APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 23
HCA/2023/000663/XC

Lord Doherty
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD BECKETT

in

APPEAL AGAINST SENTENCE]

by

DAVID BARNES

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ms Ogg, solicitor advocate; Paterson Bell Solicitors(on behalf of Mckennas Law Practice, Glenrothes)
Respondent: Prentice KC, solicitor advocate, advocate depute; Crown Agent

9 May 2024

Introduction

[1] The appellant, aged 34, was convicted of a financially motivated murder of Ean (Ian) Coutts, charge 4 on the indictment, for which the trial judge imposed a life sentence on 13 December 2023 with a punishment part of 23 years, backdated to 24 December 2021. On

charge 8, a charge of attempting to defeat the ends of justice, the judge imposed imprisonment for 5 years concurrently.

[2] In his grounds of appeal against sentence the appellant argues that when regard is had to three factors the punishment part is excessive. The factors are:

a) that the mechanism and cause of death could not be established because of the condition of the skeletal remains of the deceased found a year after death;

b) his limited criminal record;

c) comparison with the sentence sustained on appeal in *Chalmers* v *HM Advocate* 2014 JC 229, a punishment part of 23 years where the appellant, who had dismembered and concealed the body of the deceased, had an historical previous conviction for murder.

[3] He further contends that the concurrent sentence on charge 8 was excessive in comparison with the circumstances of *Chalmer*s.

The circumstances of the deceased

[4] Mr Coutts was a 60 year old brother, father and grandfather when he died. He was unfit to work for medical reasons and was unemployed. In victim impact statements his two daughters describe him as a vulnerable former serviceman who was afflicted by alcoholism and who lived an isolated life. They grieve the loss of any prospect of reconnecting with him in his later years. Both they and his sister are haunted by the uncertainty of what happened to him and worry about his suffering. His sister has suffered considerable anxiety and has needed counselling. These statements were before the trial judge who took account of them before passing sentence as he was bound to do; Criminal Justice (Scotland) Act 2003 section 14(5).

The circumstances of the offences

[5] Mr Coutts was living alone in Kinglassie in Fife. It may reasonably be inferred from the evidence that he was murdered in his own home. The appellant removed his body in a wheelie bin, put it in his car and left it about two miles away in an abandoned industrial unit in Glenrothes where it remained undiscovered for more than a year until its chance discovery on 27 September 2020. Pathology could not determine the cause of death but revealed focal fracturing of the right maxilla at the root of a tooth. There was evidence of charring of areas of soft tissue and many bones showed signs of heat fracture. The appellant had attempted to burn the body to conceal identity and destroy evidence in order to defeat the ends of justice. DNA and odontology established that it was Mr Coutts' body but the appellant succeeded in impeding the course of justice to the extent that the cause of death could not be ascertained.

[6] The appellant was decorating Mr Coutts' home when he disappeared. Thereafter, he told a series of lies to neighbours about where Mr Coutts had gone. He continued to work on the deceased's home, carrying out extensive renovations. In January 2020 the police were alerted that Mr Coutts was missing. Their investigations revealed no trace of life after 2 September 2019. They found that the deceased's house had been stripped bare. All walls and ceilings were repainted and skirtings and doors replaced.

[7] The DWP had awarded Mr Coutts a backdated payment of more than £2,000 on 27 August 2019. One of his daughters got married on 24 October 2019 and his sister, who attended the wedding, unexpectedly received text messages purporting to be from her brother asking her for money, which he had never done before. In the trial, facts were established by joint minute which showed that the appellant ordered goods and services

worth £606.69 via a fraudulent PayPal account in the name of Mr Coutts. He had used his bank card to obtain financial information and £5,610. He used that card and another credit card belonging to Mr Coutts to obtain goods and services in dozens of transactions to a value in excess of £700. He was also seen removing a large television from Mr Coutts' home.

[8] The appellant did not give evidence but maintained denial to a reporting social worker who found him to be callous and complex, displaying no remorse, responsibility or insight.

Trial judge's reasons

[9] The judge legitimately inferred that the appellant was financially motivated in murdering Mr Coutts. He considered the deceased to be vulnerable and that the appellant had abused the trust placed in him when Mr Coutts gave him access to his home for redecoration. He was aware of all of the steps the appellant had taken to conceal his crime and considered charge 8 to be very serious. He reports that he would have imposed a punishment part of 20 years if charge 4 stood alone but proceeded as required under the Prisoners and Criminal Proceedings (Scotland) Act 1993 section 2(2)(a) and associated appellate guidance; *Chalmers* v *HM Advocate* 2014 JC 2020; *Owen*s v *HM Advocate* 2022 SCCR 246. In order to strip out the element of public protection and to account for the absence of any possibility of parole, he reduced the concurrent term of 5 years to 3 years and imposed a punishment part on charge 4 of 23 years.

