HM ADVOCATE v BOYLE

No 7
26 November 2009
[2009] HCJAC 89

Lord Justice-General (Hamilton),
Lord Reed, Lord Clarke,
Lord Mackay of Drumadoon and
Lady Dorrian

HER MAJESTY'S ADVOCATE, Appellant—*Lord Advocate, Balfour*
BRYAN ROBERT BOYLE, First Respondent—*Sudjic (Solicitor-advocate), Hay (Solicitor-advocate)*
GREIG MADDOCK, Second Respondent—*Ferguson QC, Niven-Smith*
ROBERT KELLY, Third Respondent—*Macara QC (Solicitor-advocate), Considine (Solicitor-advocate)*

Justiciary – Sentencing – High Court of Justiciary sentencing guidelines – Punishment parts in murder cases – Whether virtual maximum of 30 years – Whether a ''starting point'' for ''most cases of murder'' of 12 years appropriate – Whether discounts applied should be limited – Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), sec 2 – Criminal Procedure (Scotland) Act 1995 (cap 46), secs 118(7), 196

Justiciary – Sentencing – Murder – Murder of victim by sustained attack and burning – Whether punishment parts of 15 and 12 years for co-accused unduly lenient

Justiciary – Sentencing – Murder – Robbery and murder of victim by strangulation and concealment of body – Guilty plea tendered at preliminary hearing – Whether punishment part of 15 years, discounted from 20 years, unduly lenient – Whether discount appropriate

Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9) makes provision for the imposition of a life sentence in the case of conviction for murder and (in sec 2(2)) for the imposition of a ''punishment part'', to be specified in years and months, before the conclusion of which time provisions relating to parole will not apply.

Section 118(7) the Criminal Procedure (Scotland) Act 1995 (cap 46) provides that in disposing of an appeal against sentence the High Court of Justiciary may ''pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case'', that is to give guidance of general application. Section 196 provides that in determining what sentence to pass on an offender who has pled guilty, the court may take into account the stage in the proceedings at which he indicated his intention to plead guilty.

The first and second respondents were convicted after trial of the murder of Robert Bowie. The first respondent had subjected his victim to a sustained attack, which included inflicting numerous blunt force injuries, some involving weapons, dragging him down a flight of stairs, and stabbing him on the leg with a knife. The second respondent, who was an associate of the first, then arrived on the scene and a decision was taken to burn the victim. He was put on a pyre of combustible materials and accelerant was poured over the victim and the pyre, which was then set alight. The respondents then left the scene and the victim was later removed from the pyre by firefighters and paramedics. He died in hospital five days later from the injuries sustained. The first respondent was sentenced to be detained for life, with a punishment part of 15 years, and the second respondent was sentenced to life imprisonment, with a punishment part of 12 years.

On 25 May 2007 the third respondent pled guilty to the murder of Agnes Mechen, on 30 August 2002. He had planned to rob his victim of the monies she collected door to door for a provident company. He invited the victim, who was known to him, into his home and strangled her. He removed the money from her handbag, disposed of items associated with the crime and concealed her body in the sub-floor of the house. Extensive enquiries were conducted in an attempt to trace Mrs Mechen. In 2005 and 2006 the third respondent confessed his crime, and in December 2006 that confession became known to the police. In January 2007 Mrs Mechen's body was found where it

had been concealed. The third respondent was sentenced to life imprisonment, with a punishment part of 15 years. The judge stated that but for the plea the punishment part would have been 20 years.

The Crown subsequently appealed to the High Court of Justiciary on the ground that the disposal in each case was unduly lenient. The Crown also sought to invite the court, under sec 118(7), to give guidance on punishment parts in murder cases. The appeals were heard together by a bench of five judges.

