No: 2005/0036/A1

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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2

Thursday, 17 March 2005

B E F O R E:

LORD JUSTICE DYSON

MRS JUSTICE DOBBS

HIS HONOUR JUDGE FINDLAY BAKER QC

(Sitting as a Judge of the CACD)

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R E G I N A

-v-

G.L.

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Computer Aided Transcript of the Stenograph Notes of

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MR T ROBERTS QC appeared on behalf of the APPELLANT

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J U D G M E N T

1. JUDGE FINDLAY BAKER: On 20th April 2004 at Teesside Crown Court before the Recorder of Middlesbrough, His Honour Judge Fox QC, the appellant G.L. was convicted of murder. On the same day he was sentenced to life imprisonment and an order was made pursuant to section 269(4) of the Criminal Justice Act 2003 that the early release provisions should not apply. Against that order he now appeals with the leave of the single judge.

2. Before outlining the facts of the offence which led to this sentence it is necessary to set out some of the background.

3. The appellant was born in August 1956 and was aged 47 at the time of the offence. He had previous convictions of which the most serious by far was 16 years earlier in April 1987 for manslaughter of his wife. At the time of this offence he was 30 years of age, his wife was 29 and they had three children. He had killed her at home in bed after an argument by bludgeoning her on the head with what was almost certainly an ornamental statuette. He did this while she was asleep, lying beside her infant son.

4. His plea of diminished responsibility was accepted by the Crown on that occasion. The sentence passed was a hospital order together with a restriction order under section 41 of the Mental Health Act 1983 without any limit of time being placed upon it.

5. He was released from hospital in September 1993 to a supervised placement in a home where he was described as a model patient. He was discharged from the hospital order in 1999. By March 2003 the local health trust had formed the view that they no longer needed to provide the supervision that they had been required to provide previously under section 117 of the Mental Health Act. Despite his discharge, however, the appellant still visited the site of his former supervisors, in particular to see the manager Mrs Fellows. On the day before the killing we are concerned with she saw him and gave him a haircut. He told her that he was going to Scotland the following weekend. Everything about him seemed to her to be normal. Later that evening he was seen in a public house and appeared normal to witnesses there. In the past, however, he had told a friend that he did not want to get involved with women again as he could not be sure that

"it " would not happen again - "it " was a reference to voices telling him to kill as he said they had done in relation to his wife.

6. And so we come to the facts of the present offence. The victim was a 19-year-old prostitute who it appears the appellant met in the early hours of the morning of 6th August 2003. This was outside a newsagents shop which they had both just visited. He arranged to pay her for sexual intercourse. They went to his home and to his bedroom. They started to have sexual intercourse. He killed her after subjecting her to what has been described as 'torture' - pricking her repeatedly with a bayonet before stabbing her. The fatal injuries themselves were caused by inserting the bayonet into each side of her neck and the upper body to her heart. Her abdomen was also cut either by the bayonet or another weapon. On his own account the killing took some 30 to 45 minutes. The evidence of neighbours who heard her sobbing and sounds of her terror at his hands provided strong corroboration for that. Notwithstanding Mr Roberts QC's submissions made on his behalf before us to the contrary, we conclude that this killing was a brutal and sadistic killing.

7. After killing his victim the appellant returned to the newsagents where he made a purchase. He appeared shaken and said he had fallen down the stairs. Subsequently at about 8.30 that morning he attended for his fortnightly injection of anti-psychotic medication, it being a condition of his release that he should do so. He seemed then to be his normal self. He was also supposed to take lithium daily.

8. Later the same morning he met a member of the local mental health team. The only unusual thing about him was that he was observed to be rubbing his right hand which he explained by saying that he had been "jumped" (his word) by a drug addict on his way home from a public house the previous evening.

9. He was subsequently seen on 8th and 9th August, on the latter occasion at his home. He seemed normal. On 11th August he told a member of the mental health team that he was going to Scotland, which he then did.

10. In the early hours of the next morning, about 1.30 am, he flagged down a police car in Inverness and told the officers in the car that he wanted to report a murder. He explained that he had knifed a prostitute in his home on 6th August and that he suffered from mood swings and depression. He said he had missed his injection of 6th August and that he had been in hospital for killing his wife. He said he had arrived in Inverness the previous day. He was detained and was not found to be showing signs of psychosis. At about 10 o'clock in the morning on 12th August police officers further down south entered his home and the decaying body of the victim was found on the bed. The bayonet was found under the bed. The victim's body had been covered with a duvet and a pillow had been put over her face. A personal organiser was found in his home in which he had written the words "Killed again. Should have taken my medication".