[10] He did not consider it to be mitigating that the cause of death was not ascertained, noting that this was a result of the appellant's actions reflected in charge 8 and that he should not gain an advantage from them. He noted that the appellant's previous convictions included violence and convictions for dishonesty. With reference to *Chalmers* v

HM Advocate 2014 JC 229 where a punishment part of 23 years for murder and attempting to pervert the course of justice was upheld on appeal in the case of a man who had a previous conviction for murder, the judge observed that there was no reference to financial motivation in that case and explained that he proceeded on the basis of the whole circumstances of this case.

Submissions

[11] We have carefully considered the written and oral submissions of Ms Ogg, solicitor advocate. She commends the view taken on appeal in *Cameron* v *HM Advocate* 2011 SCL 633 that a punishment part should be limited where the means by which death was caused cannot be ascertained. She founds on the range of sentences identified by this court when it reviewed a large number of examples of punishment parts in murder cases in *Leathem* v *HM Advocate* 2017 JC 214. She acknowledged that punishment parts have risen significantly since *Cameron*. She also compared the sentence of 3 years imposed on appeal in *Leathem* which she suggested was a more serious case of attempting to defeat the ends of justice by dismembering and hiding the victim's body. We note that the body was recovered within two days of the murder. She further founded on this court's approval of a sentence of 4 years for attempting to pervert the course of justice where the appellant had instructed others to dissuade a witness from identifying him at an identification parade; *Hanley* v *HM Advocate* 2018 JC 169.

Decision

[12] It is readily apparent from the terms of the judge's report, particularly at paragraphs 10 (ii), (iv), (vii) and (ix), that the appellant murdered Mr Coutts in his own

home. The judge specifically identified the abuse of trust involved as an aggravating feature.

[13] The appellant does not contend that the trial judge erred in the process by which he arrived at the sentences imposed, he challenges only the level of penalty on each charge. In doing so, he founds *inter alia* on the appellant's limited criminal record and comparison with the sentences ultimately imposed in *Cameron* and *Chalmers*.

[14] We do not consider the appellant's previous convictions to offer mitigation although plainly they do not match the previous conviction for murder in *Chalmers*. In 2016 the appellant was fined for theft and in 2018 made subject to a restriction of liberty order for theft committed on bail. For a fraudulent scheme in 2017 he was ordered to pay compensation. He was fined for uttering in 2019. On a sheriff court indictment in 2018, for assault to injury, he was made subject to a community payback order. He was soon in breach of it and sentenced to imprisonment for 9 months. The judge was correct to find that the appellant's previous convictions were of some relevance to this financially motivated murder and was right to take account of them in imposing the punishment part; Prisoners and Criminal Proceedings (Scotland) Act 1993 section 2(2) (b).

[15] The background to *Chalmers* is found in *Cameron*, a case of murder of the appellant's partner followed by his attempting to pervert the course of justice. He secreted parts of her body in various places and used her post office card to steal almost £5000 and to obtain £600 of state benefit to which he was not entitled. The cause of death was not ascertained given the passage of time before body parts were found. The trial judge imposed a punishment part of 25 years. On appeal the court considered the ancillary charges to be irrelevant to the punishment part and that where the cause of death could not be ascertained such a severe punishment part was not justified. The punishment part was reduced to 14 years. The

sentencing judge had identified financial motivation as an aggravating circumstance but the court did not refer to it in allowing the appeal.

[16] In *Chalmers (*the report at JC 220*)*, a full bench disapproved much of the reasoning in *Cameron* and noted the requirement on the sentencing judge under section 2(2)(a) of the 1993 Act to consider the seriousness of an offence of murder combined with other offences of which the person is convicted on the same indictment. Any sentence imposed on a lesser charge should be concurrent with the punishment part. The court should decide whether the conviction on a lesser charge should be reflected in the punishment part. If so, the judge should consider the element of retribution and deterrence in the lesser sentence but remove any element of public protection from that sentence. The court should also note that a finite sentence on a lesser charge would permit early release which opportunity would be lost where the lesser charge increased the punishment part. The court should allow for this in determining the extent to which the punishment part is increased.