Held that: (1) there was no minimum or maximum period for a punishment part in murder cases, and in some cases the punishment part may exceed the likely extent of the remainder of the prisoner's natural life (para 7); (2) in so far as previous authorities may have suggested that 30 years was a virtual maximum punishment part, that suggestion was disapproved (para 13); (3) in cases, for example, of mass murder by terrorist action, a punishment part in excess of 30 years may be appropriate (para 13); (4) in cases, for example, where the victim was a child or a police officer acting in the course of his duty, or where a firearm was used, a punishment part in the region of 20 years may be appropriate (para 13); (5) in cases in which a knife or other sharp instrument, with which the offender had deliberately armed himself, was used, a punishment part of at least 16 years, other than in exceptional circumstances, would be expected (para 16); (6) there was no norm or ''starting point'' for ''most cases of murder'' of 12 years or otherwise and a punishment part of 12 years would not be appropriate unless there were strong mitigatory circumstances, and a punishment part of less than 12 years would not be appropriate in the absence of exceptional circumstances (para 14); (7) in murder cases the maximum discount in sentence in the punishment part should be about one-sixth, reducing in some cases to nil (para 21); (8) there should also be a limit on the total number of years which could be discounted from a punishment part, and that limit should be set at five years (para 21); (9) in the particular circumstances of the cases under appeal, it was appropriate that the matter of sentence in those appeals be addressed in accordance with the practice prevailing at the time the sentences were passed, and without regard to the guidelines given in this case (para 23); (10) in the case of the first and second respondents, the trial judge failed to give proper weight to the seriousness of the aggravating conduct involved and the punishment parts imposed were unduly lenient; the punishment parts imposed fell to be quashed and punishment parts of 20 years in the case of the first respondent and 18 years in the case of the second respondent were substituted (para 29); (11) in the case of the third respondent, the punishment part imposed was unduly lenient having regard to the premeditated nature of the murder of a vulnerable victim perpetrated for the purposes of robbery, which had been further aggravated by the steps taken to conceal the crime; an appropriate initial figure for the punishment part would have been 22 years, with a discount of three years for the early plea and the punishment part imposed fell to be quashed and a punishment part of 19 years substituted (para 35).

Observed that the guidelines given were to be treated as such and it was important that sentencers retained a sufficient discretion to allow them to take the particular circumstances of each case appropriately into account (para 17).

Bryan Robert Boyle and Greig Maddock were indicted at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, the libel of which included a charge of murder. The respondents went to trial before Temporary Judge RG Craik QC and a jury at the High Court of Justiciary at Edinburgh and were each convicted of murder, in different terms, on 1 June 2007. The first respondent was sentenced to be detained for life, with a punishment part of 15 years, and the second respondent was sentenced to life imprisonment, with a punishment part of 12 years. The Crown subsequently appealed to the High Court of Justiciary on the ground that the disposal in each case was unduly lenient.

Robert Kelly was indicted at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, the libel of which included a charge

of murder. At a preliminary hearing on 25 May 2007, before Lord Brailsford at the High Court of Justiciary at Glasgow, the respondent pled guilty to the charge of murder. On 26 July 2007 he was sentenced to life imprisonment, with a punishment part of 15 years. The Crown subsequently appealed to the High Court of Justiciary on the ground that the disposal was unduly lenient.

Cases referred to:
Advocate (HM) v Alexander [2005] HCJAC 77; 2005 SCCR 537
Advocate (HM) v Al Megrahi 24 November 2003, unreported
Advocate (HM) v Bell 1995 SLT 350; 1995 SCCR 244
Drury v HM Advocate 2001 SLT 1013; 2001 SCCR 583
Du Plooy v HM Advocate 2005 1 JC 1; 2003 SLT 1237; 2003 SCCR 640
Locke v HM Advocate [2008] HCJAC 6; 2008 SLT 159; 2008 SCCR 236; 2008 SCL 504
Spence v HM Advocate [2007] HCJAC 64; 2008 JC 174; 2007 SLT 1218; 2007 SCCR 592; 2008 SCL 256
Walker v HM Advocate 2003 SLT 130; 2002 SCCR 1036

Textbooks etc referred to:
Lord Chief Justice, *Practice Statement (Crime: Life Sentences)* [2002] 1 WLR 1789

The appeals called before the High Court of Justiciary, comprising the Lord Justice-General (Hamilton), Lord Reed, Lord Clarke, Lord Mackay of Drumadoon and Lady Dorrian, for a hearing on 8 and 9 February 2009.

At advising, on 26 November 2009, the opinion of the Court was delivered by the Lord Justice-General (Hamilton)—

Opinion of the Court—

Penalty for murder

[1] Of all crimes in Scotland murder is the most heinous. It is constituted by any wilful act causing the destruction of human life, by which the perpetrator either wickedly intends to kill or displays wicked recklessness as to whether his victim lives or dies (*Drury v HM Advocate*). The mandatory penalty for murder is imprisonment (or, in the case of young persons detention) for life.

