

Tariff certified by the Secretary of State under Life Sentences (NI) Order 2001 on 03-09-08

THE QUEEN

-v-

JOHN SMITH

DECISION ON TARIFF

Ruling by Kerr LCJ

KERR LCJ

Introduction

1. On 10 December 1999, after a trial before Nicholson LJ and a jury at Ballymena Crown Court, the prisoner, John Smith was sentenced to life imprisonment for the murder on 27 September 1998 of Leslie Davidson, a 19 year old man. The prisoner was 20 years of age at the time of the murder. He has been in custody since 30 September 1998.

2. On 12 March 2008 I heard oral submissions on behalf of the prisoner in relation to 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 then assess his suitability for release on the basis of risk.

Background to the offence

3. On Sunday 27 September 1998 at around 3.30am, Leslie Davidson, the deceased, was walking on the hard shoulder adjacent to the road at Stiles Way, Antrim. He was accompanied by his brother and two other young males.

4. At the same time the prisoner was a passenger in a minibus full of people who had been at a club in Rathcoole and then a house party at the home of the prisoner's father in Antrim. The minibus drove up behind the group of young men walking along Stiles Way. One of the other passengers, Rodney Bishop, noticed the deceased walking along the road and asked the minibus driver to stop. The minibus turned on the road and was then driven up to the group of young men. It was pulled on to the hard shoulder just in front of them. Bishop, the prisoner and two other men, Allen and Carson, alighted from the minibus. Bishop grabbed Mr Davidson and threw him to the ground. He accused him of having burnt his brother's vehicle. Mr Davidson replied "I didn't do anything". Bishop, the prisoner and the two other men then started to hit and punch the deceased while he was on the ground. The prisoner had a knife on his person and he used this to stab Mr Davidson seven times. One of the female passengers on the bus later stated that the knife was black handled and maybe 5-6 inches long.

5. The attack on the deceased lasted only a couple of minutes. Another passenger on the minibus shouted at the men to get back into the minibus. They did this and the minibus departed. On getting back into the bus, Smith said, "Any names to the peelers and we'll know it came from somebody on this bus". He still had the knife in his hand at this stage and he shouted as the bus moved off, "Fuck the Shankill Butchers; up the Antrim Butchers". The minibus returned to the home of the driver, a Mr Lanigan, and the prisoner left at that stage, again saying, as he got off the bus, "No names to the peelers".

6. After the attack, the deceased's brother flagged down a passing police car. The ambulance arrived quickly and the police assisted paramedics to administer CPR. The deceased was conveyed to the Antrim Area Hospital where life was pronounced extinct at 4.10am.

7. The following morning Glen Allen, one of those involved in kicking and punching the deceased, received a telephone call from the prisoner's girlfriend and the prisoner spoke to him on the telephone telling him to come to their flat. Allen drove over in his mother's car shortly after

midday and told the prisoner that he heard that someone had died as a result of a stabbing. The prisoner told him to take him to Lanigan's house and on the way they stopped at the railway bridge in Steeple Road. The prisoner got out of the car and was seen to be looking over the railway bridge. A few days later the police discovered a knife in undergrowth beneath the bridge. It was consistent in appearance with the description of the murder weapon given by the other witnesses and was confirmed by the State Pathologist as consistent with the weapon that had caused the wounds which had been inflicted on the deceased. There was no trace of blood or any other forensic evidence to confirm it was the weapon, however.

The Autopsy Report

8. The post mortem examination was carried out by Professor Jack Crane. He concluded that the cause of death was a stab wound to the heart. The deceased had been stabbed a total of seven times. The fatal wound was located on the left breast just below the nipple. The blade of the weapon had incised the front wall of the heart and gone through the cavity of one of the heart chambers emerging near the base of the heart where the tip of the blade had also penetrated the wall of the aorta. There would have been considerable bleeding from this wound and it was the effects of this haemorrhage which were responsible for a fairly rapid death.

9. There were a further two stab wounds to the chest. From the appearance of the first of these, the pathologist concluded that the blade of the weapon had first gone through the left upper arm completely and entered the chest close to the left armpit passing through the third and fourth ribs and puncturing the lung. The second wound was lower down on the left side of the chest and had gone through the ninth rib in a downwards course into the abdominal cavity where it perforated the bowel and left kidney and divided the renal artery. Apart from the fatal wound to the heart, the stab wound to the chest which penetrated the abdominal cavity would have posed a serious risk to life. In addition to the chest wounds there were a further four stab wounds on the back of the right thigh although none of these had penetrated deeply enough to damage any vital structures.

10. Professor Crane considered that the wounds could have been caused by the kitchen knife which had been recovered by police. This knife had a fairly sharp cutting edge and no more than moderate force would have been required to inflict the wounds. From the two wounds which involved the heart and the kidney it seemed likely that the blade of the weapon had penetrated fairly deeply into the body.