11. Apart from his conviction for killing his wife in 1987, the appellant had been convicted of two offences of theft from his father in 1975 for which he was put on probation and an offence of robbery in 1986 for which he was put on probation with a condition of medical treatment. The papers reveal also an incident of violent behaviour in the form of strangulation towards his wife in the weeks preceding her murder but this did not lead to criminal proceedings.

12. Attention was drawn in the psychiatric evidence to marked similarities between the two homicides. Each was or appeared to be motiveless. Each involved his sexual partner. Each took place in the appellant's bedroom and in each case he wandered from home for some time before eventually giving himself up to the police and then giving an account of what he had done. Although he killed his wife with a blunt instrument and his later victim with a bayonet, there was a knife kept under his bed at the time of the earlier killing.

13. There was a difference of medical opinion over his mental state. One consultant psychiatrist, Dr Stephen Barlow, concluded that there was no objective evidence that he was suffering from a recurrence of mental illness at the time of the killing and that he was not suffering from abnormality of mind. Another, Professor Gunn, spoke of severe mental abnormality over a

period of at least 30 years. He, while decrying the application of labels in a case of this sort, did discern personality disorder, mood disorder and hallucinations. It is clear, however, that the partial defence of diminished responsibility was not accepted by the jury.

14. Mental disorder, whose nature and extent is insufficient to establish diminished responsibility in law, is nevertheless of obvious importance in this case to determine the extent of the appellant's culpability for his appalling act. It is agreed that he suffered longstanding depressive illness. After the death of his first wife one of the reporting psychiatrists diagnosed him as suffering from severe personality limitations, with paranoid tendencies and a psychiatric condition which had deteriorated to what he described as severe depression of psychotic proportions.

15. Prior to her death it appears that he had not been taking his medication and to have concealed that from those responsible for his care. Failure to take his medication was a significant feature of the present case as well. A quantity of lithium tablets was discovered when his home was searched. For a considerable period the pattern of his behaviour appears to be that, knowing the dates when he would be tested, he took a sufficient quantity of tablets just before the testing date to maintain the serum level in his blood. There was evidence that this had led to a deterioration in his mental condition, albeit one which he plainly bore some responsibility for. The history of the appellant's care in hospital and in the community over several years is of a man whose mental illness or disorder could have been and was controlled by medication until the end. It may not be without significance that after sentence he has been detained in Rampton which is where he presently is.

16. The appellant was sentenced to life imprisonment on 20th April 2004. The judge acknowledged and took into account that he had not offended for a number of years which he said was 10 years and that he was vulnerable to mental or emotional disorder. To describe the killing he used the adjectives: "dreadful" and "torturing". He recognised that it was an intentional act. He explained his decision to disapply the early release provisions and the context of the offending as follows:

"The context in which it was is one of complete masquerade by you of the truth of your life to others around you. I refer in particular to your deciding that anyone who would help you with medicine should only have perfunctory lip service paid to it and also your regular taking young women to your house.

You in my judgment pose, from that context, such a great danger that the public and especially young women must be protected from you for the rest of your life, and so I do order that early release provisions are not to apply to you and that for you, this second occasion of your killing, the first not being without its relevance, must mean that life means life."

17. The appeal is mounted on the ground that the judge should not have made an order under section 269(4) disapplying the relevant provisions concerning early release, it being contended that he did so principally for an inappropriate reason, namely the need to protect the public from further harm from him.

18. The offence in this case was committed before but sentenced after the relevant sections of the Criminal Justice Act 2003 dealing with mandatory life sentences came into force. Section 269 applies where a court passes a life sentence in circumstances where, as here, the sentence is fixed by law. Section 269 provides, so far as is relevant to the present issues, as follows:

"(2) The court must, unless it makes an order under subsection (4), order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this Chapter as "the early release provisions") are to apply to the offender as soon as he has served the part of his sentence which is specified in the order.

(3) The part of his sentence is to be such as the court considers appropriate taking into account-

(a) the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and.

(b) the effect of any direction which it would have given under section 240 (crediting periods of remand in custody) if it had sentenced him to a term of imprisonment."

(4) If the offender was 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, no order should be made under subsection (2), the court must order that the early release provisions are not to apply to the offender."

It is also material to note that section 270 provides that the sentencing judge must state in open court and in ordinary language his reasons for deciding any order made under either section 269(2) or 269(4).

