APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 58
HCA/2019/000164/XC

Lord Justice Clerk
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

AARON THOMAS CAMPBELL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie, QC, Bain; Robert Kerr Partnership, Greenock
Respondent: McSporran, QC, Sol Adv; Crown Agent

10 September 2019

[1] On 21 February 2019 the appellant was convicted by unanimous verdict at Glasgow High Court of the abduction, murder and brutal vaginal and anal rape of a 6 year old girl in the early hours of 2 July 2018. The deceased had been unknown to him prior to the incident and had been asleep in her own room at her grandparents' flat. The appellant had originally entered the property unlawfully to obtain cannabis from the child's father, who was known

to him. He removed the sleeping child, and took her to the shore area and thence to a wooded area on the site of a former hydropathic hotel where her naked body was later found.

[2] At the time of the offence and sentencing the appellant was 16 years old. He pled not guilty and relied on a special defence of incrimination of a young woman, who was the partner of the deceased's father. He gave evidence on his own behalf in support of that defence, and various defence witnesses were also called to do so. In subsequent post-trial reports the appellant admitted the crime. The trial judge described the evidence against the appellant as overwhelming. He said that the appellant's attitude was demonstrated by a video he had posted of an image of himself in a mirror with the caption that he had found where the murderer was hiding.

[3] On 21 March 2019 the trial judge sentenced the appellant to detention without limit of time with a punishment part of 27 years back dated to 6 July 2018.

The sentencing hearing

[4] Senior counsel for the appellant had submitted to the trial judge that it was highly unusual for an accused person to admit guilt in the way which had occurred here, which might be seen as an aggravation. He noted that some of the detail given by the appellant in the post-trial reports was worse than the evidence, and he did not intend to read it out. However, two factors were advanced in the appellant's favour: first, his admissions laid to rest any lingering doubts about the incrimination; and second, the admissions may give the prison authorities something to work with. The offence was of a kind which was rarely seen, and for which there was nothing to be said in mitigation, but the sentencing exercise was complicated by virtue of the appellant's age. The report of Dr Gary Macpherson,

consultant forensic clinical psychologist, made depressing reading, indicating that the appellant presented with a range of traits on the psychopathy checklist and a range of factors indicative of potentially harmful sexual behaviour. Dr Macpherson's report was not challenged, and no request was made for a continuation to obtain a defence report. Nonetheless, it was submitted that the assessment of risk in one so young was not necessarily an exercise which could be undertaken with precision, there being the possibility that things might change.

The trial judge's decision

[5] In the trial judge's words the post-mortem report made distressing reading. The deceased had 117 separate injuries, most of them being scratches and abrasions, doubtless as a result of the condition of the locus. Her death was caused as a result of significant, forceful pressure to her neck and face. The report stated:

> "External examination showed petechial (pin point) haemorrhages around the eye, within the lining of the eyes, within the mucosal lining of the mouth, and on the tongue … Internal examination has shown multiple foci of bruising to the anterior (ie front) neck structures, including bruising around her larynx and trachea. There was further bruising within the musculature on the back of the neck. There were areas of deep bruising within her face, including around the mouth and over the right cheek. The pattern of injuries to the face and neck is indicative of inflicted trauma, and is consistent with manual gripping of the neck and face with a hand(s) and the injuries around the mouth would be consistent with external covering of the mouth and nose (ie smothering).
>
> Examination of the spinal column within the neck revealed haemorrhage involving the intervertebral discs, along with a small amount of haemorrhage over the spinal cord. These findings are consistent with forceful movement of the head and neck, for example through shaking … .
>
> There were severe injuries to the genitalia, including marked, deep, extensive lacerations (tears) to the vagina and anus, with obliteration of the perineum – the area of skin and tissue between the vagina and anus. These injuries are consistent with severe, forceful, inflicted penetration of the vagina and anus, … . There was only a thin film of tissue remaining between the vagina and anus and also between the vagina and abdominal cavity.

> The injuries to the genitalia would be expected to bleed significantly (the presence of associated bruising and haemorrhage confirming at least some of these injuries have been inflicted in life)."

