Neutral Citation Number: [2020] EWCA Crim 973

Case Nos: 201904172 A4
201904185 A4
201904198 A4
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NORTHAMPTON
HHJ LUCKING QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2020

Before :

LORD JUSTICE SINGH
MR JUSTICE HILLIARD
and
MR JUSTICE FORDHAM

- -

Between :

REGINA	**Respondent**
- and -	
(1) Adison David SMITH	**Appellants**
(2) Alfie DRAGE	
(3) Cameron HIGGS	
(4) Jordan Benjamin CROWLEY	

- -
- -

Mr James House QC (instructed by **Carter Osborne**) for the **1st Appellant**
Mr Martin Rutherford QC (instructed by **Caveat Solicitors**) for the **2nd Appellant**
Mr Andrew Campbell-Tiech QC (instructed by **Stephen Moore & Co**) for the **3rd Appellant**
Mr Giles Cockings QC (instructed by **AHS Law**) for the **4th Appellant**
Mr John Hallissey (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 9th July 2020

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Approved Judgment

Reserved Judgment Protocol: This judgment will be handed down by the Judge remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for

hand down will be deemed to be 10:00 on 24 July 2020. The Court Order will be provided to Northampton Crown Court for entry onto the record.

Lord Justice Singh :

Introduction

1. These are four related appeals against sentence brought with the leave of the single judge. The appellants were sentenced by HHJ Lucking QC at the Crown Court at Northampton on 1 November 2019.

2. All four appellants were sentenced for conspiracy to rob, to which they pleaded guilty, and the murder of Reece Ottaway on 1 February 2019, of which they were convicted by the jury after a trial. There was an additional co-defendant by the name of Ethan Sterling, who was convicted of conspiracy to commit robbery and the lesser offence of manslaughter. He plays no part in these appeals.

3. Two of the appellants were sentenced for other offences, concurrently with the life sentences for murder. There were two offences of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. On 3 October 2018, Adison Smith and Jordan Crowley (also known as Kimpton) inflicted an attack on Christian Fearon. They pleaded guilty to that offence. On 4 October 2018, Crowley was also involved in an attack on Melih Buyukerzurum. He pleaded guilty to that offence also.

4. In addition, Smith pleaded guilty to three counts of conveying articles into prison on 6 January 2018. Again the sentences for those offences were made concurrent to the life sentence for murder.

5. These appeals are in substance against the length of the minimum terms which were imposed for the offence of murder. Cameron Higgs and Alfie Drage received minimum terms of 28 years each. Smith received a minimum term of 31 years and Crowley received one of 34 years. In each case the judge specified the number of days (268 days) which were to be deducted to reflect time spent on remand.

The facts

Conspiracy to rob and murder

6. The deceased was Reece Ottaway. He was aged 23 when he was murdered. He was known to the appellants as a drug dealer, mainly dealing in cannabis.

7. The deceased lived in Cordwainer House, Northampton, in a one bedroom flat rented by his friend Zak Shortland. On the morning of the murder, the deceased was sleeping with his girlfriend Katie Little, on a mattress in the living room. In total, there were five people sleeping in the flat: the deceased, Katie Little, Zak Shortland, Lucas Porter and Aiden Britten.

8. During the days preceding the murder, the four appellants came up with a plan to rob the deceased of both money and drugs. The deceased had sent a message to Jordan Crowley stating that he had reloaded his stock of drugs and they also believed he had £30,000 in cash in the flat.

9. On the morning of 1 February 2019, the four appellants and Sterling drove across Northampton arriving at Cordwainer House at approximately 1:15 am. The group forced their way into the flat, armed in preparation for the robbery with a machete, other types of large knives and a BB gun.

10. Katie Little awoke to the noise of the men entering the flat and saw that two men were armed with a large knife and a gun. The deceased got out of bed and was immediately surrounded by them. He was threatened with the BB gun and repeatedly stabbed. One of the group struck Katie Little in her face with the knife, cutting her ear. When the five departed, the deceased was slumped in a chair gasping for breath. It was a short and brutal attack.

11. Zak Shortland and Aiden Bitten had barricaded themselves in the bedroom and did not come out until after the appellants and Sterling had left. They went to the aid of the deceased who was bleeding heavily but the stab wounds inflicted led to his death at the scene. The post mortem also revealed a single tramline bruise to the right buttock that suggested a blow from a rod shaped object - the baseball bat.

