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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GARY HAGGARTY

DIRECTOR OF PUBLIC PROSECUTION'S APPEAL

Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

MORGAN LCJ (delivering the judgment of the court)

[1] This reference arises as a result of the imposition of an effective tariff of 6½ years for a wide range of serious terrorist offences committed by the offender during the period between 1991 and 2007. Throughout that period the offender was a member of the UVF rising to the spurious "rank" of "Provost Marshal". He pleaded guilty to 202 counts including 5 murders, 5 attempted murders, one count of aiding and abetting murder, 23 counts of conspiracy to murder, various serious offences involving firearms, explosives and punishment beatings and 4 counts of directing terrorism. In addition he has asked for 301 offences to be taken into account. The learned trial judge correctly concluded that this catalogue of offending reflected the total immersion of the defendant in terrorist activities over a 16 year period. His judgment sets out the disturbing detail in the most serious of the offences. The Director of Public Prosecutions submits that the tariff is unduly lenient and should be increased.

[2] Mr Murphy QC and Mr Russell appeared for the Director and Mr O'Rourke QC appeared with Ms Doherty QC for the offender. We are grateful to all counsel for their helpful written and oral submissions.

Background

[3] The background was helpfully set out by the learned trial judge. On 25 August 2009 the defendant was arrested by arrangement, interviewed and

charged in connection with the murder of John Harbinson. He had been invited to consider providing assistance at a previous meeting he attended with members of the Historical Enquiries Team and the Security Service. After he had been charged, the defendant indicated a willingness to assist the authorities within the framework provided by the Serious Organised Crime and Police Act 2005 ("SOCPA").

[4] Sections 73 to 75 of SOCPA placed on a statutory footing the practice whereby defendants who had pleaded guilty to criminal charges and provided information and assistance to the police received discounting of their sentences. By virtue of Section 73, a defendant who pleaded guilty and, pursuant to a written agreement with a specified prosecutor, provided or offered to provide assistance to an investigator or prosecutor was eligible to receive a reduction in sentence. Before any agreement was formalised with the offender, police conducted a number of "scoping interviews" to examine the nature and extent of the assistance that the offender could provide and to inform the decision as to whether he was a suitable person to be offered a SOCPA agreement. There were 21 such interviews under caution with this offender between 5 and 9 October 2009.

[5] On 13 January 2010 the offender entered into an agreement with a Specified Prosecutor pursuant to section 73 of SOCPA. That required him to:

(a) Admit fully and give a truthful account of his own involvement in, and knowledge of, criminal conduct;

(b) Plead guilty in court to such criminal offences which he admitted and which the prosecutor would determine he would be charged with;

(c) Give a truthful account of the identities and activities of all others involved in that criminal conduct;

(d) Give truthful evidence in any court proceedings arising from the prosecution of any offences disclosed.

[6] On foot of the agreement the offender was interviewed on 1015 occasions between 2010 and 2017. The product of those interviews comprised 12,244 pages of interview transcript. In those interviews he set out in detail his own involvement in the commission of over 500 offences. He has also provided specific details of the identity and roles of others who participated in the offences. Without those admissions there would not have been sufficient evidence to have sustained a prosecution against him.

Sentencing principles

[7] As the learned trial judge correctly set out in light of the convictions for murder the court was obliged to pass a life sentence and fix a minimum term pursuant to Article 5(2) of the Life Sentences (Northern Ireland) Order 2001 being

such period as the court considered appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence or the combination of the offence and one or more offences associated with it. The minimum term is usually referred to as the tariff. The offender is not entitled to be released until that period has passed and may not be released for a substantial period thereafter unless the Parole Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined.

[8] Guidance on the approach to the determination of the tariff was given by this court in R v McCandless and others [2004] NICA 1. In the case of the killing of an adult victim arising from a quarrel or loss of temper between two people known to each other the minimum term is normally 12 years before taking into account aggravating and mitigating factors. Where the offender's culpability is exceptionally high or the victim is in a particularly vulnerable position the minimum term before taking into account aggravating and mitigating factors is 15/16 years. In McCandless the court said that such cases are characterised by feature which makes the crime especially serious such as:

> "(a) the killing was 'professional' or a contract killing;
>
> (b) the killing was politically motivated;
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> (c) the killing was done for gain (in the course of a burglary, robbery etc.);
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> (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness);
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> (e) the victim was providing a public service;
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> (f) the victim was a child or was otherwise vulnerable;
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> (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."

[9] McCandless also recognised that there were cases which would require a substantial upward adjustment. The examples set out were those cases involving a substantial number of murders or cases where several factors identified as attracting the higher minimum term were present. In those cases the result might be a minimum term of 30 years and in cases of exceptional gravity the judge rather than set a minimum term may impose a whole life sentence.

[10] This is clearly a case of the utmost seriousness. The offender played a major part in the activities of a murderous, terrorist gang over a period of 16 years. He committed five murders. We are satisfied that several of the features characterising the higher starting point are present. His killings were professional in the sense that they were acts committed to further the aims of a well-resourced and much feared terrorist gang. The terrorist gang claimed to have political motivation. The victims were deliberately targeted because of their religion. In the killing of Mr Harbinson in particular there was evidence of gratuitous violence involving extensive and multiple injuries.

