

**THE EFFECT OF SCHEDULE 21 ON SENTENCING FOR
MANSLAUGHTER**

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ABSTRACT

This thesis examines the origins of Schedule 21 and the intention behind it by making detailed recourse to Parliamentary debate on the passage of that statutory provision and other related ones. Based on that scrutiny, it contends the harm of death is to be treated as more serious than before. It asks by virtue of that principle whether the statutory sentencing guidelines for murder have implications for other crimes in a sentencing regime where the gravity of the crime is the sole desiderata for determining the length of adult custodial punishment. Finding they do, it fleshes out what those ramifications are, viz. that other crimes where the actus reus is death are subject to that increased valuation on the loss of life as a harm, translating into longer terms of imprisonment. Manslaughter is noted as anomalous in being a major homicide offence not subject to recent express legislative reform on this ground. The thesis then proceeds to investigate whether the aforementioned necessity has been adverted to and implemented in sentencing practice for manslaughter. It does so by analysing a substantial canon of case law, comparing sentencing levels and their justifications before and after the remit of Schedule 21. It finds that only recently has Sch.21's true influence been appreciated by the Court of Appeal, and maps the journey to that point, asking why it was such a long one. It concludes that much is owed to the leadership of the Court of Appeal (Criminal Division) in the form of the Lord Chief Justice, Lord Judge for effecting overdue alterations to the sentencing levels for manslaughter. However it also points to the infancy of this epiphany, and identifies challenges and changes that still need to be made to deliver ordinal proportionality within this genus of harm, and questions ordinal proportionality between harm genres, intending to explore this in subsequent research.

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The effect of Schedule 21 on sentencing for manslaughter

Judge's Revolution

Dedicated to the Rt. Hon. The Lord Judge Kt PC QC,
sometime Lord Chief Justice of England and Wales

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THE EFFECT OF SCHEDULE 21 ON SENTENCING FOR

MANSLAUGHTER

Chapter 1

INTRODUCTION

This thesis builds on my previous research into Schedule 21 of the Criminal Justice Act 2003 (CJA03) and its operation by the courts for the sentencing of murder. It applies core principles of desert theory as laid down primarily by Andrew von Hirsch and Andrew Ashworth as the governing rules of proportionality. As the rationale for apportioning custodial punishment enshrined in s.153(2) of the CJA03,¹ the implications of Sch.21 for the sentencing of other crimes are contemplated in the context of desert theory.² The stimulus for conducting this investigation is located in the atmosphere and argument driving the policy of Sch.21 and contemporaneous sister-legislation. That agenda is significant for the prospect that such statutory reforms led by Sch.21 are intended by Parliament to, or should logically in effect, right a long-established wrong identified in the works of criminologists such as Ashworth. That is, that some offences against the person are not sentenced proportionate to the seriousness of the offence, an injustice particularly apparent when compared to the punishment of some offences against property.³

¹ Specifically, the shortest term commensurate with the seriousness of the offence.

² It is highly unlikely any of the crimes dealt with in this thesis would not meet the custody threshold (itself a test based upon proportionality) and thus the quantum of punishment falls to be dictated according to s.153(2).

³ A Ashworth, *Sentencing and Criminal Justice* (4th edn, CUP 2005) 149; A Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 153

Following this introductory chapter which provides a background and context for the advent of Sch.21- the centrepiece of the thesis- Chapter 2 examines whether a greater valuation on the harm of death can be said to form part of the intention behind the substance of Sch.21. It does so by a deep and searching analysis of Hansard regarding sentencing for all forms of homicide contemporary to Sch.21's passage through Parliament. Finding it can, it proceeds to question whether those statutory guidelines specifically for murder thus have a broader remit, viz. dictating increases in the sentencing for other offences resulting in death not dealt with by legislation in recent years.

Satisfied such is the case, the study moves to its next logical phase by establishing with reference to sentencing practice by the courts, whether in fact such changes have been implemented for the closest relation of murder, the offence of manslaughter. Chapter 3 establishes a picture of sentencing levels for manslaughter prior to the enforcement of Sch.21. Comparison is thus enabled with scrutiny of post-Sch.21 manslaughter sentencing in Chapter 4 to discern what, if anything, has changed in the courts' approach, and equally important, the length of custodial terms.

Background

In 1969 the death penalty was finally and completely abolished for murder in the UK⁴. It brought to an end⁵ the purview of the ultimate sanction that had lasted a millennium and a half, its use first being recorded in Britain in the 5th Century⁶. Despite the Act mandating that

⁴ Making permanent the Murder (Abolition of Death Penalty) Act 1965, s.1(1)

⁵ De facto. Capital punishment was abolished de jure (for treason and piracy) in 1998.

⁶ M Gosling, 'Dealing with those who murder' (2004) 139 (Feb) Criminal Lawyer 5, 5

all murderers now be sentenced to imprisonment for life⁷, it would be mistaken to think an entirely new system was being ushered in. This is primarily because life imprisonment isn't actually what it purports: as Lord Mustill said, 'the words which the judge is required to pronounce do not mean what they say'.⁸ In the same way that every murderer was sentenced to death prior to 1957, but was not actually executed (a near majority of 45.7% of such people being reprieved under the Royal Prerogative of Mercy between 1900 and 1949)⁹, it transpired that not every person sentenced to life imprisonment would spend the rest of their days behind bars. The release provisions of s.27 of the Prison Act 1952 empowering the Home Secretary to order the release on licence of any prisoner serving a sentence of life imprisonment were extant, and renewed by s.61(1) of the Criminal Justice Act 1967. Those reprieved before abolition were released from prison at the behest of the Home Office, when it was determined chiefly that they had spent sufficient time in jail to 'be accepted by public opinion as an adequate vindication of the law'¹⁰. Other considerations included the danger the prisoner posed to the public and general deterrence. This system, which the Home Secretary was ultimately responsible for¹¹, continued virtually unchanged following abolition¹², except for a statutory obligation¹³ upon the Home Secretary to consult the judiciary on when it would be appropriate to sanction release. This procedure persisted, albeit

⁷ (n 4)

⁸ *Doody* [1994] 1 AC 531, 549

⁹ S Shute, 'Punishing murderers: release procedures and the "tariff", 1953-2004' [2004] Crim LR 873, 873 citing *Royal Commission on Capital Punishment 1949-1953, Report*, Cmnd 8932, September 1953, 3

¹⁰ *ibid* 226

¹¹ (n 9) 874

¹² (n 9) 876

¹³ (n 4) s.1(2)

with minor alterations, so that come 2002, it was still the Home Secretary that ultimately had to give permission for a murderer to be released from jail.

Some light was shed on the approach to release taken by the Home Secretary in 1983. Leon Brittain told the House of Commons by way of a written answer that murderers of police officers and prison staff, terrorists, sexually or sadistically motivated killers of children and those murdering using a firearm in the course of a robbery would serve at least 20 years in prison¹⁴. He sought for the first time, officially at least, to separate the penal term, viz. as he described it, the length of time served in jail necessary to satisfy ‘the requirements of retribution and deterrence’ from the assessment of risk conducted by the Parole Board¹⁵. This dichotomy prevails to this day, a mandatory life sentence being formally divided into two parts. The first is the length of time that must be served as punishment for the crime, now known as the “minimum term”. It is imperative to appreciate this minimum term set for life sentences is the actual length of time that must be served in prison. On expiration of the minimum term release shall be at the discretion of the Parole Board based on criteria connected to risk, the purpose being to protect the public from dangerous murderers. Usual ‘determinate’ sentences where a period of incarceration of 12 months or longer is stipulated require only half that time actually be served in custody¹⁶.

Though little extra light has been shed on the rationale and reasons used to reach decisions on penal terms in the Home Office, the judiciary did formulate published guidance to introduce some clarity and consistency to their recommendations on the length of penal terms to the

¹⁴ HC Deb 30 November 1983, vol 49, cols 505-507W

¹⁵ (n 9) 882

¹⁶ Criminal Justice Act 2003, s.244

Home Secretary. For example, in 1997, Lord Bingham CJ wrote to all judges laying down loose guidelines on the normal tariff for murder, and relevant aggravating and mitigating factors. He said the normal starting point from which deviation should be made according to the circumstances of the specific case was 14 years, which he recognised was an increase from that used by Lord Lane CJ of 12 years. The 14 year starting point for adults was confirmed by the new Lord Chief Justice in 2000, though revisions were made to the guidance for those under 18. The latter occurred because the Home Secretary was effectively stripped of any right to, or involvement with, fixing the penal term for young offenders by the European Court of Human Rights (ECtHR)¹⁷. The upshot was that the trial judge would set the penal term in open court henceforth.

In 2002, at the request of Lord Woolf CJ, the recently created Sentencing Advisory Panel (SAP) produced a detailed document recommending a more structured approach to be adopted in reaching a judicial recommendation. It suggested the starting point be returned to 12 years, a higher starting point of 16 years be taken for particularly serious cases, and a lower one of around 8 years where culpability was ‘significantly reduced’¹⁸. At this stage, the SAP advised the Court of Appeal which was still responsible for issuing guidelines by way of judgments. It was hoped the SAP’s academic lilt would provide an overarching coherence to guidelines, rather than continuing with them developing piecemeal in isolation. Consequently, the Lord Chief Justice issued a new Practice Direction a few months later implementing most of the SAP’s advice¹⁹. The key extracts can be seen below.

¹⁷ *T v UK* (2000) 30 EHRR 121

¹⁸ SAP, *Minimum terms in murder cases* (2002) 5

¹⁹ [2003] 1 Cr App R (S) 46

Practice Direction Minimum Periods (Life Imprisonment)

The normal starting point of 12 years

10 Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in paragraph 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.

11 The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because:

- a) the case came close to the borderline between murder and manslaughter; or
- b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or
- c) the offender was provoked (in a non-technical sense) such as by prolonged and eventually unupportable stress; or
- d) the case involved an over reaction in self-defence or
- e) the offence was a mercy killing.

These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12 The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position, Such cases will be characterised by a feature which makes the crime especially serious such as:

- a) the killing was 'professional' or a contract killing;

- b) the killing was politically motivated;
- c) the killing was done for gain (in the course of a burglary, robbery etc.),
- d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness);
- e) the victim was providing a public service;
- f) the victim was a child or was otherwise vulnerable;
- g) the killing was racially aggravated;
- h) the victim was deliberately targeted because of his or her religion or sexual orientation;
- i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing;
- j) extensive and/or multiple injuries were inflicted on the victim before death;
- k) the offender committed multiple murders.

Variation of the Starting point

13 Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point, upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14 Aggravating factors relating to the offence can include:

- a) the fact that the killing was planned;
- b) the use of a firearm;
- c) arming with a weapon in advance;
- d) concealment of the body, destruction of the crime scene and/or dismemberment of the body;

- e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15 Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16 Mitigating factors relating to the offence will include:

- a) an intention to cause grievous bodily harm., rather than to kill;
- b) spontaneity and lack of pre-meditation.

17 Mitigating factors relating to the offender may include:

- a) the offender's age;
- b) clear evidence of remorse or contrition;
- c) a timely plea of guilty,

Very serious cases

18 A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.

19 Among the categories of case referred to in paragraph 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime or the offence was a terrorist or sexual or sadistic

murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate.

Despite the increasing formality and detail of these guidelines, it is worth remembering that the Home Secretary was in no way bound by the resultant recommendations from the judiciary as to the penal term for adults. However, in 2002, his role of determining the penal term, or what became commonly known as ‘the tariff’, was to be successfully challenged in the courts too. Instead of the task being handed straight to the bench in its entirety as was done with juveniles²⁰, it gave rise to the statutory guidelines signposting determinations by judges that have stimulated this research. Their purpose, intention and theoretical implications will be explored in the next chapter, as it will for other salient legislative reforms identified.

²⁰ Criminal Justice and Courts Services Act 2000, s.60, following *T v UK* (2000) 30 EHRR 121

Chapter 2

THE CONCEPTION OF SCHEDULE 21

Introduction

This chapter will examine the origins of Schedule 21:²¹ why it came into existence, what its root objectives were and thus its logical consequences. In doing so, it augments the research already conducted for my MSc into the explicit impact and interpretation of Sch.21: its operation by the courts for sentencing murder itself. It will sift through the primary and secondary sources surrounding the proposals that eventually became Sch.21 in order to draw out the Parliamentary intention behind them. The objective is to discern what, if any, broader implications the legislation has, then explore whether those implications have indeed been realised – in every sense- in sentencing practice in subsequent chapters.

Methodology

What precisely is meant by Parliamentary intention? ‘The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used’²² in a statutory provision. Such interpretation must be consistent with the ‘policy and objects of the Act’²³, which is the only proper application of a statute, as the great Lord Reid

²¹ Criminal Justice Act 2003. See Appendix 1

²² *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (Lord Nicholls)

²³ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030

held. The purpose, ‘and hence its ambit’, may be express or implied.²⁴ Legitimate techniques to achieve this include reverting to both ‘internal aids (found in the rest of the Act) or external aids (for example, material outside the Act) to identify the mischief that the statute is intended to cure and the purpose of the legislation.’²⁵

In this instance, the words of the Act are perfectly clear, but the purpose behind them is not so apparent. If it can be established that Sch.21 was motivated by a particular policy, then the meaning of the Act is potentially much wider than initially meets the eye by virtue of other statutory provisions²⁶.

Extensive reference is made to ministerial statements, not least because the government produced the guidelines of their own volition as their solution to a specific stimulus. As the architects of Sch.21, government spokespeople are best placed to explain its original aims. However, this will be balanced by coverage of extra-governmental supporters who also voted to pass the legislation. Furthermore, debates concerning other related laws being promoted around the same time will be studied to provide a contextual background. Doing so provides a broad purview of what is likely to have been Parliamentary intention in agreeing the final, amended schedule, something that needs to be distinguished from governmental or ministerial intention²⁷.

However, no attempt will be made at this stage to critique the factual basis of Parliament’s beliefs. That important task is a major undertaking and will be dealt with in subsequent

²⁴ (n 22) 396 (Lord Nicholls)

²⁵ A Bradley and K Ewing, *Constitutional and Administrative Law* (15th edn, Pearson 2011) 17

²⁶ In particular, s.153(2) of the CJA03, which requires sentences to be for the shortest period commensurate with the seriousness of the crime. If the seriousness of a crime has been altered by Sch.21 by virtue of certain features, then sentences for other crimes with those features will be affected too.

²⁷ (n 22) 396 (Lord Nicholls); J Baker, ‘Statutory Interpretation and Parliamentary Intention’ (1993) 52(3) CLJ 353, 354-357

doctoral research. Instead, this thesis will seek to establish what Parliamentary intention was in enacting the legislation. Parliament can be mistaken about the factual basis for legislation, but that does not change its legal applicability. If it did, every statute the courts had to apply would be subjected to a form of judicial review that can only be characterised as alien in this realm. What Parliament passes as law is law and to be applied by the courts whether they agree with the justifications, merits, nature, definition or extent of the mischief it is attempting to remedy or not.²⁸

ORIGINS OF SCHEDULE 21

Murderers were unique in that they were the only offenders who, for all intents and purposes, were sentenced not by a judge but by a politician. In *Anderson*²⁹, the Appellate Committee of the House of Lords held that the Home Secretary was in reality performing an act of sentencing³⁰ but was not an ‘independent and impartial tribunal’ because he was a member of the executive³¹. Previously, a mandatory life sentence would be awarded to the convicted murderer and the trial judge and Lord Chief Justice would make recommendations to the Home Secretary as to the length of the penal element, viz. the amount of time D would have to serve in jail before becoming eligible for parole. In recent times this figure should have taken into account the judicial guidelines for the sentencing of murder as covered in the preceding chapter. The Home Secretary however was at absolute discretion whether to follow these recommendations, or set a minimum term of his own choosing. The genesis of Sch.21

²⁸ A Dicey, *Introduction to the Law of the Constitution* (first published 1885, 8th edn, Macmillan 1915) 3-4, 18-20, 24-25, 39; A Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 52

²⁹ [2003] 1 AC 837

³⁰ (n 29) [17]-[18], [24]

³¹ (n 29) [26]

can thus be found in *Anderson*, which ruled the hitherto practice and power of the Home Secretary to ultimately fix the penal element of a murderer's life sentence a breach of Art.6 of the ECHR, and that consequently 'the Home Secretary should play no part in fixing the tariff of a convicted murderer'³².

Issuing a declaration of incompatibility between the statutory provisions affording the Home Secretary such a power and the ECHR, the government could do two things. Either ignore it or take action to remedy the problem. Only the latter was realistic. The government's immediate stance, espoused by the then Home Secretary David Blunkett in a written answer on 25th November 2002, was correct to note that the 'judgment will affect only the issue of *who* sets the tariff in each case'³³ [emphasis added]. He proclaimed

As is proper in a democracy, Parliament will continue to retain the paramount role of setting a clear framework within which the minimum period to be served will be established. I am determined that there should continue to be accountability to Parliament for these most critical decisions. This is fundamental to our democracy and to the maintenance of confidence in the criminal justice system.³⁴

He went on

These principles will set a framework within which judicial discretion, which is an essential feature of sentencing, will operate... The principles will set out that for the most serious crimes— such as the sexual, sadistic murder of children— life should mean life. The principles will incorporate the same aggravating factors upon which previous Home Secretaries and I have based our decisions. These factors will include murder committed in the course of armed robbery or the murder of prison or police officers in the course of their duty as set out to Parliament by my predecessor Leon Brittan in 1983.³⁵

From these initial indications, it is clear that Blunkett wished to retain executive or at least legislative influence over sentence levels for murder, and would enact a framework of

³² (n 29) [28]

³³ HC Deb 25 November 2002, vol 395, col 100W

³⁴ *ibid*

³⁵ (n 33) col 101W

principles to do so. Crucially, those ‘will incorporate the same aggravating factors upon which previous Home Secretaries and I have based our decisions.’³⁶ Blunkett’s emphasis that the only change mandated by the judgment was who fixes the tariff makes it clear that who decides the policy would not. As it stood however in practice, the means for the influence exercised by the Home Secretary would evaporate leaving purely the judicial guidelines to advise sentencers.

Not just a new procedure, but a new policy

Without the ability to henceforth set minimum terms himself, it is not immediately apparent how a Home Secretary’s policy would continue to be enforced by others. Blunkett hints at such concerns in his first public enunciation on the issue. Advocating that for certain murders ‘life *should* mean life’³⁷ (emphasis added) and that the most heinous crimes must be ‘dealt with properly’³⁸ betrays an anxiety. His implication is either that presently that is not the case, or that those goals would not be guaranteed if the Lord Chief Justice’s Practice Direction were allowed to stand alone as the sole authority for judges determining minimum terms³⁹. His tone suggests he for one still stands by the doctrine that only the executive can ensure justice is done when it comes to punishing murderers⁴⁰ and hence his

³⁶ *ibid*

³⁷ *ibid*

³⁸ HC Deb 4 December 2002, vol 395, col 928

³⁹ This had always been insinuated. Douglas Hurd, whose remarks that judicial recommendations as to minimum terms was just one factor in fixing the tariff, also included ‘the need to maintain public confidence in the system of justice’ implying that judicial recommendations alone couldn’t be relied upon to do so: HC Deb 23 July 1987, vol 120, col 349W)

⁴⁰ See the case advanced for the Home Secretary in *Anderson* defending his powers

disenfranchisement means positive steps need to be taken to uphold what the government see as “appropriate” sentencing of murderers.

Explicit about Parliament re-asserting its leading role vis-à-vis the penalty for murder, when the proposed guidelines were put before Parliament, Blunkett claimed “we are trying to achieve the same result” as when the Home Secretary fixed the tariff⁴¹. He gives a number of examples of how Home Secretaries down the years have set substantially higher tariffs for the more heinous murders to justify this⁴². It also serves to explain why Sch.21 is so much more punitive than the SAP guidance and resultant Practice Direction, which he tries to distance himself from by claiming he neither ratified nor agreed with those judicial guidelines.⁴³ In effect, he is incorporating the Home Secretary’s modifier on minimum terms into the new guidelines, since that minister will not be able to do so on an individual basis anymore. As he says, it is codifying the principles the Home Secretary uses.⁴⁴ Whilst this initially may look like a circumvention of the ruling in *Anderson*, it is in fact merely giving effect to the separation of powers demanded by the judgment, and no more. It found that sentencing, for a discrete individual, could not be performed by someone who ‘as a member of the executive, is undoubtedly not independent’⁴⁵. Ergo, *Anderson* found the procedure for setting tariffs unlawful, not the policy the Home Secretary was applying in doing so.

This notion is at odds however with Blunkett’s subsequent admission that ‘there will be an increase in those serving life sentences’⁴⁶. Why would this be the case if the new statutory

⁴¹ HC Deb 20 May 2003, vol 405, col 870

⁴² *ibid*

⁴³ HC Deb 20 May 2003, vol 405, cols 870, 871

⁴⁴ (n 41)

⁴⁵ (n 29) [48] (Lord Steyn)

⁴⁶ HC Deb 20 May 2003, vol 405, col 869

guidelines are merely replicating extant practice? Contrary to warnings ‘we must be careful that, in seeking properly to address public disquiet about the most serious murderers, we do not simply introduce a ratcheting up of tariffs for every murderer’⁴⁷, Sch.21 raises the starting point for the 16 *and* 12 year gradations, albeit by different proportions. Thus, most importantly it appears to be more punitive than prior practice of Home Secretaries for a category (unaggravated murders) that has never been subject to a Home Secretary’s modifier, unlike the upper category⁴⁸. It is evident thus that despite only having to alter who assesses the appropriate length of the minimum term, the opportunity is being taken to change the *policy* itself as well. It is at this stage that closer scrutiny of the Schedule would help illuminate developments.

THE CONTENT OF SCHEDULE 21

Schedule 21, as it eventually became, is a narrative guideline for the sentencing of those convicted of murder. It provides different ‘starting points’ for adults based upon 3 categories of the seriousness of the murder, and a fourth, separate one for juveniles. Subject to aggravating and mitigating factors, murders of ‘exceptionally high’ gravity merit a whole life order, those of ‘particularly high’ gravity a starting point of 30 years, and all others, one of 15 years. Offenders under the age of 18 should have their minimum terms fixed from a starting point of 12 years. The recent amendments made to Sch.21⁴⁹ will not be dealt with here as

⁴⁷ HC Deb 20 May 2003, vol 405, col 884

⁴⁸ HL Deb 14 October 2003, vol 653, col 872

⁴⁹ para.5A of Sch.21 introduces a new starting point of 25 years for murders committed with a weapon which is not a firearm that D had taken to the scene of the killing. Firearms are dealt with under para.5

they were not on the table and thus cannot be part of the Parliamentary intention when the CJA03 was passed.

