APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 69
HCA/2019/291/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

DAVID COLLINS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: K Stewart, QC; Gilfedder & McInnes for McCusker, McElroy & Gallanagh, Johnstone
Respondent: A Prentice, QC, Sol Adv; Crown Agent

16 October 2019

[1] The appellant was convicted of murder and attempting to defeat the ends of justice, in respect of which a life sentence was imposed, with a punishment part of 26 years. The murder was committed with a machete and other means unknown. The reason for this vagueness lies in the second charge which involved dismembering the body and disposing of the remains, only some of which were eventually recovered. The trial judge indicates that

had the murder charge stood alone the punishment part would have been 21 years. This, however, was "a lower figure" selected because the trial judge intended to add a significant element for attempting to pervert the course of justice. She does not identify what that other figure would have been. The trial judge considered that a sentence of 10 years would have been appropriate for the remaining part of the indictment and increased the punishment part to reflect the period of such a sentence which would have accounted for retribution and deterrence. The appellant has a significant record which included imprisonment for 5 years for culpable homicide.

[2] The correct approach to sentencing in a case such as this was identified in *Chalmers* v *HMA* (*No 1)* 2014 JC 220 paras 24-28. This does not provide for a reduction in the element of the punishment part allocated to the murder to reflect a consequent increase for additional charges on the indictment. What the court requires to do is first, decide whether the additional charge should be included in the punishment part. Having decided that it should, the trial judge should then "make an overall judgment having regard to the punishment part that would have been appropriate if the murder stood alone; the element of retribution and deterrence attributable to the conviction on the lesser charge; and the loss of the opportunity for early release that an independent sentence on that charge would have given." The latter element has perhaps less force currently than it previously had.

[3] This exercise involves also the application of the totality principle. In our view the approach of the trial judge did not accord with that identified in *Chalmers.* The circumstances of *Chalmers* are of particular relevance, the appellant, having a prior conviction for murder. He was convicted of the murder of a vulnerable young woman not previously known to the appellant in a violent assault (described by the trial judge as a "depraved and dreadful crime"), and attempting to defeat the ends of justice by cutting up

the body and hiding the remains for over a year, resulting in a punishment part of 23 years, 3 of which was attributed to the latter aspect of the indictment.

[4] Given that the appellant in *Chalmers* had a prior conviction for murder, it is difficult to see that a sentence in excess of that imposed there would be merited. In our view, taking an overall judgment reflecting all the relevant factors, we consider that an appropriate punishment part would be 22 years, of which 3 years would be attributable to the second charge, on which the concurrent sentence will be 6 years.