[6] Both the CJSWR and Dr Macpherson's report contained clear admissions by the appellant, and a chilling account of how he killed the child. His claim that she was dead before any sexual activity took place was wholly contradicted by the post-mortem report. The CJSWR records the appellant stating that the offence "resulted from his alcohol misuse and his curiosity and desire to experience how it would feel to kill someone".

[7] In imposing sentence the trial judge recognised the appellant's youth, saying:

> "I am conscious that you are a child. In sentencing children it has to be borne in mind that they are not yet fully rounded, mature human beings. A child's best interests are a primary consideration and the desirability of the child's reintegration into society must also be taken into account.
>
> However, the weight to be given to the various sentencing considerations will depend on a number of factors including the age of the child and all the circumstances of the case.
>
> The nature of these appalling offences and what I have read in the reports make it clear to me that reintegration and rehabilitation, while these are important considerations, are remote possibilities and neither your best interests nor anyone else's will be served by a speedy return to the community.
>
> Nonetheless, the punishment part will not be as long as it would have been had you been an adult."

[8] The trial judge had been addressed on the approach to sentencing a child under reference to *McCormick* v *HM Advocate* 2016 SCCR 308, in which dicta of Lady Hale in *R (Smith)* v *Secretary of State for the Home Department* [2005] UKHL 51 were adopted. Reference was also made to *VE* v *HM Advocate* [2018] HCJAC 12.

[9] The trial judge noted that in sentencing children, among the factors to be taken into account was the questions of rehabilitation and reintegration into society. The trial judge had to consider these issues as relevant to the retributive and deterrent aspects of

sentencing, to which the punishment part relates. As Lady Hale pointed out in *R (Smith)*, juveniles are generally less blameworthy and more worthy of forgiveness than adult offenders, although each case must depend on its own circumstances: there is a difference between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption. In the trial judge's opinion Dr Macpherson's assessment placed the appellant into that second, rare, category. In his case rehabilitation and reintegration were forlorn hopes, to the prospect of which he could attach no weight in the unusual circumstances.

[10] In reaching the figure of 27 years the trial judge had regard to *Mitchell* v *HM Advocate* 2012 JC 13 (20 year punishment part after trial, the appellant being just under 15 years old at the date of the murder and the deceased being 14 years old) and *R* v *Cornik* [2015] EWCA Crim 110 (starting point of 25 years for an appellant who pleaded guilty to killing a teacher when he was 15 years and 10 months old – reduced to 20 years to reflect age, guilty plea and mental health). As dreadful as these cases were, it seemed to the trial judge that this case was considerably worse.

Submissions for the appellant

[11] It was accepted that the crime was an uncommonly grave one which, for an adult, would have attracted a substantial punishment part. It was an appalling and heinous offence. Whatever the result of the appeal, the question of when or if the appellant is ever released will be for the Parole Board and it was accepted that such a day may never come.

[12] The case and argument referred to the fact that the appellant was a youth of 16 whose behaviour was not aggravated by prior offending or failed rehabilitation attempts in the past. It was submitted that the trial judge placed undue weight on the pessimistic

assessment of the appellant's ability to change as set out in Dr Macpherson's report. Such an assessment was more a question of future risk than an aggravation to be reflected in the punishment part. In particular and by inference from his sentencing remarks, the trial judge erred in concluding that the challenges apparent in modifying the appellant's thinking and behaviour reduced the effective mitigatory value of his youth for such terrible offending. Notwithstanding the reference in *McCormick* as to the difficulty in identifying the distinction between crimes affected by immaturity of youth and irreparable corruption, the trial judge concluded on the basis of Dr Macpherson's report that the appellant fell into the latter category. He erred in doing so, on the basis of a report which would at most have relied on a few hours observations, against the potential for more assertive rehabilitative intervention which will be available in the custodial setting. Where the appellant may be in terms of rehabilitation in years or decades to come is a matter for the Parole Board. The result was that the punishment part selected by the trial judge bore too great a resemblance to what would have been imposed on an adult, rather than the child that the appellant is, and was thus excessive.

