IN THE COURT OF APPEAL
CRIMINAL DIVISION No. 202304009 A2

[2024] EWCA Crim 85

Royal Courts of Justice

Tuesday, 23 January 2024

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE CHOUDHURY

HIS HONOUR JUDGE ANDREW LEES

REX

V

KGS

REPORTING RESTRICTIONS AND ANONYMISATION APPLY:

A order pursuant to s. 45 of the Youth Justice and Criminal Evidence Act 1999 was made that no matter relating to the offender's grandson R shall be included in any publication of these proceedings or any judgment if it is likely to lead members of the public to identify him as a person concerned in the proceedings. This prohibition will last until he reaches his 18th birthday.

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MR A. LANGDALE KC appeared on behalf of the Appellant.

MS J. LEDWARD KC appeared on behalf of the Respondent.

JUDGMENT

LORD JUSTICE POPPLEWELL:

1
An order pursuant to s. 45 of the Youth Justice and Criminal Evidence Act 1999 was made that no matter relating to the offender's grandson R shall be included in any publication of these proceedings or any judgment if it is likely to lead members of the public to identify him as a person concerned in the proceedings. This prohibition will last until he reaches his 18th birthday. In order to protect his anonymity it has been necessary to anonymise the name of the offender, the victims, and other members of their family. This anonymity will also last only until R reaches his 18th birthday.

2
On the evening of 29 March 2023 the offender shot and killed JD, the former partner of his daughter, at point-blank range. He drove to the home of JD's father, GD, and shot and killed GD at point-blank range. He was soon apprehended, and made written admissions to the killings shortly thereafter. He pleaded guilty to two counts of murder on 28 June 2023 at an adjourned pre-trial preparation hearing once a psychiatric report had confirmed he was fit to plead.

3
On 23 October 2023 he was sentenced by HHJ Bishop sitting in the Crown Court at Cambridge to life imprisonment with a minimum term of 25 years less 206 days spent on remand on each count, to run concurrently.

4
His Majesty's Solicitor General applies for leave to refer the sentences under s.36 of the Criminal Justice Act 1988 as unduly lenient.

5
We emphasise at the outset that the minimum length of time which a murderer must serve in prison does not reflect the value of the lives taken away, and does not attempt to do so. The sentence, however long, and whatever the outcome of this application, can never compensate for the grievous loss which has been suffered by the families of the victims in this case.

The Facts

6
JD was 32 at the time of his death. He lived alone in a semi-detached house in Bluntisham, Cambridgeshire. His father, GD, was aged 57 at the time of his death. He too lived alone, in a house in Sutton, Cambridgeshire, some six miles away from JD's house.

7
The offender, then aged 66, is a widower. Following the death of his wife in 2020, he sold his home and bought a motor home. At the time of the offending, he was living in that motor home on a campsite in Willingham, Cambridgeshire. He also owned a car. He was the holder of a shotgun licence and lawfully owned a Beretta shotgun.

8
The catalyst for the shootings was a Family Court decision two days earlier, on 27 March 2023. Those proceedings were between the offender's daughter, S, and JD who was her former partner. They had been in a relationship and had a son, R, who was aged seven at the time of the shootings. S and JD had separated shortly after R was born. R lived with his mother but had regular contact with his father. In 2020 S married her current partner, Paul, and they had a daughter together. Paul is a US national who was serving with the US Airforce and was stationed in the UK but had been due to be redeployed back to the United States, and S and Paul planned to move there together with R and their daughter. The Family Court proceedings, which had been going on for some time, had involved disputes about contact and financial arrangements, and now involved an application by S to remove R from the jurisdiction so that he could go with her and Paul and their daughter to the United States. JD, R's father, opposed the application and submitted his own application to increase contact time to 50/50. The interim decision of the Family Court on 27 March 2023 was that JD's contact should not be increased to 50/50, but that R could not be removed from the jurisdiction pending further enquiries and further hearings.