[11] The learned trial judge noted the judgment in R v Hamilton [2008] NICA 27. That was a case where this court quashed a whole life order and imposed in the alternative a tariff of 35 years. It was a truly gruesome case where the offender had stopped to give a lift to a pensioner making her way home from mass and then took her to a secluded place where he sexually assaulted her and then hid her body. He had previous convictions for a similar approach in respect of sexual violence. Although his record was clearly material, the sentence was passed in respect of a single attack including the aftermath. The court noted that only one factor justifying a sentence in the higher range was present. Hamilton was, therefore, quite different from this case.

[12] The learned trial judge identified three reasons for not imposing a whole life sentence in this case. His final reason was that he was not aware of any terrorist offences in this jurisdiction in which a whole life tariff had been imposed. In our view the absence of any case justifying such tariff in the past ought not to prevent the imposition of a whole life tariff where it was appropriate. In the absence of mitigating factors we are quite satisfied that this was a case for a whole life tariff.

[13] We accept, however, that mitigating factors should be taken into account before reaching the conclusion that no whole life tariff should be set. The first mitigating factor identified by the learned trial judge was that the offender had pleaded guilty and accepted responsibility for his crimes. We recognise that the weight to be given to this factor must vary with the circumstances.

[14] This factor was considered by the English Court of Appeal in R v Neil Jones and others [2006] 2 Cr App R (S) 19 which included the case of R v Hobson. Hobson had murdered twin sisters in separate incidents and an elderly couple in a third

incident. The circumstances were such that the court was satisfied that the offences were so serious that a whole life order was appropriate. The offender had indicated from an early stage that he accepted responsibility for the offences but did not enter his plea until the issue of diminished responsibility had been investigated. Despite the plea the court was satisfied that the whole life order was appropriate.

[15] In that case there was substantial evidence linking the offender with the crimes. In this case the offender's responsibility for many of the crimes could not have been established without his admissions and in a large number of cases was not known even on an intelligence basis. That is a factor which in our view gives greater weight to the plea in this instance. The third factor taken into account by the learned trial judge was that to impose a whole life sentence would defeat the objects of the SOCPA scheme which gives statutory recognition to the well-established principle of discounting the sentences of those defendants who provide assistance to the prosecuting authorities. We agree that the learned trial judge was entitled to have some regard to this factor.

[16] There was an additional mitigating factor which ought to have been taken into consideration at this stage. Between 1993 and 2004/5 it was submitted on behalf of the offender that he had acted as a covert human intelligence source. During that period he had provided material concerned with operational planning, recruitment, targeting, weapons procurement and storage, explosives and tensions or feuds within loyalist paramilitary groups. He gave pre-emptive intelligence allowing police to take prior action in approximately 44 potential incidents. At least 34 individuals were identified as being under threat and police were able to take mitigating action. On occasion weapons were recovered and police were made aware of the identity of some of those involved. In some cases prosecutions followed.

[17] The offender was of course remunerated in respect of his information and continued to operate at a high level within this terrorist organisation. There is no doubt that his position within the organisation made useful information available to him which he passed to police but it is also clear that he felt at liberty to engage in serious terrorist activity during this period.

[18] Taking the appropriate mitigating factors into consideration we agree with the learned trial judge that the mitigating factors were such as to moderate the arguments in favour of a whole life term. The prosecution submission was that in the event of a whole life term not being chosen the tariff would lie between 35 and 40 years before taking into account mitigation. We therefore cannot criticise the learned trial judge for adopting a term of 35 years but in our view where a whole life term is moderated by mitigating factors the appropriate minimum term before taking into account mitigation will normally be 40 years. That is the figure we consider appropriate in this case.

The SOCPA Discount

[19] We agree that the learned trial judge has identified the relevant principles in approaching the SOCPA discount. The overriding principle was identified by Sir Igor Judge in R v P; R v Blackburn [2008] 2 All ER 684 at [22]:

> "There never has been, and never will be, much enthusiasm about any process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence against those who participated in the same or linked crimes, or in relation to crimes in which they had no personal involvement, but about which they have provided useful information to the investigating authorities. However, like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention. The stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would escape justice. Moreover, the very existence of this process and the risks that an individual for his own selfish motives may provide incriminating evidence, provide something of a check against the belief, deliberately fostered to increase their power, that gangs of criminals, and in particular the leaders of such gangs, are untouchable and beyond the reach of justice. The greatest disincentive to the provision of assistance to authorities is an understandable fear of consequent reprisals. Those who do assist the prosecution are liable to violent ill-treatment by fellow prisoners generally, but quite apart from the inevitable pressures on them while they are serving their sentences, the stark reality is that those who betray major criminals face torture and execution. The solitary incentive to encourage co-operation is provided by a reduced sentence, and the common law, and now statute have accepted that this is a price worth paying to achieve the overwhelming and recurring public interest that major criminals, in particular, should be caught and prosecuted to conviction."

[20] The approach to sentencing was helpfully set out at [38] and [39]:

> "[38] The first principle is obvious. No hard and fast rules can be laid down for what, as in so many other aspects of the sentencing decision, is a fact specific decision.

