

Neutral Citation Number: [2014] EWCA Crim 1394
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Preston Crown Court
Mr Justice King,
T20137371

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2014

Before:

LORD JUSTICE TREACY
MR JUSTICE FOSKETT
and
HIS HONOUR JUDGE INMAN QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

	REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988	
	ATTORNEY-GENERAL'S REFERENCE NO 34 OF 2014 (R v JOHN JENKIN)	

Miss B Cheema QC for the **Attorney General**
Mr D Fish QC (instructed by **Registrar of Criminal Appeals**) for the **Offender**

Hearing date: 25th June 2014

Judgment Lord Justice Treacy:

1. This is an Attorney General's Reference pursuant to Section 36 of the Criminal Justice Act 1988. The offender, before Preston Crown Court on 4th March 2014, charged with the murders of his mother and his sister, pleaded guilty to the manslaughter of both victims. Those pleas were accepted by the Crown in the light of psychiatric evidence that the offender's responsibility for the killing of his mother was substantially impaired due to mental illness, and that his responsibility for the killing of his sister may also have been so impaired. It is common ground that those pleas are to be treated as pleas tendered at the first reasonable opportunity.

2. The judge adjourned sentence for the preparation of further psychiatric reports and at the sentencing hearing heard oral medical evidence in some detail from two consultant psychiatrists.
3. The offender was initially sentenced on 28th March 2014 to life imprisonment with a minimum term of 12 years less time spent on remand. Those sentences were passed on each count and were imposed under Section 225 of the Criminal Justice Act 2003. Additionally, the judge gave a direction under Section 45A of the Mental Health Act 1983 that the offender be treated in hospital with a Section 41 Mental Health Act restriction.
4. On 3rd April 2014 at the instigation of the judge, the case was relisted pursuant to Section 155 of the Powers of the Criminal Courts (Sentencing) Act 2000. On this occasion the judge indicated that he had relisted the case because he had failed to specify that only half of the notional determinate sentence had to be served before the offender could be considered for parole. Thus, the sentence would remain as before save that the minimum term was now to be 6 years instead of 12.
5. An outline of the facts shows that the offender lived with his mother. On 6th June 2013 he said that he would kill his mother and later tried to commit suicide. He was taken to hospital, but was released home after assessment of his mental state. He was not considered to be a danger to others. Partly as a result of this, his sister came to stay for the weekend. Early on 8th June he killed his mother with an axe which he had had in his room. When his sister discovered what had happened, he then killed her with the same weapon.
6. He told the police that he had had sex with her corpse, although this was not confirmed by any medical examination. He later repeated this to doctors at a time when he was psychotic and confused. In the absence of any supporting evidence we do not proceed on the basis that such intercourse took place. What the offender said to the police about that was only relevant to an assessment of his state of mind and a consideration of risk posed.
7. Having killed his mother and sister, he then attacked and killed his dog.
8. At the time of the offender's admission to hospital on 6th June, it appears that he had taken an overdose of two tablets of LSD, 15 codeine tablets, half a bottle of whiskey and some cannabis.
9. It appears that on the evening of 7th June after his return to the family home, the offender had an argument with his mother and sister, during the course of which he struck his sister. He later said that it was while he was in the shower after this incident that he decided to kill his mother and sister, although he did not carry out the killings until the following

day.

10. At about 8am on 8th June a neighbour heard the sound of disturbance coming from next door. It appears that what he heard must have been the culmination of a period of extreme violence in which the offender killed his family members. That neighbour then witnessed the offender bludgeoning the family dog to death with the axe he had used on his mother and sister. Police were called to the scene. Both women had extremely severe head injuries.
11. In the meantime the offender had made his way to a nearby estuary. He was found naked and crawling along the ground with a plastic tube protruding from his backside and dirty toilet paper inside his mouth. He was taken to hospital. He told nursing staff that his mother and sister had ganged up on him and that he had taken a mix of drugs and lost control and killed them.
12. The initial diagnosis made was that he was not mentally ill. Indeed a consultant psychiatrist agreed with that view, but subsequently the Crown accepted that this was an inaccurate diagnosis.
13. When the offender was interviewed by the police with appropriate safeguards, he acknowledged both killings again. He described the killing of his sister by saying that she had been disturbed by the noise of his attack on his mother. She had come to the living room, seen what was happening and tried to escape. He pursued her and repeatedly hit her with the axe until she was dead. He then made the claim of having sexual intercourse with her, which he said was interrupted by the dog. This had led him to destroy the dog. We repeat that subsequent examination of the sister's body did not confirm the offender's claim.
14. By the time the offender tendered his pleas it was accepted by the Crown that the offender had been suffering from an abnormality of mind within Section 2 of the Homicide Act 1957 as amended when he killed his mother, and that he may have been so suffering when he killed his sister.
15. The transcript of the sentencing hearing shows a very careful examination of issues relating to the offender's mental state by the parties and by the judge.
16. The judge's reasoned analysis was as follows: the two homicides took place in rapid succession over a matter of minutes. He was satisfied that at the time of the commission of those offences the offender had a mental disorder which gave rise to an abnormality of mental functioning, which substantially impaired his ability to exercise self control and/or the nature of his acts and/or form a rational judgment, and that this was at least a significant contributory factor to his carrying out of the killings.

