APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 76
HCA/2019/173/XC, HCA/2019/57/XC
and HCA/2019/56/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION AND SENTENCE

by

(FIRST) PAUL GREEN, (SECOND) LEE NOONAN
and (THIRD) ROBBIE DARREN BROWN

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (Green): J Scott QC (sol adv), Considine (sol adv); Paterson Bell
(for Fitzpatrick & Co, Glasgow)
Appellant (Noonan): O'Rourke QC, Findlater; Faculty Services Ltd
(for Bridge Litigation, Glasgow)
Appellant (Brown): CM Mitchell QC, Armstrong; Gilfedder & McInnes
(for Callahan McKeown, Paisley)
Respondent: Fraser AD; the Crown Agent

14 November 2019

Introduction

[1] