendant making his decision must be free from the pressure of the circumstances in which he is forced to make his choice. He has, after all, been charged with a criminal offence. There will be evidence to support the contention that he is guilty. If he is convicted, whether he has pleaded guilty or found guilty at the conclusion of a trial in which he has denied his guilt, he will face the consequences. The very fact of his conviction may have significant impact on his life and indeed for the lives of members of his family. He will be sentenced — often to a term of imprisonment. Those are all circumstances which always apply for every defendant facing a criminal charge.
>
> 12. In addition to the inevitable pressure created by considerations like these, the defendant will also be advised by his lawyers about his prospects of successfully contesting the charge and the implications for the sentencing decision if the contest is unsuccessful. It is the duty of the advocate at the Crown Court or the Magistrates'' Court to point out to the defendant the possible advantages in sentencing terms of tendering a guilty plea to the charge. So even if the defendant has

> indicated or instructed his lawyers that he intends to plead not guilty, in his own interests he is entitled to be given, and should receive, realistic, forthright advice on these and similar questions. These necessary forensic pressures add to the pressures which arise from the circumstances in which the defendant inevitably finds himself. Such forensic pressures and clear and unequivocal advice from his lawyers do not deprive the defendant of his freedom to choose whether to plead guilty or not guilty; rather, the provision of realistic advice about his prospects helps to inform his choice."

[29] On behalf of the appellant reliance was placed on a single reported case, namely *Cuscani v United Kingdom* [2002] ECHR 630. In that case the ECtHR decided that the applicant had not received a fair trial on account of the absence of an interpreter at his sentencing hearing, giving rise to a breach of his rights under article 6(1) ECHR. The relevant passages in the judgment are at paras 34 – 40:

> "34. The applicant complained that the fairness of his trial had been undermined on account of the failure to provide him with an interpreter with the result that he could not understand and follow the trial proceedings and appreciate the consequences of his plea of guilty. The applicant invokes Article 6 of the Convention, which provides as relevant:
>
> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."
>
> 35. The Government rejected the applicant's allegations. In their submission, the applicant's command of English was adequate to understand the proceedings and to participate effectively in the trial process. No evidence had been adduced by the applicant to controvert this view and at no stage of the pre-trial, trial or appeal proceedings did the applicant ever make a complaint to that effect. On the contrary, he only disputed his understanding of the extent of the charge to which he pleaded guilty.

36. The Government drew attention to the fact that the applicant's legal team never suggested to the trial court either on 4 January 1996 or on 26 January 1996 that the absence of an interpreter would prevent the applicant from broadly understanding the proceedings. The applicant's QC, for example, when confronted with the absence of an interpreter at the hearing on 26 January 1996, indicated that "we shall have to make do and mend." At the earlier hearing on 4 January 1996, the applicant's QC admitted that "for the purposes of consultation we can get by." Had the applicant's lawyers felt during the trial that the applicant was unable to understand what was being said in court, they would have been bound by their codes of conduct to bring this to the court's attention. Significantly, the Criminal Cases Review Commission concluded that the applicant's failure to understand fully the nature of the case was due only partly to language difficulties. It was also due to the inadequate explanation of the case given to him by his legal representatives. Accordingly, Article 6 § 3(e) could not be said to have been engaged in the circumstances of the applicant's case.

37. The applicant disputed the Government's arguments. In his principal submission, he contended that the trial judge had been clearly informed by counsel that the applicant had a "very poor" command of English (see paragraph 14 above). The judge in consequence directed that the applicant be assisted by an interpreter. However, the interpreter failed to appear at the hearing on 26 January 1996. The applicant argued that, at the very least, the trial judge should, given the turn of events, have made proper enquiries so as to ensure that it was the applicant's clear wish that his counsel proceed in the absence of an interpreter. In the event, the judge failed to hear the applicant's point of view.

38. The Court observes that the applicant's alleged lack of proficiency in English and his inability to understand the proceedings became a live issue for the first time on 4 January 1996 when the trial court was informed by his legal team that the applicant wished to enter a guilty plea to the charges brought against him. At the request of the applicant's counsel, the trial judge directed that an interpreter be present at the hearing on

sentence to be held on 26 January 1996 (see paragraphs 15 and 16 above). The judge was thus put on clear notice that the applicant had problems of comprehension. However, notwithstanding his earlier concern to ensure that the applicant could follow the subsequent proceedings it would appear that the judge allowed himself to be persuaded by the applicant's counsel's confidence in his ability to "make do and mend" (see paragraph 17 above). Admittedly, the trial judge left open the possibility of the applicant having recourse to the linguistic assistance of his brother if the need arose. However, in the Court's opinion the verification of the applicant's need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had been alerted to counsel's own difficulties in communicating with the applicant. It is to be noted that the applicant had pleaded guilty to serious charges and faced a heavy prison sentence. The onus was thus on the judge to reassure himself that the absence of an interpreter at the hearing on 26 January 1996 would not prejudice the applicant's full involvement in a matter of crucial importance for him. In the circumstances of the instant case, that requirement cannot be said to have been satisfied by leaving it to the applicant, and without the judge having consulted the latter, to invoke the untested language skills of his brother.

39. It is true that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme as in the applicant's case or be privately financed (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, pp. 32-33, § 65; the Stanford v. the United Kingdom judgment of 23 February 1994, Series A 282-A, p. 11, § 28). However, the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant. It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case, judges are required to treat an accused's interest with "scrupulous care" (see paragraphs 32 and 33 above).

> 40. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3(e)."

[30] It has frequently been observed that large swathes of the jurisprudence of the ECtHR are characterised by their fact sensitive nature. The decision in *Cuscani* is a paradigm illustration of this truism. It is to be properly analysed as a decision that Mr Cuscani's right to a fair trial was, in its peculiar factual matrix, violated. This decision establishes no point of general principle availing the appellant in the present case.

Key Pieces of Evidence

[31] To recapitulate, the case made for the appellant is that by reason of the absence of an interpreter at the time when he gave instructions to his former legal representatives culminating in the plea of guilty to murder, he proceeded under a misunderstanding and entered a plea which is vitiated in law, with the result that his conviction is unsafe.

[32] It is necessary to identify the evidential building blocks of the appellant's case. These are:

(i) The opinions of the two expert psychologists, both available at the time of the Crown Court proceedings, rehearsed in [18] above.

(ii) The written responses of the appellant's former legal representatives in reply to the original notice of appeal.

(iii) A letter dated 8 May 2021 to the court written by the appellant's former solicitor and an earlier letter of 19 October 2017 from the solicitor to the appellant.

We shall turn to consider the second and third of these evidential sources.

[33] The context is set by first considering the various assertions and allegations contained in the written materials accompanying the appellant's notice of appeal dated 16 October 2020. It is appropriate to preface what follows with the observation that the appellant had an entirely new legal team at the time of the impugned events. His trial had been listed the previous year, in 2016. It was aborted. While the full detail of these events is far from clear, it would appear that there were differences between the appellant and those representing him then.

[34] The salient allegations and assertions made by the appellant in writing are the following passages (sicut- we shall describe senior counsel as "SC" and the instructed solicitor as "Sol"):

(a) "… There was in 2016 before my trial collapsed a plea guilty deal was agreed between the prosecution and my legal team – manslaughter. [Sol] knows all about this. I did not admit to harming anyone or killing anyone."

(b) "I was encouraged by [Sol] to sign a statement that for something that was written down and I didn't really understand. Why was I not given an interpreter that I asked for?"

(c) "[SC] …. told the court during the trial that this case is manslaughter but he has pleaded guilty to murder. He made this decision without any consultation with me."