Whole life order confirmed and category broadened

The top category of ‘exceptionally high seriousness’ can be found in para.4 of the Schedule and has no sibling in any of the judicial guidelines. The affirmation of a whole life order as the statutory maximum for the penal element in a mandatory life sentence for murder did not change the status quo; in *Hindley*,⁵⁰ the House of Lords had already held that it was possible for a minimum term to be fixed as the entirety of D’s natural life if the gravity of the offending conduct merited it. Thus Parliament affirmed that ‘LWOP’ (Life WithOut Parole) was the ultimate sanction of the UK. It is the anchor of our penalty scale thereby.⁵¹

However, the range of cases that were deemed to merit such a punishment was broadened by Sch.21. Many were in the same group declared by the then Home Secretary in 1983 as worthy of at least 20 years in prison. In the language of s.153(2), the shortest term commensurate with the seriousness of the offence for murders of this nature has increased greatly to a whole life sentence. Even accepting that Leon Brittan was indicating a lower limit rather than upper or actual appropriate tariff, the policy in practice was that a whole life order was rare and exceptional:

In 1985, for instance, the trial judge gave a sentence of 20 years for an offence of rape and murder and rape and attempted murder by one individual. The Lord Chief Justice ratified that, but the Home Secretary increased it to 30

⁵⁰ [2001] 1 AC 410

⁵¹ C Appleton and B Grover, ‘The pros and cons of life without parole’ (2007) 47(4) *Brit J Criminol* 597, 612; it has since been confirmed by the courts again in *Bieber* following a human rights challenge. For discussion see M Bohlander, ‘The remains of the day- whole life sentences after *Bieber*’ (2009) 73(1) *J Crim L* 30

years. In 1996, the trial judge recommended 25 years for an offence of three sexual assaults and murders. The Lord Chief Justice affirmed. The tariff was 35 years. In 2000, three murders resulted in a sentence of 25 years. The Lord Chief Justice agreed with that. The tariff was set at 35 years.⁵²

Sch.21 makes it clear that in the second example, according to para.4, the starting point now would be a whole life order. Hence, the statutory guidelines are legislating a higher tariff than even the former practice of Home Secretaries. The modifier applied by that officeholder to impart democratic sensibilities on the tariff has itself been increased by Sch.21.

Murders of 'particularly high' seriousness

The same is true of the other gradations for which starting points were given as Shute observes:

The types of murder included in these lists [paras.4 and 5 of Sch.21] are broader than those for which a sentence of death could have been imposed between 1957 and 1965 and those which had been identified by Mr Brittan in 1983 as requiring especially long terms of imprisonment.⁵³

Not only are the categories broader but the respective starting point is higher too than previous practice of Home Secretaries. As Lady Scotland remarked in the Upper House in the context of murdered police officers, one of the instances marked out by both the LCJ's Practice Direction and Sch.21 of being in the 'particularly high seriousness' bracket:

Leon Brittan, in his 1983 statement on murder tariffs, said that murderers of police officers should serve at least 20 years. In practice... that has tended to receive a tariff of between 20 and 25 years. Therefore, setting the starting point at 30 years enables the court to increase that tariff, if it deems that the

⁵² HC Deb 20 May 2003, vol 405, col 870

⁵³ (n 9) 178

nature of the offence is so grave... We have provided a very significant increase.⁵⁴

This statement recognises not just the fact that the politically determined sentence was higher than that of the judicial recommendation which would have been in the region of 16 years given the bench's guidelines for this class of murder, but that the political sentence is now higher than what it would have been previously. Again, here there has been an increase in the 'modifier' applied by the political dimension of the process.

Murders not covered above

The same can be observed with relation to the 15 year starting point encompassing all other murders, which represents a 3 year increase from the judicial guidelines. Given that the Home Secretary affirmed the overwhelming majority of judicially recommended tariffs (87% in the five year spell 1997-2002 shortly before he lost the power to do so⁵⁵), which can safely be assumed to be the bulk of these "standard" cases⁵⁶, it is apparent there has been an inflation in the political modifier for these murders too. Indeed, this increase, in the wake of the SAP opining that the 14 year starting point Lord Bingham CJ moved to in 2000 be reversed back to 12 years, is a distinct abjuration of that policy endorsed by Lord Woolf CJ's 2002 guidance. The fact that this increase in sentencing levels will affect far more cases than any of the other provisions means that it is potentially just as important if not more so, despite not being headline-grabbing in the same way whole life minimum terms are. Ascertaining what this represents, and the intention behind it, is the focus of this chapter.

⁵⁴ HL Deb 14 October 2003, vol 653, col 872

⁵⁵ HL Deb 16 June 2003, vol 649, col 589

⁵⁶ Since they constitute 70% of murders: HL Deb 11 November 2003, vol 654 col 1264

Under 18s

One aspect which received much attention in the Upper House was the starting point for youths. The government agreed to amend the Schedule to insert a new starting point for youths, rather than grouping them with adults. Lady Scotland told the house there were ‘clear similarities’ between the sentencing levels for adults and juveniles⁵⁷, of whom those released in 2000 had served on average a minimum term of 10.8 years⁵⁸. If so, the introduction of a 12 year starting point for under 18s will reduce the starting point by 3 years for applicable young offenders compared to the Lord Chief Justice’s Practice Direction. The caselaw review of the courts’ administration of the statutory guidelines for my MSc dissertation found ‘confusion still rules’ on what ages justify mitigation for youth when the starting point of twelve years is compared to fifteen. It surmised the best approach however was to treat twelve years as the starting point for someone of age 18, and apply mitigation for youth below that. It follows mitigation should be permitted off fifteen years where the offender is below 21 (but over 18)- which conveniently makes a structure of one year’s discount each year under 21 to align 18 as the starting point for youths aged 18. This would mean mitigation is applied from that starting point for all ages under 18, but for how much less culpable someone is compared to an 18 year old rather than someone of full adult responsibility, as would have happened where there is no separate starting point. Thus sentencing levels are still higher for juveniles as a result of Sch.21, but by how much is harder to judge.

⁵⁷ (n 56) col 1243

⁵⁸ HC Deb 20 May 2003, vol 405, col 893

Why the rise in tariff?

The government's case

Having established that increases in sentencing levels for all gradations of murder have been ordained by Sch.21, although intriguingly of varying degrees⁵⁹, it is pertinent to ask *why*?

What has caused the Home Secretary's modifier itself to be revised upwards? Blunkett, moving the freshly published draft guidelines in the House for the first time propounded:

we should lay down a framework that will give the people of this country confidence in the system, for two reasons—first, that those who commit the most horrendous murders will get what used to be called, in old-fashioned language, their just deserts. Secondly, when people have confidence in the system and there is consistency in the treatment of the most difficult and dangerous crimes, they might be prepared to listen to a broader debate about sentencing policy, the sentencing framework and the work of the Sentencing Guidelines Council.⁶⁰

These two aims, one a question of proportionate punishment, and the other about a communicative aspect of sentencing for criminal justice, are united by a common thread of democratisation in a sense; of delivering a sentencing system that better reflects shared public values.⁶¹

With regards to the first justification, Blunkett exclaims, 'there is no question but that the public are bewildered by how sentences can be reached when they know that the crime that

⁵⁹ This fact is discussed in VI.iii and VIII.ii

⁶⁰ HC Deb 20 May 2003, vol 405, col 871

⁶¹ Values I emphasize, not as to whether sentences for crimes are too lenient or not, but values in the sense of principles and tenets shared by all citizens in our nation. A shift in these may have implications for the quantum of punishment however.

has been committed was so heinous that there could be only one sentence: life should mean life.’⁶²

In speaking of ‘heinous’ crimes, Blunkett appears to be referring to the gravity of the crime committed. His language describing the public’s bewilderment also intimates the extent of the alleged disparity between public conceptions of a just sentence and those actually handed down. This may go some way to explaining his allusions of under-sentencing by the judiciary in that so often their recommendations are followed, notwithstanding that the Home Secretary is under no obligation to. He is making a case for change and asking for the Parliament’s endorsement.

To reinforce his contentions in this respect, Blunkett identifies the problem of disparity between murder sentences and those of lesser offences, outlining the wider intention behind the revised structure enacted by Sch.21:

People cannot understand that when someone has been found guilty of murder...the sentence that is served for taking a life does not always equate to other forms of criminality for which people at a lower level of the sentencing framework are serving longer sentences. People think, honestly, that we have all lost our marbles. They do not understand how, if murder is the most horrendous crime, others do not see that the perpetrators must be put in jail for as long as possible so that society demonstrates its common sense through its actions.⁶³

The theme of the government’s contention is the gravity of the crime of murder is not reflected by sentences for it, not least when compared to the punishments for other offences. This dimension of ordinal proportionality in relation to lesser offences is most pertinent to the lower sentences for murder, those imposed for “average” murders, and can most closely be associated with the shift from twelve to fifteen years for those murders. Blunkett’s concerns

⁶² HC Deb 20 May 2003, vol 405, col 867

⁶³ HC Deb 20 May 2003, vol 405, col 871

are not dissimilar to a critique emanating from the academy relating to the proximity of sentences for armed robbery and serious drug crimes to grave domestic offences against the person,⁶⁴ which tend to fall in the lowest category for murder sentencing.⁶⁵ That concern about the brevity of sentences for domestic killings was the catalyst for the sentencing guidelines on provocation too.⁶⁶ Ashworth has convincingly propounded that penalties need to be rebalanced in favour of breaches of bodily integrity compared to offences infringing property rights.⁶⁷ It would explain why a substantial increase has been made to the unaggravated tier of murder as well as the others by Sch.21.

There are two options to solve this issue though, assuming it exists. The first is to increase the sentence for murder, the second is to decrease the sentence levels for those lesser crimes felt to illustrate murder as under-sentenced. The government's assessment was resoundingly that murders were under-sentenced and that the new starting points would deliver sentences that actually 'recognises the seriousness of the offence'.⁶⁸ Seriousness is determined by reference to two factors: harm and culpability. This suggests that elements of the crime of murder are now treated more seriously than before by society, or that there has been historic under-valuing of the tenets breached by murder and consequently inadequate minimum terms. We can identify this component as the harm element, simply because, the culpability ingredient of intention is common to most crimes (except ones of strict liability, for instance). If there was an increased valuation on an intention to do wrong, irrespective of the wrong, we

⁶⁴ A Ashworth, *Sentencing and criminal justice* (3rd edn, Butterworths 2000) 131

⁶⁵ Few domestic homicides entail any of the characteristics listed as indicative of 'exceptionally high' or 'particularly high' seriousness murders in Sch.21.

⁶⁶ (n 18) 2

⁶⁷ A Ashworth, *Sentencing and Criminal Justice* (4th edn, CUP 2005) 149; A Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 153

⁶⁸ HC Deb 20 May 2003, vol 405, col 901

would expect to see all crimes' penalties increased where intention was a feature, which is the vast majority. This didn't occur. Other crimes where the same harm element, death, was the actus reus however did have their sentences increased contemporaneously,⁶⁹ or even new offences created to censure and sanction other killings.⁷⁰ This would suggest it was the harm element not the intention element that was having a higher valuation placed upon it as a policy of the time. The common feature between those crimes is distinctly not their culpability elements, for murder being intention, for dangerous driving being a form of gross negligence. Again, the common denominator with the RSA06 offences is the harm of death—certainly not intention (controversially).

Scrutiny by the House of Commons

There was regrettably only one debate of decent length on the guidelines that became Sch.21 in the House of Commons. This may surprise readers as it did opposition MPs. A

Conservative MP was incensed that:

the Government are allowing the House of Commons two and a half hours to consider 16 new clauses and more than 30 amendments, an hour and a half to consider three new clauses and more than 100 amendments, and a further hour and a half to consider four new clauses, one schedule and one amendment.'

How on earth do the Government expect the House to discharge its responsibility for proper scrutiny of legislation when they are imposing such a timetable on our deliberations?⁷¹

⁶⁹ Causing death by dangerous driving: CJA03, s.285(3)

⁷⁰ RSA06, ss.20 and 21

⁷¹ HC Deb 20 May 2003, vol 405, col 842

Similarly, a Liberal Democrat MP was ‘dumbfounded’ by the dismissive attitude of the government minister given ‘nearly 500 amendments and 28 new clauses have been tabled to the Criminal Justice Bill, dealing with the most crucial issues of life and liberty.’⁷²

Of what discussion there was, the guidelines received a mixed reaction- some welcoming and some sceptical. The Tory front bench declared them ‘perfectly cogent and sensible proposals’⁷³. Disappointingly there was confusion as to the purpose of the penal term.⁷⁴

Doubt though was expressed about increasing minimum terms for all gradations of murder ‘in seeking properly to address public disquiet about the most serious murderers’.⁷⁵ This intimates Grieve, at least, was conceiving of Sch.21 in a much narrower sense than Parliament who passed the provision. Nonetheless, he was clear that he did not think the Home Secretary was starting a bidding war into how high tariffs could go⁷⁶ which militates against the hypothesis that the increases in sentencing levels was a matter of penal populism.

Fellow counsel on the government benches declared the 15 year starting point ‘entirely appropriate’.⁷⁷ Many of the members in favour were the same people pushing for reforms to the road traffic legislation,⁷⁸ suggesting they were inspired by same values and concerns and found murder sentencing wanting also. Indeed, the atmosphere of the debates is not one of allegations of “draconian” sanctions, harsh justice or excessive punitiveness. No such accusations are made. The Liberal Democrat spokesman informed the government his party

⁷² HC Deb 20 May 2003, vol 405, col 843

⁷³ HC Deb 20 May 2003, vol 405, col 882

⁷⁴ (n 73) col 884

⁷⁵ *ibid*

⁷⁶ (n 73)

⁷⁷ (n 73) col 900

⁷⁸ (n 73) col 875-876

wouldn't be voting for Sch.21 due to the figures chosen for the starting points,⁷⁹ but otherwise reservations tended to focus on the consequences of the new starting points, rather than their intrinsic merit. Numerous MPs for instance inquired about the impact on the prison population⁸⁰. This rather implies that the central provisions of the schedule, the starting points and their respective factors, were largely uncontroversial; consideration turned to the practicalities of their enforcement.

Grieve's remark though that 'the rapidity with which the proposals have been put together shines through them'⁸¹ was made when the proposals were first published and before they were passed in refined form. The lack of sustained debate on Sch.21 in the Commons, and a lack of attention on the sentencing *levels* in the Lords leaves the picture somewhat translucent. However, it is submitted that contemporaneous debate on the topic of deaths caused by driving illuminate the values and principles underpinning the assent given to Sch.21 much more crisply.

Driving offences censuring the causing of death or injury

Causing death by dangerous driving (CDDD)

In December 2000 the government launched a review of penalties for road traffic crimes. The consultation paper was especially erudite, and observed that penalties for car crimes had to be proportionate to sentences for other non-road-related offences, as well as being consistent

⁷⁹ (n 73) col 892

⁸⁰ (n 73) cols 869, 875, 881

⁸¹ (n 73) col 881

within its own species. It noted that both intra and inter offence ordinal proportionality ‘may change over time, for example in response to changing social conditions’.⁸²

It also acknowledged how attitudes to drink-driving had been ‘transformed’⁸³ come 2000. It seemed to identify no similar revolution in the attitude to causing death by culpable driving though, remarking

However devastating the consequences of causing death by dangerous driving, it seems unlikely that public opinion generally, or the sentencing practice of the courts, would equate that offence with other serious offences for which 14 years imprisonment is available.⁸⁴

It found no need from the courts to increase the statutory maximum as the existing ceiling was not prohibiting appropriate sentences.⁸⁵ Since it doubted any deterrent effect, that is any fewer deaths being caused by dangerous driving as a result of increasing the statutory maximum to a mooted 14 years⁸⁶, it concluded overall against any such increase.⁸⁷

However, given the scale of change to motoring crimes and their penalties over the course of the following decade, one would have to infer significant changes in the social fabric of the country occurred during that period, or perhaps that such changes had taken place already but not been noticed or incorporated into policy.

⁸² Home Office, *Road Traffic Penalties* (HO, 2000) 5

⁸³ (n 82) 6

⁸⁴ (n 82) 15

⁸⁵ (n 82) 15

⁸⁶ (n 82) 15

⁸⁷ (n 82) 17

Indeed, the government report was at odds with the conclusion of the all-party Parliamentary Advisory Council for Transport Safety. Their review published in 1999 complained that ‘bad driving offences, especially those involving death, are often not being dealt with in a manner which signals to society that such offences are a serious matter’.⁸⁸ It could only have been a surprise to the government then that within a couple of years of the Home Office’s 2000 report judges were sentencing at or near the statutory maximum of 10 years for CDDD.

The *Report on the Review of Road Traffic Penalties* published just over 18 months later discovered that there had been a clumping of sentences around 10 years since the last report⁸⁹ and consequently that the 10 year ceiling was ‘no longer appropriate’⁹⁰. Besides this it gave very little if any explanation for proposing lifting the cap.

Causing death by careless driving (CDDC) and the Road Safety Act 2006 (RSA06)

Despite it being announced shortly after that the maximum penalty for CDDD would be increased to 14 years jail, backbench MPs were demanding more reform of road traffic offences and penalties whilst the CJA03 enacting that rise was still going through Parliament. One proposed new offences of aggravated CDDD with a statutory maximum of life imprisonment,⁹¹ and causing death by ‘bad driving’.⁹² A multitude of MPs queued up to record ‘so many hon. Members and so many of our constituents’⁹³ bewilderment at

⁸⁸ PACTS, *Road Traffic Law and Enforcement* (London, 1999) 2

⁸⁹ Home Office, *Report on the Review of Road Traffic Penalties* (HO 2002) 5

⁹⁰ (n 89) 6

⁹¹ HC Deb 30 April 2003, vol 404, col 75 WH

⁹² (n 91) col 77 WH

⁹³ HC Deb 11 Jan 2005, vol 429, col 240

‘obscenely lenient’⁹⁴ sentences that ‘trivialise the life that has been lost’.⁹⁵ Especially in cases of Careless Driving (CD) where a fatality had resulted, the fact that there was no harm component to the offence meant that regularly any harm caused was treated as immaterial and not be taken into account when sentencing was treated as an affront to justice.

Irrespective of the fact that the Court of Appeal had changed its stance on whether the fact a death caused by careless driving could aggravate sentence between 1996 and 1999, and that SAP guidelines given effect by *Cooksley*⁹⁶ upheld this policy, the overall picture was that sentences for many motoring crimes resulting in loss of life were woefully inadequate in recognising that fact. As one MP who characterised the consensus commented, ‘a key point rightly made by many hon. Members is that sentencing policy does not appear to reflect the seriousness of the crimes committed.’⁹⁷ Another mirrored the sentiments of all the other speakers in the debate, urging that ‘when considering offences, we need to ensure that the fact of death or injury is a key point in criminal proceedings’.⁹⁸

All the same, no new offence of CDCD was incorporated into the CJA03. Demonstrating this wasn’t a passing fad, pressure continued in Parliament with attempts by backbenchers to introduce such provisions, or berating the government for not having done so.⁹⁹ Jim Knight, who proposed new offences of motor vehicle manslaughter and an aggravated version, was scathing of the existing structure of road traffic offences and their punishment. With respect to the former he criticised the ‘gulf’ between the conduct required for CD and dangerous

⁹⁴ (n 91) col 80 WH

⁹⁵ (n 91) col 82 WH

⁹⁶ [2004] 1 Cr App R (S) 1

⁹⁷ (n 91) col 88WH

⁹⁸ (n 91) col 81WH

⁹⁹ HC Deb 13 July 2004, vol 423, cols 1278-81; HC Deb 7 September 2004, vol 424, cols 181-205WH; HC Deb 11 January 2005, vol 429, cols 213-266

driving (DD) as ‘huge’¹⁰⁰. The degree of dissatisfaction with sentencing prompted him to call for ‘a change in our attitude towards road traffic accidents where serious injury or death occurs.’¹⁰¹

Although momentum was gathering amongst MPs, there was discontent with the government’s handling of the issue. A quite unusual sense of anger can be sensed in some honourable members’ speeches. One Labour MP, tangibly frustrated by the fact that the government had made sympathetic noises yet done little in the last 4 years implored, ‘It is about time that it was recognised that virtually every Member of Parliament wants something done about people who break the law in their cars and murder our constituents. It is like allowing them to do what they like with a gun.’¹⁰² No doubt criminal lawyers would recoil at the exaggeration used by this MP to make his point. Nevertheless, it might help explain the increasingly intolerant approach to bad driving, viz. that given everyone knows how the slightest error at the wheel can have catastrophic consequences upon utterly innocent people, there is an obligation on drivers to be more prudent. Those who aren’t are blameworthy in their ‘indefensible’¹⁰³ disregard for the *harm* their lax driving can have. In this respect, it is analogous to the transformation of attitude Viscount Thurso referred to vis-à-vis drink driving¹⁰⁴. Because the car is so easily a potentially lethal machine when poorly used, it is not acceptable to take charge of one in a diminished state of competence. Indeed, many MPs were ‘absolutely astonished’¹⁰⁵ that an offence of CDCD didn’t exist already. Exclamations

¹⁰⁰ HC Deb 13 July 2004, vol 423, col 1280

¹⁰¹ HC Deb 13 July 2004, vol 423, col 1280

¹⁰² (n 93) col 216

¹⁰³ (n 93) col 235

¹⁰⁴ HC Deb 7 September 2004, vol 424, col 199WH

¹⁰⁵ (n 93) col 235

such as “it is absurd that the structure of our law does not consider death to be at the centre of such cases”¹⁰⁶ are representative of unanimous agreement on the matter. The government minister was left convinced at the end of the debate ‘that we are going through a gradual cultural change in this matter.’¹⁰⁷ Less than twenty years after the last major review in the late 1980s, attitudes in the House had changed dramatically.

On February 3rd 2005 the government released a consultation paper proposing the creation of the crime of CDCD, and two related offences of essentially an illegal driver causing death. The strength of feeling in the elected House can be observed by the fact that MPs on both sides of the House were scathing of the delay in tabling provisions to enact the proposals¹⁰⁸. No doubt this was exacerbated by the fact that the government had already moved a new bill on Road Safety without them. One exasperated MP attempted to introduce the mooted new crimes as amendments to the Bill, though ministerial assurances that it was the Home Office’s intention to insert the new laws upon receipt of the report giving the government’s verdict on responses to the proposals ultimately saw them rejected. Scheduling the publication of this report for the day after the general election of 2005 is not the action of a government keen to profiteer from penal populism¹⁰⁹. It was nonetheless merely postponing the inevitable given the cross-party support for the planned sections, which were eventually enacted by the Road Safety Act 2006.