17. The judge was satisfied that compulsory treatment in a mental hospital with a restriction on release was appropriate, and that the offender was dangerous within the meaning of the Criminal Justice Act 2003. The risks which the offender posed, however, were not only connected with his mental disorder. The offender retained a significant responsibility and culpability for these offences, and a sentence of life imprisonment was required to protect the public from serious harm. The judge had received evidence that it was impossible to say at the time of sentence what degree of risk to the public the offender would pose even after treatment of his mental condition.
18. The judge said that the offender's significant responsibility for the offences was based on his voluntary taking of drugs, including LSD, which had triggered a vulnerability to psychosis and led to the killings. There was to quote the judge "a significant residual responsibility".
19. The offender is 24 years old and has no previous convictions. We find that the following principal aggravating features are present:
- a) The death of two victims.
 - b) A significant degree of culpability remaining despite the offender having suffered from an abnormality of mind.
 - c) A clear intention to kill both women.
 - d) A degree of premeditation at least in the case of the mother.
 - e) The use of a lethal weapon.
20. We find the following mitigating features to be present:
- a) The offender's absence of previous convictions.
 - b) An early guilty plea.
 - c) The offender's diminished responsibility for the killings by reason of schizoid affective disorder/schizophrenia. This latter mitigating feature is of course comprehended at least in part by the acceptance of the pleas to manslaughter.
21. For the Attorney General it is submitted that the minimum term of 6 years did not adequately mark the circumstances in which the offences were committed and the

gravity of the offender's acts for which he retained substantial responsibility and culpability on the judge's analysis. Insufficient regard was paid to the fact that the deterioration in the offender's mental health was escalated significantly by his use of LSD. Moreover, this was a case involving two homicides, one of them premeditated, with a selected lethal weapon.

22. Mr Fish QC, for the offender, accepted that it was appropriate to consider Schedule 21 of the 2003 Act in the round, and that, had this been a case of murder, and taking account of aggravating and mitigating features aside from the question of plea, a 30 year starting point would have been appropriate as a minimum term. He stressed that the judge had heard the medical evidence and had approached that aspect of the case very carefully, and that even if there was, as the judge found, significant residual responsibility remaining, nonetheless the case was one of diminished responsibility.
23. We give leave for this reference to be made.
24. When the judge below initially passed sentence he did so in terms which appear to reflect a clear intention to pass a 12 year minimum term. He referred on more than one occasion to the tariff which needed to be served in full before the Parole Board could consider whether it would be safe to release the offender. He rightly recognised that a nuanced consideration of Schedule 21 of the Criminal Justice Act 2003 was necessary.
25. He concluded by saying:

“The sentence of this court accordingly therefore is one of life imprisonment with the minimum term specified of 12 years less the days spent on remand...”
26. When the judge came to re-sentence, however, he said that the term of 12 years was what would have been appropriate had a determinate term been imposed, and accordingly substituted a minimum term of 6 years.
27. This court considered the appropriate minimum term in a case involving manslaughter by reason of diminished responsibility where the offender had been assessed as dangerous and where a discretionary life sentence was appropriate in *Wood* [2010] 1 Cr App R (S) 2. That case involved a ferocious attack with a meat cleaver, where a high level of culpability remained, notwithstanding the partial defence of diminished responsibility.
28. In a case involving a single killing with a meat cleaver and a lump hammer where a minimum term of 18 years would have been appropriate on a murder conviction, this court substituted a minimum term of 13 years for manslaughter.

