APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice Clerk

Lord Hardie

Lady Cosgrove

[2011] HCJAC 10

Appeal No: XC90/05

OPINION OF THE LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

LUKE MITCHELL
Appellant;

against

HER MAJESTY'S ADVOCATE
Respondent:

_____

For the appellant: Jackson, QC, Murray, McPhie; Robertson & Ross, Paisley
For the Crown: M Mackay AD; Crown Agent

2 February 2011

Introduction

[1] On 21 January 2005 the appellant was convicted of the following charge:

"(3) on 30 June 2003 at a wooded area near Roan's Dyke between Easthouses Road, Easthouses and Newbattle Road, both Dalkeith, Midlothian, you did assault Jodi Catherine Jones ... and did repeatedly strike her on the head and body, compress and constrict her neck and restrict her breathing, cause her to fall to the ground, apply a ligature around her arms, repeatedly strike her on the head, mouth and body with a knife or other similar instrument and you did murder her and further you did strike her head and body with a knife or similar instrument and in particular her face, ear, mouth, breast and abdomen."

[2] On 11 February 2005 he was sentenced to detention without limit of time, with a punishment part of 20 years, the sentence being backdated to 14 April 2004. He appealed against both conviction and sentence. His appeal against conviction was refused on 16 May 2008. We have now heard his appeal against sentence.

The facts

[3] The appellant was just under 15 years old at the date of the murder. The deceased was 14 years old. She was the appellant's girlfriend. On 30 June 2003, she arranged to meet him after school. She left her home at around 4 50 pm. None of her family saw her alive again. At 5 40 pm, the appellant telephoned the deceased's house and spoke to her mother's partner, asking if the deceased was there. He was told that the deceased had already left to meet him. When the deceased failed to return home at 10 pm as planned, her mother sent a text to the appellant's mobile phone, telling her daughter to come home. The appellant then telephoned the deceased's mother to tell her that he had not seen the deceased.

[4] A search party went along the Roan's Dyke Path, which passes through a wooded area and links the Easthouses and Newbattle areas of Dalkeith. The appellant joined them. As they moved down the path, the appellant went straight to a gap in the wall bordering the path, climbed through it and found the body of the deceased. The inference, which the jury seem to have accepted, was that he knew that the body was there.

[5] The deceased's body was naked apart from her socks. Her trousers had been used to tie her hands behind her back. Her clothing had been extensively cut and torn with a sharp, bladed implement such as a knife. Professor Anthony Busuttil carried out the post mortem. He found that the deceased had suffered a prolonged assault with extensive blunt force injury and that a stout, sharp pointed bladed weapon had been used against her several times before and after death. A series of incised wounds across her neck had cut through the neck muscles, windpipe, jugular vein and carotid artery. The latter injury would have caused unconsciousness within seconds and death within two minutes. It was the cause of death. There had been between 12 and 20 cuts to the neck. Extensive injuries to the face, chin, neck and head were consistent with punches, kicks or blows with a blunt weapon. One was severe enough to produce a contusion on the brain. There were signs of mechanical asphyxia possibly involving the use of clothing as a ligature. There were penetrating injuries to the forehead and tonsils, the latter caused by the introduction of a sharp object into the

mouth. There was a deep cut to the face. Cutting injuries around the eyes, and deep cuts to the breast, arm and abdomen, had been inflicted after death. Extensive bruising and cuts to the hands and arms indicated that the deceased had tried to defend herself. There were no signs of a sexual assault. Professor Busuttil said that he had been involved in many homicide cases and had not come across mutilation as extensive as this, or had done so only infrequently. Mutilation was quite uncommon, especially where there was no sexual element in the attack.

[6] There was evidence that on the evening of the murder the appellant had burned the jacket that he had been wearing. The murder weapon was never found.

[7] The appellant was interviewed by the police on several occasions, at first as a witness and then as a suspect. He denied any involvement in the murder. He said that he had been at home at the time. That remained his position at the trial, and later when he was interviewed for a social enquiry report.

The punishment part

[8] In fixing the punishment part of 20 years, the trial judge said that he took into account principally the seriousness of the offence. The deceased had looked upon the appellant with affection and trust, yet he had inflicted a horrible death on her and mutilated her body. In the trial judge's opinion, this was one of the worst cases of the murder of a single victim to come before the court in recent years. If the appellant had been older, the seriousness of the offence would have merited the imposition of a punishment part among the longest that there had been. Only the appellant's age persuaded him to fix a lesser period.