¹⁰⁶ (n 93) col 249

¹⁰⁷ (n 93) col 266

¹⁰⁸ *ibid*, (n 93) cols 253-254, HC Debs 8 March 2005, vol 431, cols 1403-1404

¹⁰⁹ cf. S Cunningham, ‘Punishing drivers who kill’ (2007) 27(2) LS 288, 297, 301-302; A Ashworth, *Sentencing and criminal justice* (5th edn, CUP 2010) 127; M Hirst, ‘Causing death by driving and other offences’ [2008] Crim LR 339, 340

The government's sloth compared to MPs desperation for these measures casts them in a revealing light. Rather than easily being derided as yet more penal populism from a government keen to stay ahead in the 'law and order' stakes¹¹⁰, the government's reluctance shifts the impetus for their introduction to ordinary backbench MPs. One of the latter surmised that pressure on prison spaces was getting in the way of the government taking the necessary steps to help ensure truly proportionate jail sentences¹¹¹. Another who declared themselves a trustee of the Prison Reform Trust found it 'absolutely bewildering'¹¹² that such a 'yawning gap'¹¹³ existed between CDDD and CD, meaning cases of CD which had caused a death did not reflect the degree of culpability and 'the fact that a death occurred'¹¹⁴. This would suggest the cross-party accord on the harm done by bad driving was organic and individually inspired rather than an elite top-down reform dreamt up by a few advisers and being rapidly and forcefully pushed through Parliament, regardless of others.¹¹⁵ If there was a genuine movement amongst society at large for greater recognition of the harm of death, this is how we would expect it to be expressed.

In sum, this investigation has unearthed much evidence that the central issue the government championed Sch.21 as remedying was as an organic, cross-party grass-roots concern. That the value of human life was higher than was being reflected both by the law and in sentencing in a range of different circumstances where it had been criminally terminated.

¹¹⁰ against the Tories: I Loader, 'Fall of the "Platonic Guardians"' (2006) 46(4) *Brit J Criminol* 561, 578

¹¹¹ HC Deb 30 April 2003, vol 404, col 90WH; HC Deb 8 March 2004, vol 431, col 1404

¹¹² (n 93) col 247

¹¹³ (n 93) col 247

¹¹⁴ (n 93) col 248

¹¹⁵ As could be argued the Iraq war, foundation hospitals, top-up fees etc were.

The veracity of the government's case

Criticism from the then Lord Chief Justice Lord Woolf, amongst others in the House of Lords, accused Sch.21 of being politically motivated.¹¹⁶ In the course of Parliamentary debate some of the ministers made remarks that could be construed as disclosing a less noble, more base motive for Sch.21,¹¹⁷ arousing the spectre that Sch.21 was merely another misguided example of penal populism, a regrettable consequence of the democratisation of criminal justice.¹¹⁸

Yet on many other issues MPs have ignored or acted in flagrant opposition to popular opinion.¹¹⁹ Indeed, on the subject of punishing murderers, the House has resiled from reintroducing the death penalty for murder even though that has consistently been shown to be the will of the majority of the general public.¹²⁰ Though these are blunt public opinion polls¹²¹ they are no different from the ones accusing the courts of lenient sentencing. There have been campaigns against the Iraq war, campaigns for and against the abolition and now restoration of the death penalty. There must be a rationale for taking action in one field of alleged discontent and not another.

¹¹⁶ Second reading of the Criminal Justice Bill, HL, 16 June 2003- Background notes to speech by Lord Woolf, [58]

¹¹⁷ HC Deb 20 May 2003, vol 405, cols 901-902

¹¹⁸ D Garland, *The culture of control* (OUP 2001); (n 110)

¹¹⁹ J Lewis, 'Television, public opinion and the war in Iraq' (2004) 16(3) *Int J of Public Opinion Research* 295, 297

¹²⁰ R Jowell et al, *British Social Attitudes: the 12th report* (Dartmouth 1995); N Walker and M Hough, *Public Attitudes to Sentencing* (Gower 1988) 3

¹²¹ J Roberts and L Stalans, *Public opinion, crime and criminal justice* (Westview 1997) 227; F Cullen et al, 'The myth of public support for capital punishment' in J Wood and T Gannon (eds), *Public opinion and criminal justice* (Willan 2009)

But assertions of government ministers that we need to implement certain sentencing levels on the basis of public demand could (a) be undermined by the research on public opinion if it testified otherwise. That would not affect the binding force of Sch.21, but would impinge on whether it had any broader implications if additionally (b) it was merely an exercise in penal populism. That would limit its remit purely to murder since it would be the only crime singled out as part of a calculated policy to try and satiate popular punitiveness.

Unaccompanied by a genuine increase in the value of the harm of death, there would be no good reason for courts to consider the harm of death any more serious when determining the gravity of other homicide offences and thus not sentence any differently.

Is validity an issue?

With regards to (a), public opinion research finds that the public often think crime is rising when it's falling,¹²² and think crimes are sentenced too leniently but then sentence at the same level or below when presented with individual cases.¹²³ This raises the question whether the perceived inadequate sentencing of murder cited by the government is mistaken. Yet little of the research in the UK up to 2003 focused on murder.¹²⁴ Where it did, it appeared questionable whether it was representative of most homicide cases. Mitchell's study conducted now over fifteen years ago in 1995 asked members of the public to sentence a

¹²² J Roberts and M Hough, *Understanding public attitudes to criminal justice* (OpenUP 2005) 10; J Roberts et al, *Penal populism and public opinion* (OUP 2003) 21-22

¹²³ A Doob and J Roberts, 'An analysis of the public's view of sentencing' (Department of Justice, Canada 1983); Roberts and Stalans (n 121) 210, 221-223; Roberts et al (n 122) 93; Roberts and Hough (n 122) 79; D Green, 'Public opinion versus public judgment about crime' (2006) 46(1) *Brit J Criminol* 131; A Lovegrove, 'Public opinion, sentencing and lenience' [2007] *Crim LR* 769

¹²⁴ B Mitchell, 'Public perceptions of homicide and criminal justice' (1998) 38(3) *Brit J Criminol* 453

range of different “homicide” scenarios. Yet only two of the total eight could be certainly inferred as murder, one of those being a killing under duress, the other being a ‘mercy killing’; hardly the average murders. The remaining scenarios were all characterised by heavy mitigation (voluntary manslaughter, thin skulls), the presence of prima facie complete defences meaning they wouldn’t actually constitute homicides anyway (self-defence, necessity), or indeed not being homicide at all under the law as it stands (no duty of care on a passer-by to rescue exists in English law¹²⁵). The mildness of the 8 scenarios is summed up by the likelihood that the one adjudged to be the worst is not necessarily a murder.

Nonetheless, 30% felt it merited death or a whole life minimum term.¹²⁶ When envisaging the worst possible homicide, 89% demanded execution or life without parole.¹²⁷ The findings ‘support Hough’s conclusions that although the public often advocates *types* of sentence which are in line with judicial practice, for serious crimes they tend to have punitive views about sentence *length*.’¹²⁸ The gulf in sentences they were sometimes prepared to give¹²⁹ is certainly an eye-opener and may explain why the gap between the 15 and 30 year starting points in Sch.21 is so big. Likewise, the burglary scenario was ranked by far as the most serious and virtually half thought a sentence of thirty years or greater, including death, was justified for it. Large variations in sentence length and treating murders for gain as meriting a 30 year starting point are distinct features of Sch.21 and on this evidence they have much support amongst subjects in this realm.

¹²⁵ *Home Office v Dorset Yacht Co* [1970] AC 1004

¹²⁶ (n 124) 463

¹²⁷ *ibid*

¹²⁸ (n 124) 471, citing M Hough, ‘People thinking about punishment’ (1996) 35(3) *The Howard Journal* 191

¹²⁹ (n 124) 462-463

Hence, it is possible that the public mistakenly think other crimes, like burglary or drug misuse, are under-sentenced, but genuinely believe homicides are. Such a possibility is plausible because of the perceived gravity of homicides of even low culpability. Palpably the causing of death is innately a matter of great seriousness. Therefore to extrapolate findings regarding different crimes to homicides is a dubious projection rather than an established fact. Additionally though, it is precisely homicide offences that academics have questioned as lying out of their ordinal rank; that is, either under-sentenced or at best properly sentenced but other crimes over-sentenced giving the impression that murder is under-sentenced. Therefore, we would *expect* people to feel differently about the appropriateness of sentencing for serious offences against the person than for other crimes. Indeed, the public opinion research found divergence between public judgment and judicial judgments in fact-based specific case scenarios were greatest when sentencing for the most serious crimes, with citizens often remaining consistently harsher.¹³⁰ Mitchell's study appears to epitomise that trend. A correlation may be drawn between this finding and the increased sentencing levels for homicides enacted by Parliament.

There is certainly a *prima facie* case that claims about public conceptions of offence gravity and the severity of sentencing are not as straightforward as they purport. Not least is the question of whether they have changed over recent years, which prompts the investigation to be conducted as part of the doctorate. A deep, thorough and authoritative conclusion requires more space than afforded by this paper. Hence, future research will seek to evaluate the precise strength the relevant shared societal values and discern to what extent, if any, there has been any change in those. As has already been averred though, whatever those findings,

¹³⁰ Hough (n 128); Roberts and Stalans (n 121) 211-212; endorsed in Roberts et al (n 122) 32

they do not bear upon the legal application and enforceability of the legislation, which is what occupies this thesis.

Veracity

As to (b), if Sch.21 constituted merely a blunt, virtually reckless hike to satiate popular punitiveness, one would have expected to see the same replicated across the board for lots of other crimes. After all, there had been outrages about the sentencing of burglars around the same time, largely whipped up by intense press scrutiny.¹³¹ Some judges were quoted, explicitly stating that but for Lord Woolf's new guideline on burglary sentencing, a convict they were sanctioning would have been sent to jail.¹³² Was the response here statutory guidelines? No. Was the response here a hastily altered set of guidelines from the CofA after executive pressure? No. Just a clarificatory email to judges. The relative action with respect to murder and inaction as regards burglary, leads us to the conclusion that Parliament was convinced there was a justifiable public disillusionment with the former, and not with the latter. In the present context, the fact that the rise came vis-à-vis offences against the person and not property crimes, is consistent with the contention that the increases in murder sentences intended by Sch.21 was a deliberate effort to right the disparity between sentences for the two genres of crime.

¹³¹ C Baker, 'Press ganged' *Law Gazette* (13 February 2003) <<http://www.lawgazette.co.uk/news/press-ganged>> accessed 7 October 2011

¹³² D Sapsted, 'Seven times burglar spared jail by new ruling' *The Telegraph* (4 January 2003) <<http://www.telegraph.co.uk/news/uknews/1417857/Seven-times-burglar-spared-jail-by-new-ruling.html>> accessed 7 October 2011

It is worth noting that the burglary guidelines were revised in 2009 of the new LCJ's own volition. This might suggest that Lord Woolf did not fully appreciate the gravity of bodily harm when he issued the guidelines in *McInerney*¹³³ and on murder in 2002. The new guidelines handed down by Lord Judge CJ centred upon 'the principle which must be grasped...that when we speak of dwelling house burglary, we are considering not only an offence against property, which it is, but also, and *often more alarmingly and distressingly, an offence against the person.*'¹³⁴ 'The importance of viewing burglary as an invasion of the privacy and security of the home'¹³⁵ is an innately physical notion. Hence *Saw* consolidates the contention of this thesis that changes to the recognition of physical safety were a key characteristic of sentencing reform in the 2000s.

Whilst it can be pointed out that via ordinal proportionality these rises in murder sentences should lead to rises elsewhere in the same harm genus according to the Parliamentary intention distilled in this chapter, it is unlikely a reactive government looking for short-term popularity boosts from penal populism would adopt such a policy. It is indirect, nuanced, implicit and performed by the courts without the fanfare of political "initiatives". Indeed, it is exactly because of this that the caselaw examination is being undertaken in the next chapter to ascertain whether any consequent increases in manslaughter sentences have actually been implemented by the Courts. This investigation will be expanded to other offences against the person in the subsequent DPhil.

¹³³ [2003] 2 Cr App R (S) 240

¹³⁴ *Saw* [2009] 2 Cr App R (S) 54, [6] bold added

¹³⁵ A Ashworth, *Sentencing and criminal justice* (5th edn, CUP 2010) 139

The government has been accused of penal populism in respect of increasing the statutory maximum for CDDD and the new RSA06 offences already described.¹³⁶ Yet the latter were not part of the CJA03, and has already been seen from my Hansard analysis, were actually a backbench crusade, rather than a cabinet conspiracy to satisfy popular punitiveness. The government, having prevaricated and postponed as much as possible, only capitulated after their general election victory made further delay futile. Hence Cunningham is mistaken to cite this field as one where Ashworth's conclusion that '[v]ote winning and populism appear to hold greater sway with the government than respect for rights'¹³⁷ applies.¹³⁸ One wouldn't doubt this judgment on a raft of other policies from New Labour, but on close scrutiny it doesn't bear up here.

It must be acknowledged some facets arouse suspicion for responding to contemporaneous moral panics, but many of the others do not. It may be the particularly and exceptionally high seriousness categories of Sch.21 have been subject to a degree of reductivist rhetoric or incorporated some popular punitiveness for the high-profile murders that will inevitably make tabloid headlines. They, after all, have been linked to starting points which represent more than just the three year rise upon previous practice the fifteen year starting point does.

Could there be a rational explanation for the tariff increases for the categories in para.4 and 5? If there is an increased valuation on bodily harm, especially death, then does this not also impinge on the moral reprehensibility of intending to kill, intending to violate egregiously bodily integrity in other aggravating respects, whether it be sadistically or sexually? Thus, the gravity of the higher culpability for 'particularly' and 'exceptionally' high seriousness

¹³⁶ Cunningham (n 109) 297, 301-302; (n 135) 127

¹³⁷ A Ashworth, 'Criminal Justice Reform' [2004] Crim LR 516, 517

¹³⁸ Cunningham (n 109) 302

murders would be increased more than the basic uplift applied for the harm of death exhibited with unaggravated murders. Whether this can be said for all the features listed as indicative of one of the higher starting points however is disputable.

If this leaves us with the conclusion that some of the tariff increase is not compatible with factors determining the gravity of an offence under desert theory, that does not undermine the aspects that are. The former are in addition to an increased valuation upon the harm of death they also embody. The key lies in the rise of the normal starting point for unaggravated murders. These are not the high profile murders arousing 'public disquiet' as the Shadow Attorney General noted. Hence, no reason exists to increase the sentences for them on account of penal populism. These are the murders for which the Home Secretary never applied a modifier to the judicial recommendation. The rise in sentencing level for unaggravated murders demonstrates an enhanced importance pertains to something elemental about the offence of murder. That it is something elemental to the offence of murder is reflected in the fact sentences for all gradations have increased. This chapter has shown that must be the harm of death. Unlike penal populism, if that has the effect of longer sentences for other homicides, it is a legitimate reason because it addresses one of the criteria for determining offence seriousness under desert theory and s.143(1).

Alternative motivations

Deterrence

Unhelpfully, other contributions by Blunkett stand out as contaminating the proportionality logic.¹³⁹ Yet no mention was made in Parliamentary debates as to the numbers of murders, that they might be increasing, or the need to reduce the murder rate- even when talking of the most wicked murders. The focus was on how grave they were. The reductivist “qualities” of Sch.21’s higher sentencing levels simply was not a theme. Explicit reference moreover is made only to seriousness in Sch.21 itself. It must be assumed that no deterrent rationale was actually intended given the laws Parliament’s actually passed.¹⁴⁰

Debates on the death by driving legislation did evince a greater reductivist streak. It was noted drivers caught by the RSA06 crimes of killing whilst driving illegally are 6-9 times more likely to be involved in an accident.¹⁴¹ The clear preventative purpose of punishing deaths caused by such drivers, without any fault element pertaining to bad driving, may smack of the criminalization "solution" employed by New Labour all too routinely.¹⁴²

Deterrence may have been a facet of some Parliamentarians reasoning alongside the harm of death but by no means all or even the majority’s. Thus it doesn’t negate or detract from the intention of the legislation to better recognise the gravity of a crime where there had been loss of life. What is cogent here is that it is out of concern for the harm of death that the offences were *created* which demonstrates how highly valued the loss of life now is. Even those motivated by a preventative spirit were *because of* the strength of their belief in the sanctity of life.

¹³⁹ HC Deb 20 May 2003, vol 405, cols 867-868, 874

¹⁴⁰ At least beyond that purely incidental to what is being laid down on the basis of proportionality, which is perfectly acceptable. It is the reason for the increases that is material in discerning their broader implications.

¹⁴¹ (n 93) col 221

¹⁴² K Dowling, ‘4300: How Labour has created a new crime every day since 1997’ *Times Online* (14 March 2010) <<http://www.timesonline.co.uk/tol/news/politics/article7061148.ece>> accessed 7 October 2011

The format of the guidelines

A tangible theme through Lady Scotland's contributions in particular is a need to provide 'clarity' in the framework. Their accessibility to the general public enables 'anyone with an interest in a case can [sic] understand the line of thought that has led to a decision different from that which might have been expected'¹⁴³. Victims' families' engagement and comprehension for instance is enhanced through straightforward layout.¹⁴⁴ Indeed, it could be contended Sch.21's simplicity is what enabled the Kinsella's campaign on the starting point for murders with a knife to be made in the first place, and be so successful.

CONCLUSION ON PARLIAMENTARY INTENTION

Thus, on close analysis of Parliamentary debate explaining and discussing the reasoning behind Sch.21 and other contemporary legislation, Parliamentary intention was to increase sentences for murder because it thought the true seriousness of the crime as sensed by society was not being recognised sufficiently. In particular, it sought to redress an under-valuation of the harm of breaches of bodily integrity, and especially in its gravest form, death. It did so most emphatically when the two were combined, as demonstrated by the whole-life starting point for sexual or sadistic murders.

¹⁴³ HL Deb 5 November 2003, vol 654, col 856

¹⁴⁴ HL Deb 11 November 2903, vol 654, cols 1242-1243

LOGICAL CONSEQUENCES OF SCHEDULE 21

For the sentencing of other offences

Most salient is perhaps the fact that Lady Scotland like the Home Secretary referred to an overhaul in sentencing policy, proclaiming the CJA03 an effort ‘to bring together a holistic response to sentencing’¹⁴⁵. The fact that changes to murder, CDDD and firearms sentencing ‘should be seen in the light of the overall changes that we are making to provide a sensible framework’¹⁴⁶ does provide us with a distinct agenda. The emerging theme is the importance of the harm of death. That is reinforced by the mandatory 5 year minimum for possession of a firearm. Undeniably it smacks of a deterrent measure, but is motivated by a more principled deep concern for life. Firearms, when used criminally, often result in death; their availability in many scenarios dramatically increases the chance of their use and their bloody consequences. The RSA06 offences corroborate the analysis that crimes causing death are more serious and therefore deserving of (greater) sanction than hitherto. To read this congruous with the future Attorney General's other statement that Sch.21 does not necessitate a ratcheting up of sentencing for *all* offences, and indeed the expectation was rejected¹⁴⁷ we must assume it was meant other offences outside those part of the agenda, for example property crimes. Thus, it seems unlikely mere punitiveness is the motivation behind the identified rises in starting points. The broader Parliamentary intention was focused on ensuring sentences for offences resulting in death were actually commensurate with the gravity of that harm; not a punitive free for all but a specific, targeted objective.

¹⁴⁵ (n 144) col 1263

¹⁴⁶ HC Deb 20 May 2003, vol 405, col 866

¹⁴⁷ HL Deb 15 October 2003, vol 653, col 1047

How broad that agenda is remains open to debate. Many of the aggravating factors suggestive of the 30 year or whole life minimum terms where the greatest increase in sentencing levels has occurred pertain to violations of bodily integrity more fundamentally.¹⁴⁸ Thus the striking rises in sentence for the more serious murders are grounded on the same principle which the harm of death is itself an example. Moreover, death is the gravest offence against the person because it terminates the person, and therefore must be indicative of placing greater value upon personal safety as a whole.

The government's intention in this respect should not be ignored, not least in the context of this thesis. Time and again, ministers asserted the primacy of Parliament to set sentencing policy for the gravest crime, and their impetus behind setting the new tariff is fundamental to the holistic effects of Sch.21. With sentencing guidelines for other crimes henceforth to be formulated by the SAP/SGC,¹⁴⁹ this is the one 'starting point' they have to gauge where brackets fall on the scale for crimes between an unconditional discharge and the statutory maximum.¹⁵⁰

If, as this chapter has concluded, the statutory intention behind Sch.21 was to better recognise the grave harm of death in sentencing, then other crimes where the harm of death is the actus reus are affected too. Sentencing for other homicides needs to be increased¹⁵¹ to take account of the greater value placed on the harm of death inherent to them all. Disparity will arise between sentencing for murder and for other homicide and non-fatal offences against the person where the court is not determining the seriousness of the crime using the same

¹⁴⁸ Sexual or sadistic misconduct as in para4(2)(a)(iii), para4(2)(b), para5(1)(e), Sch.21

¹⁴⁹ Sentencing Guidelines Council

¹⁵⁰ A von Hirsch, *Censure and Sanctions* (Clarendon 1993) 18-19

¹⁵¹ D Jeremy, 'Sentencing policy or short-term expediency?' [2010] Crim LR 593, 594

valuations on common harms between them. Murder, CDDD, CDCD and the unlawful driving causing death offences have all been subject to express primary legislation in the past decade addressing this. But one offence has not. Manslaughter appears to have been lost in the melee. Thus, the next chapter of this thesis will examine the sentencing for that precise crime. It will investigate whether the increased valuation on death signalled by the primary legislation of the past decade has been effected in the sentencing of manslaughter.

Chapter 3

THE SENTENCING OF MANSLAUGHTER PRIOR TO SCHEDULE 21

This chapter examines sentencing levels for manslaughter at the time Sch.21 came into force on 18th December 2003. Even where hearings occurred after that date, murders committed before were to be sentenced according to the tariff used at the time of the murder¹⁵².

Therefore it would be improper to expect any policy of Sch.21 to be reflected in manslaughter sentencing when it wouldn't apply to murder sentencing. This will enable a comparison to be made with sentencing practice post Sch.21's applicability, to discern what, if any, evidence exists that greater value has been placed on the harm of death by the courts.