29. The court in *Wood* gave guidance, recognising that in the case of diminished responsibility manslaughter, a reduction in culpability was inherent in the offence. However, the court went on to recognise that the degree of culpability remaining might nonetheless vary from very little to very high. This variable should be reflected in the appropriate sentence.
30. The court additionally would be entitled to have regard to Schedule 21 of the 2003 Act in considering aggravating and mitigating features. It should do so sensitive to the fact that the partial defence of diminished responsibility had been established. The court therefore identified a link between diminished responsibility manslaughter and Schedule 21 and derived support from the clear intention of Parliament to increase sentences to reflect the grave harm done by the unlawful causing of death. Cases after *Attorney General's References No's 60, 62 and 63 of 2009 (Appleby)* show the wider application of this approach to various forms of manslaughter.
31. *Wood* expressly recognised that the minimum terms set out in Schedule 21 represent real time to be served in custody so that, for example, a 30 year minimum term was the equivalent of a 60 year determinate sentence. The court said that a large disproportion between sentences for murder and sentences for offences of manslaughter which came close to murder would be inimical to the administration of justice. Clearly that could apply in a diminished responsibility case where there was high residual responsibility of the offender.
32. In *Dighton* [2012] 1 Cr App R (S) 30, which was a case of a double murder by stabbing, and which was treated as if an effective early guilty plea to manslaughter had been tendered, the court in a case where a sentence of IPP had been imposed, reduced a minimum term of 15 years to one of 12 years.
33. Whilst the court was entitled to have regard to Schedule 21 and the fact that two killings had taken place, the court was unconvinced that the rationale for taking a starting point of 30 years had the case been one of murder, applied in cases of diminished responsibility. In *Dighton's* case his responsibility was found to be "substantially diminished".
34. Whilst we accept that a nuanced approach must be taken to Schedule 21 so as to reflect the fact of diminished responsibility, that same approach should in our judgment also reflect the extent of the offender's residual culpability. The greater it is, the greater the impact of the Schedule 21 factors. Accordingly, the serious aggravating factor of more than one killing with an intention to kill, which is present in this case, should have its own impact on sentence. Otherwise the court will fail to achieve a just correlation between the sentence for murder and the sentence for manslaughter based on a full consideration of the evidence before it.
35. The judge's conclusion after very careful consideration of the medical evidence before

him was that although the offender had suffered from an abnormality of mind, namely schizoid-affective disorder/schizophrenia, the offender's voluntary taking of drugs had triggered the offender's vulnerability to psychosis and led to the killings.

36. It seems to us therefore that based on the judge's conclusion that this offender's residual responsibility was "significant", his responsibility was higher up the scale than that assessed in *Dighton*, but lower than that found in *Wood*, where the court commented at paragraph 19 that the offender's level of responsibility was "only just sufficiently diminished for the purposes of Section 2 of the Homicide Act".
37. We note that both in *Wood* and *Dighton* the court dealt with the matter in relation to the minimum term and did not involve itself in the exercise commonly carried out in IPP cases (which for present purposes can be treated as equivalent to discretionary life sentence cases), of indicating the notional determinate term and then halving it so as to take account of the effect of the early release provisions as required by Section 82A(3)(c) of the Powers of Criminal Courts (Sentencing) Act 2000. In the terms in which Section 82A is currently in force, the relevant provision is Section 244(1) of the Criminal Justice Act 2003 which provides that a person serving a term of imprisonment greater than 12 months must be released after serving half of his sentence.
38. It seems to us that there is a possible danger of sentencers falling into the trap of failing properly to distinguish between the notional determinate sentence and the minimum term. It appears that an example of this may recently have occurred in *Martin* [2014] EWCA Crim 795. The court having found that the appropriate minimum term for murder under Schedule 21 would have been 18 years, reduced that figure by two years in a case of diminished responsibility manslaughter to reflect a residual high degree of culpability for the killing.
39. After granting a further reduction to represent guilty plea, the court arrived at a figure of 12 years which it referred to as the "determinate minimum term" and "the appropriate determinate sentence". The court then proceeded to apply Section 82A(3)(c) and halved the 12 year period so as to produce a minimum term of 6 years.
40. It is clear to us that the court, with the agreement of two leading counsel, fell into error. Since the court had throughout been working in terms of the minimum term, there was no need to take into account the early release provisions as there would have been had a determinate sentence been passed. The use of the minimum term by its very nature already takes into account the early release provisions as required by Section 82A(3)(c). In the circumstances the decision in *Martin* should be regarded as being *per incuriam* and should not be followed. It may be that similar considerations influenced the judge in this case, although his decision was made prior to that of *Martin*.
41. In short, therefore, if the court chooses to work with the currency of minimum terms as it generally will do in homicide cases involving mandatory or discretionary life sentences,

it does not need to have regard to the early release provisions. If the court's consideration for any reason should embrace both notional determinate term and minimum terms, regard must be had to the important difference between these two regimes so as to avoid the sort of difficulties that arose in *Martin* and may well have occurred in this case.

42. Applying the foregoing considerations we return to this case. We agree with Mr Fish's concession that, as a murder case a 30 year starting point subject only to the question of guilty plea would have been appropriate. In our judgment, given the offender's significant degree of residual responsibility, a minimum term of 20 years would be appropriate for these offences of diminished responsibility manslaughter. The offender is then entitled to full credit of one third for his guilty plea in accordance with *Ahmed* [2012] EWCA Crim 708. This will reduce the minimum term to one of 13 years and 4 months less the time which the offender spent on remand prior to sentence.
43. The disparity between the 6 years imposed and 13 years 4 months demonstrates that the ultimate sentence imposed by the judge was unduly lenient. That being so, the matter of sentence is at large, and on the basis of the analysis above, we allow the reference and substitute a minimum term of 13 years 4 months for the period of 6 years.
44. Nothing in this judgment affects the order also made pursuant to Section 45A and Section 41 of the Mental Health Act or the discretionary life sentence.