12. The deceased's iPhone and some cash around £20 was stolen by one of the appellants.

13. The appellants left in Ethan Sterling's car. CCTV captured Sterling dropping off Crowley and Smith at around 1:36 am. Adison Smith had a noticeable limp, an injury sustained during the attack. Drage and Higgs made their way back to different addresses.

Wounding with intent

14. On 3 October 2018, Christian Fearon was outside the Elders Arms pub in Great Billing. He and two friends had stepped outside the pub in order to smoke a cigarette. As they were sitting on a bench a little way down from the pub, a car containing the appellants, Smith and Crowley, pulled up alongside them. Three other men were also in the car, Gavin Munroe, Sonny Stewart and Tyler Metcalfe.

15. The front passenger window of the car was wound down and one of the group, not Smith or Crowley, asked Christian Fearon and his friends whether they were part of "F 36", a Northampton gang. Christian Fearon and his friends replied "no". The car pulled 100 yards or so down the road. All five got out of the car and walked back to where Christian Fearon and his friends were sitting. They had masks or scarves across their faces.

16. Christian Fearon became separated from his two friends. Whilst Gavin Munro, Sonny Stewart and Tyler Metcalfe stayed back with Christian Fearon's two friends, Smith and Crowley approached Christian Fearon. He repeated to them that he was not part of F 36 and that he had done nothing wrong and tried to calm them down. He turned around and made to run away. As he did so he felt blows to both of his arms and to his back, he had been stabbed three times.

17. The five ran down the street chasing Christian Fearon's two friends before they got back into the car and drove to an area in Blackthorn; Blackthorn being the heart of F

36 territory. They stopped outside the Blackthorn One Stop shop and took a celebratory photograph. It is apparent from videos recorded on that evening that this group of men were driving around Northampton looking for members of F 36 to inflict harm on them. In these videos the men identify themselves variously as 04, or D Block; D Block being a reference to the Duston area of Northampton. Videos taken before the attack show Smith in possession of a machete.

18. By about 5:00 am the following morning of 4 October 2018, Crowley was travelling in the same car with another. He stopped on Wellingborough Road to refuel his car with petrol from a petrol canister.

19. Melih Buyukerzurum was walking home from work when he saw Jordan Crowley standing against the car in a way that looked peculiar. He took a longer look which angered Crowley. Melih Buyukerzurum attempted to defuse the situation, however, Crowley knocked on the window of the car he was driving to get his passenger, who had a knife on him, to get out of the car. The other person then quickly slashed Melih Buyukerzurum's face with the knife.

Conveying articles into prison

20. On 6 January 2018, Smith went to HMP Bedford on the pretext of visiting a prisoner. The prison drugs dog alerted the staff to the possibility of drugs being present. Smith could not describe the prisoner he was visiting, he did not know his name and when challenged he told the officers that he had a package which he handed over. He said he had been paid £200 to bring it into the prison. The package contained 25.1 grammes of cannabis, 3.07 grammes of heroin and four mini mobile phones with USB leads.

Material legislation

21. The mandatory sentence for murder is life imprisonment or, in the case of a person under the age of 21, custody for life. The sentencing court is required to set the minimum term which must be served before the offender can be considered for release on licence by the Parole Board, under section 269 of the Criminal Justice Act 2003 ("the 2003 Act"). In setting that minimum term the court must have regard to the general principles set out in Schedule 21 to that Act: see section 269(5)(a).

22. Paragraph 5(1) of Schedule 21 states:

> "If—
>
> > (a) the case does not fall within paragraph 4(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 he committed the offence, the appropriate starting point, in determining the minimum term, is 30 years."

23. Paragraph 5(2) gives examples of cases which will normally fall into the category of "particularly serious". So far as material it states:

> "(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death)".

24. Paragraph 5A, which was inserted into Schedule 21 by way of amendment in 2010, states:

> "(1) If—
>
> (a) the case does not fall within paragraph 4(1) or 5(1),
>
> (b) the offence falls within sub-paragraph (2), and
>
> (c) the offender was aged 18 or over when the offender committed the offence, the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.
>
> (2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—
>
> (a) commit any offence, or
>
> (b) have it available to use as a weapon, and used that knife or other weapon in committing the murder."