Methodology

Both the express content of written judgments, and the end sentence will be examined for such indications. This is for a number of reasons. Firstly, recognition of the above change may not necessarily be cognizant or explicitly stated, but subconsciously incorporated into determinations of the appropriate figure.

Secondly, the substance of judgments may not necessarily reflect or comport with the reasoning given in written judgments handed down. Since we are concerned with what is happening in reality and the truth behind it, the actual determination as to sentence length is equally as valuable as the court's judgment.

¹⁵² CJA03, Sch.22

Thirdly, manslaughter cases vary so greatly in their circumstances, nature and thus gravity that close attention needs to be paid to the precise details and facts of every case scrutinised. This will aid comparison between various like offences, which by definition have more controls and fewer variables, making identification of variations simpler and enhancing the validity of differences found.

Every manslaughter sentencing case reported in volumes of the Criminal Appeal Reports (Sentencing) from 2004 until 2010 inclusive has been read, analysed, and contributed to the findings of this thesis. The SAP has employed a similar technique in recent times.¹⁵³ This ensures a range of manslaughters has been covered, important since it is a broad offence, and the sheer number involved provides depth which enhances the reliability of the conclusions drawn. By using only cases upon appeal a much better sense of policy is derived for three reasons. Firstly, the Court of Appeal tends to set policy as the Lord Chief Justice sits on it, and many of its judges are members of the Sentencing Council and other similar policy-making bodies in the field of sentencing.

Secondly, perhaps in part because of this but above all because of the doctrine of precedent in English law, cases from the Court of Appeal are binding authorities on sentencers in lower courts, viz. all at first instance. Thus, decisions of the CofA are indicative of the policy and approach lower courts, which hear many more cases, are likely to adopt.

Thirdly, their role in ‘correcting’ or ‘vetting’ sentences of lower courts in itself applies policy. In such cases we can be more sure that the sentence decided upon is an accurate, valid representation of what “the law” is, avoiding potentially aberrant or idiosyncratic decisions in

¹⁵³ SAP, *Manslaughter by reason of provocation* (2004), 3

lower cases. By engaging with the sentencing remarks of judges at first instance an idea is also gained of what is going on at “ground level”.

The structure of the caselaw analysis will thus be chronological, loosely utilising different categories to aid comparison of like cases over time and notice differences in sentencing levels more readily. This will best enable small, gradual changes to be detected when manslaughters committed after the enforcement date of Sch.21 are critiqued in the next chapter.

Manslaughters arising out of physical assaults

Wasik’s summary of sentencing levels for different varieties of manslaughter in 2000 is a useful, succinct digest. Adopting categories used in Thomas’ *Current Sentencing Practice* and working on the basis of the cases contained therein, he claims that manslaughters stemming from a fight are sentenced in the range of 2-4 years for less serious cases, and 5-8 years for the upper bracket.¹⁵⁴ However he asserts that one such example of cases falling in the lower category is “one punch” manslaughter.¹⁵⁵ Neither *Coleman*¹⁵⁶ nor cases from the early 2000s would seem to support this.

“One Punch” Manslaughters

¹⁵⁴ M Wasik, ‘Sentencing in Homicide’ in A Ashworth and B Mitchell (eds) *Rethinking English homicide law* (OUP, 2000) 185

¹⁵⁵ *ibid*

¹⁵⁶ *Coleman* (1992) 13 Cr App R (S) 508

Coleman concerned D who had punched two men, once each to the face. One of them fell over as a consequence and his skull fractured when his head hit the ground. V died from that injury. Lord Lane CJ presiding over the Court of Appeal (Criminal Division) conducted a review of the precedents concerning the scenario

where a person receives a blow, probably one blow only, to the head or face, is knocked over by the blow and unfortunately cracks his head on the floor or the pavement, suffers a fractured skull and dies. It is to be distinguished sharply from the sort of case where a victim on the ground is kicked about the head. It is to be distinguished sharply from the sort of case where a weapon is used in order to inflict injury. It is further to be distinguished from where the actual blow itself inflicts the injury which causes death.¹⁵⁷

That such a narrow definition can be made in the notoriously broad offence of manslaughter offers a rare opportunity to compare sentence levels with a greater degree of controlled factors than is usually the case. Thus, particular focus will be made in the thesis on this class of manslaughter which offers the firmest foundations for comparisons of sentencing levels over time. Lord Lane CJ concluded ‘the starting point for this type of offence strictly confined, as we have endeavoured to confine it, is one of 12 months’ imprisonment on a plea of guilty.’¹⁵⁸

This exact approach still seemed to be in operation a decade later, as exemplified by *Edwards*,¹⁵⁹ where D was convicted after a trial of a one punch manslaughter and had his sentence cut to 18 months on appeal. 18 months is the logical starting point without the

¹⁵⁷ (n 156) 510

¹⁵⁸ (n 156) 512

¹⁵⁹ [2001] 2 Cr App R (S) 125

benefit of a guilty plea- which affords upto a third off any length of jail term¹⁶⁰ - where 12 months is given as the starting point with the benefit of a guilty plea, as in *Coleman*.

In *Grad*¹⁶¹ a sentence of 9 months jail, described by Pill LJ as ‘at the very bottom of the bracket in this type of case’¹⁶², was substituted for the original imposed at the Crown Court of 18 months.

Yet there were symptoms that prevailing norms had evolved since *Coleman*. In *Lumsden*¹⁶³ the levels of sentence seen in *Cheetham and Baker*¹⁶⁴ and *Hamar*¹⁶⁵ appear to have been a factor in upholding a three year sentence on an early guilty plea for a one punch manslaughter.¹⁶⁶ The trend Davis J drew from some of the recent cases is most enlightening. It,

amongst other things, indicates that the court in recent years has perhaps been inclining to move upwards from the starting point indicated by the case of *Coleman* (1992) 13 Cr.App.R.(S.) 508. The other case to which Mr Heywood referred us, Attorney General's Reference No.100 of 2001 (Welch) [2002] 2 Cr.App.R.(S.) 81 (p.365), contains some pertinent observations as to the importance which the Court will attach in these cases to the loss of life which arises.¹⁶⁷

¹⁶⁰ SGC, *Reduction in sentence for a guilty plea* (2004)

¹⁶¹ [2004] 2 Cr App R (S) 43

¹⁶² (n 161) [30]

¹⁶³ [2005] 2 Cr App R (S) 27

¹⁶⁴ [2004] 2 Cr App R (S) 53

¹⁶⁵ [2001] 2 Cr App R (S) 61

¹⁶⁶ (n 163) [17]-[18]

¹⁶⁷ (n 163) [18]

When speaking of what has *changed* in recent years though, the Court referred to ‘increasing’ concern about drunken violence- of which it urged a ‘stern view’- but spoke more routinely about ‘holding inevitable concern at the loss of innocent life involved.’¹⁶⁸ This might indicate that any rise in tariff constituted by this case owes more to the former than the latter.

With occasional departures appearing anomalies in the context of the majority of appeals following *Coleman* and *Edwards* in habitual fashion, *Coleman* unsurprisingly remained the ‘leading’¹⁶⁹ case in 2005 according to the most eminent sources. The retrospective character of the common law is aptly highlighted by the difficulties in changing an approach when an authority is so entrenched and relied on customarily almost as a matter of procedure.

Breaking new ground or pioneering even minor evolution based on the present let alone future is hamstrung by a cursory reversion to old cases.

This is exacerbated when reference is usually only made to a couple of old but ‘leading’ authorities and fail to take into account other more recent or indeed more factually similar cases. More thorough analyses, as performed in *Lumsden*, can produce more accurate attuned sentences. This illustrates how the doctrine of stare decisis, which our common law hinges upon, may not be at fault so much itself, but depends on those who operate it. The maxim that each case turns on its own facts, which it undoubtedly does in criminal cases unlike in any other field of the law, should not be allowed to provide a loophole by which judges evade the equally important tenet of treating like cases alike. Indeed, where variation in crime and criminal can be so great, even more reason to seek like precedents to assist in the complex task of arriving the sentence that accurately reflects the gravity of the crime, rather than start

¹⁶⁸ (n 163) [20]

¹⁶⁹ A Ashworth, *Sentencing and criminal justice* (4th edn, CUP 2005) 121

from square 1 each time. This is a clear benefit that the use of 3 starting points has in the sentencing guidelines that the SAP saw as an improvement upon Lord Bingham's 1.

More substantial physical attacks

Other assaults resulting in death in the period preceding the enforcement of Sch.21 do seem to fall within Wasik's ranges though. Placing one punch manslaughterers in a league of their own contra Wasik, assaults which fall towards the lower half of the physical assault category, do appear to fall in the 2-4 year bracket. One such example is *Heslop*¹⁷⁰ where seven punches of moderate force were made to V's head and face. The term was two and a half years on a guilty plea for D, 18 at the time.

More serious batteries also appear to fall in a 5-8 year range consistent with Wasik's categorisation. *Attorney General's Reference No. 49 of 2004*¹⁷¹ illustrates how even the most brutal assaults conform to Wasik's upper bracket. V exhibited countless injuries and had suffered 'non-consensual'¹⁷² sexual trauma to her anus.¹⁷³ Keene LJ held:

Cases like *Silver* do indicate that on a plea of guilty to manslaughter because of the absence of the intent necessary for murder, even where great violence was used on the victim, a sentence of five years will often be appropriate where there is no weapon employed.¹⁷⁴

¹⁷⁰ [2004] 1 Cr App R (S) 72

¹⁷¹ [2005] 1 Cr App R (S) 72

¹⁷² *A-G 49/2004* [10]

¹⁷³ *A-G 49/2004* [7]

¹⁷⁴ *A-G 49/2004* [19], *Silver* (1994) 15 Cr App R (S) 836

The sexual assault, ‘which must have caused her [V] great pain and humiliation’, aggravated the crime¹⁷⁵, which in sum deserved ‘a commensurate sentence of between seven and eight years’.¹⁷⁶ Even so, it undervalues the culpability and aggravating factors when compared to other manslaughters which themselves undervalue the harm of death.

There is evidence however that terms could exceed this. In *Wadsworth*¹⁷⁷ a 17 year old appellant had a 6 year sentence upheld but deemed “as towards the top end of the acceptable range”.¹⁷⁸ Given that without a guilty plea and the mitigation of youth available to this appellant, the starting point would have been around 10 years, this must indicate a very high level of culpability.

Ten years without a guilty plea was expressly affirmed in *Attorney General’s Reference Nos. 72 and 73 of 2005*.¹⁷⁹ The Court of Appeal, evaluating in late 2005 whether the sentences of 5 2/3 and 3 2/3 years were unduly lenient, were troubled by the aggravating feature of kidnap in the case. Latham LJ found

merit in the argument of the Attorney General that the judge in approaching the matter on the basis that the appropriate sentence was seven years’ imprisonment for manslaughter in the commission of an offence, which itself could have resulted in the

¹⁷⁵ A-G 49/2004 [22]

¹⁷⁶ A-G 49/2004 [22]

¹⁷⁷ [2004] 1 Cr App R (S) 14

¹⁷⁸ *Wadsworth*, [21]

¹⁷⁹ [2006] 1 Cr App R (S) 112, [24]

sentence of three-and-a-half years' imprisonment, failed adequately to reflect the gravity of the offence.¹⁸⁰

This rare instance considering inter-offence ordinal proportionality highlights the undervaluation of the harm of death in manslaughter sentencing compared to other offences, which will comprise the prime focus for subsequent doctoral research. It echoes Blunkett's insistence in the Commons that there was a disproportionately small distance between sentences for some lesser crimes and homicides,¹⁸¹ indicating the harm of death was undervalued in evaluating crimes' seriousness prior to Sch.21.

At five years on a guilty plea, *Reece*¹⁸² and *Bertram*¹⁸³ are at the bottom of the bracket. In *Reece* D and V were acquainted with one another. An altercation erupted which left V on the ground. He had been kicked at least once whilst down there because one 'blow was of sufficient strength to leave a bruise and a shoe impression on the deceased's cheek',¹⁸⁴ which had killed V. Referring to cases more than a decade old stating the range was 2-7 years, Scott Baker LJ ascertained the appropriate length to be in the region of 4-4 ½ years which was increased to five to reflect D's previous convictions (which were fairly tame). Scott Baker LJ's bracket must be seen as low due to the era of cases he was referred to by counsel acting on behalf of D arguing for a lower sentence. Research of his own would have unearthed more contemporary cases indicating the slightly higher range as discerned by Wasik. Conversely, the Crown Court judge's punishment was six and a half years.

¹⁸⁰ *ibid*

¹⁸¹ (n 63)

¹⁸² [2005] 1 Cr App R (S) 21

¹⁸³ [2004] 1 Cr App R (S) 27

¹⁸⁴ *Reece* [5]

It is worth asking whether there are repercussions of uncontested appeals against sentence where no counsel is instructed for the Crown as in *Reece*. A one-sided presentation of a case in the adversarial system is to abrogate its most quintessential dimension. Whilst this may occur in appeals against sentence in all manner of crimes, its effect on the ‘treat like cases alike’ tenet must be considered where in other cases argumentation and case law is submitted by the Crown in an effort to uphold or even increase the sentence of the trial judge. The consequence is to warp ordinal proportionality.

Assaults on infants

Manslaughters of infants are often treated by the Court of Appeal as being a category of their own and thus are addressed separately here. Wasik found the range to be between two and eight years for offences of this nature. That is, arguably, merely a broader brush stroke than the 2-4 and 5-8 year brackets he gauged for assaults resulting in adult fatalities. If so, it would seem to suggest that the age and vulnerability of infant victims wasn’t being treated as an aggravating factor by the courts in the period upto 2000.

Only two cases precisely concerned the manslaughter of infants committed shortly before 18th December 2003 without overlapping into other categories. One was *Khair*,¹⁸⁵ where the Court of Appeal upheld a seven year sentence after a trial as ‘at the top end of the scale’.¹⁸⁶ Waller LJ had noted *Yates*¹⁸⁷ where Roch LJ remarked that the range for this class of case was two to five years on a guilty plea.

¹⁸⁵ [2005] 1 Cr App R (S) 29

¹⁸⁶ *Khair* [9]

¹⁸⁷ [2001] 1 Cr App R (S) 124

At the lower end of the bracket was *Attorney General's Reference 16 of 2005*.¹⁸⁸ There the Court of Appeal upheld a three year sentence for a childminder who had shaken a 5 month old baby to death. The trial judge was satisfied the injuries were inflicted out of exasperation and frustration. Even so, he admitted 'the resulting sentence may seem to some somewhat on the short side'.¹⁸⁹ Not Rose LJ who upheld the sentence on the basis that it was 'impossible'¹⁹⁰ to deem it unduly lenient since it was within the range of sentencing options established by authorities in the field. Firstly, such a rationale misses the point that each case has an appropriate place on that scale; merely being within it does not mean like cases have been treated alike according to their respective gravity. Secondly, those precedents cited by the Court of Appeal stretched back to the 1980s. The retrospective nature of the common law, answering today's problems with yesterday's answers, appears to be an inherent problem when judges fail to question how relevant an old authority might be. There is, certainly from Rose LJ, no inkling that such old authorities, and indeed, more recent authorities that merely restate the law based on old cases giving outmoded precedents fresh life,¹⁹¹ need to be seen through the lens of contemporary standards.

Similarly, once again, one must wonder whether the approach of narrow, discrete categories has, not per se but in practice, retarded development of the tariff or closed judges minds to the question of ordinal proportionality between this and other classes of manslaughter, not just within a species of manslaughter. It must be asked why a serious manslaughter of a

¹⁸⁸ [2006] 1 Cr App R (S) 28

¹⁸⁹ *A-G 16/2005* [17]

¹⁹⁰ *A-G 16/2005* [19]

¹⁹¹ E.g. *Yates*

young child does not receive even a slightly longer sentence than a serious manslaughter of an adult, all other things being equal. The former is defenceless, vulnerable, more easily harmed and loses more by having the opportunity of living the overwhelming majority of their life deprived of them.

Stabbings

Indeed, although stabbings are given their own sub-category by Thomas, the range of five to eight years stated by Wasik to be the norm is the same as that for the serious assaults.

In two cases it was explicitly considered whether the bracket of 10-12 years enunciated in *Latham*¹⁹² should apply, seemingly because it involved a knife. *Latham* was a manslaughter upon provocation case however. Such muddled thinking tends to indicate the classifications used in manslaughter sentencing ‘reflect frequently recurring factual situations’ rather than ‘significant moral distinction’¹⁹³ as Wasik ventured.

Where a single wound ‘unsurprisingly’¹⁹⁴ proved fatal unconsciously seems to acknowledge the case must be close to murder in gravity. All the same, the Court of Appeal commented that 8 years was the shortest commensurate term of imprisonment for the offence¹⁹⁵ - in real terms four years to the twelve or so that would be imposed for murder at the time. The gulf between the jail terms for the most aggravated manslaughters and unaggravated murders is again palpable.

¹⁹² [1997] 2 Cr App R (S) 10

¹⁹³ (n 154) 185

¹⁹⁴ *Attorney General’s Reference 143 of 2002* [2004] 1 Cr App R (S) 12 [9]

¹⁹⁵ *A-G 143/2002* [15]

This can be contrasted to *Silkstone*,¹⁹⁶ where the Court of Appeal sheared 8 years down to 5, and well below five years, *Attorney-General's Reference 64 of 2004*¹⁹⁷. The latter reveals the most stark disparities may be found amongst what is deemed the lower rungs of seriousness. D, on being told V (who had old convictions for paedophilia) had been 'messing' sexually with her children, headed round in a drunken frenzy to V's abode. There, she set about assaulting V rending him lying- possibly unconscious- on the floor. She grabbed a 'jagged' piece of wood and plunged it into V's chest 'five or six times, with considerable force, looking mad with rage.'¹⁹⁸ D suffered 'large lacerations' to his bowels which would have 'needed a significant degree of force to cause those lacerations, which are injuries of a kind usually found in road traffic accidents or falls from a height.'¹⁹⁹

Increasing her 2½ year term to 3½ upon the Reference, the Court of Appeal can hardly be said to have remedied the unduly lenient sentence. The mitigation speciously identified by Rose LJ cannot account for how far this case lies outside its ordinal rank, even given pre-Sch.21 sentencing levels ascertained above. This included consequentialist considerations such as the chance of reoffending and the behaviour of D in jail²⁰⁰, and the rather Victorian notion 'that, if the offender had not been a woman, with the mitigation in her favour arising, in particular, from her family circumstances'²⁰¹ the sentence would have been 5 or 6 years.

Mention of the aggravating factors that D looted property from the house of the deceased, or

¹⁹⁶ [2004] 2 Cr App R (S) 78

¹⁹⁷ [2005] 1 Cr App R (S) 107

¹⁹⁸ *A-G 64/2004* [8]

¹⁹⁹ *A-G 64/2004* [10]

²⁰⁰ *A-G 64/2004* [17]

²⁰¹ *A-G 64/2004* [19]

that the victim was an elderly alcoholic and thus vulnerable,²⁰² reinforces the aberrance of this decision. Rose LJ is thus liable to the same criticism that he levelled at the trial judge having been ‘unduly influenced by the mitigation in relation to this offender and paid too little regard to the gravity of this offence.’²⁰³

The upshot is the appellant in this case will serve 1 ¾ years in jail before being released. Under Sch.21 which had come into force for murders committed at the time of the Court of Appeal’s hearing, 15 years is the starting point for an unaggravated murder. Not only is the disparity set to be even greater than before without major increases for manslaughters like this, but the lack of any disparity to mark the difference in gravity of this furious onslaught and other crimes is highlighted by the sentences for two men who ‘pleaded guilty to assault with intent to rob and were sentenced respectively to three and two years’ imprisonment’.²⁰⁴ They had attacked V the day previous to D.

Hence, in no way can Rose LJ’s revised sentence be said to have met his own objective which he claimed he was pursuing²⁰⁵ on the authority of Kay LJ:

As in the other settings in which death may result to which we have referred, this public concern and the need for deterrence must be reflected in sentences passed by the court. This inevitably will mean longer sentences than might have been considered appropriate some years ago in a different climate of opinion and concern.²⁰⁶

²⁰² *A-G 64/2004* [4], [8], [12]

²⁰³ *A-G 64/2004* [21]

²⁰⁴ *A-G 64/2004* [6]

²⁰⁵ *A-G 64/2004* [14]

²⁰⁶ *Attorney General's References 19, 20 and 21 of 2001* [2002] 1 Cr App R (S) 33, [42]

Rather, it prompts compelling concern about the value of life judges were evidently *content* placing on the loss of life in sentencing. Only they were exercising control over tariff levels for manslaughter. Little wonder corrective legislation was needed when the prospect of the bench sentencing the gravest of homicides dawned.

Manslaughter upon provocation

This category follows that on stabbings because the vast majority of manslaughters upon provocation involve the use of knives. Thus it should aid comparison of the two, divided as they are by a different level of MR, and semi-justificatory circumstances for that.

Wasik summates that five to eight years was the usual bracket, but pointed out exceptions. Firstly non-custodial sentences had been known in cases of ‘cumulative provocation’²⁰⁷. Secondly, the then recently decided *Latham* had somewhat set the cat among the pigeons prescribing terms in the region of 10-12 years ‘where an offender deliberately goes out with a knife, carrying it as a weapon, and uses it to cause death, even if there is provocation’.²⁰⁸ The court had expressly been asked to address the gravity of causing death in *Latham* by the Attorney General. Thus cases that follow it entail a higher valuation on the harm of death by virtue of its status as a leading authority.

Yet in practice the Court of Appeal has been reluctant²⁰⁹ to embrace the lengths of sentence espoused in *Latham*, reinforcing the impression they do not grasp the rub. This leaves higher-

²⁰⁷(n 154) 187

²⁰⁸ [1997] 2 Cr App R (S) 10, 18

²⁰⁹ *Lahbib* [2005] 1 Cr App R (S) 68

end terms in single figures at seven years²¹⁰ and nine. In the latter, *Bennett*²¹¹, D was convicted following a trial of killing his 3½ month old baby through ‘severe’²¹² violence including vigorous shaking and a blow to the head ‘equivalent to a fall on to the head from a height of six feet.’²¹³ The trial judge assessed the measure of provocation as ‘low’.²¹⁴ It is a mystery when exactly it became the reaction of a reasonable person to respond to a baby’s crying not with exasperation but its killing. Latham LJ expressed scepticism commenting ‘people are expected to exercise reasonable control over their emotions, and that as society advances it ought to call for a higher measure of self-control.’²¹⁵ This point is of broader importance it is argued since it demonstrates recourse to any violence is gradually less and less acceptable as society develops, therefore making it more serious when it does occur. Needless to say, this goes for the gravest result of violence, death, as much as any other harm if not more so.