11. Other injuries were found on the body. These consisted of bruising and abrasion to the forehead, nose and cheeks. None of these was serious and they could have been caused by a fall to a rough surface. One of the injuries (which had caused a patterned bruise on the right cheek) could have been caused by a kick from a shod foot. There were some other abrasions on the right side of the chest and back which had been caused by the kicking that had been administered to the deceased whilst he was on the ground.

The police interviews of the prisoner

12. Smith was first interviewed on 28 September 1998. He claimed that he had not been involved in any way in the attack on Mr Davidson and that he had been dropped off before any incident occurred. He asserted that others who had implicated him in the incident were lying. He stated that he had been drinking heavily during the evening and had also been taking 'E' tablets.

13. During his second interview on the same day, Smith accepted that he had been present in the minibus when the attack took place. He denied having a knife and stated he could not remember if he had even got out of the van when the attack was happening. He again claimed that he had been drinking heavily and had taken 2½ 'E tabs' and diazepam. He repeated that others were telling lies by saying that he had had a knife and had stabbed the deceased. During his final interview on Tuesday 29 September 1999 the prisoner again denied any involvement in the attack on the deceased and when the evidence of others was put to him he claimed that they were lying.

The trial

14. Rodney Bishop and James Carson were also charged with the murder of the deceased. They pleaded guilty to manslaughter and their pleas were accepted by the prosecution. Bishop was sentenced to a custody probation

order comprising 6 years' imprisonment and 2 years' probation. Carson was sentenced to a similar order of 4 years' detention with one year probation.

15. At the trial the prisoner accepted that he had stabbed the deceased but denied murder, advancing a defence of diminished responsibility on the basis that he was so heavily under the influence of alcohol and drugs that he had no intent to kill or cause grievous bodily harm. This defence was not accepted by the jury.

Reports

16. Two reports were submitted on Smith's behalf at trial: -

Report of Professor G W Fenton, consultant in neuropsychiatry

1. Professor Fenton examined the prisoner and had access to the trial papers. His report recorded the prisoner's personal history and noted that he had no prior mental health problems apart from substance misuse. There was neither previous history of seriously aggressive behaviour nor history of mental health difficulties in his family. Smith had completed secondary level education with no disciplinary problems. At the time of the murder Smith was employed in a textile firm. He had been in a long term relationship with his girlfriend with whom he was planning to buy a home.
2. The prisoner admitted drinking excessively from the age of 15. At its height his weekly intake was of the order of 50 units. He had, he claimed, reduced his alcohol consumption as his relationship with his girlfriend progressed but still drank heavily at the weekends when socialising. He had also been taking 1 - 2 ecstasy tablets each weekend from the age of 16/17. He told Professor Fenton that on the weekend of the murder he had been drinking heavily on the Friday night (9/10 pints of beer and 4-5 vodkas). On Saturday he started drinking early, consuming 12 bottles of lager and 1.5 litres of wine before he left his home. At the club he drank 7/8 lagers and 3 or 4 vodkas and when he went to the party at this father's house he had a further 7/8 lagers and several glasses of wine before getting back into the minibus. He had also taken an ecstasy tablet at around 11.30 pm and a further 1.5 ecstasy tablets at his father's house at 1.30am approximately. He claimed to have taken two valium tablets at about 2.00am.
3. The prisoner's mental state examination was found by Professor Fenton to be normal and his intellectual ability appeared in the average range. His recollection of the events of the offence, however, was patchy.

4. Professor Fenton considered that the combination of excessive amounts of alcohol consumed over the weekend, together with the ecstasy and valium, would have seriously affected the prisoner's mental functions, co-ordination and capacity for self-control. The history of long term heavy misuse of ecstasy was likely to have damaged the prisoner's serotonin brain system, lowering the levels of serotonin and reducing impulse control. The following passage from the consultant's report is instructive: -

"This intrinsic change in brain function would impair his capacity for self-control and make his behaviour especially vulnerable to the disinhibiting effects of excessive alcohol intake, reinforced by the acute effects of further Ecstasy and valium. The impulsive and frenzied nature of the stabbing, out of character with his usual behaviour, in the absence of a credible motive would be compatible with this view. These observations may well support a plea of diminished responsibility."

Report of Colin McClelland Educational Psychologist

This report concluded that the prisoner was a man of reasonable intelligence, in the low average category (bottom 9% of the population). His reading was strong and would sustain him in a great number of types of employment. His educational history was uneventful with some positive indicators although no formal qualifications. He appeared well adjusted and had lived an ordinary enough life with a job, girlfriend and their own flat.

Previous convictions

17. The prisoner had previous convictions for minor offences of disorderly behaviour. The first of these occurred in June 1996 and he was fined £100. In April 1997 he was further fined £125 for a similar offence and was bound over to keep the peace and be of good behaviour for 2 years. In August 1998 Smith was again fined £for disorderly behaviour and in February 1999 he was charged with breach of the previous binding over order and a recognizance of was estreated. His final conviction for disorderly behaviour was in relation to an incident in July 1998. He was prosecuted for this in April 1999, and was sentenced to 28 days' imprisonment.