[2] Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9) (as amended) provides:

> '(1) In this part of this Act ''life prisoner'', ... except where the context otherwise requires, means a person– ...
>
> (aa) sentenced to life imprisonment for murder ...
>
> and in respect of whom the court which sentenced him for that offence made an order mentioned in subsection (2) below.
>
> (2) The order referred to in subsection (1) above is an order that subsections (4) and (6) below shall apply to the life prisoner as soon as he has served such part of his sentence (''the punishment part'') as is specified in the order, being such part as the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public), taking into account–
>
> (a) the seriousness of the offence, or of the offence combined with other offences of which the life prisoner is convicted on the same indictment as that offence; ...
> (b) any previous conviction of the life prisoner; and
> (c) where appropriate, the matters referred to in paragraphs (a) and (b) of section 196(1) of the 1995 Act.

(3) A court which imposes life imprisonment for an offence such as is mentioned in subsection (1) above shall make such order as is mentioned in subsection (2) above and such order shall constitute part of a person's sentence within the meaning of the 1995 Act for the purposes of any appeal or review.
(3A) An order such as is mentioned in subsection (2) above–

(a) shall specify the period that the court considers appropriate under that subsection in years and months; and
(b) may specify any such period of years and months notwithstanding the likelihood that such a period will exceed the remainder of the prisoner's natural life.

(4) Where this subsection applies, the [Scottish Ministers] shall, if directed to do so by the Parole Board, release a life prisoner on licence.
(5) The Parole Board shall not give a direction under subsection (4) above unless–

(a) the [Scottish Ministers have] referred the prisoner's case to the Board; and
(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. ...

(6) Where this subsection applies, a life prisoner may ... require the [Scottish Ministers] to refer his case to the Parole Board.'

[3] Section 196(1) of the 1995 Act (Criminal Procedure (Scotland) Act 1995 (cap 46)) provides:

'In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account–

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
(b) the circumstances in which that indication was given.'

The convictions

[4] The first and second respondents were on 1 June 2007 each convicted after trial of the murder of Robert Bowie on 14 October 2006. The terms on which they were respectively convicted were different. The first respondent was convicted as charged that at an address in Dunfermline he

'did assault [Mr Bowie] and repeatedly strike him on the head with a bottle, repeatedly kick and stamp on his head, drag him down a set of stairs, stab him on the leg with a knife, strike him with a pole, pour accelerant over him and set fire to same, set fire to magazines and debris all to his severe injury, permanent disfigurement and permanent impairment and as a consequence thereof he died of said injuries on 19 October 2006 at St John's Hospital, Livingston and you did murder him'.

The second respondent was convicted on the same charge but under deletion of the words

'repeatedly strike him on the head with a bottle, repeatedly kick and stamp on his head, drag him down a set of stairs, stab him on the leg with a knife, strike him with a pole'.

The first respondent was on 19 July 2007, he then being 19 years of age, sentenced to be detained for life and an order made under sec 2(2) of the 1993 Act (as amended) that he serve a period of 15 years before subsecs (4) and (6) should apply. On the

same date the trial judge sentenced the second respondent, who was then 21 years of age, to be imprisoned for life and made an order under sec 2(2) that he serve a period of 12 years before subsecs (4) and (6) should apply. At the date of the murder the first and second respondents were 18 and 20 years of age respectively.

[5] The third respondent on 25 May 2007 pled guilty before a different judge to the murder on 30 August 2002 of Mrs Agnes Mechen, then aged 64. The charge to which he pled was that he

> 'did assault [Mrs Mechen] and did seize her by the body, struggle with her, place a cord around her neck and tighten same, rob her of a handbag, the contents thereof and a quantity of money and you did murder her and you did previously evince malice and ill-will towards [Mrs Mechen].'

On 25 July 2007 the judge sentenced him to life imprisonment and ordered that a period of 15 years be served before secs 2(4) and (6) of the 1993 Act (as amended) should apply. The plea of guilty had been tendered at the first preliminary hearing. The judge stated on sentencing that, but for that plea, the punishment part would have been 20 years. At the date of the offence the third respondent was 27 years of age, at the time of sentencing 32.

[6] The Lord Advocate has appealed under sec 108 of the 1995 Act against the punishment parts in each of these sentences on the ground that the disposal in each case was 'unduly lenient'. She has also sought to make use of the opportunity presented by these appeals to invite this court to give guidance under sec 118(7) of the 1995 Act on punishment parts in murder cases. Because of the potential importance of the issues arising and because reconsideration might require to be given to certain views expressed by three-judge benches, a bench of five judges was convened for the purpose of hearing these appeals.