9
There were a number of communications prior to the shootings which were relied upon by the prosecution as evidence of planning. In particular, there were a number of text messages downloaded from the offender's mobile phone which, as the Judge concluded, showed that he was "getting very involved in the family proceedings dispute between [his] daughter and [JD]". He also sent text messages over the preceding months, about which the judge said this:

"From the texts which have been produced the family proceedings have been troubling you to a significant degree over the year before the murders. Some of the texts indicate that you are thinking about taking the law into your own hands. The defence submit that these comments were bravado only but they were plainly more than that."

10
On 17 August 2022 there had been an exchange with someone called April in which the offender had said, "I have a shortlist of people I intend to murder". On 19 October 2022 he had said to April, "I will override any court decision", adding later "first hearing end of November. But there is always a plan B." The offender's telephone contained photographs of the houses occupied by both JD and GD and their vehicles, taken between November 2022 and early February 2023. These had been taken in connection with the family proceedings and were accompanied by commentary about contact arrangements, and financial aspects of the family proceedings, demonstrating the extent to which the offender was getting involved in those family proceedings. The Judge found that although those were not part of the planning for the murders, a by-product of that research was that the offender knew where the victims lived.

11
On 27 March 2023, the day the Family Court made its interim ruling that R could not be removed from the jurisdiction pending further enquiries and hearing, the offender sent a message on his mobile telephone telling a friend "I will be [R's] carer/guardian, and let [S] and co move over to America. No problems. I'd kill a host of individuals but implication spread out too wide." There was evidence that at around this time (and on the day of the murders) the offender was making enquiries about viewing properties to rent.

12

On the morning of the murders the offender drove his car to Meridian Close where JD lived, and remained there for about two minutes. He then drove to The Row in Sutton where GD lived, arriving ten minutes later and pausing there for a few seconds. The offender's car was seen again later and briefly in Meridian Close at 3.20 in the afternoon and again at about 4.40.

13
At half past seven in the evening, the offender began a series of checks designed to ensure that the two victims were home and alone for the evening. He drove onto The Row in Sutton. On that occasion, GD returned to his home in his van a few minutes later and the offender drove past GD's home address before leaving the street. At about quarter to eight, he drove into Meridian Close and waited there for about a minute. He repeated that at about five past eight.

14
At about 8.40 he drove along The Row and parked up at the side of the road. He went up to the van parked outside GD's home address before leaving.

15
Shortly before nine o'clock, he drove into Meridian Close again and parked up. At around nine o'clock, JD's girlfriend left his home, having spent the evening there with JD. She drove home, leaving JD alone in his house.

16
Very shortly after her departure, the offender went up to the front door of J's house, carrying his loaded shotgun. He knocked on the front door. When JD opened the front door, the offender shot him at point-blank range, to the left chest and then to the right side of his head. The injuries were rapidly fatal.

17
Alerted by the shots, neighbours emerged from their homes and saw the offender walking from the front door, having closed it behind him, carrying the shotgun which he placed on the backseat of his car before driving off. The neighbours called 999 and soon found JD's body, where he had collapsed in the hallway of his home.

18
The offender drove straight to The Row in Sutton, where his car was seen shortly before 9.15. He parked up. A lady walking a dog noticed him doing something in the boot with a dark long-shaped object, which was undoubtedly the shotgun. He appeared startled by her presence.

19
Within a couple of minutes, at 9.17, the offender knocked on GD's front door. When GD opened the door, the offender shot him three times at point-blank range, to the top of the head, the right chest and the left hip. In fact, four shots had been fired, one of them missing, indicating that the offender had reloaded the two-barrel gun at the scene. Those injuries would have been rapidly fatal.

20
The offender then closed the front door, and left the scene in his car. He drove to the caravan site in Willingham where he had been living, placed the shotgun in a cupboard in his motor home, and drove away in that vehicle, intending, it seems, to drive to Bristol.