[13] In argument, the submission was rather more nuanced. Senior counsel for the appellant frankly stated that he recognised that the balance, in the case of the appellant, was indeed towards irreparable corruption, as the trial judge had inferred, although this was not necessarily the case. He recognised that the reports were "incredibly negative and pessimistic". They were nevertheless a snapshot only of the individual at a given time. The trial judge may have been unduly influenced by the pessimism in the report he had as to the prospects for change, thus incorrectly reflecting the element of future risk in the sentence which he selected. That would be a fair reading of the trial judge's comment that neither the appellant's nor the public's interests would be served by a "speedy return to the

community." A period of 27 years before the appellant could apply for parole did not allow for the promotion of maturation, development of a sense of responsibility and a healthy personality. One does not know whether, in a significantly shorter period, the position may have altered to a significant degree. However, counsel did not suggest that the appellant fell into the category of offender for whom a punishment part in the low teens was merited, merely that in all the circumstances 27 years was excessive. It was recognised that the requirement for a substantial punishment part meant that the appellant would inevitably almost be approaching middle age before consideration by the Parole Board could become a reality.

[14] A report had been obtained from a forensic psychologist Dr Lorraine Johnstone, who had contacted the agents after sentencing, suggesting that Dr Macpherson had limited experience in dealing with young offenders, and taking issue with his approach in certain respects. However, senior counsel did not place any reliance on this report. It provided some additional background information, but much of it related to matters of management of future risk which were not relevant. He did not consider that it took his argument any further.

[15] Further, and in any event, the trial judge erred in taking account of the sentence in *R* v *Cornik*, which was determined in the setting of a sentencing regime where the starting point for knife crime, set in Scotland by reference to *HMA* v *Boyle* 2010 JC 66, was much higher than in this jurisdiction. In paragraph 8 of *Boyle* the court endorsed the view expressed in *Walker* v *HMA* 2003 SLT 130 that murder of a police officer in the execution of duty, or of a child, might attract a punishment part of about 20 years. In *Mitchell,* the dissenting opinion of the Lord Justice Clerk (Gill) suggested that in sentencing a young first offender the punishment part should, whilst marking the gravity of the offence, leave hope

that the young person can be rehabilitated as a useful member of society, finds resonance in the more recent case of *McCormick.* The question of the appropriate punishment part for young offenders was examined more recently in *Kinlan & Boland* v *HMA* [2019] HCJAC 47, which had involved a brutal attack on an innocent victim by rendering him unconscious, then proceeding to kick and stamp on his head a further twenty times. Like the appellant, *Kinlan* suffered from a personality disorder (ADHD) which increased the challenge of rehabilitation, but a reduction of his punishment part from 14 years to 12 would have been viewed as appropriate. Counsel emphasised that he was not suggesting that a punishment part at this level would be appropriate but *Kinlan* illustrated the importance to be attached to the youth of an offender, and the limitations in that respect of the guidance given in *Boyle* regarding adults.

[16] The notion of comparing terrible forms of murder to rank their savagery was as difficult as it was unpleasant. The appellant's crime was a truly terrible one, but other cases do bear comparison, in particular *Mitchell* where the punishment part was 20 years. In no case has a punishment part of the level applied in the present case been seen as appropriate for such a young person. The powerful mitigating factor of youth should not be set aside on a curtailed assessment process of the kind involved in Dr Macpherson's report. The conclusion of "irreparable corruption" should be left to the Parole Board to reach, on advice, after many years of observation, intervention and steps designed to rehabilitate. The trial judge selected a sentence which was excessive for the purposes of punishment and deterrence because he allowed himself to be unduly swayed by what he saw as the impossibility of rehabilitation.