Personal background

18. Smith had attended the local primary and High schools where his behaviour had been normal. He had excelled at physical education and played in the high school football team. He had not obtained any qualifications but on leaving school at the age of 16 obtained employment in a local joinery firm. He left after 9 months to work for his uncle for a few months but gave up work for a period on receiving a compensation payment. He had been employed by a local textile firm for the two and a half years prior to the offence.

19. The prisoner's parents had separated when he was about 16 years old. His father had had an affair and left the family to live with his girlfriend who was pregnant. The prisoner had been very close to his father and was devastated by this. He reconciled with his father when he was about 18 and developed a relationship with him that was more akin to that which one would have with an older peer rather than a father. His mother who was in employment had always worked very hard and continued to support the prisoner. He has an older sister who was in employment and a younger sister who was then still at high school.

Representations made on behalf of the prisoner

20. Written and oral submissions were made on behalf of Smith. In broad summary, in the written submissions it was suggested that his case fell between the normal and the higher starting points provided for in the *Practice Statement* issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 (which shall be referred to in greater detail below). It was argued that the victim was not in a vulnerable position. It was also submitted that the prisoner suffered from a mental disorder or disability due to effects of his prolonged alcohol and drug abuse which lowered the degree of his criminal responsibility albeit not to the extent of the defence of diminished responsibility. The prisoner relied on the report of Professor Fenton to establish that his longstanding misuse of ecstasy had damaged the serotonin brain system which led to low levels of serotonin thereby reducing his self-control and impulse control. It was argued that this equated to a permanent brain injury and that although his behaviour was affected by the consumption of alcohol and drugs at the time of the offence, the principal factor in the offence was the damage to his brain.

21. Reference was made to section 2 of the Homicide Act 1957 in support of the claim that the prisoner's condition was capable of amounting to an abnormality of mind. Although the jury had rejected the defence of diminished responsibility it was submitted that the prisoner's behaviour was significantly affected by his medical condition and that the normal starting point should be reduced to reflect this. It was also suggested that there were no aggravating features and that the mitigating factors present include spontaneity and lack of pre-meditation. On this issue, it was pointed out that there was no evidence that the prisoner had any grievance against the deceased whereas the co-accused did have such a grievance.

Practice Statement

22. In *R v McCandless & others* [2004] NICA 1 the Court of Appeal held that the *Practice Statement* issued by Lord Woolf should be applied by sentencers in this jurisdiction who were required to fix tariffs under the 2001 Order. The relevant parts of the *Practice Statement* for the purpose of this case are as follows: -

"The normal starting point of 12 years

10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually

unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty."

Conclusions

23. I consider that this is clearly a higher starting point case. The deceased was entirely vulnerable to the prisoner's murderous attack. He had been rendered effectively defenceless by the assault of the others involved. Quite apart from that, the prisoner's culpability was, in my view, exceptionally high. It is to be remembered that the categories of killings instanced in paragraph 12 of the *Practice Statement* are not designed to be exhaustive – they are merely illustrative of the type of killing where a finding of exceptional culpability might be made. Here the prisoner wantonly stabbed the deceased no fewer than seven times. He crowed about his attack after returning to the minibus and he warned the occupants of the bus not to inform the police. These features distinguish this killing as one of outrageous callousness. In any event the case falls clearly within paragraph 12 (j) of the *Practice Statement* in that the prisoner inflicted extensive injuries on the deceased. The manner in which so many

injuries were inflicted, more than one of which could have been fatal, betokens gross culpability on Smith's part.

24. I take into account that the prisoner's self restraint may have been lowered by his consumption of drugs and alcohol although the condition from which he suffered, self induced as it undoubtedly was, cannot rank as a major mitigating feature. I am not persuaded that this attack can properly be characterised as spontaneous. It was clear that when Smith and the others alighted from the minibus, an attack on Mr Davidson was intended. When the unfortunate deceased was rendered helpless on the ground, the stabbing took place. Smith cannot truly be said to have acted spontaneously at that point. Indeed, an aggravating factor associated with the offence is the fact that Smith had armed himself with a knife although clearly this could not have been with the particular attack on the deceased in mind.

25. Smith was a young man at the time although he had clearly passed many of the milestones of adulthood. A benevolent view might be that with greater maturity, he may have been inclined to act in a somewhat less outrageously irresponsible way. I have therefore taken into account his youth at the time of the murder but this again cannot warrant a substantial reduction on the minimum term to be imposed.

26. A factor that cannot be lost sight of is the prevalence of assaults by young men with knives. Sadly, for many years these have been all too common in our community. A minimum term of imprisonment, designed to fulfil the requirements of retribution and deterrence, must reflect society's abhorrence and rejection of this type of crime.

27. Taking all these matters into account, and having due regard to all that has been urged upon me on the prisoner's behalf, I have concluded that the appropriate minimum term in his case is sixteen years. This will include the period spent on remand.