21

He was very quickly identified by the police as the murder suspect and that night his motor home was brought to a stop by the police on the M5 at about 1.30 am. He was arrested on suspicion of murder and told the arresting officer where the shotgun was. He was taken to Worcester police station. During the booking-in procedure, he was heard to say "Sometimes you have to do what you have to do, even if it is wrong in the eyes of the law." He later said he was very remorseful. He was transferred to Parkside police station in Cambridge, and interviewed under caution in the presence of a solicitor. He answered "no comment" to all questions asked. He was charged with murder.

22
He was not arraigned at the Plea and Trial Preparation Hearing scheduled for 11 May 2023 as a psychiatric report was being prepared as to fitness to plead. He sent the first of three letters to the court on 18 May, a week later, in which he confessed to the two murders and said he had intended to plead guilty at the hearing on 11 May. He said:

"I am struggling with the burden of my guilt and wish to bring to a closure the suffering and emotional stress that my actions on this tragic and fatal night have caused ... if I could turn back time I would and I regret that there are not enough words or remorse I can offer to the families affected by this crime."

23
He sent a second letter to the court dated 30 May 2023, in which he offered a lengthy explanation of his personal circumstances, and which made plain the connection between his actions and his feelings resulting from the outcome of the Family Court hearing. He set out his personal history from the time when his wife was diagnosed with cancer, and the difficulties faced by him over the following years in having to care for her alone until her death. He indicated that he had used alcohol in order to manage his stress and his anguish. In that letter he made a number of derogatory assertions about JD's care of his child R, which were not accepted by the prosecution.

24
At the adjourned Pre-trial Preparation Hearing on 28 June, the offender pleaded guilty to the two counts of murder on the indictment.

25
Shortly before the sentencing hearing, on 20 October 2023, a third letter written by the offender was uploaded to the Digital Case System. The content of that letter is important. Much of it repeats that which the offender had previously set out in his earlier letters. He said that his actions were "driven" by the actions of JD, encouraged by his father GD, and the offender's overwhelming desire to protect his grandson:

"My action has been driven by the physical and emotional abuse from his biological male parent and the failure of the family courts ... I would not and cannot condone what happened but love can be blind and be the catalyst for tragedy. This is a crime of passion."

...

"During these years of caring for my wife and acting as [R's] father and grandfather, I would acknowledge I developed anger management issues towards [JD & GD] over their mistreatment of [R]."

26

He said that when he received a letter from JD's solicitors advising that JD would be making an application to the Family Court for greater contact "from this moment on I struggled to manage my anger, stress, anxiety, and the red mist brought on by my growing alcohol dependency. But despite my rage moments, I never planned any harm and am ashamed of the events of 29 March."

27
He said that the decision of the Family Court on 27 March: "May have been the point where the straw broke the camel's back, but I tried hard to control my anger." The decision was, in his words, "a catastrophic error of judgment which would ruin [R]'s life" and which had "pushed me over the edge":

"The court had failed [R] and thus failed me. The decision proved to be catalyst for all of the dark thoughts I was struggling to manage and control. I had failed [R]. In my mind [JD] had destroyed [R] in an instance (sic) and this was born from his own interests. My grandchildren have now been placed in care for the crimes of their grandfather. I despise myself for all the hurt I have caused and am continuing to cause."

…

"I was in a fragile state of the mind at the time [of the murders] but I would never seek to use my mental health to defend this act."

28
He continued to express his remorse for his actions, somewhat qualified by his explanations. The letter concluded:

"Unfortunately, I am driven by a duty, and human instinct to protect and care for the ones I love. I accept this should not have been at the expense of the law, but I do not believe the family courts are fit for purpose".

29
The final two paragraphs made further criticisms of the working of the Family Courts generally.

Sentencing

30
The offender had no previous convictions or cautions recorded against him.

31
When sentencing there were no reports before the court. Although a psychiatric report had been obtained during the course of the proceedings, it was not served on the court and no reliance was placed upon it by the defence at any stage, including at the sentencing hearing. Having raised the matter explicitly with defence counsel, the judge was satisfied that he did not need to obtain a psychiatric report before sentencing the offender.