19. It may now be helpful to consider certain observations of the Lord Chief Justice in the case of R v Sullivan and others [2004] EWCA Crim. 1762, a decision which was given on 8th July 2004 and which, therefore, was not available to the sentencing judge. In Sullivan the Lord Chief Justice drew attention to sections 142 and 143 of the 2003 Act, headed respectively "Purposes of sentencing" and "Determining the seriousness of an offence". He observed that although these provisions are not yet in force, they provide valuable insight into the overall intention of Parliament. He made specific reference to sentences for murder, as follows, at paragraph 9:

"The sentence for murder is, of course, fixed by law so section 142 does not apply to the determination of the minimum period in the case of a life sentence. However, the section is still important. This is because it underlines the very different task that a judge performs when deciding the length of a minimum term, having imposed a life sentence, from the task that he performs when he decides what should be the length of a determinate sentence. In the case of the minimum term he is only directly concerned with 'seriousness', the protection of the public being provided by the imposition of the life sentence. After the minimum term has been served, protection of the public becomes the responsibility of the Parole Board, who then decide when it is safe to release the offender on licence."

It is clear from the words of sentence which we have quoted that the learned Recorder was in error in basing his decision to order that the early release provision should not apply on the danger which the appellant posed to the public. The protection of the public is provided by the imposition of a life sentence and becomes the responsibility of the Parole Board after the minimum term has been served. The Recorder's only concern should have been the "seriousness" of the offence and any associated offending. He should not have concerned himself with "dangerousness".

20. How then should he have approached the matter? In relation to seriousness the Lord Chief Justice goes on in Sullivan to observe that section 143 is relevant. That provision reads:

"143 Determining the seriousness of an offence.

(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might forseeably have caused.

(2) In considering the seriousness of an offence ('the current offence') committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to-

(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and.

(b) the time that has elapsed since the conviction."

The remaining subsections are not relevant for present purposes.

21. This merely puts into statutory and mandatory form what has in fact been, broadly speaking, good practice for many years.

22. It is now necessary to refer to section 269 to observe how seriousness is to be determined. Section 269(5) provides:

"(5) In considering under subsection (3) or (4) the seriousness of an offence (or of the combination of an offence and one or more offences associated with it), the court must have regard to-

(a) the general principles set out in Schedule 21, and

(b) any guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21."

Schedule 21 is entitled 'Determination of Minimum Term in Relation to Mandatory Life Sentence'. It is not necessary to rehearse its provisions in full. It provides three relevant starting points applicable to adults for the determination of the minimum term: full life for cases where seriousness is exceptionally high; 30 years where it is particularly high but not exceptionally so; and 15 years for cases which fall into neither of the preceding categories. It then provides a list of aggravating and mitigating factors which may result in a minimum term of any level or of the whole life order. In general, operation of this schedule is subject to extensive comment in the case of Sullivan .

23. Schedule 21 provides an even more rigorous approach to the determination of the minimum term than had applied previously and when followed will in some cases lead to longer minimum terms. Its general principles, although not its actual operation, apply to determinations made after 18th December 2003 (when it came into force) even where, as here, the offence was committed before that date - see paragraph 6 in the case of Sullivan .

24. However, to meet objections under Articles 5 and 7(1) of the European Convention on Human Rights, the 2003 Act contains transitional provisions. These are provided by section 276 and are to be found in schedule 22. Specifically in relation to sentences imposed after 18th October 2003 in respect of offences committed before that date, it provides in paragraph 10 as follows:

"10. The court-

(a) may not make an order under subsection (2) of section 269 specifying a part of the sentence which in the opinion of the court is greater than that which, under the practice followed by the Secretary of State before December 2002, the Secretary of State would have been likely to notify as mentioned in paragraph 2(a), and

(b) may not make an order under subsection (4) of section 269 unless the court is of the opinion that, under the practice followed by the Secretary of State before December 2002, the Secretary of State would have been likely to give the prisoner a notification falling within paragraph 2(b)."

The references in the above provision to paragraphs 2(a) and 2(b) are respectively references to the minimum period which, in the view of the Secretary of State, should be served before release on licence and the intention of the Secretary of State that the prisoner should never be released on licence at all. Further references to judges determining minimum terms in transitional cases is provided again in the case of Sullivan at paragraph 24:

"It is also clear that the approach a judge is intended to adopt in determining the minimum term for this category of offender under the 2003 Act falls into two stages. The judge has to initially assess what would be the appropriate period applying Schedule 21. Having ascertained that period he then reduces the period so far as is necessary in order to comply with the requirements of paragraph 10 of Schedule 22. This is intended to avoid any question of a breach of Articles 5 and 7.1."

The first part of the judge's task is therefore to apply schedule 21. The second part is to apply the practice statement and reduce the period yielded by the application of schedule 21 downwards in any case where he would otherwise pass a longer minimum period than the Secretary of State would have imposed himself.