(d) "Behind closed doors my former solicitor and barrister QC … forced me and put me under pressure and made me guilty of something I did not agree with and made me sign the statement with something I didn't know what was wrote down in the statement. At the time I had difficulty reading, writing and understanding English and I asked for an interpreter and he refused to get me one and I did not understand anything that was going on in the court …"

(e) "After they made me guilty and I told them I wished to change my plea from guilty to not guilty and also I told them I'm not guilty of any murder charge against me in this case …"

[35] Before turning to the responses of the appellant's former legal representatives, we record that his court gave careful consideration to the issue of waiver of privilege. On 20 September 2021 the appellant signed a formal waiver of privilege document. This court satisfied itself that this was a reliable and authentic document. Furthermore, the appellant, then unrepresented, made clear to this court that he was aware what he was doing and was anxious to proceed in this way. There is one final ingredient in this discrete equation. It is the practice of the Court of Appeal upon receipt of a notice of appeal making allegations against the putative appellant's legal representatives to bring same to their attention, inviting a response. This is how the materials to which we now turn were generated.

[36] There is a detailed written response from, firstly, the appellant's former solicitor. This contains the following material passages:

> "From reading the grounds of appeal I understand that Mr Koca's position can be summarised as follows:
>
> 1. That I had been privy to a deal whereby the Accused would receive a sentence of 10 years but that I did not act upon this nor did I make the court aware of the existence of such a deal.

2. That he did not want to plead guilty to murder.

> I can categorically state that at no time whatsoever was a deal or any other offer made or communicated to me from the prosecution or any other source in relation to resolving the case in such a way that Mr Koca would receive a term of 10 years imprisonment. …
>
> I believe that such an outcome may have been discussed with Mr Koca by his original legal team … Mr Koca, whilst always maintaining his denial of any involvement whatever in the murder … did make a number of references to having been offered a 10 year sentence in return for a guilty plea. This was something that he said to me on a number of occasions. Mr Koca also said this in the presence of senior and junior counsel."

Next the solicitor recounts a conversation in his presence between prosecuting senior counsel and the appellant's senior counsel:

> "We were told that no such offer had ever been made. Senior counsel was adamant that this was as clear a case of premeditated murder that he had ever come across. He further went on to state that under no circumstances would there be any agreement to accept a plea to manslaughter and that the Crown would be strenuously pursuing a case of murder against the accused even if he were to enter a plea to manslaughter."

The solicitor continues:

> "This left no doubt but that Mr Koca was entirely wrong about his belief that a deal had been offered."

[37] The solicitor then provides a detailed account of the events of 13 March 2017. By this stage the jury had been sworn.

> "On this date Mr Koca had a discussion with myself and both counsel in preparation for the start of the case. Shortly after this concluded I was called by the accused who wanted a further discussion with myself alone ….
>
> I attended with him and during this discussion he provided a dramatic change of instructions. He indicated that he had in fact killed Mr Magee …"

The appellant (per the solicitor), having recounted his transit from his place of work to the dwelling in question, continued:

> "… when he arrived he saw the deceased in his home and …. became frightened. He went into the back garden and armed himself with a blade from a broken set of garden shears. He said that when Mr Magee entered the back garden he launched an attack upon him. He could remember stabbing the deceased multiple times. He remembered losing control of himself. He followed the deceased outside the garden attacking him all the while. The deceased staggered off a short distance before collapsing to the ground. Mr Koca then ran off in a state of panic. He was not sure where he put the weapon. He could provide no instruction about the location of the weapon at all. When asked why he had not said any of this to the police he could provide no answer. I concluded the consultation and went to the court room where I immediately informed senior and junior counsel of this development."

The solicitor's response continues:

> "A further lengthy discussion took place with the accused, myself and both counsel. The accused confirmed his new instructions. My recollection is that Mr Koca was emotional and tearful. It was decided to seek an adjournment of the case to allow Mr Koca some time to gather his thoughts. The case was adjourned until the next day …
>
> The next day, 14 March 2017, after further discussions with myself and counsel present together the accused instructed us to enter a plea to murder. Mr Koca did repeat his earlier assertions that he had been offered a 10 year sentence and he was upset with the fact that the prosecution would not agree to such a plea. It was explained to him that his instructions did not disclose a defence to the offence of murder. If he wished to advance a case of manslaughter on his instructions we would do so but a case of manslaughter on his was almost certainly bound to fail as a matter of law."