32
The judge had victim personal statements which detailed the devastating effects which the murder had had on the family of the two victims.

33

In advance of the sentencing hearing, prosecution counsel had prepared a sentencing note setting out the facts, the relevant statutory provisions and the applicable guidelines. The defence also put forward a sentencing note.

The relevant law and guidelines

34
The mandatory sentence for an offence of murder committed by an adult is imprisonment for life (s. 321 of the Sentencing Act 2020). In fixing the minimum term, the Sentencing Act requires the court to have regard to sch.21 of that Act in doing so, and to any other relevant guidelines which are not incompatible with that schedule. In respect of adult offenders, sch.21 sets four starting points in fixing the minimum term. They are starting points which are expressed to be those which will "normally" apply depending on the presence of specific features. They are a whole life order, a minimum term of 30 years, a minimum term of 25 years, and a minimum term of 15 years. So far as relevant, sch.21 states as follows:

"Starting points

2(1) If—

(a)
the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b)
the offender was aged 21 or over when the offence was committed, the appropriate starting point is a whole life order.

(2)
Cases that would normally fall within sub-paragraph (1)(a) include—

(a)
the murder of two or more persons, where each murder involves any of the following—

(i)
a substantial degree of premeditation or planning.

[…]

3(1) If—

(a)
the case does not fall within paragraph 2(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and

(b)
the offender was aged 18 or over when the offence was committed, the appropriate starting point, in determining the minimum term, is 30 years.

(2)
Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—

[...]

(b)
a murder involving the use of a firearm or explosive,

[...]

(d)
a murder intended to obstruct or interfere with the course of justice.

[...]

(f)
the murder of two or more persons.

[...]

Aggravating and mitigating factors

7.
Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.

8.
Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

9.
Aggravating factors (additional to those mentioned in paragraphs 2(2), 3(2) ...) that may be relevant to the offence of murder include—

(a)
a significant degree of planning or premeditation.

[...]

10.
Mitigating factors that may be relevant to the offence of murder include—

[...]

(d)
the fact that the offender was provoked (for example, by prolonged stress) but, in the case of a murder committed before 4 October 2010, in a way not amounting to a defence of provocation."

35
There was no dispute that a life sentence was mandatory and the only question was setting the minimum term. The prosecution contended that there was an element of premeditation and planning, which the court could consider to be a "substantial degree" of premeditation or planning for both murders, and that the court could find that the seriousness of the offences was "exceptionally high" within the meaning of para.2 so as to warrant a whole life order. The court's attention was drawn to the guideline case of R v Stewart and others [2022] EWCA Crim 1063; [2023] 1 Crim App R (S) 17 on the imposition of whole life terms. The prosecution submitted in the alternative that if the seriousness was not "exceptionally high", the case fell clearly within para.3 as one of "particularly high"

seriousness as it involved the murder of two persons and the use of a firearm, such that the starting point would be one of 30 years. It was suggested that the aggravating features present comprised the presence of two qualifying factors under para.3, that is to say the use of a firearm and the murder of more than one person; the element of planning and premeditation; the fact that the victims were in their own home; and the effect on the surrounding community, which was said to make this equivalent to "a killing in public". The court was referred to the Sentencing Council's guideline on "reduction in sentence for a guilty plea", which provides that the minimum term should be reduced in the case of a guilty plea to murder, but that such a reduction should not exceed one-sixth of the minimum term, and can never be more than a reduction of five years.

36
On behalf of the offender, the defence submitted to the Judge that the case was not one of exceptionally high seriousness and that the degree of planning for each murder fell short of that which was required to place the case within para.2 of sch.21. It was accepted that the case fell within the category of "particularly high seriousness" described in para.3 by reason of the two factors identified, and as such a 30-year starting point was appropriate. It was submitted that the text messages relied upon by the prosecution did not establish, to the criminal standard, that the offender had formed any murderous intent months or weeks before the murders. Any planning or premeditation it was submitted was not "significant" and thus there was no statutory aggravating factor of the kind listed in para.9 of sch.21. It was suggested that the offender had only formed a murderous intent when JD's girlfriend left his home on the evening in question, and that the previous visits earlier in the afternoon and evening did not establish premeditation, albeit that it was accepted that the offender had at least made preparation for such an outcome by taking the shotgun in the evening.