The appellant's personal circumstances

[9] The appellant has no previous convictions. His parents separated when he was 11 years old. He lived with his mother and his older brother, and spent time with his father at weekends. The reports available to the trial judge suggested that the appellant had a fairly comfortable home life, and had hobbies such as horse-riding and motorcycling. Despite their separation, both parents appear to have taken part in his upbringing. They were united in disapproving of his use of cannabis.

[10] The appellant at first did well at school but latterly got into trouble and fought with other pupils. The school referred him to an educational psychologist, who monitored his transition from primary

to secondary school. His mother also arranged for him to attend a different secondary school from the one to which his primary school contemporaries were to go. He did well for the first two years at secondary school, but then his performance deteriorated. His teachers had concerns about matters such as homework and school uniform. He began to get involved in fights again. He expressed an interest in satanism that was reflected in his essays and in graffiti on his schoolbooks. His English teacher was sufficiently concerned to refer the matter to a guidance teacher. There was also evidence that he was interested in knives. He regularly smoked cannabis. By the time of the murder, he was smoking it every day during and after school. He bought it in bulk and shared it with friends, including the deceased. Following the murder, he was segregated from other pupils, and was eventually excluded.

[11] Before the sentencing judge, senior counsel founded on the appellant's youth. It had taken a long time for the indictment to be served, during which the appellant had had the matter hanging over him. He and his family had had a difficult time in the months following the murder. Counsel had found the appellant to be intelligent, courteous, respectful and conscious of the seriousness of his position. There had been no difficulties in the preparation of his defence. The appellant came from a loving background. The break-up of his parents' marriage did not of itself provide the key. He remained close to his parents. They had been wholly supportive. At the age of 16, it should not just be a question of locking him up. It was to be hoped that something would be done to address the problem that must be there.

[12] The defence submitted a report by a consultant forensic clinical psychiatrist who concluded that the appellant was not suffering from mental disorder within the meaning of the Mental Health (Scotland) Act 1984. There was no evidence of severe emotional maladjustment or childhood abuse or of significant abnormality of mind at the time of the murder.

[13] Before this court senior counsel focused the appeal almost entirely on the question of the appellant's age.

The sentencing guidelines

[14] In *HM Adv* v *Boyle and Ors* (2010 SCCR 103), a decision of five judges, this court gave the following guidance for the fixing of the punishment part on a conviction for murder.

"[13] In our view there may well be cases (for example, mass murders by terrorist action) for which a punishment part of more than thirty years may, subject to any mitigatory considerations, be

appropriate. In so far as *Walker* and *Al Megrahi* may suggest that thirty years is a virtual maximum punishment part, that suggestion is disapproved. On the other hand we endorse the exemplification given in the penultimate sentence of paragraph [8] of *Walker* of the types of murder which might attract a punishment part in the region of 20 years."

The exemplification in *Walker* v *HM Adv* (2002 SCCR 1036) to which the Court there refers is as follows:

"[8] In the absence of significant mitigation most cases of murder would, in our view, attract a punishment part of 12 years or more, depending on the presence of one or more aggravating features. In the individual case account has also to be taken of the seriousness of the offence combined with other offences of which the accused has been convicted on the same indictment, along with any previous convictions of the accused, in accordance with the terms of section 2(2) of the 1993 Act, as amended, to which we have referred. As the sentencing judge suggests in his report in the present case a number of murder cases might be of such gravity - for example where the victim was a child or a police officer acting in the execution of his duty, or where a firearm was used - that the punishment part should be fixed in the region of 20 years. However, there are cases - which may be relatively few in number - in which the punishment part would have to be substantially in excess of 20 years."

The further guidance given in *HM Adv v Boyle and Ors* is as follows:

"[14] The first sentence of paragraph [8] of *Walker* may carry the implication that a punishment part of twelve years is the norm or starting point for determining the punishment part in most cases of murder: the reference to '12 years or more, depending on the presence of one or more aggravating features' might be read as suggesting that "in most cases" the period would be longer than twelve years only if there was one or more aggravating features. We doubt whether it was the court's intention to set any such norm. In any event we would not regard twelve years as an appropriate 'starting point' for 'most cases of murder'. A substantial number of murders - we have in mind in particular those arising from the use by the offender of a knife or other sharp instrument with which the offender has deliberately armed himself (discussed below) - would justify a starting point of a significantly longer period of years. A punishment part as low as twelve years would not be appropriate unless there were strong mitigatory circumstances, and a punishment part of less than twelve years should not be set in the absence of exceptional circumstances - for example, where the offender is a child.

[15] The Lord Advocate emphasised that murders committed with knives, swords and similar weapons were currently a matter of grave concern in Scotland. Although there were no figures available specifically for murder cases, she advised us that police figures for homicides as a whole indicated that for 2007/08 there were 22 per million in Scotland as against 14.6 for England and Wales and 14 for Northern Ireland. Just under half of the Scottish figures represented deaths caused by a pointed weapon.