25. Paragraphs 8 and 9 of Schedule 21 state:

> "8. 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.
>
> 9. 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."

26. Paragraph 10 sets out a non-exhaustive list of aggravating factors. It is not suggested that any of the aggravating factors mentioned in paragraph 10 were present in this case.

27. Finally, paragraph 11 states:

> "Mitigating factors that may be relevant to the offence of murder include—
>
> (a) an intention to cause serious bodily harm rather than to kill,
>
> (b) lack of premeditation,
>
> …
>
> (g) the age of the offender."

Sentencing remarks

28. The judge passed sentence on 1 November 2019. At that date Smith, Drage and Higgs were aged 20, having been 19 at the time of the murder. Crowley was aged 21, having been 20 at the time of the murder.

29. Smith had two previous court appearances for three offences, including the possession of a knife in a public place. Drage had a previous court appearance for affray. Higgs had one previous conviction for possession of a knife in a public place. Crowley had 16 court appearances for 27 offences, including unlawful wounding.

30. The judge did not require a pre-sentence report and we make it clear, having regard to the provisions of section 156 of the 2003 Act, that we do not consider one to be necessary now.

31. The judge did have a psychiatric report from Dr S Thirumalai and a psychological report from John Cordwell. She also had a report from the intermediary who assisted Smith during the trial.

32. The judge had before her Victim Personal Statements from Katie Little, the parents of the deceased and other members of his family. She also had Victim Personal Statements from the victims of the two attacks under section 18. She also had a Community Impact Statement from a Detective Chief Superintendent, which informed her of public concerns about knife crime in Northamptonshire.

33. The judge had a difficult sentencing exercise to perform. This was not only because there were five offenders to be sentenced but also a number of different offences committed by each of them. Her sentencing remarks were thorough and careful. The main offence for which she had to sentence these four appellants was the offence of murder. She took the view that, in setting the minimum terms, the starting point had to be one of 30 years because the case fell within paragraph 5 of Schedule 21. She was well aware that she retained a discretion to determine the minimum term and that she should have regard to the principles set out in Schedule 21 but not to follow them rigidly. She found that there were no statutory aggravating features under paragraph 10 of Schedule 21. However, there were these non-statutory aggravating features: this was a group attack, the killing took place in the presence of Katie Little and there

were two other people in the flat. (In fact, with Mr Porter, there would have been three other people.) She said that the statutory mitigating factors were the Appellants' ages and the absence of an intention to kill.

34. The judge had regard to the relevant sentencing guidelines for the other offences, namely robbery in a dwelling, wounding with intent and possession of drugs with intent to supply. No complaint is made before us as to the sentences imposed for the other offences, which were made concurrent to the minimum terms for murder.

35. In the case of Higgs the judge said:

> "I do not conclude that you are a dangerous offender pursuant to the Criminal Justice Act 2003."

She imposed a sentence, taking account of his guilty plea, of 12 years detention for the offence of conspiracy to rob. She imposed a sentence of custody for life with a minimum term of 28 years less the time spent on remand.

36. In the case of Smith the judge took into account the medical reports before her and what she had been able to observe herself of him during the trial. She said:

> "I am sure that you have a complex set of issues that meant you had significant interruptions to your education, were diagnosed in the past with ADHD, but have, nevertheless, embraced a violent, criminal lifestyle centred around drugs and gangs. You may be a follower rather than a leader but you are an enthusiastic follower, happy to use serious and lethal violence. The videos in which you feature demonstrate this very clearly."

37. She concluded that Smith was a dangerous offender. She imposed an extended sentence of 14 years detention in respect of the offence of wounding with intent, including a custodial period of 10 years and 9 months. For the offences of conveying articles into prison, she imposed concurrent terms of detention of 2 years for the heroin, 12 months for the cannabis and 16 months for the mobile phones, after taking into account his guilty pleas. For the offence of conspiracy to rob she imposed a sentence of 12 years detention after taking into account his guilty pleas. For the offence of murder she imposed a minimum term of 31 years less the time spent on remand.