Punishment parts: Discussion

[7] Section 2 of the 1993 Act (as amended) prescribes no minimum or maximum for the period of a punishment part. All that it prescribes is that the period must be specified in years and months (sec 2(3A)(a)). Subsection (3A)(b) makes it plain that the specified period may exceed the likely extent of the remainder of the prisoner's natural life. Thus, while the statute does not empower the judge to specify a 'whole life' period, in an appropriate case a prisoner in Scotland may be sentenced to a period which in practical terms will extend until his or her death.

[8] In *Walker v HM Advocate* the appellant appealed against a punishment part specified by the sentencing judge (Lord Reed). The appellant had deliberately planned the robbery and murder by machine gun of three serving soldiers. In his report Lord Reed observed:

> 'Bearing in mind that the appropriate punishment part in the present case had, in my view, to be substantially in excess of 20 years, and taking account of the periods imposed in the cases which I have mentioned [Robert Francis Mone and Howard Charles Wilson], I reached the conclusion, albeit with hesitation, that the extreme end of the scale must be about 30 years, and that a period of that length was justified in the present case.'

In allowing the appeal and substituting a punishment part of 27 years, the court said:

> '[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.

[9] We are in no doubt that in the present case the factors highlighted by the sentencing judge put it clearly into the latter category of case. We have taken into consideration that in the case of the murders committed by Robert Francis Mone and Howard Charles Wilson the punishment part was fixed at 25 years. However, these cases have not been the subject of consideration by the appeal court, and there is, as in many instances, difficulty in comparing the nature and gravity of one case with those of another.

[10] In all the circumstances we are satisfied that the sentencing judge was well justified in selecting as the punishment part a period in excess of 25 years. In saying that we have particularly in mind the fact that this was a deliberately planned execution of a number of soldiers acting in the course of their duty and that it was done in order to achieve gain. On the other hand, it is not impossible to conceive circumstances in which there might be even greater aggravation, let alone the existence of significant previous convictions. In all the circumstances we have reached the view that the punishment part of 30 years, which the sentencing judge fixed with some hesitation, was excessive. We will quash the order for that period and substitute an order of 27 years.'

[9] The court does not state in terms that 30 years is the maximum for a punishment part but its reasoning has been interpreted as if it had reached a conclusion to that effect. The editor's commentary to the case in the *Scottish Criminal Cases Reports* is in the following terms:

'It is difficult to envisage a case of murder which will be such that one cannot envisage a still worse case. Be that as it may, it appears that the view of the court is that 30 years is the maximum for a penalty part [*sic*], and that there is no room for a longer period. Such a view is in line with the Lord Chief Justice's Guidelines of 21 May 2002, in which he says that 'there might even be' a minimum term of 30 years which, he comments, is equivalent to a sentence of 60 years, and is a period which would offer little or no hope of release.'

[10] In *HM Advocate v Al Megrahi* the court, having referred to *Walker v HM Advocate*, said:

'While it is not said in terms, the implication in that is that 30 years should be regarded as virtually the maximum that should be imposed as the punishment period. The overwhelming factor in the present case is the deliberate and planned use of an explosive device to cause multiple deaths and corresponding anguish to relatives of victims.'

It later added:

'On one view it is difficult to imagine a worse case of murder and on that view it may be argued that on the basis of the authorities quoted the appropriate punishment part would be 30 years. We must, however, have regard to such mitigating factors as are before us, in particular the age of the accused, and on that basis we are prepared to restrict the punishment period to one of 27 years'.

[11] The view that a period of 30 years is or may be the maximum length, or virtually the maximum length, of a punishment part of a sentence for murder may be traced to the Practice Statement (Crime: Life Sentences), by which on 31 May 2002 the Lord Chief Justice (Lord Woolf) issued guidelines to judges in England and Wales on what was referred to as 'the minimum term' in murder cases. He notices (para 3) that 'for the purpose of calculating the earliest date of normal release on licence the minimum term is approximately the equivalent of a determinate sentence of twice its length'. In discussing 'very serious cases' he said (para 18):

> 'In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.'

The reference in the latter sentence to a statement that there is no minimum period anticipated sec 269(4) of the Criminal Justice Act 2003 (cap 44) which required a sentencer in certain circumstances to make an order that the early release provisions were not to apply to the offender. It is accordingly clear that the Lord Chief Justice envisaged that, in cases of exceptional gravity, there might be no minimum term fixed.