[16] We agree that at the present time knife crime is a scourge in the Scottish community and that the court should be acting, and be seen to be acting, in a way which discourages the carrying of sharp weapons, the use of which may lead to needless deaths. Sentences which may cause individuals to think more carefully before arming themselves and which reflect public concern at such killings are appropriate. Other than in exceptional circumstances we would expect punishment parts in cases of that kind to be at least sixteen years, and they might be significantly longer depending on the circumstances.

[17] The foregoing are guidelines and should be treated as such. The circumstances in which murders are committed and the circumstances of offenders vary substantially. It is important that sentencers should retain sufficient discretion in selecting a punishment part as to allow them to take the particular circumstances appropriately into account."

Sentencing young offenders

[15] Sentencing guidelines are subject always to the discretion of the sentencing judge and, on appeal, to the discretion of this court. Experience shows that there are frequently special factors in individual cases that are not expressly dealt with in guidelines. In many cases, the special factor is that the accused is a young offender, and often a first offender too. In such cases, the exercise of discretion presents the court with a particularly anxious and demanding problem. My own view is that in a case of that kind the court should take particular care to fix a sentence that, while marking the gravity of the offence and its effects, will leave hope that the young person can be rehabilitated as a useful member of society and achieve some positive outcome in his life.

[16] The sentencing judge has taken into account the gravity of the deed itself and indirectly, I am sure, the effect of the death on the victim's family. He has also looked to the elements of denunciation and retribution that are appropriate in a case of this kind.

[17] This murder involved extreme violence, the use of a knife, the mutilation of the body and the abandonment of the victim at the scene. On any view, therefore, the gravity of the case was obvious.

Some punishment parts imposed on adult offenders

[18] In *HM Adv* v *Boyle and Ors* (*supra*) the appellant Boyle and his co-accused committed a sustained attack on the victim with a bottle and with repeated kicking and stamping on his head. The appellant then dragged the victim in a semi-conscious state down a flight of stairs, stabbed him and struck him with a pole. He and his co-accused then dragged or carried the victim to the side of the building where they made a pyre of magazines and other combustible materials. They placed him on the pyre, poured lighter fuel over him and over the pyre and set it alight. They then left the scene. The victim could be moved from the pyre only with the assistance of fire fighters. He died five days later. Apart from the burns, which were probably the major cause of death, he sustained blunt-trauma injuries to the head and neck; three lacerations to the left frontal-parietal scalp with bruising of the muscle underlying the scalp; a comminuted and slightly depressed fracture of the left temporal bone with moderate extra-dural haemorrhaging, and a stab wound 30mm in length in the left upper thigh. Neither of the accused showed any remorse. During the trial both were disrespectful to the family of the deceased. Each sporadically disrupted the trial by refusing to attend.

[19] The appellant, being then 19 years of age, was sentenced to be detained for life with a punishment part of 15 years. On an appeal by the Crown, this court likened the case to the medieval horrors of execution by burning and said that it was difficult to envisage more cruel or sadistic treatment of another human being. The court remarked that such cold-blooded conduct could only strike horror into the minds of right-minded members of the community. The court considered that the appellant's offending was not mitigated by his age. It substituted a punishment part of 20 years.

[20] In *Cowie* v *HM Adv* (2010JC 51) this court held that a punishment part of 20 years was appropriate for an adult offender who took part in an unprovoked, cowardly and barbaric attack on a stranger whom they left to die at an isolated place, semi-naked and in freezing conditions.

[21] In *Fraser* v *HM Adv*, which was not appealed on sentence, a punishment part of 25 years was imposed for the planned assassination of the accused's wife by an unknown assailant on the accused's behalf in circumstances where the accused had given himself an alibi and where the body was concealed and destroyed. In *Al-Megrahi* v *HM Adv*, a punishment part of 27 years was imposed by a court of three judges for the murder of 270 victims by the bombing of an aircraft in an act of terrorism. These cases illustrate the approach to sentencing in murders of maximum severity.

Conclusions

[22] Comparing the sentence appealed against with sentences imposed in other cases gives limited guidance; but I think that there is some help to be had from the decisions to which I have referred. The view of the sentencing judge was that if the appellant had been an adult, the punishment part would have been among the longest that there had been. Having regard particularly to *HM Adv* v *Boyle and Ors* (*supra*) and *Cowie* v *HM Adv* (*supra*), both of them examples of quite barbaric murders, I think that if this case had involved an adult offender, the appropriate punishment part would not have been more than 20 years. But whether or not I am right in that view, I consider that the punishment part imposed on this appellant was excessive in view of his age.