At the five year mark is *Brooks*,²¹⁶ a sentence on a guilty plea. There had been sustained sexual abuse by V of D, who was 17 come the time of the offence. When V indicated another session was imminently to be commenced, D grabbed a knife and stabbed V seven times in the back, four times in the neck, and poleaxed him over the head with a dumbbell. Having left the house to purchase a hacksaw he then dismembered the body. An intention to kill is conspicuous. Together with the finding of fact that D could have broken free from the

²¹⁰ *A-G’s Ref No. 192 of 2003*

²¹¹ [2004] 1 Cr App R (S) 65

²¹² *Bennett* [7]

²¹³ *Bennett* [3]

²¹⁴ *Bennett* [6]

²¹⁵ *Bennett* [7]

²¹⁶ [2004] 1 Cr App R (S) 53

relationship on many occasions casting the dynamic of the provocative conduct in a different light, D's culpability remains very high. Mitigation was identified in the D's youth, offer of a guilty plea and perhaps mistakenly²¹⁷ the years of abuse he was subjected to. In common with most other provocation cases it was not even contemplated whether D possessed an intention to kill rather than an intention to cause GBH, a colossal factor influencing culpability.

In sum, these sentences disclose no evidence of the courts adopting a higher valuation on the harm of death given their consistency with the trends discerned by Wasik. The authority of *Latham* is something of an anomaly which sentences for other classes of provocation outside those it deals with have failed to adjust to.

Diminished Responsibility

This is the other form of voluntary manslaughter covered in the appeals reported upto the enforcement of Sch.21. Wasik wrote that where a hospital order was not adjudged to be appropriate then a sentence of between three and six years was usual. Certainly two of the cases conform to that pattern, and at the lower end.

Those are *Lawrenson*²¹⁸ and *Derekis*.²¹⁹ There were common features to both. The Ds were women, subjected to a prolonged narrative of distress. The trigger in each episode was another bout of the distress or fear of it about to happen. Both Lawrenson and Derekis stabbed their Vs only once and pleaded guilty.

²¹⁷ *Brooks* [19]. This was mentioned discretely from the provocation. As another bout of the abuse constituted the provocation there is risk of double counting in evaluating the mitigating factors here.

²¹⁸ [2004] 1 Cr App R (S) 5

²¹⁹ [2005] 2 Cr App R (S) 1

In *Lawrenson* Goldring J gave much credence to reports of D's progress in prison and fresh probation reports in reducing a five year jail term to three years. He is open to the same criticism made by Thomas of the Court of Appeal in the 1980s for 'acting not as an appellate court, but as a parole board, adjusting sentences in light of a favourable prison report'.²²⁰

Such consequentialist considerations at any rate are irrelevant to the gravity of the crime, the rationale for determining the length of custodial sentences.²²¹

Derekis had her sentence varied downwards from six years. Potter LJ cited a number of authorities from the mid to late 1990s from which he garnered 'no more than four years at the most should have been imposed in circumstances of the extenuating nature which existed in this case.'²²² Three and a half was most appropriate and the term ordered by the court.

These two cases are in sharp contrast to the anomalous *McMilan*²²³. Kennedy LJ failed²²⁴ to follow his own evaluation of the law that the seriousness of the offence was the sole criterion. He set a minimum term the equivalent of an 18 year determinate sentence, seemingly based on the length of time the psychiatrist assessed as necessary to rehabilitate V²²⁵.

²²⁰ M Wasik, 'Going round in circles?' [2004] Crim LR (50th Anniversary Edition) 42, 49

²²¹ CJA03, s.153(2)

²²² *Derekis* [16]

²²³ [2005] 2 Cr App R (S) 63

²²⁴ *ibid* [9], [13]

²²⁵ *ibid* [9]

Death by driving

Much space was devoted to ascertaining Parliament's purpose in raising the statutory maximum for CDDD and introducing the new crimes of the RSA06 in the previous chapter.

It is perhaps expected then to see that there was something of a trend towards higher sentences for vehicular manslaughter in the period examined which covered much of the time the CJA03 was being debated as a Bill, no doubt raising awareness of the government's heightened maximum sentence for CDDD.

Earlier cases such as *Wright*²²⁶ and *Scott*²²⁷ reported in early 2004 saw sentences of eight years upheld and seven years cut to six respectively. In order for comparison to later cases to be possible, since every individual case turns on its own facts, it is necessary to once again give some detail about the behaviour that those sentences were deemed suitable for.

In *Wright* Goldring J cautioned against adopting a level of sentence from *Mahmood*²²⁸ as that case 'was heard some years ago and may be thought to be out of line with present authorities'.²²⁹ He made the same observation in *Scott*.²³⁰ D's culpability in this case is inescapably high, evidently intending to hit and so harm V and being reckless as to causing death.²³¹ As such it must be very close to the border with murder. Nonetheless, the eight years was described as 'severe'²³² but not manifestly excessive.

²²⁶ [2004] 1 Cr App R (S) 4

²²⁷ [2004] 1 Cr App R (S) 50

²²⁸ (1993) 14 Cr App R (S) 8

²²⁹ *Wright* [8]

²³⁰ *Scott* [12]

²³¹ *Wright* [7], [9], [11]

²³² *Wright* [12]

In *Scott* the length of sentence in *Gault*²³³ was effectively followed to leave a period of 6 years incarceration. It was a common feature of both that there was a late guilty plea. That judgment given by the then Lord Chief Justice is the de facto starting point for motor manslaughter after the CDDD statutory maximum was raised to ten years, so following it evinces no shift from early 1990s practice shortly after *Mahmood*. Hence, no more recent emphasis on the harm of death was noted.

Although mention of the new 14 year sentencing limit for CDDD was not made until *Ballard*²³⁴, two cases prior to that did sanction terms of imprisonment notably longer than prior practice. The nine year sentence in *Franks*²³⁵ was however intended to be consistent with contemporary practice.²³⁶

Conversely, in *Parfitt*²³⁷ Kay LJ sought to carve leeway from existing precedents because ‘this case was worse than each of those other cases [cited] in any event.’²³⁸ The most outstanding merit of the late Kay LJ’s judgment is however the consideration of inter-offence ordinal proportionality, specifically between murder and manslaughter.

It is perhaps right to observe that if the jury had thought it was murder, the least sentence that we see that could have been determined as being the appropriate sentence in respect of him would have been one that would have led to him remaining

²³³ (1995) 16 Cr App R (S) 1013

²³⁴ [2005] 2 Cr App R (S) 31

²³⁵ [2005] 1 Cr App R (S) 13

²³⁶ *Franks* [23].’

²³⁷ [2005] 1 Cr App R (S) 50

²³⁸ *Parfitt* [20]

in custody for 14 years before such time as he was considered for parole, the equivalent of a minimum of a 28-year sentence. Thus, this sentence of 12 years has to be seen in that context, and it is clear that the judge was making a very significant allowance for the fact that the jury were not satisfied that this was a case of murder.²³⁹

Having made these sagacious, broad-minded and thorough contentions, the Court of Appeal upheld the sentence of 12 years imposed on D concluding ‘we can see nothing wrong at all with the sentences.’²⁴⁰ From this comparison it is quite clear how large the gap stood between ordinary sentences for murder and sentences for the worst manslaughters before Sch.21 was even in force. Needless to say, without adjustment to take into account Sch.21’s rises for culpable killings, the gulf will be stretched further.

This trend was continued in *Ballard* when the Court of Appeal upheld an 11 year sentence as ‘severe but appropriate’ for a 19 year old offender. D, inebriated, drove like a lunatic,²⁴¹ mounting pavements driving at pedestrians who desperately tried to flee. Finally, ‘the car mounted the central reservation and struck the victim with such force that he was tossed into the air.’²⁴²

The conviction was ‘prosecuted...to bring into play even the increased sentencing powers that now arise in relation to the statutory offences.’²⁴³ This is revealing as it intimates the Court of Appeal has adverted to the relevance of the tariff increases for one homicide (CDDD). We should expect therefore to see them do so for the offence

²³⁹ *Parfitt* [22]

²⁴⁰ *Parfitt* [26]

²⁴¹ Driving fast, performing wheel spins, swerving, pulling handbrake turns

²⁴² *Ballard* [5]

²⁴³ *Ballard* [12]

of manslaughter holistically when Sch.21 (pertaining to all murders) is applicable.

Maurice Kay LJ has shown an understanding of the impact of those rises where similar interests are at stake. Consequently, he declined to adopt the sentencing levels of CDDD authorities counsel submitted to him from previous generations in trying to reduce the sentence.

The erudite and contextually aware development in *Ballard* was not heeded in *Dwyer*²⁴⁴ though. This case was in one sense worse than *Parfitt* since D appeared to actively try to dislodge V from the bonnet of the car she was driving by swerving between different lanes on the multi-carriageway she was driving down at speed. Arguably the crime was in the course of a property offence too.²⁴⁵

Dobbs J paid lip-service to the patent gravity of the case, with robustly phrased reasoning.²⁴⁶ Conversely she then ruled the original starting point too high, and sliced the term to five years taking account of D's guilty plea and age, 18. Whilst this is not inconsistent with old sentencing practice of the 1990s based on *Gault*, it fails to reflect the higher sentences seen since in *Parfitt* and *Ballard*, and the salience of the new maximum penalty for CDDD. The case is a classic example of tough-talking judgments bearing no relation to the substance- the sentence.

*Clarke*²⁴⁷ decided in late 2005 regarding a motor manslaughter committed before 18th

²⁴⁴ [2005] 2 Cr App R (S) 9

²⁴⁵ *Dwyer* [1]

²⁴⁶ *Dwyer* [15]

²⁴⁷ [2006] 1 Cr App R (S) 132

December 2003 cut a sentence from nine to seven and a half years. It was manslaughter in the course of a property crime. The basis of plea was that D did not realise he had driven over someone as he manoeuvred the stolen lorry in a tight courtyard to escape the premises, though the trial judge pointed out that D's 'conduct showed a total disregard for the safety of others in the vicinity'.²⁴⁸

The trial judge 'remarked that the sentence must reflect public abhorrence of a man losing his life as this man had'²⁴⁹, but Leveson J (as he then was) for the Court of Appeal merely felt the manslaughter 'to some extent overwhelms the albeit serious planned theft of the lorry'.²⁵⁰ The sentence for stealing the lorry and its valuable cargo of electronics was four years. Whilst the advertence to inter-offence ordinal proportionality is welcomed, the actual assessment made of the gravity of the two offences is not. It certainly incorporates no greater valuation on the harm of death by virtue of the CDDD increase. Indeed, it is suggested it is a good example of the undervaluation on harm those reforms potentially help redress, and provides further fuel for Blunkett's ordinal proportionality complaints.²⁵¹

Gross negligence

This is a convenient moment at which to look at manslaughters arising out of gross negligence, a morally distinct category of manslaughter but for which Wasik gave no summary of sentence levels. This part examines precedents from manslaughters committed in

²⁴⁸ *Clarke* [6]

²⁴⁹ *Clarke* [8]

²⁵⁰ *Clarke* [16]

²⁵¹ (n 63)

the run up to 18th December 2003 to give an idea, so comparison can be made with cases post that pivotal date.

Perhaps the reason Wasik didn't provide a bracket for this class of case is the how little rhyme or reason the sentences evince. At both ends of the period scrutinised, were sentences much lower than those in the mean time. Sentences varied from two and a half years after a trial to six years on a guilty plea for no convincing reason.

The former was *Hood*²⁵², an earlier case where D's negligence in failing to get medical attention for his sick wife was not the sole cause of her death. The carelessness spanned weeks however. On the contrary, *Onley*,²⁵³ another case of failing to care for a relation (this time a mother and her baby) equates to a nine year sentence in a contested matter. Although a higher sentence in the latter was merited, seven and a half years is a greater gap than between some one punch manslaughters and assaults verging on murder. Yet the latter have been conflated with pathetic and selfish omissions in *Onley*.

*Walters*²⁵⁴ also saw six years upheld on a guilty plea. The extent of Scott Baker LJ's reasoning appeared to be the noble observation: 'the fact is that by his criminal conduct the appellant took an innocent life'. Without the coherent structure of mens rea applicable in unlawful act manslaughters, the focus seems to shift onto the harm of death in gross negligence cases. Contrariwise, the lack of any reasoning as to why one instance of criminal

²⁵² [2004] 1 Cr App R (S) 73

²⁵³ [2005] 1 Cr App R (S) 26

²⁵⁴ [2005] 1 Cr App R (S) 100

conduct resulting in the death of an innocent victim might be more or less serious than another, more or less deserving of nine years after a trial, is less encouraging.

Two vulnerable young men died in *Rodgers*²⁵⁵ due to the profiteering of a landlord who had been put on notice about problems with a gas heater. Waller LJ ruled the sentence of five years 'can in no way be described as manifestly excessive'. Finally Judge LJ (as he then was) declined to rule a 12 month sentence as unduly lenient.²⁵⁶

In these cases it appears the harm of death was brought to the fore, often sub-consciously as there was less for the court to concentrate on and analyse in terms of culpability. When more than just a fleeting factor in the shadow of culpability, the result appears to be substantial sentences that manage to convey the gravity of the harm done. The paradoxical result is cases of unlawful act manslaughter by assault, where by definition someone needed to have intended to cause V a degree of harm, were actually sentenced at a similar or lesser level than these instances where there was no malice whatever towards V.

Fire (arms)

Wasik claimed six to twelve years was the normal range for manslaughters involving firearms, upto a maximum of fifteen. In *Kent*²⁵⁷ that bracket would appear to be stretched to the limit. With the benefit of a full guilty plea discount the jail term was upheld at ten years, meaning a starting point of fifteen years. D was young and their culpability significantly below the ceiling that would still qualify for a manslaughter rather than a murder

²⁵⁵ [2005] 2 Cr App R (S) 19

²⁵⁶ *Attorney General's Reference 134 of 2004* [2005] 2 Cr App R (S) 47

²⁵⁷ [2004] 2 Cr App R (S) 67

conviction.²⁵⁸ More serious, adult cases would thus justify sentences considerably in excess of fifteen years, on the basis of *Kent*.

Yet it is doubtful this escalation in tariff owes much to the motivation behind Sch.21 or its counterpart motoring reforms. Hedley J made extensive reference to the trial judge's entitlement to use deterrent sentencing to send out a message to people in the city afflicted by gun crime. Satiating the public concern that cases like these 'excite' was perfectly proper he asserted. Such justifications for what appear to be heightened sentencing levels are disappointingly debased²⁵⁹.

Use of a firearm is a major aggravating factor for reasons *Kent* exemplifies all too regrettably. They are incredibly dangerous and cause great harm, often the gravest harm, when used, indeed even misused as here. In that sense it is representative of how dearly we treasure life that we are keen to protect it from such potent threats as the firearm. Logically there is a principled case for conduct risking death to be ranked more seriously as a result of an increased valuation on death, but on a proportionally lesser basis given those crimes are not, of course, actual homicides. *Kent* however encourages longer sentences based upon marginal deterrence and public concern about a certain type of crime. That leads to figures being plucked out the air idiosyncratically and pushes a conventional but proper evaluation of harm and culpability to the background.

²⁵⁸ They intended only to frighten, not even hurt V.

²⁵⁹ A von Hirsch et al, *Criminal deterrence and sentence severity* (Hart 1999)

*Hussain*²⁶⁰ was an arson case where the Court of Appeal upheld an eighteen year sentence for no less than eight counts of manslaughter. Remarkable for the sheer loss of life, *Hussain* was in Rose LJ's words 'demonstrably in line with the 12-year sentences in the authorities to which we have referred imposed following pleas of guilty.'²⁶¹ In being so, it cannot constitute any aggravation for the fact that eight deaths were caused rather than one. Rose LJ perhaps reflects that in upholding the sentence as not 'even arguably manifestly excessive'²⁶².

A case understandably²⁶³ at the other end of the scale was *KC*,²⁶⁴ where four years was reduced by one year. An unpleasant game amongst children was taken too far when and then went badly wrong as the risk to V's life foreseen by D unexpectedly materialised when a door accidentally became wedged shut.

Manslaughter in the course of a property crime

These had noticeably higher brackets than most of the other categories, manslaughters in the course of burglary being subject to sentences of six to ten years according to Wasik, and twelve to fifteen years for armed robberies resulting in manslaughter.

Only one reported case fell purely within this category in the lead-up to Sch.21's jurisdiction commencing. *Ali and Lotay*²⁶⁵ concerned Ds perpetrating what the Court of Appeal dubbed

²⁶⁰ [2004] 2 Cr App R (S) 93

²⁶¹ *Hussain* [11]

²⁶² *Hussain* [12]

²⁶³ D 'had available to him all the mitigation that he could possibly have had'.

²⁶⁴ [2005] 1 Cr App R (S) 97

²⁶⁵ [2005] 2 Cr App R (S) 2

‘street robberies’.²⁶⁶ Ds selected V, 83 and frail using a stick to walk, as an easy target. They followed her, until Ali alighted from the getaway car driven by Lotay, ran upto V, wrenched her shopping bag including her purse from her grasp causing her to fall over, and ran back to the car. V died from the injuries she incurred from the ‘accelerated fall’²⁶⁷. Tugendhat J for the Court of Appeal ratified 10 years imprisonment for Lotay and nine and a half for the younger Ali, 21.

The manslaughter was, but for the robbery, essentially analogous to *Coleman*. The Court of Appeal adopted the position in *A-G’s Ref 19, 20 and 21 of 2001*²⁶⁸ that the property crimes were worth six years in themselves, reconciling differences between that case and the present. In resolving that Lotay and Ali’s sentences were ‘in accordance with other comparable cases’,²⁶⁹ an indictment of the treatment of mid-level property crimes and high-level offences against the person is contentedly confirmed by the Court of Appeal. Little else can explain why this case merited 10 years on a guilty plea and yet an ordinary one punch manslaughter merited between one and two on contemporaneous standards.

Conclusion

Overall, this chapter has established the sentencing level for manslaughter across a variety of its incarnations at the point immediately preceding Sch.21’s advent. This enables Chapter 4 to investigate what, if any, change has occurred in manslaughter sentencing levels since greater importance was attached to the causing of death by Sch.21’s increased sentencing

²⁶⁶ *Ali* [3]

²⁶⁷ *Ali* [8]

²⁶⁸ [2002] 1 Cr App R (S) 136

²⁶⁹ *Ali* [33]

regime for murder. In the process, it has sought to cast a critical eye across the relativities between sentences for manslaughter and murder, and both within and between different species of manslaughter, to accentuate some of the injustices that Sch.21 has the potential to help remedy. By looking at cases spanning a few years prior to Sch.21's operation, any updates to the summary Wasik made of sentencing levels from the 1990s has been made, as well as identifying any trends that may have been set in motion and how the reasons for them comport with the objectives of Sch.21.

Most illuminating has been the first shoots of recognition that death as a harm has increased in gravity calling for sentences to reflect this, in the context of one punch manslaughter. By the same token, that the same appreciation was not made in other class of case characterises the narrow, species-specific approach of the Court of Appeal, whose commendable concentration on the intricacies of offence gravity within categories is sorely missing from consideration of the brackets the Court uses for each category. Gross negligence manslaughter are consequently sentenced on a scale with the same bounds to that used for manslaughter arising out of assaults. Escalations in the tariff for other types of manslaughter were noted, though inspired by deterrence or pandering to perceived public fear of that type of crime. Most classes however proffered little or no signs of an upward drift in prison terms with Court of Appeal judgments regularly working from levels endorsed in the 1980s or early 1990s. Suggesting no heightened valuation on the harm of death elemental to manslaughter, Sch.21's rebalancing is just as required for manslaughter sentencing as it is for murder, if not more so.

Chapter 4

MANSLAUGHTER SENTENCING POST SCHEDULE 21

Schedule 21 came into force on 18th December 2003. Sentencers are required to ‘have regard to’²⁷⁰ it when sentencing any murder committed after that date.²⁷¹ This thesis has argued that Sch.21 is relevant to the sentencing of manslaughter, it also being a homicide offence and that the sentencing levels for it should relate, in some way, to those for murder, and thus take account of Sch.21 and any changes it mandates in relation to murder sentencing.

The next part of this thesis examines whether any increases in the sentencing levels for manslaughter occurred for manslaughters committed after 18th December 2003.

No guideline authority

Often when a significant piece of legislation comes into force, guidance is offered by the Court of Appeal on its interpretation and operation.²⁷² Such a leading judgment, often issued by the Lord Chief Justice or another high ranking judge, helps provide uniformity of approach and gives answers to the most pressing problems presented by early appeals. An authority of this nature would be especially helpful in our context, since Sch.21 does not explicitly deal with manslaughter, nor do the other salient new laws enacted by the CJA03. However, no such case emerged as the first appeals against sentence for manslaughters

²⁷⁰ CJA03, s.269(5)

²⁷¹ Different, ‘transitional provisions’ apply for those committed before this date but being sentenced after the commencement of Sch.21 The material aspect of those transitional arrangements is that no sentence should be greater than what it would have been under the old system where the sentence was decided by the Home Secretary: paras 9-10, Sch.22, CJA03.

²⁷² Eg *Sullivan* [2005] 1 Cr App R (S) 67; *Lang* [2006] 2 Cr App R (S) 3

committed after 18th December 2003 started to come before the Court of Appeal.²⁷³ It appears the leadership of the Court of Appeal had missed the relevance and importance of those statutory reforms outright. They were not alone. Whilst there was a guideline on the new sentences devised by the CJA03²⁷⁴ and academic commentary discussing other sentencing developments,²⁷⁵ the topic of this thesis was lost in the melee.²⁷⁶

It was not until a change in the leadership of the criminal judiciary that the logical consequences of Sch.21 for manslaughter sentencing were given any credence, and then on a gradual basis. The first part of this chapter will map the Court's progression to that point to glean any evidence of treating manslaughters as more serious than before. This is because sentencers may have sub-consciously been reflecting a higher valuation upon the harm of death amongst society at large when they came to determine the gravity of crimes and thus the lengths of sentences.²⁷⁷ If so, this might, unwittingly, to some greater or lesser degree, have implemented the rises in sentencing required by Sch.21. Depending on the reasons behind any such increases, and the uniformity of their application, conclusions as to the role of the harm of death in determining the seriousness and thus severity of sentence across different sub-categories will vary.