[12] The Scottish legislation requires the sentencer to specify a punishment part in years and months — although, as we have said, it would be open to him or her to specify a period which was in excess, even well in excess, of the offender's anticipated lifespan. Although in one sense there is an equivalence between a punishment part and a determinate sentence of twice its length — the point of time at which the offender first qualifies for consideration for release on parole is the same — there is a measure of unreality about speaking of a determinate sentence of 60 years. It is difficult to envisage such a sentence being passed in Scotland; almost certainly in such cases a discretionary life sentence or an order for life long restriction would be passed. Moreover, murder is so special a crime that comparison with crimes for which there is no mandatory sentence of life imprisonment is of limited value.

[13] In our view there may well be cases (eg mass murders by terrorist action) for which a punishment part of more than 30 years may, subject to any mitigatory considerations, be appropriate. In so far as *Walker v HM Advocate* and *HM Advocate v Al Megrahi* may suggest that 30 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 para 8 of *Walker* of the types of murder which might attract a punishment part in the region of 20 years.

[14] The first sentence of para 8 of *Walker* may carry the implication that a punishment part of 12 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 12 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 12 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 12 years would not be appropriate unless there were strong mitigatory circumstances, and a punishment part of less than 12 years should not be set in the absence of exceptional circumstances (eg 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 16 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.

[18] We were referred to a number of other statistics and to the treatment of sentences for murder in a number of other jurisdictions. We did not find these statistics particularly helpful. It is of interest to notice how other legislatures have provided for disposals in murder cases. However, the Scottish Parliament has for this jurisdiction set the basic provision against which parameters are appropriately set by the High Court of Justiciary to meet Scottish conditions as they may prevail from time to time.

[19] The remaining question of general importance which arises is the proper approach to discounts for early pleas of guilty in murder cases. At one time it was very rare indeed for persons accused of murder to plead guilty to that offence. But times have changed and it is appropriate that we say something about the proper approach. In *Spence v HM Advocate* (where the offender was convicted of culpable homicide) the court gave at para 14 further guidance on the discounts which might, following *Du Plooy v HM Advocate*, be given when pleas of guilty were tendered at certain stages and thereafter adhered to. At para 15 it was recognised that special circumstances might apply to particular sentences, including to indeterminate sentences. Reference was made to *HM Advocate v Alexander*. In that case (where the offender had murdered his estranged wife and her partner in circumstances of extreme violence) the sentencing judge, having started with a punishment part of 24 years, had discounted it by seven years, resulting in a specified period of 17 years. The respondent had intimated his intention to plead guilty after being indicted for trial, although he had given an indication earlier that pleas would be offered and there had been delay in obtaining psychiatric advice. On appeal by the Crown the court reduced the discount to four years, so that the specified period was 20 years. The discount accordingly amounted to one-sixth of the 'gross' punishment part. The court does not expressly state how it came to that figure — though it notices certain factors which the sentencing judge had failed to take into account.

[20] In England and Wales the Sentencing Guidelines Council has issued a Definitive Guideline entitled 'Reduction in Sentence for a Guilty Plea' (revised 2007). In relation to reduction for a plea of guilty to murder the council recommends an approach, in circumstances other than where there would be a whole life term, which includes 'where it is appropriate to reduce the minimum term having regard to a plea of guilty, the reduction will not exceed one-sixth and will never exceed five years' (para 6.6.1(b)); it then recommends a sliding scale of deduction starting at its highest at one-sixth, which is only available 'where there has been a willingness to plead guilty at the first reasonable opportunity' (para 6.6.1(c)). That one-sixth appears to be in parallel with the maximum of one-third in non-murder cases (para 4.2). Thus it is suggested that, subject to the maximum of five years, the discount should in murder cases be half of that in equivalent circumstances in non-murder cases.

[21] There is a certain logic to this approach — based upon the relative stages at which prisoners on determinate and indeterminate sentences first become entitled to be considered for parole. But, as the solicitor-advocate for the third respondent argued, the arithmetic can be approached in a different way which might result in the discounts in murder and non-murder cases being in equivalent circumstances the same. As we have said earlier, murder is a special case and a strictly mathematical approach may be inappropriate. That said, we are not persuaded that the same discount should be allowed from a punishment part as from a determinate sentence of the same length. We agree that in murder cases the maximum discount should be about one-sixth, reducing in some cases to nil. We also see force in there being a limit on the total number of years which can be discounted from a punishment part in a murder case. We agree that this should be set at five years — which, of course, could only be reached in very serious cases.