38. In the case of Crowley the judge concluded that he was a dangerous offender. He had embraced a violent, criminal lifestyle centred around drugs and gangs. In relation to the two offences of wounding with intent she imposed an extended sentence of 15 years imprisonment, including a custodial period of 11 years and 8 months. For the offence of conspiracy to rob, after giving a 25% discount for his plea, which had taken place at the Plea and Trial Preparation Hearing, she imposed a sentence of 11 years and 3 months. For the offence of murder she imposed a minimum term of 34 years less the time spent on remand. She made it clear that she kept in mind both the principle of totality and the fact that he was still only 21.

39. In the case of Drage the judge activated the whole term of the suspended sentence for his previous offence of affray, to run concurrently to the life sentence. For the offence of conspiracy to rob, she gave credit of just over 10% because his plea had been entered on the first day of the trial. She imposed a sentence of 13 years and 6 months. For the offence of murder she imposed a minimum term of 28 years less the time spent on remand.

40. In the case of each Appellant the judge specified the number of days (268 days) which had been spent on remand and were therefore to be deducted from the minimum terms imposed.

Relevant principles to be derived from the authorities

41. In *R v Last and Others* [2005] EWCA Crim 106; [2005] 2 Cr App R (S) 64, at para. 17, Lord Woolf CJ said that the provisions of Schedule 21 do not remove the sentencing judge's discretion. "They merely indicate the matters to which the judge must have regard when exercising his discretion." In addition, he continued:

> "Schedule 21 does not seek to identify all the aggravating and mitigating factors, it merely provides relevant examples."

42. In *R v Peters and Others* [2005] EWCA Crim 605; [2005] 2 Cr App R (S) 101 Judge LJ, the Deputy Chief Justice at that time, set out the approach to be applied when determining the minimum term in accordance with Schedule 21. It is unnecessary to restate all of those principles here but it is important to have them in mind. We draw out some of those principles for present purposes.

43. First, the sentencing decision depends on the facts of each case and each defendant. It is not capable of arithmetical calculation: see para. 3.

44. Secondly, the protection of the public, which is rightly regarded as the prime consideration, is achieved by the mandatory life sentence itself. This is because an offender cannot be released even after the expiry of the minimum term unless the Parole Board is satisfied that he no longer presents a danger to the public. Accordingly, the minimum term is designed to serve the sentencing purposes of punishment and deterrence: see para. 4.

45. Thirdly, "justice cannot be done by rote": see para. 5.

46. Fourthly, the true seriousness of the offence, which the minimum term is intended to reflect, represents a combination and a balancing of all the relevant factors in the case, including aggravating and mitigating factors: see para. 8.

47. Fifthly, in considering an appeal from the sentencing judge, this Court will not interfere unless, in all the circumstances, the minimum term is manifestly excessive or wrong in principle. "If, looked at overall, this Court takes the view that the end result fell within the appropriate range of sentence and the margin of judgment and discretion given to the sentencing judge, nice points, whether or not based on a

mathematical calculation, about whether he allowed sufficiently for this, or that specific feature of the case, will not result in a successful appeal": see para. 9.

48. Sixthly, the age of the offender is a relevant factor. At paras. 10-12 Judge LJ said:

> "10. Schedule 21 includes repeated references to the age of the offender. Significant distinctions to the normal starting point are drawn between offenders who are aged 21 or over, 18 or over, or under 18 at the time of the offence. Thus, for example, for an offender aged 18 or over whose case does not fall within paragraph 4(1) or 5(1) or 5(2), the appropriate starting point is 15 years, but if he is aged under 18, the appropriate starting point becomes 12 years. And quite apart from different starting points directly related to age, there is a specific, additional, mitigating feature under paragraph 11(g), 'the age of the offender'.
>
> 11. It has long been understood that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence. Schedule 21 underlines this principle. Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday. Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity. …
>
> 12. The first stage in the process nevertheless remains the prescribed statutory starting point. This ensures consistency of approach, and appropriate adherence to the relevant legislative provisions. Schedule 21 does not envisage a moveable starting point, upwards or downwards, from the dates fixed by reference to the offender's eighteenth or twenty-first birthdays. Nor does it provide a mathematical scale, starting at 12 years for the eighteen year old offender, moving upwards to 13 years for the nineteen year old, through to 14 years for the twenty year old, culminating in 15 years for the twenty-one year old. The principle is simple. Where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a substantial, or even a very substantial discount, from the starting point may be appropriate. One way in which the judge *may* check that the discount is proportionate would be for him to consider it in the context of the overall statutory framework, as if Schedule 21 envisaged a flexible starting point for offenders between eighteen and twenty-one. This would have the advantage of linking the mitigation which would normally arise from the offender's relative youth with the statutory