Analysis

[17] At the time of sentencing the trial judge had available to him a psychological report from Dr Gary Macpherson. This court also has a report from Dr Johnstone, which is essentially a Risk Assessment Report ("RAR") of the kind which would be produced for the purposes of section 210B-H of the 1995 Act which sets out the process for consideration, and where appropriate, imposition of, an Order for Lifelong Restriction. In such cases it is necessary for the court to consider whether the risk criteria are met, and to determine whether the nature and circumstances of the offence, alone or in conjunction with other offences or behaviour, are such as to demonstrate that there is a likelihood, that if at liberty, the offender would seriously endanger the lives or physical and psychological well-being of the public at large. Dr Johnstone was critical of several aspects of Dr Macpherson's report as not meeting the requirements of a structured RAR. It is important to emphasise at the outset therefore that the report prepared by Dr Macpherson is not such a report. What Dr Macpherson produced was a psychological report on the appellant in which he was asked *inter alia* to comment about risk of future offending in general terms, but not to prepare a full risk assessment. As the trial judge clearly recognised, the relevance of future risk in this context is limited to its impact on issues of punishment and deterrence. Future risk is a matter for the Parole Board, not for the sentencing judge in selection of the punishment part. In a case of murder the question of the risk posed by the offender to the public is not a matter for the trial judge, but for the Parole Board in due course, who require to be satisfied that "it is no longer necessary for the protection of the public that the prisoner should be confined". For these reasons Dr Johnstone's criticisms of Dr Macpherson are not well founded. As the court noted in *Kinlan* (para 1):

> "The punishment part sets a period which the court considers will satisfy the requirement, in the sentencing equation, for retribution and deterrence. The court is directed by Parliament 'to ignore any period of confinement which may be necessary for the protection of the public' (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(2) and (2A)). The determination of the punishment part does not constitute a recommendation or suggestion by the court that the offender ought to be released upon the expiry of the punishment part. It simply establishes a period during which the offender cannot apply for parole. Thereafter, he may only be released if the Parole Board 'is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined' (ibid s 2(5)). Even if he is released on parole, he will remain on licence, and subject to any conditions which may be deemed appropriate, indefinitely. "

[18] The trial judge made it clear that he was well aware that this was the nature of the exercise upon which he was embarking. Thus, although Dr McPherson referred to various aspects of the appellant's psychological makeup, and the issues which made future change a limited prospect, in the context of an assessment of generalised risk factors, it is clear that the trial judge did not do so. He recognised that future risk in that sense had no part to play in selection of the punishment part, and that his focus required to be on the issues of retribution and deterrence. The appellant's capacity to change was relevant to these factors, and to that extent the trial judge considered that he required to address it.

[19] The factors identified in *R* (*Smith*) as differentiating the sentencing of adolescents, were recognised in that case as being:

> "… relevant to the retributive and deterrent aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders."

[20] The trial judge was accordingly correct to examine these issues in that context. Such an exercise would not involve trying to make an assessment of the risk which the appellant might present to the public when at liberty, this being entirely a matter for the Parole Board. The trial judge made this clear at the time of sentencing, when he said:

> "The period I select is known as the punishment part of the sentence and its purpose is to satisfy the requirements of retribution and deterrence. The Parole Board will deal in due course with the protection of the public…".

In his report, the trial judge states:

> "In punishing children, among the factors to be taken into account are the questions of rehabilitation and reintegration into society. These are irrelevant to the retributive and deterrent aspects of sentencing. That is what the punishment part is for.
>
> It seemed to me that I had to consider the questions of rehabilitation and reintegration in fixing the punishment part since, as Lady Hale pointed out, these considerations are relevant to the prohibitive and deterrent aspects of sentencing. However, each case depends on its own circumstances."