37
It was submitted that the mitigating factors outlined in para.10(d) of sch.21 (i.e. "the fact that the offender was provoked (for example by prolonged stress) but ... in a way not amounting to a defence of provocation") was present in this case, and required a significant downward reduction to be applied to the minimum term. It was submitted that this was a subjective test, based on what the defendant perceived and what ultimately caused the "prolonged stress" which led to him mentally collapsing in a way which led to the commission of the offence. It was also submitted that, inevitably, the offender would die in prison because of his age, and as such his sentence should be further reduced to reflect his age; and further for his lack of previous convictions and for his positive good character. Reliance was also placed on his obvious remorse and on his plea of guilty.

38
Having heard submissions from the crown and the defence on Friday, 20 October 2023, the Judge adjourned to give the matter further consideration over the weekend and pass sentence on the following Monday, 23 October. He described the murders as "executions" motivated by the offender's distorted beliefs over the Family Court proceedings in respect of the care of his grandson. Dissatisfied with the decision made at the interim hearing to preserve the status quo, the offender had taken the law into his own hands and ended the lives of two innocent men.

39
Having reviewed the decision of this court in Stewart, the judge concluded that the murders did not fall within para.2 of sch.21 as requiring a whole life order. Instead, para.3 applied, and the seriousness was "particularly high" so as to attract a 30-year starting point, on the grounds that there were two murders and a firearm was used.

40
He found that there were additional aggravating factors comprising the following. First, what he characterised as a significant degree of premeditation and planning in the light of (a) the texts earlier in 2022 about taking the law into his own hands, (b) his beliefs about the Family Court ruling, (c) the repeated visits on the day to the victim's home and (d) the offender having a shotgun with him by the evening at latest. Secondly, there was the aggravating factor of both victims being in their homes where they were entitled to be safe. Thirdly, there was an impact on the community, which was an aggravating factor (although the judge did not go so far as to equate this with a "killing in public").

41
When it came to aggravating and mitigating factors, the judge said that although two factors referred to in para.3 were present, he declined to treat this as an aggravating feature, saying "I have already taken [them] into account in arriving at the correct minimum term, so I do not double-count those aspects."

42
The judge then found that the following mitigation fell to be taken into account. First, the offender's age and previous good character, not just an absence of convictions but having led a hard-working and productive life. The Judge said he took into account the impact of prison on a man sent there for the first time at the age this offender was.

43
Secondly, the judge took into account in mitigation his repeated expressions of remorse for what he had done and the effect it had had on the family of his victims. The judge said that the third letter made his express remorse "somewhat equivocal" by placing it in the context of his perceived duty to the family and his views about the Family Courts; but that the best evidence of remorse was the early guilty pleas. Remorse was therefore, he said, some mitigation.

44
Thirdly, the Judge rejected the suggestion that the offender had been "provoked" within the meaning of para.10(d) of sch.21. But he did take into account the stress suffered by the offender as a result of his wife's illness and death; his beliefs, which he described as "distorted beliefs", about the welfare of his grandson; and his recognition of his "anger management" issues and his increased use of alcohol during that time. The Judge said:

"It may not be helpful to analyse legally whether the mitigation is best described in the statutory terms as provocation or whether I take it into account as general mitigation that you have lived under great stress and anxiety for some time and this includes a period which had nothing to do with your grandson or the [D] family but was during the care of your wife and her death in December 2019. This stress and anxiety continued in your involvement in your grandson's life. I accept that you clearly loved your grandson and this led to you becoming overwrought about the family contact disputes. This provides background to these offences which I take into account in mitigation."