[22] Sentencers pronouncing sentence at any time after the issue of this opinion should have, in so far as relevant to the circumstances, regard in terms of sec 197 of the 1995 Act to the views here expressed.

[23] We turn now to the particular circumstances of the cases under appeal. Senior counsel for the second respondent submitted, under reference to *Locke v HM Advocate* (particularly per the Lord Justice-General, paras 18, 19), that in addressing the issue whether any punishment part was too lenient regard should be had to the practice sanctioned by the appeal court as at the original date of sentencing (in the case of the first and second respondents, 19 July 2007) and not to any guidelines which might be laid down in these appellate proceedings. We doubt whether the guidelines which we have now given are inconsistent, or at least materially inconsistent, with any practice pertinent to the circumstances of the present appeals and prevailing at the time when these sentences were passed. However, we see the force of counsel's submission and shall address the matter of sentence in these appeals without regard to these guidelines. We also bear in mind the observations by Lord Justice-General Hope in *HM Advocate v Bell* (pp 353, 354) in relation to the limited circumstances in which this court should interfere on the grounds of undue leniency with the disposals of sentencing judges.

First and second respondents

[24] These respondents were associates. They had been together on the evening of 14 October 2006 but had then separated. The first respondent had attacked the deceased in the flat at 289 Inchkeith Drive, Dunfermline. This was a sustained attack

which involved repeated striking of the victim on the head with a bottle and repeated kicking and stamping on his head. The first respondent then dragged the victim in a semiconscious state down the stairs from the flat. He then stabbed the victim on the leg with a knife and struck him with a pole. At about this time the second respondent arrived on the scene. A decision was then taken to burn the defenceless victim. He was dragged or carried to the side of the building where a pyre of magazines and other combustible materials was raised. The victim, who was still alive, was placed on it. Lighter fuel was then poured over the victim and the pyre, which was then set alight. Leaving the victim smouldering there the two respondents together with a girlfriend of one of them left to catch a train. Some time later children detected smoke from the fire and shortly thereafter heard the victim moaning. The emergency services were alerted. Ambulance men and later fire fighters attended the scene. The ambulance men were unable because of the heat to move the victim from the pyre. He could only be moved with the assistance of the fire fighters. He was still alive but died in hospital five days later.

[25] The trial judge's report is unsatisfactorily short in detail on the nature and extent of the victim's injuries and on the causes of death. We were, however, provided with copies of the post mortem report spoken to at the trial. It discloses that, in addition to other less serious blunt-trauma injuries to the head and neck, the victim had sustained three lacerations to the left fronto-parietal scalp with bruising of the muscle underlying the scalp. There was a comminuted and slightly depressed fracture of the left temporal bone with moderate extradural haemorrhaging. There was a stab wound 30 mm in length in the left upper thigh. The most clinically significant injury was, however, severe widespread burning of the skin of the left cheek, the entire left upper limb, the left side of the chest, the back, the buttocks and thighs. The cause of death was given as 'Head Injury, Effects Of Fire And Stab Wound To Thigh'. The main focus of his hospital treatment was on the victim's burning injuries.

[26] It is clear that a cause, probably the major cause, of death was the burning injuries sustained on the pyre. The jury's verdict carries the inference that each of these respondents was party to placing on the pyre a living human being with the wicked intention of killing him by burning or with wicked recklessness as to whether or not he died by that means. It is inconsistent with the verdicts that, when they put him on the pyre and set light to it and to him, they believed or had any reason to believe that he was already dead. The circumstances are redolent of the medieval horrors of execution by burning. It is difficult to envisage more cruel or sadistic treatment of another human being.

[27] Neither of these respondents has shown any remorse for his crime. Shortly after leaving the victim the second respondent telephoned the police complaining about the confiscation of a bottle of vodka; no attempt was made to alert the police to the fate of the victim. Their conduct during the trial showed no respect for the family of the deceased. Each sporadically refused to attend in court, with consequent disruption to the proceedings.

[28] The first respondent has one minor conviction for assault, not significant in the context of the present offence. He was 18 years of age at the time of the murder and was accordingly an adult. We do not consider that his offending is mitigated by his age. The second respondent has, in addition to a long record of road traffic offences, two prior convictions for assault. Again, these are in context not significant.