[21] In his interview with Dr Macpherson the appellant volunteered that he was "quite satisfied" with the murder. He reported that he continued to experience thoughts of killing and having sex with children and having sex with dead bodies. He wished to point out that he was not fantasising about this, but "acting on his thoughts." In the deceased's home, "once I realised she was a child, I started having thoughts about raping her, about killing her." He said "Four questions – murder, rape, necrophilia and paedophilia. All I thought about was killing her once I saw her." He appeared irritated by the medical evidence that the child was alive at the time of the sexual assault as this would not have fulfilled his desire for necrophilia. Exploring the appellant's relationships and play activity, Dr Macpherson noted there had been "a sadistic aspect to his play and a particular interest in behaving sadistically to persons or creatures who are smaller, weaker or vulnerable". In his assessment of the appellant, Dr Macpherson stated:

> "Aaron Campbell presents with a range of traits on the Psychopathy Checklist: Youth Version including (a) a superficial, shallow and insincere interpersonal style and a grossly inflated view of his abilities; (b) emotional/affective deficits including a lack of remorse, shallow emotions, and a callous lack of empathy; (c) a chronic and excessive need for stimulation; an inability or unwillingness to formulate plans or commitments; and (d) serious criminal behaviour."

He added:

> "Aaron Campbell presents with a wide range of risk factors for sexual offending including deviant sexual interests in sexual violence and sexual contact with children; an obsession and preoccupation with extreme sexual thoughts; attitudes that support his sex offending: an unwillingness to challenge or change his sexually deviant thinking; prior adult sanctions for exhibiting sexually inappropriate behaviours; excessive violence during his sexual crime; sexual crime against a child who was also a stranger; diverse sexual assault behaviours; an antisocial interpersonal orientation; a lack of intimate peer relationships; recent escalation in negative affect; impulsivity and poor self-regulation; a dysfunctional home environment and problematic relationship with his parents."

[22] On the critical question of capacity for change, a factor of real importance in assessing the mitigatory effect of youth, Dr Macpherson noted the appellant's "capacity to mimic or articulate change when no such change has taken place", vouched by an earlier incident of "treatment shamming" when the appellant had been on the Time to Grow programme in 2016/2017 following an incident of fire-raising. [This may echo the point made in Dr Johnstone's report, where she stated:

> "I would also caution that he is very likely to be the type of prisoner who will pose no particular management problems or behavioural concerns and perhaps manoeuvre himself into a trusted position – perhaps as a Passman - in the establishment and thereafter take an opportunity to perpetrate a serious offence."]

Dr Macpherson's conclusion was that:

> "I am of the view that the capacity for change may be limited due to the nature of Aaron Campbell's personality structure and his complex risk factors. I apologise to the court for appearing pessimistic however I am not confident that Aaron Campbell has the capacity or desire to change his behaviour in any meaningful way and as such the risks will remain for the foreseeable future."

[23] The report by Dr Johnstone is a full RAR, and as such addresses issues which are not relevant to the assessment of the punishment part, for the reasons explained above. Nevertheless, her conclusions include the observations that

> "The data suggested that Aaron Campbell's journey to this extreme offence was consequent to a myriad of factors … that are consistent with a dangerous and severe personality disorder) and whilst the combination of these distal factors was highly potent, it seems that …

> It appears that when he decided to kill Alesha MacPhail, he was thinking and acting in a way that allowed him to experience motivation and justification for her rape and murder. In addition, since that time, he has shown a lack of remorse or empathy for his offending or any real appreciation of the impact of his crime."

Like Dr Macpherson, she identified traits which she classified as coming within the descriptions of antisocial personality disorder, narcissistic personality disorder, psychopathic personality disorder, and a sadistic personality. The offences showed the hallmarks of a sadistic sexual murder. On the issue of capacity for change, she stated:

> "It is impossible to conclusively say whether or not change … is possible … In sum, taking the totality of information available to me, I have concluded that whilst the reintegration and rehabilitation of Aaron Campbell will be very challenging, it is not necessarily impossible."

However, it is clear from the whole tenor of her report that she could not be other than pessimistic about this prospect. Of his account to her, which differed from what he had told Dr Macpherson, she stated

> "I cannot confidently exclude the possibility that at least some – if not many - aspects of his account lack veracity."

The appellant used many and diverse cognitive justifications and rationalisations for his behaviour.