45
The Judge said that having considered all the aggravating and mitigating features as he had explained them, he would have fixed the minimum term at 30 years, after a trial. He then gave maximum credit for the offender's guilty pleas, thereby reducing the minimum term to 25 years, further reduced to give credit for time spent on remand of 206 days.

Submissions

46
On behalf of the Solicitor General, Ms Ledward KC accepted that the judge had been entitled to decline to impose a whole life order, although she submitted that this case was on the borderline of requiring such a tariff. She also accepted that he correctly applied the maximum discount for the offender's pleas of guilty. Her submissions may be summarised as follows:

(1)
The offending involved the murder of two persons and, for that reason alone, this was a case of at least "particularly high" seriousness which for that reason alone required a starting point in determining the minimum term of 30 years.

(2)
The aggravating features were then that:

(i)
the murders involved the use of a firearm (a factor also listed in para.3 as normally resulting independently in a 30-year starting point);

(ii)
the murders were intended to obstruct or interfere with the course of justice (a further factor listed in para.3); this was not a factor relied upon by the prosecution before the Judge, and therefore was not addressed during the sentencing exercise by the prosecution or by the defence or by the Judge;

(iii)
there was at least a significant degree of premeditation (a statutory aggravating factor under para.9);

(iv)
the victims were killed in their own homes, and

(v)
there was an impact on the local community.

47
She accepted that the following mitigating factors applied:

(i)
lack of previous convictions and good character;

(ii)
remorse, albeit, as she characterised it, qualified;

(iii)
the offender's personal circumstances resulting in prolonged stress; and

(iv)
the age of the offender being such that he was very likely to die in prison.

48
She submitted that having adopted the correct starting point of a 30-year minimum term, the Judge made two obvious errors which led (overall) to a third. The first was that he did not take into account that there were not two, but three factors listed in para.3 which were present. The second was that he wrongly concluded that to treat the presence of more than one para.3 factor as an additional aggravating factor would be to "double-count". Third, that as a result he lost sight of the fact that this

was a case which, as she submitted, was arguably (by reason of the combination of aggravating features) on the borderline of meeting a whole life order, and which therefore warranted a significant uplift from a 30-year starting point, even when taking into account the mitigation which was present. Her submission was that all the circumstances required a minimum term which was nearer to 40 years than 30 years after a trial.

49
The submissions by Mr Langdale KC on behalf of the offender may be summarised as follows. This was a difficult sentencing exercise in which the Judge took into account all the relevant factors. He started at the right starting point, he balanced the aggravating and mitigating factors, and reached a conclusion which was sound. It was not open to the Solicitor General on this reference to advance the argument that there was an intention to interfere with the course of justice when that had not been suggested to the Judge below. In any event such an intention was not supported by the evidence. The judge was entitled to treat the existence of two factors within para.3, namely a double murder and a murder with firearms, as both being taken into account in reaching a starting point of a 30-year term. The Judge was entitled to treat the aggravating and mitigating features as balancing themselves so as to arrive at a notional minimum term after a trial of 30 years. In his submission the sentence was not lenient. Alternatively, if lenient, it was not unduly so, which requires it to be less than an appropriate sentence by a considerable margin before this court is entitled to interfere.

Discussion

Approach to Schedule 21

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It is important to keep in mind the guidance in R v Jones [2005] EWCA Crim 3115, [2006] 2 Cr App R (S) 101 and subsequent case law as to how Schedule 21 is to be applied. The guidance given there is provided to assist the judge to determine the appropriate sentence. The judge must have regard to the guidance, but each case will depend critically on its particular facts. There are large gaps between the four starting points (15 years, 25 years, 30 years and whole life) which provide "a very broad framework" for the sentencing exercise. They are so far apart that it will often be impossible to divorce the choice of starting point from the application of aggravating and mitigating factors. This is expressly recognised by para.8 of sch.21. The starting points give the judge guidance as to the range within which the appropriate sentence is likely to fall having regard to the more salient features of the offences, but even then, as para.9 recognises, "detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order." Full regard must be had to the features of the individual case so that the sentence truly reflects the seriousness of the particular offence and the individual circumstances of the offender. It is also important to keep in mind that, as this court said at para.19(iii) of Stewart, being in prison for a finite period of 30 years or more is a very severe penalty.