[29] A distinction must be drawn between the culpability of these respondents in respect that the second respondent played no part in the initial blunt-instrument

attack on the victim or in the stabbing of him, both contributory factors to his death. However, the most striking aspect of this murder is the conduct of both these respondents in deliberately placing the living but disabled victim on a pyre and igniting it. Such cold-blooded conduct can only strike horror into the minds of right-minded members of the community. We consider that the trial judge failed to give proper weight to the seriousness of that aggravating conduct and that the punishment parts specified by him were so lenient that this court is entitled, having regard to *HM Advocate v Bell*, to interfere with them. We shall quash the punishment parts specified and substitute in their place 20 years in the case of the first respondent and 18 years in the case of the second respondent.

Third respondent

[30] The victim of this crime was a 64-year-old grandmother. She had part-time employment as a collector of monies payable to a provident company. This work involved calling at the homes of customers to collect payment. The third respondent was one of her customers. The victim was friendly with his mother; her son had gone to school with him.

[31] In the early evening of 30 August 2002 Mrs Mechen set off on her collection round. Having called at the homes of various other customers, she arrived at the third respondent's door. She was carrying a black leather shoulder bag containing two purses and a folder with lists of customers. The third respondent was waiting for her. He invited her in. He then closed the door and put a length of electrical flex round her neck, pulling it tight. Despite the victim's protests, including her reminding him that they were known to each other, he strangled her until she died. The murder was premeditated. The third respondent had the previous evening told his partner that he intended to 'mug' Mrs Mechen because she had money and that he would have to kill her. He said he would attack her from behind, strangle her and put her body under the floor. His partner at that stage thought he was joking. However, the following afternoon he told her that he had decided to go ahead with the killing. His partner told him repeatedly to do no such thing. She thought he had accepted that advice. She was absent from the house when the attack was made. Later that evening he confessed to her to having carried out the killing.

[32] The third respondent removed the cash (amounting to about £180–£200) from Mrs Mechen's bag, later disposing of the bag. He also disposed of a carpet on to which the victim had bled during the attack. He took the body through a trap door into the sub-floor area where he concealed it under a mound of soil or rubble. Several days later police officers, in the course of extensive enquiries in an attempt to trace the missing Mrs Mechen, called at the third respondent's flat. He denied having seen her on the day of her disappearance. Over the succeeding months the third respondent was observed constantly to bleach and paint the common close — perhaps in an attempt to disguise any smells of decomposition. Later that year he confessed his deed to his sister and in 2005 made a like confession to a friend. In 2006 he spoke to another acquaintance about it but was not at that time taken seriously. In December of that year the third respondent's partner, who had by then left him and formed another relationship, recounted his confession to her new partner. Through that partner's employment news of the third respondent's confession became known to the police. On 23 January 2007 Mrs Mechen's body was found where it had been concealed. Its concealment under a mound in a cool and

undisturbed environment had resulted in the body being largely mummified. On being questioned by the police the third respondent repeatedly denied that he had been involved in the murder or in the concealment of the body.

[33] From the time of her disappearance until her body was found Mrs Mechen's family made extensive enquiries in an attempt to find her. Her family was distraught at her disappearance and ultimately at the discovery of her body.

[34] The third respondent plead guilty to her murder at the first preliminary hearing. It was said that a plea could not reasonably be tendered before that time as the third respondent's legal advisers were awaiting the views of a consultant psychiatrist and of a consultant psychologist. Both ultimately advised that there was no basis for a plea of diminished responsibility. Immediately thereafter the plea was tendered. The third respondent has no previous convictions. He has expressed remorse.

[35] In his case the issue is whether the punishment part of 15 years ultimately imposed was unduly lenient. In our view it was. This was a premeditated murder of a very vulnerable victim perpetrated for the purposes of robbery. It was aggravated by the steps taken to conceal the crime and by the distressing consequences for the family of the victim. We consider that an appropriate initial figure for the punishment part would have been 22 years with a discount of three years for the early plea, giving a specified period of 19 years. This discount represents a little more than one-eighth of what would otherwise have been specified. The period specified by the sentencing judge will accordingly be quashed and 19 years substituted.

The Court sustained the appeals.

Crown Agent – Martin Johnston & Socha (Glenrothes) – Dewar Spence (Leven) – Fitzpatrick & Co (Glasgow)