²⁷³ *Taylor* [2006] 1 Cr App R (S) 12; *Binstead* [2005] 2 Cr App R (S) 62; *Barnard* [2005] 2 Cr App R (S) 81

²⁷⁴ SGC, *New Sentences: CJA03* (2004)

²⁷⁵ Eg A Ashworth and E Player, 'CJA03: The sentencing provisions' (2005) 68(5) MLR 822; A von Hirsch and J Roberts, 'Legislating sentencing principles' [2004] Crim LR 639

²⁷⁶ After Shute (n 9) was unwelcoming of Sch.21's introduction, the next published article was Jeremy (n 151) after *Appleby*.

²⁷⁷ A discretionary custodial sentence must be 'commensurate with the seriousness of the offence': CJA03, s.153(2)

Manslaughter by reason of provocation sentencing guidelines

An early opportunity was presented to recognise the materiality of Sch.21 and the other relevant aspects of the CJA03 to manslaughter sentencing when the Home Secretary asked the SAP to draw up guidelines for sentencing manslaughter upon provocation. By quoting in the introduction from a government consultation paper on domestic violence voicing concern

‘that current sentencing in cases of manslaughter by reason of provocation in domestic violence homicides does not adequately reflect the seriousness of the cases and the loss of life, and that the tariff is out of line with levels of sentencing in other cases of homicide and serious violence’²⁷⁸

the SAP showed it was on notice as to the focus of this thesis.

The SAP did advert to the potential relevance of Sch.21.²⁷⁹ Their advice to the SGC conceded ‘there is clearly a very large gap’²⁸⁰ between sentencing levels for manslaughter upon provocation and the starting point for unaggravated murders. However, they noted the Lord Chief Justice in *Sullivan*²⁸¹ gave no reason to increase manslaughter sentences because those for unaggravated murders hadn’t been raised by Sch.21- on his analysis.²⁸² Similarly, the ‘majority’ who responded to the SAP’s consultation were against Sch.21 influencing manslaughter upon provocation sentencing.²⁸³ Manslaughter is of ‘a distinctively different character’ the SAP’s guidance concluded due to the pivotal difference in culpability between

²⁷⁸ SAP, *Manslaughter by reason of provocation* (2004) 2

²⁷⁹ (n 278) [55]-[59]

²⁸⁰ (n 278) [57]

²⁸¹ (n 272)

²⁸² (n 278) [57]

²⁸³ (n 278) [58]

the two crimes, culpability being the ‘primary factor in determining seriousness’.²⁸⁴ A strong argument can be made for this contention, but it is not normally made by those academics who partly comprised the SAP. Rather, it is made by those who assert murder is a uniquely heinous crime and thus worthy of a mandatory life sentence to mark that. The usual polemic of the academy is that murders vary widely in their gravity²⁸⁵ and murderers in their dangerousness, so the mandatory life sentence is wrong for arbitrarily treating different cases alike, in simple terms.²⁸⁶ This recognises that of course, some of those who are guilty of manslaughter are on the cusp of murder, because just like murder, manslaughter is a spectrum too.²⁸⁷ Thus to claim they are of a ‘distinctly different character’ is inconsistent, even more so where the two offences share the same level of mens rea.

It has already been argued in a preceding chapter how Sch.21 and other related sentencing reforms constitute an increased valuation upon the harm of death, which Lord Woolf CJ in *Sullivan* appeared to rule out. He asserted from comparison of pre-existing guidelines that Sch.21 had changed nothing for “standard” murders, when one examined the aggravating and mitigating factors.²⁸⁸ That simply cannot be the case. In his Practice Direction issued following advice from the SAP, the normal starting point was 12 years,²⁸⁹ and an intention to cause GBH rather than kill was a mitigating factor on all starting points.²⁹⁰ Sch.21 replicates

²⁸⁴ (n 278) [59], citing SAP, *Advice to the Sentencing Guidelines Council – 3, New Sentences – Criminal Justice Act 2003* (2004)

²⁸⁵ (n 151) 607

²⁸⁶ (n 135) 118-119

²⁸⁷ A Ashworth, ‘Reforming the law of murder’ [1990] Crim LR 75, 77; M Wasik, ‘Form and function in the law of involuntary manslaughter’ [1994] Crim LR 883, 888

²⁸⁸ *Sullivan* (n 272) 327-330

²⁸⁹ [2003] 1 Cr App R (S) 46, [10]

²⁹⁰ (n 289) [16]

that level of mens rea as a mitigating factor in all instances²⁹¹ but has a normal starting point three years higher than Lord Woolf CJ's Practice Direction. Culpabilities being equal, this must constitute an increased valuation on the AR of the offence, viz. death.

However, even relying on *Sullivan* as the SAP do, one would have to be satisfied that existing ordinal proportionality is satisfied between Sch.21 (which hasn't changed anything on Lord Woolf CJ's analysis for our purposes) and manslaughter sentencing practice, to acquiesce from seizing the opportunity to correct an imbalance. For the benefit of ordinal proportionality manslaughter sentences should lie in a proportionate relationship to those for murder. In discounting Sch.21's relevance so hastily that chance was discarded, and seemingly with it the prime basis for increasing the valuation on the loss of life when sentencing related offences.

Finally it is of prescience for the ensuing caselaw analysis to scrutinise the mantra relied upon by the SAP/SGC that culpability is chief in determining seriousness. That must be true within offences, within the same harm levels. Where the magnitude of harm caused is equal, a crime perpetrated with low culpability is less serious than that with a greater degree of blameworthiness. But above all we see offence seriousness, where culpabilities are equal, are determined by harm level. It is the fact someone dies that makes an intentional killing more serious than an intentional theft; that we as a society consider that harm loss of life more serious than that of loss of property. As such, harm is the cornerstone of offence gravity, upon which culpability varies on a spectrum to determine how serious one particular theft is than another, one killing than another. Murder and manslaughter are merely brackets on that spectrum devised for the purpose of labelling different levels of culpability. Hence, the

²⁹¹ para 11(a), Sch.21

approach to sentencing manslaughter should start from the same basis as that of murder, adjusted to vary proportionately as the culpability does.

The advice produced by the SAP recommended a tariff largely duplicating that used at the time, entrenching the sentencing levels of a previous generation. This is, in many ways, unsurprising since what other authority could be used to gauge sentencing levels having discounted Sch.21's germanity. The mid range appears to be a little broader at 4-9 years in comparison to Wasik's research finding 5-8 years, with a starting point of 12 years in a range of nine to fifteen for a low degree of provocation, mimicking *Latham*. One difference is that it is not however characterised by the use of a knife only. Where there was a high degree of provocation, potentially a non-custodial sanction upto four years prison, with a starting point of three years jail was suggested. Those levels were largely accepted by the SGC, whose definitive guidelines of November that year set a slightly higher range for the low provocation category, at ten years to life.

Given the entrenchment of old sentencing levels by the guidelines, sentences have remained as static in their severity as any category.

Before the enforcement of the SGC guidelines and at the lowest end of the spectrum is *Barnard*,²⁹² where five years prison was sheared down to three by the Court of Appeal. Owen J was influenced by *Norman*²⁹³ which said seven years was the top of the range. The D in that case received 5 years on appeal after a trial where D had stabbed V twice after a lull in heavy

²⁹² [2005] 2 Cr App R (S) 81

²⁹³ (1994) 15 Cr App R (S) 165

fighting. *Barnard* was deemed ‘a case of the most extreme provocation’ and had the benefit of a guilty plea, which appears to be the grounds for a three year term of imprisonment.

As an instance where an individual went out with a knife (undeniably in one sense at least) and used it to cause death upon provocation, *Latham* appears worth mentioning- even if only to be distinguished. Yet it appears nowhere in Owen J’s judgment, reinforcing *Latham*’s pariah status. It may be no coincidence that the Crown was unrepresented in this appeal.

In *Bibby*²⁹⁴ the Court of Appeal held the appropriate range there was ten to twelve years, which indicates this was considered to be a rare case of low provocation, in the parlance of the sentencing guidelines not then finalised. The trial judge’s sentence of 7 ½ years was upheld as a significant discount for the mitigating age of D, just 15 at the time of the offence.

The first appeal where the guidelines came into play was *Douglas*.²⁹⁵ The Court of Appeal held that the level of provocation was high, the other end of the scale from the trial judge’s sentence of twelve years that would suggest he thought it was low. The Court was aware ‘the appellant decided on immediate retaliation, armed himself with knives and sought out and killed’²⁹⁶ V in a pub where he knew he would be. It was their conclusion that *Douglas* fell between two authorities pre-dating the sentencing guidelines, one of which was *Latham*, and that nine years was therefore more appropriate. In referring to pre-guideline cases the Court is displaying something of a nonchalance towards the guidelines themselves. Unsurprisingly

²⁹⁴ [2006] 1 Cr App R (S) 19

²⁹⁵ [2007] 1 Cr App R (S) 58

²⁹⁶ *Douglas* [25]

the final sentence bears little resemblance to the guidelines and burnishes the hypothesis that appeal judges are disinclined to depart too greatly from original sentence.

Other judgments finalised sentences commonly of six years, whether upheld²⁹⁷ or cut from the upper limit for ‘substantial provocation’.²⁹⁸ They were rarely outside this range drawing into question whether detailed thought was going into the exact degree of provocation present, tending instead to deem all provocation ‘substantial’. It may be worth considering the semantics at play here: between “high” and “low” normally comes “medium”. Using the term substantial may mistakenly lead sentencers to think that because provocation has been established, it must therefore have been substantial. An exception would be *Calvert*²⁹⁹, which made a deeper investigation into the level of provocation. This did come post *Wood*³⁰⁰ however, which urged sentencers to consider more carefully the exact degree to which the abnormality of mind diminished D’s responsibility.

Certainly the great merit of the guidelines that they encourage a culpability orientated approach to determining seriousness is at risk of being overlooked by the Court of Appeal. Indeed, notwithstanding the established SGC guidelines, attempts were made by the Court of Appeal to derogate from them on the basis of ‘public concern.’³⁰¹ The platform for this echoed *Latham* in justifying more robust sentence levels in scenarios where the manslaughter occurs as a result of young men carrying knives on their person. Thus any increase in the

²⁹⁷ *Gant* [2007] 2 Cr App R (S) 100

²⁹⁸ *O’Reilly* [2008] 2 Cr App R (S) 67; *Kehoe* [2009] 1 Cr App R (S) 9

²⁹⁹ [2010] 1 Cr App R (S) 50

³⁰⁰ [2010] 1 Cr App R (S) 2

³⁰¹ *Daley* [2008] 2 Cr App R (S) 95, [15]

tariff *Daley* constitutes is not owed to the stimuli behind the statutory provisions discussed in this thesis.

PIECEMEAL PROGRESS?

It took five years and two Lord Chief Justices after Sch.21 came into force before the broader significance of it and the death by driving legislation was appreciated by the upper echelons of the judiciary. The delay in bringing to bear the repercussions of those reforms on manslaughter sentencing reveals the likelihood of years of injustice. Thus, this section of the chapter will map the road to Lord Judge CJ's seminal judgments in *Wood* and *Appleby*, attempting to discern what, if any, kind of piecemeal progress may have been made towards implementing the thrust of the aforementioned legislative reforms from a detailed analysis of decisions from the Court of Appeal.

One punch manslaughter

At first it appeared to be “business as usual”, the Court of Appeal picking up where they left off, for example cutting a sentence of 2½ years for a one punch manslaughter to 18 months, citing *Coleman* and *Edwards*.³⁰² Coming after a trial, the starting point evidently was 12 months on a guilty plea. There was no mention in the judgment of the court being directed to any other cases, and Gage LJ draws no further on material precedents. It is dispiriting to think that apathy, whether from counsel or the Court of Appeal, is the cause of variation in

³⁰² *Binstead* [2005] 2 Cr App R (S) 62

sentences for like crimes.³⁰³ That is to fail the doctrine of stare decisis which our common law is predicated on. More meaningfully, it produces injustice.

In making noble proclamations that ‘any incident such as this which results in the loss of life of another person must be regarded as serious’³⁰⁴ then sentencing an offender to serve in truth less than a year in jail,³⁰⁵ *Binstead* has much in common with *Furby*. There Lord Phillips CJ’s judgment rehearsed the gravity of the harm of death,³⁰⁶ but then endorsed a 12 month sentence on the authority of *Coleman*.

Once again, it was the first instance sentencer who had seen the light, observing

‘What is clear, however, is that there has been a recognition in recent years that too little attention was sometimes paid in the past to the fact of loss of human life, and in my judgment that must be right. Causing the death of another human being by unlawful violence must result in a sentence of some length.’³⁰⁷

The source of this ‘recognition’ can only be Parliament as there has been scant reference to the under-estimation of the harm of death in sentences purporting to be commensurate with the seriousness of the offence in the case law examined in Chapter 3. The Lord Chief Justice on appeal refused to endorse the Crown Court judge’s remarks or give any succour to their factual basis. Instead, he asserted the mantra ‘it is right, however, that the length of the sentence must reflect the culpability of the offender.’³⁰⁸

³⁰³ Cf. *Cheetham, Lumsden* where more thorough examination of precedents was made.

³⁰⁴ *Binstead* [10]

³⁰⁵ CJA03, s.244

³⁰⁶ [2006] 2 Cr App R (S) 8, [11]

³⁰⁷ *Furby* [10]

³⁰⁸ *Furby* [12]

Contrariwise, ‘the need to mark and to discourage the growing tendency’ of drunken violence did justify heavier sentences.³⁰⁹ This is a somewhat superficial finding which does not attempt to query why such conduct may be unsettling, viz. because of the harm that is done and the tenets such harm breaches. It mistakenly assumes sentencing can be a way of reducing the occurrence of like behaviour³¹⁰ through marginal deterrence,³¹¹ which is prone to inconsistency of application and thus disparity in sentence between like cases. Moreover, it fails to consider how the criticism over low sentences for those who cause death by careless driving, which is nothing to do with getting drunk in public places and winding up in vicious brawls, evoked as much passion as anything when debated in Parliament.

He erred, it is submitted, in claiming that the 12 months figure in *Coleman* was a lower limit of a range rather than a starting point.³¹² He proceeded to contradict himself by slashing the 2 ½ year jail term to 12 months anyway, despite *Furby* not even falling within the narrow definition of one punch manslaughter enunciated in *Coleman*.³¹³ This surprising decision owes much to Lord Phillips CJ’s underwhelming retrospective reasoning: ‘we turn back to Coleman. We can see no reason on the facts of this case to go beyond the recommended starting point of 12 months.’ It is clear from this regressive judgment that Lord Phillips CJ in no way acknowledged or incorporated an increased value upon the harm of death in sentencing homicide. In his eyes it never changed from 1990.

³⁰⁹ *Furby* [25]

³¹⁰ Cf. the accepted wisdom and consensus of sentencing experts: Ashworth (n 169) 29

³¹¹ (n 259)

³¹² *Coleman* 513

³¹³ *Coleman* 510 cf. *Furby* [28]

Even more astonishing is the abjuration of this attempt to turn the tide of cases preceding it. Perhaps in *Cheetham* and *Lumsden*, and certainly after *Binstead* it appeared the Court of Appeal was trying to wriggle free from the constraints of *Coleman*, establishing a de facto tariff of about 30 months.³¹⁴ The fact that no one punch manslaughter sentence sanctioned by the Court of Appeal post-*Furby* was at the twelve month level, indeed not less than 2½ years,³¹⁵ highlights how retrograde *Furby* was in the eyes of judges. Despite its status as a leading case, examination of everyday practice by the Court of Appeal uncovers a different story, shunning its quite literal ‘turn back to *Coleman*’ levels. Detailed analysis of numerous, lesser Court of Appeal authorities is thus essential to reach the truth. This is where so many decisions of that court were lacking, following one or two ‘leading’ cases like *Coleman* without paying heed to the rest of the canon of sentencing precedents in the same class.

Where *Furby* was cited, it was the element of the judgment acknowledging sentences upto 4 years had been known rather than the re-adoption of twelve months as a starting point.³¹⁶ Instead the approach espoused by Judge LJ in *Attorney General’s Reference 9 of 2005*, pre-dating *Furby*, appeared gain traction, judging by steadily increasing sentencing levels in one punch cases. Judge LJ’s judgment gives an early insight into the origins of the approach he was to pioneer as Lord Chief Justice in *Wood* and most seminally *Appleby*.

Judge LJ gave complexion to consequences of actions, even when unforeseen, by reminding the Court ‘the blow administered to him [V] resulted in his death, his life brought to a cruel

³¹⁴ *Attorney General’s References 3 and 4 of 2005* [2005] 2 Cr App R (S) 98: 2-3 years; *Attorney General’s Reference 9 of 2005* [2005] 2 Cr App R (S) 105: 3 ½ years; *Roberts* [2006] 1 Cr App R (S) 31: 2 ½ years

³¹⁵ Those being *Warwood* [2006] 2 Cr App R (S) 113; *Cunningham* [2007] 1 Cr App R (S) 14; *Hogan* [2007] 1 Cr App R (S) 110 (where it wasn’t even in issue)

³¹⁶ *Warwood* [4], [15]; *Attorney General’s Reference 78 of 2006* [2007] 1 Cr App R (S) 114, [18]

and sudden end, to the great distress and grief of those who loved him.³¹⁷ He laid down the standard of behaviour and civility subjects expect³¹⁸ with the effect of accentuating the importance of the doing of harm. Thus he held, ‘those who are violent, as this offender was, and in the circumstances in which he was, have to face up to the consequences of their actions, even if the consequences were unintended.’³¹⁹ What comes through as a strong and consistent theme is the importance of the consequences of people’s actions, when they infringe or as here vapourise core principles and values protected by the criminal law. In placing particular emphasis on the harm caused, Judge LJ, without any apparent cue from the provisions of the CJA03, has increased its role in the determination of offence gravity based on culpability and harm. Consequently (no pun intended) the sentence of 2 years was increased to 3½.

Indeed, the fact that two and half years or more had become the accepted level is reflected in length of sentence of 2 ½³²⁰ and 3 years³²¹ not even being challenged in subsequent appeals where the matter in issue was the selection of an indeterminate sentence. Where it was, three years was upheld³²² or the level to which terms were pruned down to.³²³ Affirming 3 years for a boy of 15 pleading guilty at the first opportunity, Hughes LJ said the range was ‘properly’ between two and a half upto five years.³²⁴ Such sentences

³¹⁷ *Attorney General’s Reference 9 of 2005* [2005] 2 Cr App R (S) 105, [13]

³¹⁸ *A-G 9/2005* [15]

³¹⁹ *A-G 9/2005* [16]

³²⁰ *Hogan* [2007] 1 Cr App R (S) 110

³²¹ *Frazer* [2007] 1 Cr App R (S) 69; *Nobes* [2008] 1 Cr App R (S) 17

³²² *Attorney General’s Reference 113 of 2006* [2007] 2 Cr App R (S) 29; *Gosling* [2009] 1 Cr App R (S) 10

³²³ *Chapman* [2008] 1 Cr App R (S) 103

³²⁴ *Attorney General’s Reference 113 of 2006* [2007] 2 Cr App R (S) 29, 169

were hitherto unheard of and plainly incompatible with *Coleman*, which is briefly dismissed as ‘at or near the bottom of the scale’.³²⁵ Does this new consensus betray a subconscious transformation in appellate judges’ conceptions of the harm of death too in such cases?

The justification for such levels appears to be as much supposed public concern about violence on the streets than the harm of death however,³²⁶ even in the two References quoted above.³²⁷ This is reflected by the lack of any substantial rises in tariff for types of manslaughter not customarily involving those “aggravating” factors, as will be seen below.³²⁸ That exposes the fickleness of an approach based upon ‘public concern’ as opposed to one rooted in shared societal values. The latter can and should be applied anywhere if its roots giving rise to public concern are soundly founded- including where there is not public concern merely for lack of awareness or publicity for instance.

Moreover, despite increasing sentences in this branch, it is clear any kind of ordinal proportionality with murder is a long way from being achieved. *Hughes LJ* suppressed the notion that there is a relationship between the sentencing levels remarking, ‘of course the sentencing regime would have been completely different.’³²⁹

³²⁵ *A-G 113/2006* 168

³²⁶ *Furby* [25]-[28]; *A-G 78/2006*(n 316) [18]

³²⁷ *A-G 9/2005*, [15]; *A-G 113/2006*, 169

³²⁸ Also *Keen* [2008] 1 Cr App R (S) 8 and *Wilson* [2008] 1 Cr App R (S) 75 are good examples of pre-Sch.21 business as usual.

³²⁹ *A-G 113/2006*, 165

The heightened appreciation of the gravity of death was something that Crown Court sentencers seemed to be grasping more acutely³³⁰ than their appellate colleagues.³³¹ Perhaps it is because they are closer to "the ground" in their local courts, more involved and in more frequent contact with ordinary people in their courts bearing out the oft-touted virtues of decentralisation. Does sentencing at first instance tend to take place more in the abstract than hamstrung by outmoded precedents, entailing judges' own, full understanding of the harm of death? Do Court of Appeal judgments where only one or two leading cases like *Coleman* are referred³³² to omit scrutiny of more recent and relevant precedents that might cast sentencing practice in a more dynamic light, compared to those more thorough ones?³³³ These methodological aspects of legal practice may have highly significant impacts on the law and are worthy of further research.

Even so, cases virtually identical to *Coleman* began to receive 18 months longer in the Court of Appeal.³³⁴ Hughes LJ, now Vice-President of the Court of Appeal (Criminal Division), did though follow Judge LJ in arguing, 'although he did not mean to do it, he had certainly caused not just serious harm but much worse and the consequence of what he had done is a proper factor in sentencing'³³⁵ in another one punch case. But such reasoning was the exception rather than the norm. Often there was no discernible reason for the escalating trend in the Court of Appeal.

³³⁰ 5years in *Roberts*, 4years in *Cunningham* [10]; *Coleman*'s 12 months derided as 'far too low' in A-G 78/2006, [15]

³³¹ *Roberts* 2½, *Cunningham* 2½

³³² *Edwards*, *Binstead*

³³³ A-G 9/2005 [8]-[9]

³³⁴ *Cunningham*; A-G 78/2006

³³⁵ A-G 113/2006, 165

At best, in the vast majority of cases there seems a reluctance on the Court of Appeal's behalf to pare down first instance judges' sentences too greatly, perhaps out of regard for the latter's proximity to the facts. Reductions in sentence of more than half³³⁶ might be seen as almost insulting in a profession where deference remains important. This of course does have the effect of retaining a degree, albeit a lesser one, of the Crown Court judge's increased tariff. This might explain why four³³⁷ and five³³⁸ year sentences on a guilty plea were shortened to two and a half years, rather than the eponymous 12 months of *Coleman*.