[24] In general terms, and for their relevance only to the issues of punishment and deterrence, we do not think that there is really any significant difference between the information gleaned from Dr Macpherson's report and that of Dr Johnstone. Both report that the appellant has traits which may be classified as antisocial, narcissistic, psychopathic, and sadistic. As we have noted, the trial judge was correct to take account of the various factors identified in Dr Macpherson's report for the effect they may properly be said to have on the issues of punishment and deterrence, with primary relevance to the first of these. The only questions are whether his method of doing so (i) led him to stray into issues which

relate to public protection, within the province solely of the Parole Board; or (ii) to underestimate the mitigatory effect of the appellant's youth in selecting the appropriate punishment part.

[25] The trial judge made it clear in his sentencing statement at the time that he understood that what he required to do was to select a sentence reflecting only the requirements of retribution and deterrence and that anything else was a matter for the Parole Board. In stating that the appellant's best interests would not be served by a "speedy return" to the community, we think he was doing no more than pointing out that a significant punishment part was required to meet the requirements of retribution and deterrence. In complex cases such as this, there will frequently be an overlap of factors which may be relevant to the issue of future risk and management thereof, which are issues for the prison service and ultimately the Parole Board, but which are also relevant to the issues of retribution and deterrence, to the issue of punishment with which the court must grapple. Concrete examples may be found in the present case in the deliberation, the intention, the sadistic satisfaction taken from the offence, the truly awful nature of the crime and the appellant's response to it, involving not only a complete lack of remorse but expressions of a sense of fulfilment or accomplishment from his crime. Whilst relevant to punishment these are also factors which may inform assessment of future risk to the public. Where the degree of that risk is identified before the court, and in particular, where the assessment is as discouraging and negative in risk terms as it is in the present case, it can be difficult to lay aside all consideration of future protection of the public. The difficult task for the sentencer is to find where the balance lies and to ensure that the sentence imposed does indeed recognise the limitations applicable to selection of the punishment part. Even the most experienced judge may find it difficult to identify where that balance lies where the

factors relevant to risk are so interwoven with factors relevant to punishment. In the present case, whilst we are satisfied that the trial judge was searching for this balance, we have reached the conclusion that the detailed information suggesting the extent to which the appellant is likely to present a future risk (which has, if anything been strengthened by Dr Johnstone's report), coupled with the appalling nature of the crime and the bleak prospects for change, led the trial judge to make inadequate allowance for the mitigatory effect of youth, even in such a shocking offence as the present.

[26] We recognise that the trial judge identified the process of sentencing a child, whose best interests must be taken into account as a primary factor, as a different exercise from that of sentencing an adult. The prospect of rehabilitation, and the desirability of reintegrating the child into society must be, and in this case clearly were, in the forefront of the judge's mind. He specifically considered the potential for reintegration and rehabilitation insofar as impacting on retribution and deterrence, but concluded, for reasons which we fully understand, that these were at best "remote possibilities". However, there is a difference between something which is a remote possibility and something which is an inevitable impossibility. Both experts are extremely guarded, not so say pessimistic about the appellant's capacity for change, but did not rule it out as a possibility. Dr Macpherson referred to the appellant's capacity for change as "limited" and Dr Johnstone said "it is not necessarily impossible". The general capacity for change in young people was described in *R (Smith)* as meaning that even the most heinous crime was not necessarily evidence of an irretrievable depraved character. Attention was there drawn to the fact that it can be difficult even for experts to distinguish between the juvenile offender whose crime reflects irreparable corruption. Indeed, both Dr Macpherson and Dr Johnstone made specific reference to the difficulty in properly diagnosing psychopathy in one so young. They

highlight the difficulties which exist in predicting the extent of a capacity for change in a person so young; and the difficulties in truly diagnosing psychopathy in youth, having regard to the malleable nature of adolescent personality, and the normal adolescent characteristics of impulsivity and irresponsibility (Dr Macpherson's report, p21). There is also the point, highlighted by Dr Macpherson (p24), that risk assessment measures should be used to guide plans rather than predict risk. This is explained on the basis that:

> "Risk assessments with young people have typically been informal and discretionary, conducted by individuals with variable training and different philosophies. This variability has led to inconsistent decision-making and a lack of a clear rationale or evidence-based criteria upon which to form judgements. Recent meta-analytic reviews observe that structured risk assessment procedures are widely used in clinical and criminal justice settings, their predictive accuracy varies depending on how they are used. The risk assessment procedures appear to identify low risk individuals with high levels of accuracy, but their use as sole determinant of detention, sentencing and release "is not supported by the current evidence."