> provisions which apply to an offender a year or two older, or younger, and would contribute to a desirable level of sentencing consistency. Due allowance should then be made for the relevant aggravating and mitigating features to produce the final determination of the minimum term, and thereafter the judge should explain the reasons for the determination in open court." (Emphasis in original)

49. Seventhly, the significance of there being an intention to cause really serious harm rather than to kill was considered by Judge LJ at paras. 13-14:

> "13. Paragraph 11(a) of Schedule 21 identifies an intention to cause serious bodily harm rather than to kill as a potential mitigating factor. An intention to cause serious bodily harm is a sufficient intention for murder, and violence inflicted with such an intent remains an offence of the utmost seriousness requiring the mandatory life sentence in the same way as murder resulting from an intent to kill. It has however long been recognised that, all other features of the case being equal, the seriousness of a murder committed with intent to kill is normally more grave and serious than one committed with intent to cause grievous bodily harm. Paragraph 11(a) gives effect to that common understanding.
>
> 14. That said, no specific distinction based on the offender's intent is made in any of the starting points under paragraphs 4 or 5(1) and (2), 6 and 7, and there is no specific or special starting point for cases where the offender intended really serious harm rather than death. Moreover paragraph 11(a) underlines that such an intention to cause grievous bodily harm, as opposed to an intention to kill, 'may' provide relevant mitigation, but not necessarily, and not always. Thus, murder committed with an intent to kill may attract yet greater mitigation than a killing to which paragraph 11(a) applies. For example, where the killing represents an act of mercy, motivated by love and devotion, as envisaged in paragraph 11(f), the intention is indeed to kill, to provide a merciful release. It is unlikely that the mitigation in such a case will be less than the mitigation allowed to an offender who involves himself in an unlawful violent incident and, intending to do really serious harm, causes death. Similarly, there are cases in which death, even if unintended, is a possible or likely consequence of the offender's premeditated conduct. For example, those who abduct a child intending to blackmail the parents into providing a large ransom may deliberately make the parents aware that the child is being tortured, to encourage a positive response from the parents. In the course of torture the child may die. Just because the very objective of the criminal is a ransom, death may not be intended. If it is a consequence of

> the abduction or torture, we doubt whether much, if any, allowance would normally be made in mitigation for the fact that the death of the child was an unintended consequence of the deliberate infliction of bodily harm."

50. In *Attorney General's Reference Numbers 7 and 8 of 2006* (*Ellis and McAfee*) [2006] EWCA Crim 839; [2006] 2 Cr App R (S) 112, Lord Phillips CJ considered the interpretation of paragraph 5(2)(c) of Schedule 21. He made it clear, at paras. 24-25 that a murder will still be "for gain" if it is "in the course of" a burglary even if it was not "in furtherance of" it. The legislation uses both terms.

51. Lord Phillips CJ said that a judge may be justified in taking into account that the murder was not premeditated, which is one of the mitigating factors expressly listed in paragraph 11 of Schedule 21. But the appropriate course then is to take the 30 year starting point and then to make "substantial reductions from it": see para. 25. We note in passing that, in the same paragraph, Lord Phillips CJ drew a distinction between a premeditated murder, which is deliberately carried out in order to further a burglary, and a murder which is an unplanned reaction to an unexpected confrontation in the course of a burglary. This is because that distinction was relevant on the facts of that case. There can be many situations in between those extremes. The present case provides an example, since the Appellants went equipped with various weapons in order to commit a robbery. Although it was not their intention to commit the murder they must have been aware that one or more weapons might be used depending on what happened in the course of the robbery.

52. We also note that, at para. 28, Lord Phillips CJ confirmed what had been said in *Peters*, that the youth and immaturity of the offenders constituted "significant mitigation".

53. In *R v Bouhaddaou* [2006] EWCA Crim 3190; [2007] 2 Cr App R (S) 23, Lord Phillips CJ again considered the meaning of a murder "for gain" in paragraph 5(2) of Schedule 21. An argument similar to the one made in the present case on behalf of Higgs was made in that case at para. 11. The argument was that a murder will only be committed for gain if it is committed in order to facilitate the gain. In that case the offender had stabbed his victim in order to facilitate his escape from the house, having been caught red-handed in the act of burglary. This Court held that that was "sophistry": see para. 15. Lord Phillips CJ said that escaping after a burglary is an integral element of the criminal enterprise and, if murder is committed to facilitate escape from a burglary whose object is gain, then it can properly be said to be committed "for gain". If there were any doubt about that it would be removed by the contrast between the words "in the course of" and "in furtherance of" which the draftsman had used.