More substantial assaults

Indeed, ordinal proportionality within different manslaughters by assault had been pushed to narrow extremes. The developments in one punch cases mean deep problems of principle are prompted by the proximity of some custodial terms for more serious assaults not subject to the same upward trend. They infringe ordinal proportionality by appearing to conflate the gravity of crimes distinctly different in their moral reprehensibility.

Whilst the sentences in *Case*³³⁹ of twelve years is beyond anything else before or after Sch.21's remit, the other grave assaults seem to conform with the levels of punishment identified in Chapter 3. 9 years in *Liu and Tan*³⁴⁰, and starting points in the region of 10

³³⁶ *Roberts* is 50%

³³⁷ *Cunningham*

³³⁸ *Roberts*

³³⁹ [2007] 1 Cr App R (S) 57

³⁴⁰ [2007] 2 Cr App R (S) 12

years in *Fisher*³⁴¹ and *Attorney General's References 27 and 28 of 2008*,³⁴² do not stretch the apparent limits witnessed for manslaughters committed before Sch.21's applicability.³⁴³

Predictably, no reference to Sch.21 was made in any.

Similarly in *D and P*³⁴⁴ the persistent abuse, degradation, and torture of a vulnerable V meant the behaviour was close to the murder threshold.³⁴⁵ In a Court of Appeal judgment devoid of any real reasoning for the sentence length, the starting points of eight years for D, 16 at the time of the crime, and seven years of P, 14, were implicitly approved. Thus the IPP minimum terms of 3 ½ and 3 years including aggravating factors compare to murder minimum terms in the region of seven years, excluding remaining aggravating factors. In determinate terms, that equates to roughly 7 years gap. The disparity is emphasised by the sentences only being c. 4 years longer than the sentence in an otherwise comparable one punch case. So much for being close to the murder threshold.

In *Jones*³⁴⁶ D, having already brawled with V, pulled V's legs away as he walked down the stairs, causing V to fall down them. D then kicked V whilst V lay on the floor so hard V's pancreas was crushed against their spine. 'It was the kind of injury that is normally associated

³⁴¹ [2008] 2 Cr App R (S) 34

³⁴² [2009] 1 Cr App R (S) 87

³⁴³ *Wadsworth; Attorney General's References 72 and 73 of 2005* [2006] 1 Cr App R (S) 112

³⁴⁴ [2008] 2 Cr App R (S) 23

³⁴⁵ *D and P* [12]

³⁴⁶ [2009] 1 Cr App R (S) 73

with a road traffic accident.³⁴⁷ Richards LJ for the Court of Appeal ruled the Crown Court judge's starting point of nine years- duly reduced for an early guilty plea- too high. Four years on a guilty plea was appropriate. Once again, first instance sentencers' attempts to update the tariff for manslaughters was struck down by appellate judges apparently incognisant of ordinal proportionality or increases in other manslaughter categories and how their justifications may pertain to other categories too. The facts of *Jones* merit a significantly higher sentence to distinguish it from the evolving tariff for one punch manslaughter, which was regularly approving three years on a guilty plea.³⁴⁸ Instead, statically it echoes pre-Sch.21 standards.³⁴⁹

Infants

Not unexpectedly, the picture with regards to infant victims is parallel. Old authorities, which themselves merely reviewed even older precedents to decide what the appropriate sentencing level was, are relied upon once again. Thus, obsolete standards which the Court has failed to distinguish as from a bygone era out of touch with modern valuations on the gravity of the loss of life are approved. One such paragon is the decision in *Fletcher*,³⁵⁰ where following the stock observations on the harm of death, an old case along the lines described above³⁵¹ is applied in an unquestioning, habitual fashion. Seven years was sheared down to five, excising any increase upon previous practice reflecting the greater valuation upon loss of life.

³⁴⁷ *Jones* [9]

³⁴⁸ e.g. *Gosling* [2009] 1 Cr App R (S) 10

³⁴⁹ *Reece* (n 182)

³⁵⁰ [2006] 2 Cr App R (S) 67

³⁵¹ *Yates* (n 187)

Stabbings

As with a number of other categories, progress was initially slow, the first case receiving a custodial sentence of a mere three and a half years.³⁵² That probably owes as much to the flagrantly generous basis of plea as to Laws LJ further somehow managing to sentence as gross negligence what was accepted in the basis of plea as unlawful act manslaughter.

Porter is a case of great significance however. ‘The judge was clearly very conscious, as indeed is this Court in many cases before it, of the great disparity between the effect of a life sentence for murder and the sort of determinate terms of imprisonment passed on offenders convicted of manslaughter.’³⁵³ Recognising the suitable starting point if it had been a murder was fifteen years, he set a minimum term of nine years considering the facts came ‘as close to murder with mitigating circumstances as may be imagined’.³⁵⁴

David Clarke J for the Court of Appeal though overruled this sensible reasoning because ‘we are not satisfied that those high starting points prescribed by Parliament for murder are of relevance to the issue of sentencing for manslaughter.’³⁵⁵ He was later to change his mind in subsequent case law.³⁵⁶ Instead of giving force to the trial judge’s rational, coherent approach which had plentiful Parliamentary justification, David Clarke J found the sentencing level laid down in *Latham* ‘inadequate’ due to severer sentencing in crimes involving knives and

³⁵² *Hillman* [2006] 2 Cr App R (S) 85

³⁵³ *Porter* [2007] 1 Cr App R (S) 115, [29]

³⁵⁴ *Porter* [28]

³⁵⁵ *Porter* [30]

³⁵⁶ *Holtom*, see below

public concern regarding them since that authority had been decided.³⁵⁷ That was augmented by the ‘serious aggravating feature’ of D carrying the knife on his person and using it.³⁵⁸ Thus at 14 years *Porter* does represent an increase in tariff for manslaughter by stabbing, though not for the reasons which this thesis advocates.

Manslaughters in the course of a property crime

Curiously the Attorney General requested sentencing for these offences take account of Sch.21. The 30 year starting point normally appropriate for murders for gain ‘must be reflected to some extent in the appropriate sentence’³⁵⁹ for manslaughter done for gain he submitted. Although Latham LJ urged ‘caution’ with respect to such a proposal due to the different MR between the two offences, the substance of his judgment *does* appear to defer to the Attorney General’s advocated approach. He held the right sentencing range for the offence in question was ten to twelve years, appearing to accept the Attorney’s suggested tariff.³⁶⁰ Compared to *Ali and Lotay* however the difference is unclear. 10 years was the sentence there after guilty plea mitigation, and the range here described as 10-12 before. What remains consistent is the disproportionate impact of the manslaughter coming in the course of a property crime when compared to the likely sentence for merely the killing-around seven years.

If a degree of ordinal proportionality has been achieved between Sch.21 and like manslaughter for gain due to the former Reference, that must be welcomed. Since the

³⁵⁷ *Porter* [32]

³⁵⁸ *Porter* [32], [31]

³⁵⁹ *Attorney General’s References 90 and 91 of 2006* [2007] 2 Cr App R (S) 31, [16]

³⁶⁰ *A-G 90+91/2006* [11]

starting point of ten years adopted by the Court of Appeal there was at the top but not outside the pre-Sch.21 range, it remains to be seen whether the Court will be prepared to exceed it where more serious cases arise, inching the tariff higher. Regardless, piecemeal application of different factual scenarios named by Sch.21 as indicative of one starting point or another to respective sentencing levels for manslaughter however risks creating fresh, or exacerbating in this instance perhaps existing, kinks in ordinal proportionality between the different types of manslaughter, given they are sentenced so rigidly within them. Without a coherent, structured scheme to devise sentences for manslaughter proportionate to the new regime for murder, starting with the most fundamental aspect of Sch.21 and associated legislative enactments namely the greater seriousness of mortal crimes, disparity and unfairness are rife in a hodgepodge of precedents and practices. Indeed if the greater valuation on loss of life was recognised in other cases, this would help to close the gap somewhat between this class of case and those without the property offence dimension.

This appears to be urgently needed when confronted by the parity in sentence confirmed in *Attorney General's Reference 38, 39 and 40*.³⁶¹ Equating the robbery in V's home with the one punch manslaughter as the Court of Appeal did is open to the full force of the criticisms levelled at the treatment of offences against the person and property crimes. Applying the effect of Sch.21 would help rebalance the weighting of the gravity of these crimes by the courts in sentencing.

In manslaughter by assault cases no judgment refers to a respective submission that it should be borne in mind the corresponding starting point for murder is equivalent to a 30 year determinate sentence. The existence of a specific circumstance in a case appears to increase

³⁶¹ [2008] 1 Cr App R (S) 56

the likelihood that comparisons to Sch.21 are made. This is corroborated by precise factual features resulting in other relevant sentencing laws influencing the tariff, as seen below.

Death by driving

For example, some mention of the repercussions of the higher statutory maximum for CDDD upon sentencing for motor manslaughter was made early on by the Court of Appeal in *Brown*.³⁶² Gage LJ held ‘the sentence was bound to reflect the fact that he had pleaded guilty to a more serious offence’³⁶³ than CDDD for which the maximum penalty was now fourteen years. Ten years detention in a YOI was thus ‘severe’³⁶⁴ but upheld due to the circumstances. D had driven the wrong way down the A1(M) in an attempt to kill himself in a collision with another vehicle. He steered to hit a car that had swerved to avoid his oncoming car and killed a young mother.

New heights were reached in the aftermath. *Dudley* upheld fourteen years for the manslaughter of two policemen on a dual carriageway where D, attempting to evade capture by the police, careered into a patrol car containing Vs to avoid a road block they had erected to stop him. This extends the trend of double digit prison terms seen before the theoretical applicability of Sch.21.

The length of nine years custody was not even challenged in *Bennett*. Two cases of gross negligence manslaughter where the fatal injuries were inflicted with a motor vehicle saw

³⁶² [2006] 1 Cr App R (S) 124

³⁶³ *Brown* [14]

³⁶⁴ *Brown* [15]

sentences finalised by the Court of Appeal at six³⁶⁵ and eight³⁶⁶ years. Being well beyond the usual range for that class of manslaughter must indicate a more robust tack to all driving-related deaths in the wake of the CDDD penalty increase and the principles behind the RSA06.

Fire (arms)

Both Sch.21 and other provisions of CJA03³⁶⁷ had signalled offences involving firearms as meriting greater punishment than previously. Once again, the courts appeared to pick up on this and respond to Parliament's palpable intention. Older authorities submitted to the Court of Appeal in *Briggs*³⁶⁸ were treated with caution because 'Parliament and the courts have generally adopted a more severe approach to homicide involving firearms since.'³⁶⁹ The increase in tariff from 12-14 years in the mid-1990s to 30 years under Sch.21 was cited as a key example.³⁷⁰

Why the Court of Appeal seems perfectly capable of advertent to the relevance of increased sentences in the context of aggravating factors by virtue of Sch.21, but not in the essential ingredients of the offence is unclear. Certainly the rises have been greater for firearms in Sch.21, but are still obvious in the escalation to 15 years from 12 for unaggravated murders.

³⁶⁵ *Attorney General's Reference 111 of 2006* [2007] 2 Cr App R (S) 26

³⁶⁶ *Bissell* [2008] 1 Cr App R (S) 79

³⁶⁷ s.287

³⁶⁸ [2007] 2 Cr App R (S) 67

³⁶⁹ *Briggs* [12]

³⁷⁰ *ibid*

The judgment in *Briggs* also takes account of other recent development in firearms sentencing, primarily the five year mandatory minimum for possession of a firearm. Such considerations of other recent developments concerning similar offence features consolidates the approach this thesis has taken to the salience of Sch.21 to manslaughter sentencing. It throws into even starker relief however why provisions concerning mandatory sentences for a different but related offence are taken into account in this instance, but not Sch.21. Again, the Court of Appeal is characterised by a conscientiousness when certain easily identifiable factual circumstances arise, keenly considering inter-offence ordinal proportionality between various gun crimes. Contrariwise, it fails to see the bigger picture with regards to the fundamental core offence being dealt with and Sch.21, clearly of much greater structural importance and general influence. This highlights one of the chief problems with a narrow category-specific approach; there is rarely any attempt to ensure ordinal proportionality *between* them, even if there is a keen focus on it *within* them.

Such a tendency also gives rise to the pitfalls of circumstance-orientated deterrent rationales. *Attorney General's Reference 133 of 2006*³⁷¹ exemplifies this in another fire (arms) case. An eight year sentence was inflated to eleven on the grounds of sending a deterrent message to those who believe "honour" killings or intimidation are acceptable means by which to govern their families. A justification for treating such cases more seriously than another case of arson is that they display a disregard for autonomy in trying to control lawful behaviour in such a draconian fashion. Their purpose thus is to abrogate a central tenet of our society and its laws. This produces a coherent aggravating factor that can be applied wherever facts inform accordingly. Repeated recourse to the rhetoric of marginal deterrence is intellectually diet and unhelpful in trying to foster consistent sentences for like cases.

³⁷¹ [2007] 2 Cr App R (S) 91

Nevertheless, the eleven year term is beneath the starting point of twelve years on a guilty plea accepted by the Court of Appeal in pre-Sch.21 *Hussain*, indicating no uplift whatever stimulated by a subconsciously greater appreciation of the gravity of death, let alone Sch.21's logical materiality.

In other realms any reference to the harm of death beyond the customary observations, or considerations of ordinal proportionality vis-à-vis murder were scarce.

Gross Negligence

Deaths occurring after 18th December 2003 do not seem to have been punished any more seriously than those before. Although a seven year sentence in *Connolly*³⁷² was substituted for one of nine, the fact that four lives had been lost would justify the two additional years to the five year sentence upheld in pre-Sch.21 *Rodgers* where two people died. Sentences of twelve³⁷³ and fifteen³⁷⁴ months were also confirmed by the Court of Appeal showing how low sentences could still commonly be in this species of manslaughter.

Diminished Responsibility

D was a cannibal in *Bryan*³⁷⁵ and had been sentenced for two voluntary manslaughters to a whole life minimum term, having already been convicted of diminished responsibility

³⁷² [2007] 2 Cr App R (S) 82

³⁷³ *Roys* [2009] 1 Cr App R (S) 91

³⁷⁴ *Attorney General's Reference 86 of 2006* [2007] 1 Cr App R (S) 101

³⁷⁵ [2006] 2 Cr App R (S) 66

manslaughter before in 1994. D had killed and dismembered the first V, then cooked and eaten part of V's brain. In custody after his arrest for this killing, he slaughtered an elderly fellow inmate who he'd selected as the most vulnerable and bottom of the food chain.³⁷⁶ 'The seriousness of the case, I have no doubt whatever, is exceptionally high, even having regard to your illness' which 'substantially impaired' D's culpability, the original sentencer decreed.³⁷⁷ It is hard to avoid the linguistic commonality between the judge's assessment of the gravity as 'exceptionally high' and the phrasing of para.4 of Sch.21, which suggests a whole life term as the starting point for such heinous murders. Indeed, a whole life term is what D received. No less than two Treasury counsel were enlisted by the Crown to try and uphold the sentence on appeal.

Lord Phillips CJ noted that the statutory basis for determining the gravity of a crime, namely both culpability and harm.³⁷⁸ He declared '[t]here is no greater harm known to the criminal law than death. It robs the primary victim of his or her life and causes deep distress and deprivation for relatives and friends of the victim.'³⁷⁹ Summarising, he said 'the harm that was done by the appellant was immense; the circumstances in which that harm was done were horrifying; but his culpability was very considerably diminished by his mental illness.'³⁸⁰ The notional determinate sentence was fifteen years on each count, running consecutively, notwithstanding that terms didn't reach double figures for this species for voluntary manslaughter normally.³⁸¹

³⁷⁶ *Bryan* [12]

³⁷⁷ *Bryan* [26]

³⁷⁸ *Bryan* [29]

³⁷⁹ *Bryan* [30]

³⁸⁰ *Bryan* [36]

³⁸¹ *McMilan* is best treated as anomalous

Nevertheless, just a few months later the Court of Appeal, denied the Attorney General's critique 'that the case law establishes a bracket of six to eight years for manslaughter by reason of diminished responsibility, above which the court should not normally go'.³⁸² They asserted 'the absence of a coherent body of developing authority, or of any adequately reasoned argument on behalf of the Attorney General to support'³⁸³ an increase in sentencing practice militated against it. Cases following afterwards tended not to exceed six years on a guilty plea,³⁸⁴ rather substantiating the Attorney General's criticism and meaning sentencing in this field was left behind, oblivious to the changing world around.

Hence it is not surprising that diminished responsibility manslaughter was the first type of manslaughter to have its sentencing reformed.

R v. Wood

Lord Judge CJ pioneered what proved to be a revolution in assessing the gravity of an offence in *Wood*.³⁸⁵ Classic desert theory as defined by its leading exponents states 'the gravity of a crime depends upon the degree of harmfulness of the conduct, and the extent of

³⁸² *Attorney General's Reference 49 of 2005* [2006] 2 Cr App R (S) 12, [20]

³⁸³ *A-G 49/2005* [21]

³⁸⁴ *Gilliatt* [2007] 1 Cr App R (S) 78; *Kehoe* [2009] 1 Cr App R (S) 9

³⁸⁵ [2010] 1 Cr App R (S) 2

the actor's culpability.³⁸⁶ The statutory enactment of this principle in s.143(1) also omits to give special credence to either factor.³⁸⁷ Yet as has been seen, in determining the gravity of many manslaughters, especially voluntary ones (ironically because of the level of intention), the focus has either been obsessively on culpability to the subversion of harm and its role, or simply to value the harm of death at such a low level when taken together with culpability as to under-represent the sanctity of that wrong in our society. Now as Lord Chief Justice, it appears Lord Judge was on the first leg of a mission to right this wrong. He started from the touchstone of assessing the seriousness of a crime:

self-evidently, s.143(1) of the 2003 Act requires the assessment of the seriousness of any offence to address the offender's culpability and the harm consequent on his actions. However neither consideration is paramount, and more important for present purposes, they are not exclusive considerations. Death is the consequence of every murder... However the very fact that a series of paragraphs offer starting points for the minimal custodial sentences—whole life, 30 years, and 15 years, with equally specific provisions for offenders aged under 18 years—demonstrates what every judge knows, that in murder cases although the *result*—the death of the victim—is identical, the gravity of each individual offence is not. Accordingly we disagree that the assessment of the seriousness of an offence of manslaughter on the grounds of diminished responsibility must be focused exclusively on the defendant's culpability.³⁸⁸

This makes a similar point to that argued earlier in this thesis, viz. that the basis of any manslaughter, not least voluntary manslaughters, provides no good reason objecting to a relationship between the two which can incorporate common features such as the valuation on the harm of death and gauge starting points for manslaughter proportionately lower than those for murder according to the difference in culpability.

³⁸⁶ A von Hirsch and A Ashworth, *Proportionate Sentencing* (OUP 2005) 144

³⁸⁷ CJA03. Indeed, it goes further than the harm caused and includes any harm 'the offence... was intended to cause or might foreseeably have caused' too. Cf. SGC, *Overarching Principles* (2004)

³⁸⁸ *Wood* [14]

‘There is no express statutory link between the guidance in Sch.21 to the 2003 Act and the principles to be applied to sentencing decisions in diminished responsibility manslaughter. Where diminished responsibility is established it serves to reduce the defendant's culpability for his actions when doing the killing, but the remaining circumstances of the homicide are unchanged. Specific features of the seriousness of the homicide, for example a double rather than a single killing, or the sadistic killing of a child may be common both to murder and diminished responsibility manslaughter. At the same time the mitigating features expressly identified in Sch.21 extend to what may approximate but not amount to the defence of diminished responsibility and provide an additional connection between the Schedule and the defence. Finally, the culpability of the defendant in diminished responsibility manslaughter may sometimes be reduced almost to extinction, while in others, it may remain very high. Accordingly when the sentencing court is assessing the seriousness of the offence with a view to fixing the minimum term, we can discern no logical reason why, subject to the specific element of reduced culpability inherent in the defence, the assessment of the seriousness of the instant offence of diminished responsibility manslaughter should ignore the guidance. Indeed we suggest that the link is plain.’

Of the facts itself Lord Judge CJ found ‘that the appellant's culpability was diminished, but it was very far from extinguished...the level of his responsibility was just, but only just sufficiently diminished for the purposes of s.2 of the Homicide Act. As in *Chambers*, a very substantial element of mental responsibility remained.’³⁸⁹ Such deep analyses of the facts daring to make the finding that actually D was still culpable to a high degree for their killing are rare³⁹⁰ as the usually narrow band of 3-6 years recognises. The emphasis of this aspect is another victory for ordinal proportionality which relies upon accurate and nuanced variations. So too is contemplation of the exact level of mens rea,³⁹¹ an influential facet of determining seriousness for any crime but which seems to be altogether forgotten about in diminished responsibility cases.

³⁸⁹ *Wood* [19]

³⁹⁰ *Chambers* (1983) 5 Cr App R (S) 190 and *Bryan* appear to be isolated examples.

³⁹¹ *Wood* [10]

With this in mind, he exposes the gulf between murder tariffs which amount to determinate sentences of at least 30 years, and those for manslaughter, something which he is right to say is not ‘fully appreciated.’³⁹² My case law review has shown that a handful of judges sitting in the Crown Court have adverted to this and been struck down by the Court of Appeal for trying to address it, rejecting the cogency of the reasons now expounded by the Lord Chief Justice. He implored that state of affairs

‘cannot be ignored, and a vast disproportion between sentences for murder and the sentences for offences of manslaughter which can sometimes come very close to murder would be inimical to the administration of justice. At the lowest, this means that the actual sentences imposed in cases of diminished responsibility manslaughter decided before the 2003 Act came into effect should be treated with utmost caution. The decisions may helpfully point to relevant broad considerations, but the actual sentences themselves no longer provide an accurate guide to the level of minimum term sentences to be imposed now.’³⁹³

That recommendation is best expanded also to post-Sch.21 cases decided before *Wood*, since this thesis has found no change in sentencing levels after the applicability of Sch.21. Above all he appreciated

‘the stark reality that the legislature has concluded, dealing with it generally, that the punitive element in sentences for murder should be increased. This coincides with increased levels of sentence for offences resulting in death, such as causing death by dangerous driving and causing death by careless driving. *Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before.*’³⁹⁴

³⁹² *Wood* [22]

³⁹³ *Wood* [22]

³⁹⁴ *Wood* [23] emphasis added

It is that *increased valuation upon harm* which the changes to murder sentencing represented by Sch.21 and developments in motor homicides manifest that is the root cause of the necessity for sentencing concerning other related offences to adjust accordingly in order to maintain ordinal proportionality- or rather to introduce some. Excavating the reasons behind the fresh disparity created between murder and manslaughter sentences by Sch.21 produces a more thorough analysis of why that disparity has arisen and on what grounds it might be closed. To simply assert ‘the logic of the need for proportionality is irresistible and needs no additional justification’³⁹⁵ is superficial in no way indicates what offences might or might not be affected by the tariff increases of Sch.21.