This is further stated in the following:

> "… The implication is that even after 30 years of development, the view that violence, sexual, or criminal risk can be predicted in most cases is not evidence based … these tools are not sufficient on their own for the purpose of risk assessment … [and] can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case. The literature suggest that it is not possible to predict with certainty what one individual will do in the future but it is possible to make evidence-based guesses."

Dr Macpherson thus made it clear that to a certain extent the tools used in the assessment of risk carried a "health warning" when referring to future predictions, especially in adolescents. This was entirely endorsed by Dr Johnstone, who echoed the observations in *R (Smith*) that in adolescents aspects of their psychological functioning, including, critically, personality traits and emotional functioning should not necessarily be seen as stable, enduring, or ultimately prognostic of adult outcomes.

[27] In *R (Smith)* three main reasons for distinguishing the position of child offenders from that of adults were identified. These were (i) lack of maturity and an underdeveloped

sense of responsibility, with a concomitant degree of impetuosity and recklessness; (ii) a greater likelihood of falling under negative influences, from peers or otherwise, including the difficulty of extricating themselves from a criminogenic setting; and (iii) the fact that personality traits of juveniles are more transitory and less fixed than in adults, which meant there was a greater capacity for change, with a higher prospect of reintegration and rehabilitation. These factors may mitigate the offending, and render the appellant less blameworthy than might be considered the case for an adult. In a case such as the present, these factors require to be examined not from the standpoint of the risk the individual may present, but so that, where appropriate, the court may ensure that the sentence imposed properly allows for the process of maturation, with the possibility of the development of responsibility and the growth of a healthy adult personality.

[28] Of the relevant factors, the second appears to be of little, if any significance. Although a desire to please or impress his peers here has been identified, there has not been any suggestion that the appellant's behaviour in committing the offence was the result of, or influenced, by negative peer pressure or a criminogenic background. The remaining factors, that of immaturity, and its recognised concomitants, and that personality traits in juveniles may be accepted as being more transitory and less fixed both apply to the appellant; and to the extent that these traits or attitudes may be influenced by a dysfunctional and chaotic, though not in this case criminal, family background this too must be borne in mind. In the appellant's case it seems there was a dysfunctional home background, with lack of attachment, absence of boundaries and parenting problems, including a degree of physical and emotional abuse. These are all factors which may have adversely impacted on the development of the appellant's character to date, but which may not entirely dictate development of his character in the future. The likelihood for change in the appellant may

indeed be limited, but on the basis of the expert material we do not think that it is possible entirely to rule out any residual capacity for change in such a young individual, notwithstanding the atrocious nature of his crime. We accept that there is merit in the submission of senior counsel for the appellant that a determination of irreparable corruption is not one which can or should be made by the court at this stage, but is a question for the parole board in due course. Accordingly we consider that the trial judge erred in classifying the appellant as falling into this category and that he underestimated the mitigatory effect of the appellant's youth, and that the punishment part selected was excessive.

Selecting the punishment part

[29] In determining the appropriate punishment part the trial judge took account of several cases where the appellant had been a young person. We accept that little can be gained by reference to *Cornik*, standing the different sentencing regime and the existence of a statutory minimum punishment part for an offender under 18 (para. 7 of Sch. 21 to the Criminal Justice Act 2003).