54. At para. 18 Lord Phillips observed that the "huge gulf" between a starting point of 15 years and one of 30 years poses a considerable problem for sentencers. Depending upon the particular facts, sentences for murder should cover all parts of the area between those two starting points. This means that it may be appropriate to move a long way from the starting point to reflect aggravation or mitigation.

55. At para. 19, Lord Phillips said that, whatever the starting point, an intention to kill is assumed within that starting point. The absence of an intention to kill "is an important mitigating factor" and is likely to go hand in hand with the absence of premeditation. We note, however, the following passage in para. 19:

> "There is a significant difference between a criminal who sets out to use violence, although not intending to kill, to achieve his criminal end and the criminal who uses violence without setting out to do so, when unexpectedly caught in the act of the crime."

Again, we would observe that Lord Phillips was not seeking to set out all the possible permutations and his judgment should not be read as if it were a statute. In the present case, the Appellants may not have intended to kill but they were not simply caught in the act of a burglary. They went equipped with weapons so that they could be used if necessary in the course of a robbery.

56. In *R v De Silva* [2014] EWCA Crim 2616; [2015] 1 Cr App R (S) 52, this Court reduced the minimum term of 32 years to one of 28 years in circumstances where the offender was 19 years old and, upon being confronted by the elderly home owner in the course of a burglary, stabbed him 22 times with a knife brought to the scene. Each case must turn on its own facts but we note that the appellant's age was regarded by this Court as a significant mitigating factor. At para. 10, Blake J observed that:

> "young offenders are more likely to be impulsive, unthinking, and respond to situations with excessive and gratuitous force."

The Court considered that a minimum term of 32 years for a young man who killed when he was aged 19 was "a very severe sentence, and perhaps uniquely so."

57. In *Attorney General's Reference (Clarke)* [2018] EWCA Crim 185; [2018] 1 Cr App R (S) 52, which was not a murder case, at para. 5 Lord Burnett CJ said:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R v Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R (S) 101 is an example of its application: see paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday. The ages of these offenders illustrate the point. …"

58. We invited submissions from the parties about the decision of this Court in *R v Hummerstone* [2014] EWCA Crim 670, in which the judgment was given by Treacy LJ. Although every case turns on its own facts that case did have some similarities to the present case. The appellant was aged 18 at the time of the offences. His previous criminal record was a relatively insignificant one. He was convicted of murder. He also had to be sentenced for a number of other offences, including aggravated burglary and wounding with intent. The minimum term imposed of 26 years was upheld on appeal as being not manifestly excessive.

59. The appellant had gone with his co-defendant, to the flat of the deceased, where he lived with his partner and three very young children. The co-defendant was convicted of aggravated burglary but acquitted of murder and wounding with intent. The plan was to rob the deceased of drugs and money. There was no intention to kill.

60. On behalf of the appellant counsel submitted that not every case in which a murder is committed in the course of a robbery is necessarily "particularly serious" because paragraph 5 of Schedule 21 uses the word "normally". He submitted that the appropriate starting point should have been 25 years, in accordance with paragraph 5A, because a knife had been taken to the scene. The Court rejected that submission and said, at para. 19:

> "It is clear to us that the whole picture of events must be taken into account in assessing whether the seriousness of this case was particularly high. The offence of murder is not to be viewed in isolation but alongside the other offences on the indictment which form part of the overall picture. The facts show a planned aggravated burglary carried out by two men. The originator of the offence was this appellant. He described himself as the 'team captain' during his evidence at trial. The two men forced their way into the victim's flat in the small hours of the morning. They knew the premises were occupied. They were disguised. This appellant had bought the imitation firearm for this very purpose the day before the offence. The accomplice held that weapon. The appellant was brandishing the large chopping knife. The purpose of the break-in was to rob those inside of money and drugs which the robbers believed they would find."