Intention to interfere with the course of justice

51
We agree with Mr Langdale's submission that the Solicitor General should not be allowed to argue that there was an intention to interfere with the course of justice in this court because it would be unfair to do so. We see no reason to doubt Mr Langdale's contention that if such a submission had been raised during the Crown Court proceedings, the defence would have drafted a basis of plea challenging such an assertion; and a trial of issue would have been required, because of the Crown's present submission that it would be make a difference to sentence, which it is assumed would also

have been advanced at the time of the point being taken. A Newton Hearing would have been required. Mr Ledward relied on this court's decision AG's reference (Stewart) [2016] EWCA Crim 2238 [2017] 1 Crim App R (S) 48 at [32]-[36], which is to the effect that where the prosecution make a concession as to offence categorisation within a guideline before the sentencing court, the Attorney General is not bound by such a concession on a reference, and the same applies to points not taken below. There are a number of authorities in this court to that effect. However, that proposition applies where and because the concession is not as to a matter of fact but simply as to a matter of judgment or evaluation of how undisputed facts are to be categorised or treated. The court made that clear in Stewart at [33]. By contrast, where the point which is conceded or not taken is a disputed fact, of which the Judge must be satisfied to a criminal standard, and which it would be unfairly prejudicial to be advanced for the first time on the reference, that reasoning does not apply.

52
Moreover, we agree that on a fair reading of the material before the Judge it would be wrong to treat that as establishing to a criminal standard that the offender's intention was to frustrate the family proceedings. There was no evidence that the defendant gave any thought to trying to "obstruct" or "interfere" with the course of justice. The material is equally consistent with an increasing animosity towards JD which was of longstanding, driven by a perception of JD's deficient parenting of R, and exacerbated by JD's desire for greater contact; the animosity towards GD came from his support for JD in the family proceedings. The animosity was further exacerbated by the offender's frustration with the Family Court system which he thought should have ruled out of question any possibility of JD having any form of joint custody. It was this animosity towards the victims which led to the murders, rather than anything targeted at the family proceedings themselves. It was in this sense that the judge described the Family Court decision on 27 March as the trigger and the offender taking the law into his own hands.

53
Ms Ledward submitted that it was clear that the offender acted as he did because he disagreed with the outcome of the family proceedings to date, which he viewed as a grave mistake. She submitted that where there was a murder of a party to such proceedings, in which a murderer is dissatisfied with the course that the proceedings are taking, that must surely amount to a murder that was intended to interfere with the course of those proceedings. She submitted that the offender's motive was quite clearly to affect the course of those proceedings and the inescapable inference is that that was not only the motive but that he acted with the intention of changing or interfering with the outcome of those proceedings by removing those who were pursuing the opposing case.

54
We would not accept that that is an inescapable inference. Intention depends upon what subjectively is in the offender's mind, not merely the objective effect of his conduct, however foreseeable. His animosity towards his victims had been heightened by his frustration at the outcome of the latest stage of the proceedings, but that cannot automatically be equated with an intention to interfere with the proceedings by carrying out the murders.

55
However, having said that, we nevertheless observe that interference with the course of the proceedings was undoubtedly the effect of the conduct of the offender. That is, in our view, an aggravating feature which was not taken into account by the Judge. That is a matter to which we will return.

Double counting for two factors within para.3

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It was an error of principle for the judge to say that treating the fact that there were two factors mentioned in para.3, namely a double murder and the use of firearms, did not require an increase because that would involve double-counting. On the facts of this case it would not do so. Parliament has indicated that a double murder is of itself something which normally puts the offending in the category of very high seriousness so as to attract a starting point of 30 years for that reason. The statute also requires a single murder using a firearm normally to be treated as of the same seriousness, warranting a starting point of 30 years for that feature alone. The statute treats such a single firearm murder as significantly more serious than, for example, one with a knife, for which the starting point is set at 25 years if taken to the scene. It is of course important that sch.21 is not applied mechanistically, but it follows from what we have said that parliament must have intended that if there were two murders which would of themselves normally require a starting point of 30 years, a significant upward adjustment would be appropriate if there were the use of the firearm in each case, at least where, as in this case, there was no necessary connection between the two features by reason of the nature of the offending.