[30] In *Mitchell* the Lord Justice Clerk observed that comparing the sentence appealed with other cases gives limited guidance, and the majority in that case also highlighted the difficulty of such a comparative exercise. We acknowledge that truth, particularly where the circumstances have not been the subject of consideration on appeal. Even where there has been an appeal, the conclusion is only that the sentence was not excessive in that particular case, and not indicative of a range for the offences in question. In addition, unlike knife crime, for example, crimes of such depravity as the present case are thankfully rare, highlighting the difficulty of meaningful comparison. The subject matter is highly fact-specific: as the trial judge noted, each case depends on its own circumstances. The matter is

further complicated when the offender is a child, where the process of sentencing involves considerations which are different from those which operate in the case of an adult. Nevertheless, as the court noted in *Hibbard* v *HMA* 2011 JC 149 (para 15):

> "Nevertheless, if precedents for similar crimes involving adults on the one hand and children on the other are analysed, there is bound to be recognisable arithmetical difference in the two levels. Those for a child will be proportionately lower, even if the exercise has not involved a direct comparison. It is not illegitimate, therefore, for a court to look at the sentences for adult offenders, since by doing so it will gain some knowledge of the recognised levels."

The court further noted that even with a child offender, the minimum period of custody for the crime of murder is likely to be significant in recognition of the need for retribution and deterrence.

[31] In *Mitchell* the Lord Justice Clerk noted a series of extremely serious cases and the punishment part imposed on an adult offender. These included *Boyle* (20 years for a 19 year old for a murder involving violent assault then setting the victim on fire when alive, likened to medieval horrors; punishment part of 22 years for a 27 year old who had murdered in the course of robbery, and hidden the body where it remained for 4 years); *Cowie* v *HMA* 2010 JC 51 (20 years for an unprovoked, cowardly attack on a stranger, left to die at an isolated place, semi-naked and in freezing conditions); *Fraser* v *HMA* 2008 SCCR 407 (25 years for planned assassination of the accused's wife by an unknown assailant, where the body was concealed and destroyed); and *Megrahi* v *HMA* 2002 JC 99 (27 years for the murder by bombing of 270 victims). To that list one might add *Walker* v *HMA* (27 years for deliberately planned robbery and murder by machine gun of three serving soldiers); and *Smith* v *HMA* 2011 SLT 212 (35 year starting point not excessive for the murder of a woman and her 10 year old daughter, with sadistic sexual torture of each victim). In *Smith* the court repeated what was noted in *Boyle*, namely that a punishment part of 30 years was not to be

considered a maximum, and that any suggestion to the contrary, based on the figures selected in *Walker* and *Megrahi* was not correct. Acknowledging as we have done the difficulty in comparing one case with another, from these cases it can be seen that even for an adult a punishment part of 27 years would be reserved to mark only very serious crimes. One would expect the sentence on a youth for comparable crimes to be proportionately lower (*Hibbard*).

[32] In *Mitchell,* where the offender was a youth, the majority concluded that a punishment part of 20 years was not excessive. The murder involved prolonged assault with extreme violence, the use of a knife, the mutilation of the body and the abandonment of the 14 year old victim at the scene where her body was discovered naked and bound. The appellant was 15 at the time of the murder. The extent to which rehabilitation or reintegration remained realistic is perhaps unclear. The sentence imposed in that case is roughly consistent with the observations in *Walker,* approved in *Boyle,* that certain types of murder - for example where the victim was a child - might attract a punishment part in the region of 20 years. We recognise that the present case is not simply one of murder and that there are several important factors differentiating it from that of *Mitchell.* In that case there were no signs of a sexual assault, and there was no question of abducting the child victim from her home. The present case, by contrast, involved the abduction from her home of a sleeping child, and extremely brutal sexual assaults of the utmost degeneracy, committed whilst the child was alive, and causing very significant injury and pain.

[33] Against the cases to which we have made reference, a punishment part in excess of 20 years was plainly merited. We have concluded that a punishment part of 24 years would be appropriate to reflect the appellant's youth. We will accordingly allow the appeal to the extent of substituting that period for the sentence imposed.

[34] As with all punishment parts, this is not an indication of the date when the appellant will be released. It specifies rather the period which must pass before the appellant may even apply for parole. As the trial judge had observed, and as was recognised by counsel for the appellant (see para 12 above), "whether [the appellant] will ever be released will be for others to determine but as matters stand a lot of work will have to be done to change [the appellant] before that could be considered. It may even be impossible".