25. As is clear from the reasoning set out at paragraphs 26 and following in Sullivan the best guidance as to the practice of the Secretary of State is to be found in the Practice Directions issued by the present Lord Chief Justice and his predecessor, Lord Bingham.

26. As now appears, from Practice Direction (Criminal Proceedings), para IV. 49 (as substituted by the Practice Direction (Crime, Mandatory Life Sentences) (No 2), July 29th 2004 (which is to be found in Archbold at paragraph 5-251) and from the case of Sullivan , the best guide to what would have been the practice of the Secretary of State if applied to the present case is the Practice Statement of 31st May 2002 which is reproduced in the Practice Direction IV.49.23 to 34.

27. Before embarking on the exercise which we have now identified we make reference to one more passage in Sullivan dealing with the possibility of different minimum term figures being reached by the application of the two different processes. Paragraph 35 reads:

"Comparing the position under the statutory and non-statutory guidance and giving due weight to the ample discretion (described in a helpful article by Dr Thomas QC in Archbold News, Issue 3, April 3 p.9 as a "legitimate and extensive discretion in its operation") given to the judge making the determination by the statutory guidance, we are of the opinion that if there is any difference between them it is not as great as has been supposed.

The differences in figures are largely explained by their different structures. When there are differences they are at the top of the range for the most serious crimes. This interestingly is the area in which the records show the Secretary of State could differ significantly from the figure recommended by the judiciary. However this is still the category of case which is most likely for the judge to have to consider reducing the figure reached in applying the approach suggested in schedule 21, relying on paragraph 10 of schedule 22. The judge would also have to be on his guard against determining a higher figure merely because the starting figure that is taken is greater."

This passage is reflected in paragraph IV.49.34 of the Practice Direction.

28. We now move to the actual ascertaining of the minimum term, first under schedule 21 and then under the Practice Statement of May 2002. Under schedule 21 the present case does not fall within the 'exceptionally high' category calling for a whole life starting point. Cases involving a murder by an offender previously convicted of murder would fall into that

category but the present case is one of murder by an offender previously convicted of manslaughter. The case does however fall into the 'particularly high' category calling for a 30 year starting point because of the associated offence of manslaughter and because the murder itself involved sexual and/or sadistic conduct. The suffering of the victim before her death and the previous manslaughter offence would have been aggravating features in addition but for the fact that they are unavoidably taken into account in fixing the starting point. However, the fact that the appellant "suffered from mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered his degree of culpability" is in our judgment clearly a significant mitigating factor -- that quotation is taken from paragraph 11C of the schedule.

29. We have already recorded the extent to which we understand mental disorder has and continues to be a significant part of the appellant's life. Taking that into account we have reached a minimum term under schedule 21 of 25 years. Under the 2002 Practice Statement this case would have attracted the higher starting point of 15/16 years by virtue of "gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing" - see paragraph Iv.49.26. However, it would be aggravated by the appellant's "previous record and failures to respond to previous sentences to the extent that this is relevant to culpability rather than to risk" - see IV.49.30. Further, it would in our judgment be regarded as an especially grave offence attracting a term of 20 years or upwards by virtue of the combination of the sadism displayed and the previous homicide -- see IV.49.33.

30. The question is how much above 20 years would it be appropriate to elevate this case having regard to these factors? In fixing the upper limit it seems to us necessary to temper the figure having regard to the appellant's mental health history and to the need to avoid double counting of aggravating features. In our judgment the proper minimum term reached by this route is 22 years. The court is not permitted to specify a minimum period higher than the Secretary of State would have been likely to notify. We do not of course know what he would have notified, but we do know that it would have been most unlikely that he would have specified a minimum

period shorter than that yielded by the application of the 2002 Practice Direction. Accepting therefore the guidance given by the case of Sullivan , we adopt the figure of 22 years.

31. That is not quite the end of the matter. The final stage for determination of the minimum period to be served is the crediting of any time spent on remand in custody before sentence. That is required by section 269(3)(b). In this case, by our calculation, which will require to be checked, the period to be credited appears to be from 12th August 2003 (the date of the appellant's arrest) to 20th February 2004 (the date of his sentence), a total of 193 days. The deduction of that from the figure which we have decided leads to the conclusion that the period specified should be 21 years and 172 days. We therefore conclude that the minimum period to be served before the appellant's case becomes eligible for consideration for early release by the Parole Board should be that period, 21 years and 172 days. In our judgment, therefore, his sentence should have been life imprisonment with the minimum period to be served of 21 years and 172 days. In these circumstances, we quash the decision to order a full life sentence and substitute that period as the specified period. To that extent this appeal against sentence is allowed.

32. MR ROBERTS: May I just indicate that I have confirmed the day count as being 193 days.