[23] There is no doubt that the appellant is an unsympathetic individual. There is also no doubt as to the strength of public outrage in Dalkeith and beyond. But it is important to keep in mind that the appellant was a first offender who was just under 15 years old at the time of the offence. The punishment part appealed against is longer than he had lived at the date of the sentence. Since the appellant will not even be considered for parole until he is almost 36, the chances of his being rehabilitated and making something of his life will be gravely prejudiced. The prospects of his becoming institutionalised beyond hope of recall will be significant.

[24] I have the utmost sympathy for the family of the victim and I understand entirely why this murder should have caused public revulsion. Nevertheless, I think that the sentencing judge should not have imposed a punishment part of such severity on such a young offender. In my opinion, justice would be done in this case if the punishment part of the sentence were fixed at 15 years. I do not consider that we are precluded from that disposal by anything said in the guidance given in *HM Adv* v *Boyle and Ors* (*supra*). I regret, therefore, that I have to differ from your Lordship and your Ladyship.

Disposal

[25] Since your Lordship and your Ladyship have concluded that there is no good reason for our interfering with the sentence appealed against, the order of the court will be that the appeal is refused.

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Appellant;

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For the Crown: M Mackay AD; Crown Agent

2 February 2011

[26] I regret that I am unable to agree with the conclusion of your Lordship in the chair that this appeal should be allowed and that the punishment part of the sentence should be fixed at 15 years.

[27] While I understand and share your Lordship's obvious concerns about a sentence requiring a young person to spend his youth and the early part of his adult life in custody before he can even apply for parole, such concerns arise in every case in which a teenager commits murder by stabbing his victim and the punishment part of his sentence is fixed at 16 years or more. That, however, is the consequence of the guidance provided to sentencers by the court in *HMA* v *Boyle*, at paragraph [16] of its opinion quoted by your Lordship. In that part of its opinion the court recognised concerns about a particular problem associated with knife crime in Scotland and was advocating a punishment

part of **at least** (my emphasis) 16 years in such cases, other than in exceptional circumstances. The court also recognised that the punishment part might be significantly longer depending upon the circumstances of the case. I agree with your Lordship that sentencing guidelines are subject always to the discretion of the sentencing judge. They provide a structure for judicial discretion but should not lead to a mechanistic approach to sentencing. However, the sentencing judge retains a responsibility for determining the appropriate sentence in any case. (*HMA* v *Boyle; HMA* v *Mackenzie 1990 JC 62; HMA* v *Graham 2010 HJAC 50*). Having said that, it is also desirable and in the public interest, as well as the interest of everyone involved in the sentencing process, that there should be consistency in sentencing.

[28] If the guidelines in *HMA* v *Boyle* are followed, the result is likely to be that a punishment part of 16 years is the norm or starting-point for determining the punishment part in all but the most exceptional of cases of murder by stabbing. It is common for such murders to be committed by young people often in the context of what may be described as a "gang culture". I do not consider that the youth of the appellant in this case merits a departure from the starting-point of 16 years. There is no suggestion that he was unaware of the dangers associated with knives, in which he had an interest. Unlike many young people convicted of such crimes of violence, he is unable to attribute his violent behaviour to a deprived background. As your Lordship has observed, the appellant has enjoyed a privileged background with the active support of both of his parents despite their separation. (para [9]).

[29] He does not suffer from mental disorder and there was no evidence of emotional maladjustment or childhood abuse or of significant abnormality of mind at the time of the murder. (para [12]). In all the circumstances it is appropriate to take 16 years as a starting point.

[30] The question then becomes whether 16 years is the appropriate period or whether the circumstances merit the imposition of a significantly longer period. The circumstances of the murder have been narrated by your Lordship, including the nature and extent of the injuries inflicted upon his 14 year old victim by the appellant (para [5]). It is unnecessary for me to dwell upon them. Suffice it to say that this was a sustained, prolonged and brutal attack upon an innocent young girl involving extensive blunt force injury, mechanical strangulation, multiple cuts and penetrating injuries as well as extensive post mortem mutilation. This clearly merits a significantly longer period as a punishment part than a case of murder involving a single stab wound or even two or three stab wounds. Having considered the nature and extent of the attack and the consequential injuries inflicted upon the deceased before and after death, I am unable to conclude that the sentencing judge erred in the

exercise of his discretion when he selected a period of 20 years. The period might well be severe but it cannot be categorised as excessive.