The following passage in this lengthy response is also to be noted:

> "It was conveyed to Mr Koca that the prosecution intended to prosecute him for murder regardless of any change of instructions and that they believed that he had deliberately set out to commit murder. The decision was left up to him having taken account of all the matters relating to the case and our advices re same. Mr Koca instructed us to enter a plea of guilty to the offence of murder. His instructions were clear and unequivocal. He was not pressurised to enter a plea and he was not promised any specific outcome other than that he would be entitled to some, albeit limited, credit for sparing the family of the deceased the ordeal of a trial. Mr Koca signed his authority for us to enter a plea to the offence of murder. A plea was duly entered and the case adjourned for sentencing. I am aware that Mr Koca confirmed his instructions in his meetings with the probation service prior to sentencing."

[38] As already noted sentencing was adjourned, a probation report was generated, a sentencing hearing followed and the reserved decision of the court was promulgated on 12 May 2017. The story does not end here. The solicitor's account continues:

> "After the conclusion of this case I continued to act for Mr Koca in respect of a number of matters relating to his divorce, miscellaneous prison matters regarding his religious freedoms and his application to be repatriated back to Turkey. Mr Koca was very confident that he would never have to serve his full sentence if he were to get back to Turkey. He believed that he was justified in his actions, that no Turkish authority would find fault in a husband and father killing someone who had usurped his place within the family. He was buoyant and confident in his attitude at this time. For this reason he had not instructed me to enter an appeal against his sentence. When it became apparent to him that his application for repatriation would take a long time to be completed, he indicated that he wanted to appeal against his sentence. He was advised that an appeal against sentence was unlikely to succeed …"

This latter issue gave rise to a parting of ways between the appellant and his solicitor.

[39] The appellant's former solicitor wrote an earlier letter to his client. This is dated 19 October 2017 and states inter alia:

> "You have indicated that you wish to appeal your sentence and that you are unhappy with your conviction for murder and that you were concerned that you should not have entered a plea of guilty to murder. You were firmly of the view that this was a case in which you should have been convicted of manslaughter."

On the assembled evidence, this is the first intimation of dissatisfaction by the appellant. Strikingly (a) this came fully seven months after his plea of guilty and (b) the solicitor had continued to provide various professional services to him in the intervening period. Furthermore, another three years passed before the appeal materialised.

[40] Senior counsel who represented the Appellant throughout the events under scrutiny also responded in writing to the court. He stated inter alia:

> "Mr Koca was informed that the prosecution denied that his previous representatives had ever been given any assurance as to his willingness to accept a plea to manslaughter or that he would receive a sentence of 10 years' imprisonment in exchange for such a plea. He was also informed that the prosecution position was that this was a clear case of murder …
>
> [On 13 March 2017] … [the solicitor] … informed us that Mr Koca had admitted to killing Mr Magee and that he had furnished details as to the background of and the events leading up to the killing. He requested that we return with him to consult with Mr Koca on the basis of our new instructions …
>
> We returned to the holding room and consulted with Mr Koca on the basis of his new instructions. He confirmed he had provided to [the solicitor] namely that he had killed Mr Magee …"

Senior counsel's response elaborates on the account provided by the appellant at this juncture. It continues:

> "He again raised the issue that he had received an undertaking from the prosecution that if he pleaded guilty to manslaughter he would receive a sentence of 10 years. It was again explained to him that prosecution counsel denied that any such undertaking had been given and that the prosecution would not accept a plea to

> manslaughter. It was explained to him that given the strength of the prosecution case against him and upon his present instructions the offence of murder would be likely to be made out. He gave instructions that he would enter a plea of guilty to the offence of murder. He signed a statement of authority of his instructions to us to enter the plea of guilty. [The solicitor] wrote out this statement which included the additional sentence that 'I plead guilty because I did kill Mr Magee and for no other reason' added by [junior counsel]. [The solicitor] read out this statement in full to Mr Koca before he was invited to sign it. He was never at any time misled about his case and his instructions were taken in a diligent, conscientious and detailed manner and they were acted upon as per his wishes. He was never put under any pressure to change his instructions or plead guilty."