It did not take long for the remit of these developments to be expanded to involuntary manslaughter as was logical and proper.

APPLEBY

Attorney General’s References 60, 62 and 63 of 2009

Lord Judge CJ once again presided over this co-joined Reference and appeal against sentence (more commonly known as *Appleby*³⁹⁶). Its perspective differed slightly from that in *Wood* which pointed to the nexus between diminished responsibility manslaughter and murder and

³⁹⁵ Jeremy (n 151) 607

³⁹⁶ [2010] 2 Cr App R (S) 46

their ingredients. In *Appleby* however the increased valuation upon the harm of death, only touched upon at the end of *Wood*, took centre stage.

Lord Judge CJ began by placing *Coleman* in its context as an authority nigh on twenty years old from a ‘a time when there was less public disquiet about violent behaviour and death in town and city centres and residential streets than there is now.’³⁹⁷ Crucially, unlike his predecessor Lord Woolf in *Sullivan*, he made no distinction when stating ‘the assessment of the tariff to represent the punitive and deterrent element following conviction for murder (now the minimum term) was lower than it is now.’³⁹⁸ He was though mistaken like his predecessor to allege ‘the expression “starting point” was used in *Coleman* to mean “lowest point”’³⁹⁹; the starting point of 12 months was meant for a “standard” one punch manslaughter in exactly the same way a starting point of 15 years is meant for a “standard” murder under Sch.21, subject to aggravation or mitigation as appropriate.⁴⁰⁰

Lord Judge CJ repeated the contention from *Wood* that consequences of a crime were relevant in sentencing too. Whilst this has always been the case, there has been a tendency evinced in both case law and from the SAP and SGC that culpability should predominate over the harm done where they were disparate. This must be why the Lord Chief Justice cited the full provision including ‘any harm which the offence caused, was intended to cause or

³⁹⁷ *Appleby* [7]

³⁹⁸ *ibid*

³⁹⁹ *ibid*

⁴⁰⁰ *Coleman* 513

might foreseeably have caused⁴⁰¹ and described this as ‘new’. The better explanation is that the criteria for determining harm according to desert theory had a gloss added to it to by dissenters from constructive liability. Lord Judge CJ however adds no caveat to the plain meaning of s.143(1), or resiles from its obvious conclusion: ‘in manslaughter culpability may be relatively low, but the harm caused is always at the highest level.’⁴⁰²

Supplementing this is the attendant provisions of the CJA03 and other contemporary legislative reform, viz. Sch.21 as discussed in *Wood*, revision of CDDD penalty and creation of new death by driving offences. ‘Taken altogether the recent changes in the legislative structures during the last few years lead to the inevitable conclusion’⁴⁰³ in *Wood* and beyond ‘so as to ensure that the increased focus on the fact that a victim has died in consequence of an unlawful act of violence, even where the conviction is for manslaughter, should, in accordance with the legislative intention, be given greater weight.’⁴⁰⁴

To be clear, the above should be understood as disclosing two different, though possibly interlinked, justifications for sentencing one punch manslaughter (or indeed any other type of manslaughter). Firstly the movement behind greater censure of those who culpably kill is part of a broader societal journey to a heightened level of reverence for the sacredness of life. Secondly, concern about violence on the streets maybe symptomatic of that in the linear sense that crimes resulting in loss of life are viewed as worse and therefore more unsettling for people when they occur than previously. Or it may be a passing moral panic dependent

⁴⁰¹ *Appleby* [14]

⁴⁰² *ibid*

⁴⁰³ *Appleby* [21]

⁴⁰⁴ *Appleby*[22]

upon (perceived) levels of crime. The purpose of this thesis is not to resolve that dilemma, but to assert that the increased valuation on harm of death is compelling for the reasons submitted in Chapter 2 and must be applied to all manslaughter sentencing in the light of Sch.21 applying it to murder sentencing. Whilst the ‘public concern’ theme is viewed as an aggravating factor by Lord Judge CJ,⁴⁰⁵ it is important to note a number of difficulties. One is that it may only arise on the facts of a particular manslaughter and therefore isn’t common to all manslaughters, unlike the harm of death. Another is the extent to which it is explicable on the second suggested ground, any incorporation of it in sentencing by way of an aggravating factor would be to double count that increased valuation on the first ground. Furthermore, if it has arisen out of the third cause, it is immaterial to the determination of the gravity of the crime. Desert is the rationale, not any kind of consequentialist theory of punishment such as deterrence, reductivism, let alone pure penal populism.

Irrespective of his rationale on the harm of death, primarily founded upon Sch.21, Lord Judge CJ denies ‘there is or should be any direct arithmetical connection between the sentences for murder addressed in Sch.21 and the terms imposed for manslaughter. On the contrary, Parliament has clearly preserved the vital distinction between murder and manslaughter.’⁴⁰⁶ The latter may be so, but failing to orientate manslaughter sentences around Sch.21 misses the opportunity to introduce some genuine structural ordinal proportionality to the relationship between murder and manslaughter. Implementing the increased role for the harm of death is essential but doing so merely ensures the old “relationship” between murder and manslaughter is maintained; any disparity that existed prior to Sch.21 will still exist after

⁴⁰⁵ *Appleby* [12]

⁴⁰⁶ *Appleby* [16]

unless manslaughter sentences are deliberately orientated around the levels stipulated by it. This should be the premise for the Sentencing Council were they to be asked to draw up guidelines for sentencing manslaughter. It would be no easy task,⁴⁰⁷ but that doesn't mean it shouldn't be undertaken. Regrettably, Lord Judge CJ has not extrapolated from *Wood* the obvious link between Sch.21 and diminished responsibility manslaughter he cites again in *Appleby*.⁴⁰⁸ He seems to imply Parliament has not legitimated Sch.21 being used for manslaughter, and in that sense he is right to say 'there is no express statutory link between' them. But that does not inhibit him from applying the logical implications in terms of the harm of death.⁴⁰⁹ Neither should it inhibit him from applying the logical demands of ordinal proportionality. It is clear by his own admission regarding *Appleby* that a 'problem of...disparity'⁴¹⁰ exists between the respective sentences for murder and manslaughter. The Court's answer to the disparity emanating from a manslaughter sentence less than one seventh of a murder arising out of the same facts being it was 'the harsh reality' of Ds convictions for different crimes is astounding. That disparity is huge, unfair and needs to be remedied without delay by shifting the tariff for manslaughter closer to murder. Though the Court was not at liberty to interfere with the manslaughter sentence on this occasion, it is the Lord Chief Justice's attitude which dashes hope of ameliorating the inequity further.

R v Holtom

The final step was to apply the effect in the remaining species of manslaughter, gross negligence, ostensibly the category most far removed from murder by virtue of its mens rea.

⁴⁰⁷ Wasik (n 154) 184

⁴⁰⁸ *Appleby* [15]

⁴⁰⁹ CJA03, s.153(2) demands it

⁴¹⁰ *Appleby* [16]

The Court presided over by Lord Judge CJ held the ‘greater emphasis to be placed on the fatal consequences of a criminal act...applies to cases of manslaughter by gross negligence in the workplace’⁴¹¹ as it does to other homicides.

R v Thornley

Lord Judge CJ presiding again confirmed that the ratio of *Wood* and *Appleby* applied to manslaughter upon provocation cases too,⁴¹² in spite of the SGC guidelines- rather ‘updating’⁴¹³ them. Of relevance there too was the new 25 year starting point for manslaughters upon provocation committed with a knife brought to the scene, which meant that was even ‘more significant’ an aggravating factor than when the guidelines had been issued. ‘The court’s observation on the weight to be attached to decisions of the Court of Appeal on sentencing issues or policies is plainly of the greatest importance’,⁴¹⁴ Thomas reminds us, underlining the importance of *Thornley* and Lord Judge CJ’s other landmark cases.

The degree to which the increased valuation upon the loss of life accounted for the final sentence is hard to gauge however. The impact of it and the other factors identified as having changed the approach since November 2005 were demonstrable in Calvert-Smith J’s 16 year sentence at first instance. It is not so obvious from Lord Judge CJ’s revised 12 year term, though this remains distinctly above the headier cases of former generations; *Lahbib* pre-Sch.21, *Douglas* and *Daley* both post SGC guidance.

⁴¹¹ *Holtom* [2011] 1 Cr App R (S) 18, [19] (David Clarke J)

⁴¹² *Thornley* [2011] 2 Cr App R (S) 62, [13]-[16]

⁴¹³ D Thomas, ‘Sentencing: manslaughter by reason of provocation’ [2011] Crim LR 415, 418 (note)

⁴¹⁴ *ibid*

EFFECT

Despite leading the charge, the sentences Lord Judge CJ approved evinced only minor increases on prior practice established from the case law review conducted in this paper.

In *Bryan and Roberts* heard as part of *Appleby* Lord Judge CJ distinguished the case from the classic one punch scenario, not merely on the ground there were two punches but they were ‘ferocious blows administered from behind without warning, so ferocious that...[D] was unconscious before he hit the ground’.⁴¹⁵ The term of imprisonment was increased to five years for the principal Bryan who made the assault. This incorporated a reduced guilty plea discount and double jeopardy, meaning the starting point must have been around 6 ½ to 7 years. Given a bad case of a true one punch manslaughter had begun to merit starting points of almost five years prior to *Appleby*, the increase here afforded to the greater weight of death is probably about a year, taking into account the aggravating factor that this wasn’t properly a one punch manslaughter. Such a minor rise is justifiable on the grounds that one punch cases were one of the few categories to be subject to an increased tariff in the years after Sch.21. This paper is satisfied from close scrutiny of judgments that the greater appreciation of the harm of death was a motivation behind those rises.

Penalties of seven and seven and a half years including partial guilty plea discounts were upheld for the appellants Tom and Ben Cowles, also in *Appleby*. Ds set upon an innocent group that had tried to prevent Ds beating up a random passer-by on the street. They

⁴¹⁵ *Appleby* [57]

unleashed viscous carnage with countless forceful punches to various members of V's group, including Tom Cowles who punched V at least six times to the face whilst he held him in a headlock. 'The degree of force applied around the neck'⁴¹⁶ most likely caused the mortal injury. The Lord Chief Justice deemed the sentences to 'reflect the overall criminality'.⁴¹⁷ Seven and a half years however appears too propinquitous to the five year term awarded to Bryan in the same case. The culpability here was 'high' and the sentences supposedly 'at the top of the bracket'⁴¹⁸. Yet cases decided shortly before this one however had already pushed the top of the bracket up from Wasik's eight years to nearer ten or above,⁴¹⁹ though other cases appeared unaware of that also. It is tough discerning what the increase in harm valuation is in these sentences without breaching ordinal proportionality.

Subsequent cases to *Appleby* saw three and a half years, for one punch manslaughter in some guise or another, in *Church*.⁴²⁰ That is hard to reconcile with Bryan's sentence in *Appleby*. Although Bryan punched V twice, it was still V's head striking the ground from the consequential fall that was the cause of death as opposed to the punch itself in *Church*. Although D in *Church* was young he also had previous experience of inflicting substantial harm- breaking a victim's jaw in two places- from a single punch, putting him on notice as to the danger inherent in thumps to the head. Treating the two cases as roughly alike, the gap of eighteen months appears to render the sentence in *Church* on the generous side. Certainly what component of the term constitutes the greater gravity of causing death is imperceptible,

⁴¹⁶ *Appleby* [78]

⁴¹⁷ *Appleby* [85]

⁴¹⁸ *Appleby* [83]

⁴¹⁹ A similar brawl with a pack instinct got nine years in *Fisher* [2008] 2 Cr App R (S) 34

⁴²⁰ *Attorney General's Reference 112 of 2009* [2010] 2 Cr App R (S) 79

particularly when compared to pre-*Appleby* sentences of three years on a guilty plea.⁴²¹ If this is designed to appreciate the likelihood that some degree of increase had already been implemented in one punch cases as found by this thesis, Lord Judge CJ omitted to explain so. The ambiguity here and in the following cases is likely due, in part at least, to the fact that ‘*Appleby* did not provide guidance on the extent to which sentences for manslaughter were too low.’⁴²² Ergo, the quantum of increase necessary is unclear.

Contrariwise, in *Burridge*⁴²³ the increase explicitly applied by Leveson LJ was conspicuous given pre-*Appleby* levels of five to seven years for that class of case. The judgment was impressive also for its recognition of the ‘extreme vulnerability’ of infant victims, an aggravating factor ostensibly passed over in older cases judging by their parity with assaults on adults. The judgment also points out how the increased valuation was ‘not considered’ in the preparation of the provocation sentencing guidelines.

The decision in *Attorney General’s Reference 8 of 2011*⁴²⁴ made clear, following *Thornley*, that *Wood* and *Appleby* applied to manslaughter upon provocation sentencing. Finding the provocation was low but endured over an extended period of time,⁴²⁵ Leveson LJ giving the judgment of a Court presided over by the Lord Chief Justice declared the shortest term commensurate with the seriousness of this ‘ferocious’⁴²⁶ knifing was 10 years.⁴²⁷

⁴²¹ Indeed that was the sentence D, just 15 and pleading guilty, received in *A-G 113/2006*. Cf. Jeremy, (n 151) 594, who assumes the first instance sentence of 20 months in *Church* is the pre-*Appleby* level. The research conducted in this paper shows it was considerably higher.

⁴²² (n 151) 594

⁴²³ [2011] 2 Cr App R (S) 27

⁴²⁴ [2011] EWCA Crim 1461

⁴²⁵ *A-G 8/2011* [16]

⁴²⁶ *A-G 8/2011* [5]

Confusingly, this is at the bottom of the range stipulated by the sentencing guidelines which Leveson LJ realised were subject to the uplift in terms required by *Wood* and *Appleby*. The perennial trend of judgments' substance not corresponding with their reasoning is thus continued, prompting doubts as to the implementation of the ratios in *Wood*, *Appleby*, *Holtom* and *Thornley*. Only time will proffer a more comprehensive, reliable evaluation.

The punishment is also much shorter than in *Thornley*, despite being a distinctly more serious case.⁴²⁸ The failure to refer to a like, recent, leading case incorporating the higher valuation on harm is hardly conducive to the founding of a new canon of authorities post-*Appleby*.

CONCLUSION

This thesis has found raised sentencing levels for some but not all genres of manslaughter prior to the seminal judgments in *Wood* and *Appleby*. It has questioned though the foundation of some of those increases, and how they comport with the reasoning propounded in Chapter 2 as to the proper legal basis for any such change. It is submitted that elongating jail terms predicated upon the discredited rhetoric of marginal deterrence as a response to moral panics be rescinded when assessing terms that should be determined solely with reference to desert theory. Regrettably though, this maybe wishful thinking for the foreseeable future. Irrespective, perpetuated mistakes should not preclude the proper determination of sentence grounded on the gravity of the crime. Sch.21's greater valuation on

⁴²⁷ *A-G 8/2011* [17]

⁴²⁸ The provocation was much greater in *Thornley*, although over a shorter time, and there was a clear threat to D and his wife. The attack itself was also not so violent and sustained in *Thornley* as the latter, where an intention to kill is tangible.

the harm of death must, therefore, still be reflected in sentences across manslaughter.

Extensions beyond those terms for superfluous reasons must stand or fall on their merits.

It is highly encouraging to see these recent developments from the Court of Appeal at last, and in the coming years hopefully many new precedents will be set superseding their forerunners from the 1990s and early 2000s. But one must ask why it took so long in the first place for the Court of Appeal to make this realisation, why the progress was so slow to this point. Jeremy claims, with the benefit of hindsight, ‘it was always obvious that the increase in starting points used for the calculation of minimum terms in murder cases that was provided for in Sch.21 would render an increase in sentences for other crimes, particularly those including some of the ingredients of murder, inevitable.’⁴²⁹ Odd then that neither he nor any other published writer argued such in the five years preceding *Wood*. Either it wasn’t obvious, or there was tacit willingness to abrogate the will of Parliament. Indeed, he seems to allege something of the latter with regards to the Court of Appeal at least.⁴³⁰

Much credit must go to Lord Judge CJ who began the process where predecessors hadn’t. One can only hope a background as a criminal judge will once again be seen as a sensible pre-requisite for the office of Lord Chief Justice. The fact it was the Labour government, Party backbenchers and the Conservative Opposition allied ‘in the face of the unanimous opposition of the senior judiciary’ surely indicates precisely why the supposed ‘triumph of knee-jerk political reaction over organic growth will continue’: the judges simply didn’t “get it.” In the aftermath, they continued to overlook the message that was so clear to Lord Judge

⁴²⁹ Jeremy (n 151) 594

⁴³⁰ (n 151) 599-601, 603

CJ, who in revolutionary leading judgments *Wood* and *Appleby* did what his appellate colleagues should have been doing throughout. Naturally, if the courts had been effecting evolutionary organic growth rooted in shared societal values all along, there may never have been cause for Sch.21. The lack of organic growth found in this thesis must support the likes of Blunkett whose speeches implied the judiciary couldn't be relied upon to reflect offence seriousness properly; even when met with corrective legislation, they refrained from implementing its implications. Although he sat on the bench in *Sullivan*- a judgment of Lord Woolf CJ-⁴³¹ Lord Judge CJ's understanding of the evolution was evidenced in *Attorney General's Reference 9 of 2005*, and finally brought to bear when he ascended to the leadership remit of Lord Chief Justice.

The extent of those increases is yet to be fully gauged but the binding authority now exists for sentencers in the Crown Court to implement the higher valuation upon the harm of death in assessing the gravity and thus commensurate sentence for homicides. Where the tariff rises prior to *Wood/Appleby* were to an extent influenced by the new emphasis on the loss of life, for instance in motor manslaughter cases and one punch manslaughter, this must be taken into account when applying the effects of *Appleby*.

The danger is that the shortcomings in sentencing practice identified throughout this thesis, not least the frequent failure to refer to a substantial canon of authorities in building an *accurate, nuanced* picture of the established tariff, will undermine the impact of *Appleby*. If courts are not aware of what sentencing practice was for any particular type of case before *Appleby* recognised the influence of Sch.21, then they have no foundation upon which to

⁴³¹ (n 151) 600

apply an increase to. Combined with the *Appleby* modifier to be applied individually at each sentencing judge's discretion, the present situation is a recipe for inconsistency.

‘Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.’⁴³² Despite the momentous decisions pioneered by Lord Judge CJ there remains a gulf between murder and manslaughter sentences which far outstrips the difference in gravity between the two crimes, a view shared by Jeremy.⁴³³ Whilst *Appleby* may have ensured the developments in murder sentencing are now factors in the sentencing of manslaughter too, before Sch.21 was enacted there was unjustifiable disparity between punishments for the two homicides.⁴³⁴ The quest for ordinal proportionality between them requires yet more admirable courage and intellect from the Lord Chief Justice, probably with the Sentencing Council's assistance this time. Without some form of guidelines for manslaughter proportionate to Sch.21, reform will remain stuck at the current halfway house.

Beyond that, the ordinal proportionality between sentencing for offences against the person more broadly and punishments for property crimes has been called into serious doubt by this paper. The exact nature of the increased valuation on loss of life will be investigated alongside the strength of property rights to establish whether in actual fact our sentencing levels for the two different harm genres are in proportion, and examine what role Sch.21 has in rectifying any such inherent bias. That is the future of this project at doctoral level

⁴³² W Churchill, Mansion House Speech (1942) on Montgomery's victory at El Alamein.

⁴³³ (n 151) 607

⁴³⁴ (n 151) 606, which contradicts his rose-tinted view of the past that Sch.21 ‘distorted the delicate proportionality’ that presumably existed before.

This is not ‘a dispiriting tale’⁴³⁵ for the reasons alleged by Jeremy at least. Yet there is a risk it will retain the wishful optimism of a fairy tale without reforms to everyday practice. Many of the trends, deficiencies and oversights noticed in judgments scrutinised for this research are not remedied by *Appleby* et al. They pose ongoing pitfalls for the exercise of sentencing at all levels and are of holistic importance therefore to *doing justice*.

⁴³⁵ (n 151) 607

APPENDIX 1

Criminal Justice Act 2003

Schedule 21 DETERMINATION OF MINIMUM TERM IN RELATION TO MANDATORY LIFE SENTENCE (as amended)

Starting points

4 (1) If—

- (a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and
 - (b) the offender was aged 21 or over when he committed the offence,
- the appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

- (a) the murder of two or more persons, where each murder involves any of the following—
 - (i) a substantial degree of premeditation or planning,
 - (ii) the abduction of the victim, or
 - (iii) sexual or sadistic conduct,
- (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
- (c) a murder done for the purpose of advancing a political, religious [, racial]1 or ideological cause, or
- (d) a murder by an offender previously convicted of murder.

5 (1) 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.

(2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph

(1)(a) include—

(a) the murder of a police officer or prison officer in the course of his duty,

(b) a murder involving the use of a firearm or explosive,

(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),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or

(h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

5A.— (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.

6 If the offender was aged 18 or over when he committed the offence and the case does not fall [within paragraph 4(1), 5(1) or 5A(1)]1, the appropriate starting point, in determining the minimum term, is 15 years.

7 If the offender was aged under 18 when he committed the offence, the appropriate starting point, in determining the minimum term, is 12 years.

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.

10 Aggravating factors (additional to those mentioned in [paragraph 4(2), 5(2) and 5A(2)]1) that may be relevant to the offence of murder include—

(a) a significant degree of planning or premeditation,

(b) the fact that the victim was particularly vulnerable because of age or disability,

(c) mental or physical suffering inflicted on the victim before death,

(d) the abuse of a position of trust,

- (e) the use of duress or threats against another person to facilitate the commission of the offence,
- (f) the fact that the victim was providing a public service or performing a public duty, and
- (g) concealment, destruction or dismemberment of the body

11 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,
- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) [...]1 ,
- (e) the fact that the offender acted to any extent in self-defence [or in fear of violence]2 ,
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender

12 Nothing in this Schedule restricts the application of—

- (a) section 143(2) (previous convictions),
- (b) section 143(3) (bail), or
- (c) section 144 (guilty plea)

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