61. The Court considered the absence of premeditation at para. 21, where it said the following:

> "It is clear to us, firstly, that this offence, being a murder committed in the course or furtherance of a robbery or burglary, is one which in the circumstances comes fully within paragraph 5(1). It is not a necessary pre-condition that the killer should at the outset have intended to murder the victim in order to facilitate the commission of the offence of robbery or burglary. Whilst the killing may not have been premeditated in the sense that there was an intention necessarily to kill or do

> really serious bodily harm prior to entering into the premises, the nature of the attack shows a degree of persistence, and as this court has previously observed in relation to knife crime, every knife carried represents a danger since the consequences of carrying a weapon of that sort are foreseeably serious and extend to murder. We therefore do not consider that the mitigating factor in relation to premeditation carries particular weight in this case."

62. The Court considered the absence of an intention to kill at para. 22, where it said the following:

> "Turning to the absence of an intention to kill, that plainly is a mitigating factor, but, as was observed in *R v Peters and others* [2005] 2 Cr App R (S) 101, it cannot be assumed that the absence of an intention to kill necessarily provides very much mitigation. Where a weapon is taken and used and is of a sort which is liable to cause death, the mitigation on this ground is reduced. Thus, when consideration is given to the two factors relied on by the appellant in challenging the starting point, we consider that the case was indeed properly assessed as having a 30 year starting point since the aggravating factors we have earlier identified are of considerable gravity and greatly outweigh the mitigating factors relied on. We do not consider that the judge was wrong. In our judgment, this case properly fell into the category of one involving particularly high seriousness when it is looked at in the round."

63. At para. 26 the Court expressed the view that an older offender would have attracted a starting point somewhat in excess of the initial 30 year point. Allowance for the mitigation available to the appellant would have reduced that to 30 years but from that figure the judge would then have to make further allowance for the youth of the appellant. In the circumstances of that case, the Court concluded that a reduction of four years to reflect that consideration of age was within the range of reasonable allowance afforded to the sentencing judge. For that reason the minimum term of 26 years was not manifestly excessive.

Analysis

64. We will address first a submission which was advanced only by Mr Campbell-Tiech QC on behalf of Higgs. He submits that the judge took the wrong starting point, of 30 years, and should have taken the starting point of 25 years on the basis that this case was properly to be regarded as falling within paragraph 5A of Schedule 21 rather than paragraph 5. Mr Campbell-Tiech reminds this Court that the "general principles" set out in Schedule 21 are not prescriptive. Ultimately, he submits, the question which a

sentencing judge must ask is "what is the appropriate starting point which fairly reflects the facts of the particular case?" Is the seriousness of the murder "particularly high"?" He also submits that the structure of Schedule 21 shows that there can be overlapping categories, which necessitates such a judgement having to be formed. For example, paragraph 5(2)(h) refers back to paragraph 4(2). It is clear from those provisions that there can be cases in which, because a person is under the age of 21, a case which would otherwise be in the "exceptionally high" category of paragraph 4, and would therefore justify a whole life order, may mean that a 30 year starting point is appropriate.

65. Mr Campbell-Tiech also submits that unlike other cases which the Courts have considered, for example *Hummerstone*, in this case the criminal enterprise of robbery was brought to an end once the deceased was subjected to the violent attack upon him. He submits that this cannot be said to be properly a murder done "for gain". Nor is it a case where the murder was committed in escaping from a burglary or robbery, as was the case on the facts of *Bouhaddaou*.

66. We do not accept those submissions. In our view, it is clear that this case squarely fell within the terms of paragraph 5, even if it might otherwise have fallen into paragraph 5A. It is quite true that the categories in Schedule 21 are not hermetically sealed. But that does not mean that the judge was not entitled to place this case within paragraph 5.

67. Furthermore, we accept the submission on behalf of the Respondent that it would be unduly artificial to try to separate different elements of what happened in what was inevitably a fast-moving scene. The criminal enterprise did not come to an abrupt end once the attack on the victim which led to his death began. It is also clear, on authority and on the wording of paragraph 5, that a murder "for gain" does not necessarily mean that it was committed with the expectation of gain. It will suffice if it is committed "in the course of" a robbery or burglary. This is also underlined by the fact that that phrase can be contrasted with what immediately follows, "in furtherance of".