Senior counsel adds:

> "Mr Koca was treated with courtesy and respect throughout all my contact with him. **He never displayed any difficulty in understanding the nature of the charges or the evidence against him or the advice that he was given. He had no difficulty in communicating ….**
>
> **He never at any stage asked for an interpreter. Had he done so then this request would have been immediately complied with.**"
> [Emphasis added.]

Appeal Against Conviction: Our Conclusions

[41] It is appropriate to begin with two specific rulings, neither opposed by either party. First, in the exercise of the power conferred by section 25(1)(c) of the 1980 Act, the court orders that the evidence consisting of the written responses of the appellant's former legal representatives be received. Second, the court grants leave to amend the grounds of appeal against conviction in the terms proposed. Turning to the sole substantive issue, the decided cases have not attempted any exhaustive formulation of the circumstances in which an appellate court could find that a first instance plea of guilty was equivocal so as to give rise to an unsafe conviction. The legal principle in play is intrinsically flexible, capable of responding to a broad range of factual scenarios. This court considers that it encompasses in principle the misapprehension case advanced by this appellant.

[42] The submissions of Mr Charles MacCreanor QC and Ms Rosie Walsh, of counsel, on behalf of the prosecution highlight inter alia the objective evidence bearing on the sequence of events at the critical time, namely mid-March to

mid-May 2017, the contents of the pre-sentence report, the interview records (involving no interpreter), the length of the appellant's residence in Northern Ireland, the undisputed evidence about his employment here, the presence of an interpreter throughout the pre-sentence report interview and, finally, the responses of the appellant's former legal representatives.

[43] The thrust of the next main submission advanced is that there is a fundamental distinction between the case initially made by the appellant on appeal, namely that he had pleaded guilty to the count of murder under compulsion and the new case now canvassed namely that his plea of guilty unfolded in circumstances where there was a lack of understanding between him and his former legal representatives. The absence of the documentary record of the "plea deal" asserted by the appellant is highlighted. However, compulsion to plead guilty, rather than any misunderstanding between client and lawyer, had been his case until the advent of his newly appointed legal team and the ensuing skeleton argument and amended grounds of appeal. Attention is also directed to the repeated protestations of innocence in the appellant's appeal in its original incarnation and his wholly inaccurate assertion that a pizza delivery man had initially been charged with the murder, contrasting this with the case ultimately advanced on his behalf. It is further submitted that the appellant's appeal, as ultimately formulated, is objectively devoid of credibility and reliability.

[44] Two further factors (amongst others) are highlighted in counsels' submissions. First, it is contended that the reports of the two psychologists have certain intrinsic limitations. In particular they followed upon interviews conducted in the English language and the application of tests which are not directly related to the appellant's case on appeal. In addition these reports, it is contended, are supportive of the suggestion that the appellant was fully cognisant of the differences between the offences of murder and manslaughter. Finally, counsel submit that the prosecution case was overwhelming.

[45] Upon the hearing of this appeal the court probed with some care the evidential foundation of the single ground of appeal now pursued. This was duly clarified by Mr Magill and, in this context, we refer to our outline of certain evidential sources above. The court considers that there is an important distinction to be made between evidential foundation and mere foundation. The former we have identified. However, the latter is of an altogether different species. It relates to the manner in which the appellant has opted to put the central thrust of his case before this court. He has done so through the medium of instructions to the solicitor and counsel appointed by the order of this court in the skeleton argument presented and as developed in counsel's oral submissions to this court.

[46] We would elaborate on the foregoing as follows. It is beyond plausible dispute that a major element of the appellant's case to this court has no evidential foundation, properly so-called. Rather it reposes in the mechanism of counsel relaying to the court his client's instructions provided in consultation. This

contrasts sharply with evidential foundation and the mechanism of seeking to adduce fresh evidence. This mechanism is starkly absent from this appeal. Stated succinctly, the appellant has conveyed to his newly appointed legal representatives a series of bare, unsubstantiated assertions in a manifestly self-serving context and, in turn, these have been presented to the court. The imperfections, shortcomings and frailties in an exercise of this kind require no elaboration.