[31] I have also considered your Lordship's analysis of other cases resulting in the conclusion that the sentencing judge erred when he considered that a longer period would have been appropriate in the case of an adult offender. Regrettably I cannot agree. In *Walker* v *HMA* the court recognised the difficulty of undertaking a comparative exercise involving cases which had not been the subject of consideration by the appeal court, as well as the general difficulty in comparing the nature and gravity of one case with another. (para. [9]). *Fraser* v *HMA* and *Al-Megrahi* v *HMA* both fall into the former category. Moreover, in *Al-Megrahi* there was an outstanding Crown appeal against an alleged unduly lenient sentence when Al-Megrahi was released from custody by the Executive. There is, in my opinion, the additional difficulty associated with a comparative exercise that even in those cases considered by the appeal court taken as comparators, the court was concerned with the question whether a sentence imposed was excessive. That was the case in *Cowie* v *HMA*. The court did not specify the range available to the sentencer but merely concluded that the sentence imposed was entirely appropriate to the crime and was not excessive.

[32] Sentencing is not an exact science and in almost every case there will be a range within which the sentencer may exercise his or her discretion in determining the appropriate sentence. For that reason different sentencers may reach a different view but as long as the resulting sentence falls within the appropriate range of discretion it cannot be said to be excessive. If an adult had attacked the 14 year old in this case in the manner described, a much longer period than 20 years would, in my view, have been within the range of discretion available to the sentencing judge. I am reinforced in that view by what appears to be a recent trend of imposing longer periods as punishment parts of life sentences. The most recent example is *Smith* v *HMA 2010 HCJAC 118* in which the court concluded that a punishment part of 32 years, restricted from 35 years to reflect an early plea of guilty, was not excessive. Although that case involved the murder of two people, one of whom was a child, nevertheless it confirms that in some cases a period in excess of 30 years is an appropriate period for a punishment part. While I do not consider that such cases will or should be confined to multiple murders, it is not possible or appropriate to enumerate all the circumstances in which such a sentence may be appropriate. Suffice it to say that the determination of the appropriate period will depend upon a variety of factors, one of which will be the nature, circumstances and severity of the attack resulting in the death of the victim.

[33] In all the circumstances I would refuse this appeal.

APPEAL COURT, HIGH COURT OF JUSTICIARY

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Lady Cosgrove

[2011] HCJAC 10

Appeal No: XC90/05

OPINION OF LADY COSGROVE

in

APPEAL AGAINST SENTENCE

by

LUKE MITCHELL
Appellant;

against

HER MAJESTY'S ADVOCATE
Respondent:

_____

For the appellant: Jackson, QC, Murray, McPhie; Robertson & Ross, Paisley
For the Crown: M Mackay AD; Crown Agent

2 February 2011

[34] I too regret that I am unable to agree with the conclusion of your Lordship in the chair that this appeal should be allowed and that the punishment part should be fixed at 15 years.

[35] Reference has been made by your Lordship to the guidance provided to sentencers by the court in *HMA* v *Boyle*. That Full Bench decision establishes (para [16]) that other than in exceptional

circumstances, a punishment part of at least sixteen years, and possibly significant longer, might be expected for murders committed by the use of a knife. The court observed that at the present time knife crime is a scourge in the Scottish community. It is of course a regrettable fact of daily life in our criminal courts that much of that knife crime is committed by young offenders.

[36] Your Lordship has analysed other cases and come to the conclusion that had the present case involved an adult offender, the punishment part would not have been more than 20 years. I regret I cannot agree. The suggestion that 30 years is to be seen as a virtual maximum punishment part is now specifically disapproved (para [13] of *Boyle*). An appeal against a punishment period of 32 years, restricted from 35 years for the early plea, for the double murder of a mother and her daughter has since been refused by the court in the case of *Smith* v *HMA* 2010 HCJAC 118.

[37] Every case of murder is distinguished by its own particular facts and circumstances. It is extremely difficult to compare in any meaningful way the circumstances and gravity of one case with those of another. There can be no doubt that the sentencing judge was correct to regard this as a very serious crime. It involved the repeated use of a knife and a sustained and brutal attack on a trusting and defenceless fourteen year old girl who suffered a horrible death and whose body was thereafter extensively mutilated. I do not consider that he can be said to have erred in considering that a longer period would have been appropriate for this crime had it been committed by an adult offender.

[38] I too understand and share your Lordship's concerns about the imposition of a sentence requiring a young person to remain in custody without prospect of release for a very long period. Nevertheless, having regard to the guidance provided by the court in *Boyle* and the grave nature of this crime, I find I am unable to conclude that the punishment period chosen was outwith the reasonable range available to the sentencing judge.

[39] In all the circumstances I too would refuse the appeal.