68. We next address a submission that was made in particular on behalf of Smith by Mr House QC. He submits that the judge was wrong to say that there were two non-statutory aggravating features in the present case. Those two features were that this was a group attack and that there were other persons present in the flat when the attack occurred, including the victim's girlfriend, Katie Little. Mr House submits that these were not unusual features and will often be found in cases of this kind. He submits that Parliament has effectively subsumed these features when setting the 30 year starting point in para. 5.

69. We disagree. Although they may well be found in many such cases, the fact remains that Parliament has thought it right in enacting paragraph 5 to say that a case may be particularly serious even where these features are not present. In such a case the 30 year starting point would still be applicable. In our view, if anything, the judge would have been entitled to go further. In our view, the aggravating circumstances of this case were not simply as she described them but they also included the fact that Ms Little was physically prevented from going to the assistance of the deceased as he was being attacked in their home. She herself was injured in the process.

70. There were submissions made before this Court on behalf of Higgs and Smith in particular to the effect that there were material differences between the appellants, for example as to the role which each had played. We consider that the judge was entitled, particularly having heard the evidence at the trial, to conclude that there was no material distinction to be drawn between the four of them.

71. On behalf of Higgs it was submitted that the judge failed to have regard to the fact that she had concluded that he was not a dangerous offender, unlike the other appellants. We reject that submission. She clearly had that in mind, as she had mentioned it in her sentencing remarks. It was, however, of no material significance when it came to the determination of the minimum term, since the aim of protection of the public is, as Judge LJ said in *Peters*, already built into the fact that Parliament has thought it right to require a mandatory life sentence for the offence of murder. This has the consequence that the purposes of the minimum term are punishment and deterrence.

72. We also consider that the judge was entitled to come to the view that there was nothing in the medical reports before her about Smith which should lead to a distinction being made between him and the others. We have read those reports and do not consider that anything in them required her to take a different view. We also bear in mind that, as the trial judge, she would have been familiar with Smith's ability to follow the proceedings. He was not unfit to plead or be tried. He did need the assistance of an intermediary but that did not necessarily lead to the conclusion that his culpability was materially reduced in relation to his offences. Mr House was at pains to emphasise before us that the judge had changed her mind about whether the intermediary should sit with Smith during the trial rather than outside the dock but, in our view, this reinforces the point that she was well placed to assess whether and to what extent this had any material bearing on his culpability for his offences.

73. Accordingly, we have reached the conclusion that, in the circumstances of this case, the judge would have been entitled to go above 30 years before taking into account mitigation. As we have already emphasised, the exercise cannot be conducted in an arithmetical way. What is called for is judgement.

74. The crux of the arguments on behalf of all four appellants is that the judge gave insufficient regard to three features of the case which were present in respect of each of them:

    (1) Their relatively young ages.

    (2) The lack of an intention to kill.

    (3) The lack of premeditation.

75. In our view, the third of those features adds nothing material on the facts of the present case to the second.

76. As we have said earlier, the judge undoubtedly had a difficult sentencing exercise to perform. We commend the thorough way in which she approached her task.

77. In our view, the crucial point is the one which is common to all of these appellants: it is whether the judge at the end of the day gave sufficient weight to both the ages of the appellants and to the fact that she had found that they did not have an intention to kill. We have come to the conclusion that, with respect, she did not give sufficient weight to those two features of this case.

78. In our view, those factors, when taken together, should have led to a minimum term in the case of Higgs and Drage of 26 years rather than 28 years.

79. It is clear from the reasoning of the judge that she carefully sentenced in respect of the other offences for which she had to sentence Smith and Crowley. No complaint was made before this Court about the correctness of those sentences. It follows that the minimum terms in their cases had to be higher than those for Higgs and Drage, particularly bearing in mind the principle of totality and that the other sentences would be concurrent. Applying the thinking of the judge therefore we have come to the conclusion that the appropriate minimum term in the case of Smith should have been one of 29 years rather than 31 years and the minimum term in the case of Crowley should have been one of 32 years rather than 34 years. In each case the number of days spent on remand (268 days) must be deducted from those minimum terms.

80. We have come to the conclusion that, despite the careful way in which the judge approached her task, at the end of the day the minimum terms imposed in these cases were manifestly excessive. They will be reduced in accordance with paras. 78-79 above. To that extent these appeals are allowed.

81. Before we conclude we would like to thank all counsel for their written and oral submissions.