[47] One particular feature of the immediately preceding analysis should be highlighted. The appellant has had ample opportunity to demonstrate to this court, via the proposed adduction of appropriate evidence, his understanding of the English language at the time of the critical events in March – May 2017. Such evidence could, conceivably, have been provided by acquaintances, employers, relatives by marriage, the probation officer, the attending interpreter and others. Another obvious source is the records of the Prison Service documenting the courses in English which – per his instructions to his newly appointed lawyers – the appellant has pursued successfully since first incarcerated as a remand prisoner circa May 2015. The court specifically raised this issue with Mr Magill. He had no instructions thereon. Furthermore, an application to adduce evidence to this court from the appellant could have been made. There was none.

[48] As highlighted by prosecuting counsel, the multiple frailties in the appellant's case extend further to the belated nature of the case now made; its inconsistencies with the original appeal grounds, themselves heavily delayed and his account to the probation officer in April 2017; the timing of his admissions in the latter setting; the sequence of events in March – May 2017; the strong parallels between his former solicitor's account and that documented in the pre-sentence report; the continuing professional relationship with his solicitor post-conviction and sentencing; and the persuasive and detailed terms of the responses of his former instructed solicitor and senior counsel.

[49] In addition to the foregoing, it is appropriate to highlight that in the original formulation of his appeal the appellant alleged ethnic discrimination and racism, without a scintilla of particularity. Moreover he made three further claims in this discrete context: a green handled knife with blood unconnected to the appellant was found on some unspecified date in June 2015 at some unspecified location; a charge of murder was preferred against a pizza delivery man in 2016 and later withdrawn; and the witness statement of the brother of the deceased "… was thrown out by the court because it was dishonest." The inclusion of these specific claims with the original notice of appeal is pertinent, for three reasons. First, none of them has any supporting evidence. Second, they are disputed by the prosecution. Third, they formed no part of the appellant's case as presented to this court. In tandem with the other facts and factors already rehearsed, they serve to expose the manifest frailty of the appellant's case.

[50] Mr Magill accepted, correctly, that the appeal as now formulated can succeed only if this court is persuaded that there is a sufficient degree of veracity, accuracy

and consistency in its reconfigured essential core. This, as highlighted, consists of an extensive series of bare, unsubstantiated assertions conveyed to the court by the appellant through the medium of counsel's skeleton argument and oral submissions. In the abstract, the court accepts that an appeal constructed and presented in this way might conceivably succeed. However, in the concrete context of the present case, the court concludes without hesitation that this appeal is wholly lacking in substance and merit. Considered at its notional zenith, it is impoverished from beginning to end. In short, the court concludes that there are no reasons for doubting the safety of the appellant's conviction.

[51] The renewed application for leave to appeal against conviction is dismissed accordingly. Given our analysis and conclusion on this issue, the application to extend time is similarly dismissed.

Appeal against Sentence

[52] As already noted, the appellant's notice of appeal post-dated his guilty plea and sentencing by some 3½ years. This contains the following passage (verbatim):

> "I did not receive any correspondence as to why my solicitor refused my appeal and also refused to appeal my conviction. I wasn't happy to plead guilty to any murder charge against me. In 2016 – 18/8/16 – the prosecution already offered me a deal, if I take all responsibility they will give me 10 years deal and that 10 years deal was given to my former solicitor … and give it to my [later solicitor] on 18/08/16. In the court [my former solicitor] didn't give the court or judge the 10 year deal statement and he still has it."

Elaborating in an accompanying written statement the appellant continues:

> "There was in 2016 before my trial collapsed a plea guilty deal was agreed between prosecution and my legal team – manslaughter. [My later solicitor] knows all about this. I did not admit to harming anyone or killing anyone …
>
> In spite of my poor English, both in writing and reading and understanding I was encouraged by [my later solicitor] to sign a statement that for something that was written down and I didn't really understand …"

As originally drafted the notice of appeal did not seek to challenge the appellant's tariff of 14 years' imprisonment. However, in the most recent phase of the appeal proceedings, his instructed lawyers have signified his wish to do so and, to this end, seek to amend the notice of appeal by addition of the following:

"**GROUNDS OF APPEAL AGAINST SENTENCE** …

The sentence is manifestly excessive and sentencing judge erred:

(i) In determining that this case fell within the 'higher starting point' in **McCandless and Others**.