Aggravating and mitigating features

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This was a case of particularly high seriousness because there were two murders. These were not, as sometimes happens, two victims at a scene killed in rapid succession in the course of a single incident. These murders involved two separate incidents, separated in time, separated in place, with their own individual premeditation and planning, and with travel between them and reloading of the shotgun in between.

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The use of firearms was an important aggravating feature, as we have said, requiring a significant upwards adjustment measured in years.

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Further aggravation is to be found in the significant degree of planning and premeditation, which was accurately described by the judge as stretching back for a considerable period, at least contingently.

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The offending is also made more serious because by the shooting of JD offender intended to deprive a seven-year-old child of his father forever. That was a specific motivation for his murder. That is an aggravating feature quite apart from the intention to deprive the child of his grandfather as well, and apart from the impact on the wider family attested to in the victim impact statement.

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It is also significant that, as we have said, the effect of the conduct was to interfere with the course of justice. The function of the court in the family proceedings was to look after the best interests and welfare of R. The murders prevented the court from considering the extent to which that would be served by contact with JD or custody with him. The murders put an end to the dispute between S and JD by the offender taking the law into his own hands. That is a serious interference with the administration of justice which was the foreseeable result of what this offender did, even if it formed no part of his motivational intention. That does not go to increase his culpability, but it does increase the harm caused by the offence.

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Further aggravation is to be found in the murders taking place in the victims' own homes where they were entitled to feel safe.

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Against these aggravating factors, the mitigation was of more limited weight. In accordance with the guidance of this court in R v Clarke [2017] EWCA Crim 393, [2017] 2 Cr App R (S) 18, old age and extreme old age in prison, and ill health or foreseeable potential ill health which may accompany old age, are mitigating factors because of the extent to which they may make the sentence more onerous. They are however, as that case said, to be taken into account "in a limited way" because the harm and culpability of the offending are the principal factors to be taken into account in sentencing serious offending of this nature. Under the minimum term imposed by the judge, the offender would in any event be in his early to mid-90s, if still alive, when he first became eligible to apply to the Parole Board for release. Similarly, good character does not count for a great deal in offending of this nature. We recognise that the stress which had affected the offender was something to be taken into account in his favour. It could not be treated as lessening his culpability to a very substantial extent, given the nature of the murders and their significant planning, but it did form, as the judge said, some mitigation. Moreover, there was remorse, which is a separate consideration from pleading guilty, and also afforded some mitigation. However, the third letter from the offender did make this, as the judge observed, somewhat equivocal.

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We disagree with the judge's assessment that the aggravating and mitigating features could be taken as balancing each other out. In our view the aggravating features clearly outweighed the mitigation by some margin. We recognise that an assessment of the potency of aggravating and mitigating factors is not an exact science, and involves an evaluative judgement on which views of different sentencing judges may legitimately differ. Nevertheless, to treat the aggravating factors we have identified, which were of considerable weight, as entirely offset by the mitigating factors, which were of limited weight, was in our view well outside the range of any legitimate evaluation of them.

Conclusion

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We have little hesitation in rejecting the submission made on behalf of the Solicitor General that this case fell "on the borderline" of meriting a whole life tariff. Applying the principles identified in R v Stewart it clearly did not. Nevertheless, taking all the circumstances of the offender and the offending into account, a minimum term, after a trial, of at least 35 years was called for, which after discount for a plea would be one of at least 30 years.

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It follows that in our view a minimum term of 25 years was not merely lenient but unduly so.

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We therefore grant leave to refer and we substitute on each count a sentence of life imprisonment of 30 years less 206 days spent on remand.

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