[17] The full bench adjourned and in due course imposed sentence on Mr Chalmers as reported in the decision on which the appellant founds in his grounds of appeal (2014 JC 229, para [13]). The means by which Mr Chalmers had murdered the deceased were not ascertained given the passage of time and his actions in attempting to dismember and conceal her body, dispose of other items and take other steps in an attempt to defeat the ends of justice. The trial judge passed sentence in 2011 when Mr Chalmers was 59 and in poor health. He had a previous conviction for murder in 1974 when he was 22. The trial judge imposed a punishment part of 23 years and a concurrent sentence of 6 years for attempting to defeat the ends of justice of which 3 years was applied to the punishment part. Noting the previous conviction for murder, the court did not consider the punishment part of 23 years to be excessive and refused the appeal.

[18] We note that *Chalmers* was considered by this court in *Collins* v *HM Advocate* 2020 SLT 465. It was a case of murder involving the use of a machete and other means unknown where the appellant had partially dismembered the body of his victim and was given a punishment part of 26 years with a concurrent sentence of 10 years for attempting to pervert the course of justice. The trial judge would have imposed 21 years had murder stood alone and increased the punishment part by 5 years. The court was referred to the decision in *Chalmers* and, noting the effect of the previous conviction for murder in that case, reduced the punishment part to 22 years of which 3 years was attributable to the second charge on which the concurrent sentence would be 6 years. In its short opinion the court makes no reference to any previous convictions or financial motivation. Neither in *Chalmers* nor *Collins* did the court endorse a principle that an inability to ascertain the cause of death necessarily limits the appropriate punishment part.

[19] Whilst the provision does not apply in Scotland, and the recommended starting point of 30 years is not comparable to sentencing practice in Scotland, we note that in England the Sentencing Act 2020 in schedule 21 para 3(2)(c) places murder done for gain alongside categories of murder involving:

- a police or prison officer in course of duty;
- use of a firearm or explosive;
- interfering with the course of justice;
- sexual or sadistic conduct; two or more victims;
- hostility on the basis of racial, religious, sexual orientation, disability or transgender identity.

[20] Several of these aggravating features were identified by the full bench in *Boyle* v *HM Advocat*e 2010 JC 66 at paragraph 13 as bringing a case of murder into a range of punishment

part in the region of 20 years. This court has recently noted that the trend in punishment parts has been upwards; *Owens* at paragraphs 11 and 18, as was acknowledged in submissions.

[21] We consider that the trial judge was correct in finding that the financial motivation he imputed to the appellant was a significantly aggravating circumstance. That feature distinguishes the present case from both *Chalmers* and *Collins*. In any event the circumstances of all crimes are different and all murders are different. There will invariably be distinguishing features.

[22] In common with the trial judge, we cannot conclude anything about the means by which the appellant killed Mr Coutts or the level of violence he used. What is significant in this case is that the trial judge found that the appellant committed a calculated, premeditated murder for economic gain by inveigling his way into his victim's trust, which he then abused. The appellant had previous convictions for crimes of dishonesty and a significant assault prosecuted on indictment, which ultimately led to a prison sentence of 9 months. We have information from victim impact statements, something not referred to in any of the cases on which the appellant founds.

[23] We find no justification for considering the sentence of 5 years' imprisonment on charge 8 to be excessive. The sentence of 4 years approved on appeal in *Hanley* for a very different kind of attempt to pervert the course of justice is of little assistance. A concurrent sentence of 5 years may be higher than that selected on appeal in *Leathem* but it is lower than the 6 years approved on appeal in *Chalmers* and *Collins*. We recognise that the 3 years of the punishment part attributed to it is a moderately higher proportion than that identified in *Chalmers* and *Collins* but consider the exercise to be a broad one.

[24] In any event, the test is whether a miscarriage of justice has occurred by reason of the sentence imposed; 1995 Act section 106(1) and (3). In practice this means whether the sentence is excessive or inappropriate: *Murray* v *HM Advocate* 2013 SCCR 88 at paragraph 32. In determining whether sentence was excessive, the court does not consider steps in the sentencing process in isolation but the sentencing process as a whole and the sentence ultimately passed: *Murray*; *McGill* v *HM Advocate* 2014 SCCR 46 at paragraph 13; *Miller* v *HM Advocate* 2024 SCCR 112 at paragraphs 31-32.

[25] Viewing matters in that way, and in the whole circumstances we have described, we are not persuaded that the sentences imposed were excessive or inappropriate.

[26] The appeal is therefore refused.