(ii) In unreasonably rejecting the possibility that **the Appellant's account** was truthful."

[Emphasis added]

[53] It is necessary to interrogate the phrase "the appellant's account". Following arrest by the police and caution the appellant replied, "I didn't do anything". He asserted that he knew nothing about the murder; he denied telling PM that he believed his wife to have been in a relationship with the deceased; he denied his wife's written account to like effect; he gave inconsistent replies about having identified a photograph of the deceased on Facebook; he initially denied that a pair of jeans in a police photograph taken at his place of work were his; regarding the critical time period, he admitted to having changed his clothes and leaving his place of work, but claimed this was only for some few minutes and that he went nowhere; he later admitted having made screen captures of photographic images of his wife with the deceased and later deleting them from his mobile phone; he made no comment in response to the evidence of his access to a kitchen knife or its disappearance.

[54] The foregoing does not purport to be a detailed essay of the appellant's 20 police interviews. However, what it demonstrates is that he provided no "account" of the killing in response to his initial caution, during extensive interviews, by a written statement under caution or by tendering a written statement without caution.

[55] Eventually, almost two years later, the appellant did provide an "account" of the killing, for the first time. He did so when being interviewed by a probation officer for the purpose of preparing a pre-sentence report: see above. Counsel on his behalf informed the court, on instructions, that the appellant accepts the accuracy of this account, with the exception of one matter namely its lack of emphasis on his fear for his personal safety when he unleashed his armed attack on the deceased. This represents a substantial variation of his original stance vis-à-vis this report when lodging his appeal:

> "At 25th April 2017 [XY], probation officer, wrote a report that was never shown to me or discussed. I have a feeling that there is a certain amount of ethnic discrimination and racism."

We refer also to para [49] above.

[56] At the Crown Court two written submissions were deployed by the prosecution. We have referred to the first of these at para [4] above. It was clarified at the hearing before this court that this was prepared essentially for the purpose of opening the case to the jury. The second prosecution submission incorporates the first in full and was enlarged to address specific sentencing issues. From both documents it is clear that the prosecution case at all times was that the missing kitchen knife was the murder weapon. From the sentencing hearing transcript and decision, which was reserved and followed one week later, two matters are clear. First, the judge adopted the thrust and substance of the two prosecution papers, with one exception of note, namely the provenance of – and not use of – the knife alleged to have been employed by the appellant in the killing. Second, the appellant's counsel, in their plea in mitigation, adopted the "garden shears" account. They would have been bound to do so, having regard to the contents of the pre-sentence report, absent explicit instructions from their client to adopt some other position about the attack inflicting the death. Pausing, there was before the sentencing court no other "account" of the killing of the deceased.

[57] In the sentencing decision the judge described the appellant's account to the probation officer as "wholly implausible, self-serving and mendacious …" Pausing at this point, it is possible to identify certain features of the sentencing decision which, prima facie, lend some force to the submissions of Mr Magill. First, the decision fails to particularise this omnibus assessment. Second, there was no agreed basis of plea. Third, there was no "Newton" hearing. Fourth, the judge did not engage with the appellant's claim about the weapon which he admitted to have used (the garden shears), focusing exclusively on the use of a knife with which he had armed himself in advance.

[58] Summarising, therefore, this aspect of the sentencing decision is unsatisfactory and open to criticism. The question for this court to determine is whether this lends sustenance to the appellant's contention that the minimum term imposed, 14 years' imprisonment, is manifestly excessive.