> [39] The first factor in any sentencing decision is the criminality of the defendant, weight being given to such mitigating and aggravating factors as there may be. Thereafter the quality and quantity of the material provided by the defendant in the investigation and subsequent prosecution of crime falls to be considered. Addressing this issue, particular value should be attached to those cases where the defendant provides evidence in the form of a witness statement or is prepared to give evidence at any subsequent trial, and does so, with added force where the information either produces convictions for the most serious offences, including terrorism and murder, or prevents them, or which leads to disruption to or indeed the breakup of major criminal gangs. Considerations like these have to be put into the context of the nature and extent of the personal risks to and potential consequences faced by the defendant and the members of his family. In most cases the greater the nature of the criminality revealed by the defendant, the greater the consequent risks. … Accordingly, the discount for the assistance provided by the defendant should be assessed first, against all other relevant considerations, and the notional sentence so achieved should be further discounted for the guilty plea. In the particular context of the SOCPA arrangements, the circumstances in which the guilty plea indication was given, and whether it was made at the first available opportunity, may require close attention. Finally, we emphasise that in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental. In this court, on appeal, focus will be the sentence, which should reflect all the relevant circumstances, rather than its mathematical computation."

[21] This court approved that approach in R v Hyde [2013] NICA 8. It was submitted on behalf of the prosecution that different considerations arose in murder cases because of the nature of that crime. This court has recognised in R v Turner [2017] NICA 52 that the application of sentencing principles can be influenced by the fact that the crime which the offender has committed is murder. In R v King [1985] 82 Cr App R 120 Lord Lane CJ said that having regard to the quality and quantity of the material, the willingness to give evidence and the degree to which the offender has put himself and his family at risk created expectation of some substantial mitigation varying from about ½ to 2/3 reduction. We do not accept that any of the

cases relied upon by the prosecution before the trial judge support the proposition that the expectation on the part of someone convicted of murder of the effect on the tariff should be different in appropriate circumstances.

[22] It is common case that the offender has given a vast volume of information in respect of his own criminality and that of others. This includes information in relation to 519 incidents. In 194 of these incidents there are independent records to indicate that the incident occurred. The police have confirmed that the offender has a very good memory and the level of detail in his accounts is remarkable given the significant number of incidents in which he has been involved and the time that has passed since the incident occurred. His accounts have been clear and consistent.

[23] There has been some concern about his credibility and reliability. He made allegations of serious criminality including conspiracy to murder against two named police officers between February 1994 and June 1994. Extensive enquiries by the Police Ombudsman revealed that one of the named officers was on sick leave from 16 February 1994 until 1 June 1994. The prosecution also considered that the offender had minimised his role in relation to specific offences and in relation to his involvement in UVF offending that occurred after the Good Friday Agreement. In large measure his contribution has been extremely valuable in intelligence terms but the prosecution assessment is that the reliability and credibility of the offender are such that the test for prosecution could only be met in circumstances where there was independent supporting evidence of sufficient quality to support his account.

Consideration

[24] Applying the guidance and principles set out above we consider that the minimum term before taking into account mitigating circumstances was 40 years. The trial judge allowed 15% for the assistance given before he entered into the SOCPA agreement. That is clearly a very significant discount but we cannot take issue with it as it reflects the potential saving of a number of lives.

[25] The discount under the 2005 Act should be applied to the figure resulting from the aggravating and mitigating circumstances. To apply the discount under the Act to the figure comprising only aggravating circumstances leads to an increase in the discount. That, in our view, is not consistent with the underlying scheme of the 2005 Act that the discount for assistance should be applied once aggravating and mitigating factors excluding the discount for the plea have been factored in.

[26] The learned trial judge allowed a discount of 60% under the 2005 Act. That again reflected the very considerable quantity of information and the generally good quality of what was provided. Mr O'Rourke submitted that this was an exceptional case where a much higher discount should have been provided. We do not accept that submission. Although the offender was willing to give evidence the assessment was that the test for prosecution would only be met where there was corroboration. That was material in assessing the discount.

[27] The next stage in the sentencing exercise was the application of the discount for the plea. The judge allowed a discount of 25%. We consider that was generous taking into account that the plea was part of the reason for not imposing a whole life term. We cannot say, however, that it lay outside the boundary of what was properly within the discretion of the sentencer.

[28] Finally, we do not consider that any discount for double jeopardy is appropriate. This offender is not facing a return to prison or a change in his circumstances as a result of any increase in the tariff other than if he is brought back under the 2005 Act and no such application is in place.

Conclusion

[29] As set out above we consider that the minimum term before taking into account mitigating factors was 40 years. Applying the appropriate discount for the pre-agreement disclosures, a 60% reduction under the 2005 Act and a generous 25% discount for the plea results in a tariff of 10 years. We are satisfied, therefore, that the tariff of 6 ½ years was unduly lenient given the catalogue of infamy and murder of which he was guilty. We substitute a tariff of 10 years. That represents a very considerable discount from a 40 year starting point and provides a generous incentive for those who are prepared to assist in combating terrorist violence.