[59] In a recent decision of this court, some examination of the legal essence of a manifestly excessive sentence was undertaken. See *R v Ferris* [2020] NICA 60, [48]-[59] and at [58] especially:

> "A sentence which, in the opinion of the appellate court, is merely excessive and one which is manifestly excessive are not one and the same thing. This simple statement highlights the review (or restraint) principle considered above and simultaneously draws attention to the margin of appreciation of the sentencing court. Thus, it has been frequently stated that an appeal against sentence will not

> succeed on this ground if the sentence under challenge falls within the range of disposals which the sentencing court could reasonably choose to adopt. The "manifestly excessive" ground of challenge applies most readily in those cases where the issue is essentially quantitative, i.e. where the imposition of a custodial sentence is indisputable in principle and the challenge focuses on the duration of the custodial term …
>
> The effect of this doctrinal approach is that challenges of this kind will, in principle, be difficult to make out …
>
> This court is not endowed with the nuanced insights and understandings which this protracted intimacy at first instance generates …
>
> The question for this court is not whether any member of this judicial panel would have done differently, to the advantage of the appellant. Rather the enquiry for this court is whether this assessment on the part of the sentencing judge entailed any identifiable error of legal principle or was the subject of any material error of fact or bears the hallmarks of the manifestly unsustainable, having regard to the totality of the sentencing matrix."

[60] As these passages make clear, in any appeal against sentence based on the manifestly excessive ground this appellate court must reckon the discretion, the margin of appreciation, available to the trial judge. This court must also pay due regard to the factor of the judge's immersion in the case, which cannot be replicated at this level. It is for these reasons that the function of the Court of Appeal in appeals against sentence has frequently been described as one savouring of review, to be contrasted with a full scale rehearing of the merits.

[61] There is a superficially tenable basis for the analysis that, in substance, the only "higher starting point" aggravating factor identified in the sentencing decision is that of premeditation. However, although not expressed in this way by the sentencing judge, the infliction of multiple stab wounds and the lack of provocation are two additional factors mentioned elsewhere in the decision. Furthermore, there are the additional, undeniable factors of disposal of the murder weapon and concealment of the appellant's clothing in the aftermath: these fortify the premeditation aggravating factor, rather than amount to further free standing such factors.

[62] Finally, taking at its zenith the single account of the killing provided by the appellant (to the probation officer), there is an incontrovertible element of preparation. In this respect, this court considers it inappropriate to debate or

distinguish in semantic terms the descriptors commonly applied in sentencing contexts – premeditation, preparation and planning. In plain English terms these resolve in substance to the same thing and they fall to be applied by the application of common sense to the realities of the individual case. Approached in this way, the appellant's culpability might have been somewhat higher if the murder resulted from the scenario depicted by the prosecution rather than his own account to the probation officer. However, in sentencing appeals it is necessary for this court to stand back, making a panoramic evaluative assessment in matters of this kind. This approach impels inexorably to the conclusion that this was incontestably a "higher starting point" case.

[63] The only remaining question is whether, the correctness of the sentencing judge's starting point thus affirmed, his terminus ie the imposition of a tariff of 14 years' imprisonment, is unsustainable being manifestly excessive. Here, again, there is some attraction in Mr Magill's submission – which is incontrovertible – that the sentencing decision contains no explanation of the calculation of credit afforded for the appellant's belated guilty plea (the only expressed mitigating factor) or the tariff which would have resulted in the absence thereof. However, standing back, this court is satisfied that the tariff imposed fell within the range reasonably available to the sentencing judge.

[64] The analysis undertaken above suffices to warrant (a) an extension of time for appealing against sentence and (b) the grant of leave to do so. However, for the reasons given and notwithstanding the identified shortcomings in the sentencing exercise, the imposition of a minimum term of 14 years' imprisonment to be served by Orhan Koca for the murder of Eamon Magee on 30 May 2015 is sustainable in law. In a nutshell, this was an appalling, cowardly murder of a defenceless victim striking at the foundations of the rule of law in any civilised society bereft of any mitigating or redeeming feature.

Omnibus Conclusion

[65] This court, therefore, concludes:

(i) Leave to amend the grounds of appeal against conviction is granted. Leave to appeal out of time is refused. The renewed application for leave to appeal is dismissed.

(ii) Leave to appeal out of time against sentence and to amend the grounds of appeal accordingly is granted. The appeal against sentence is dismissed.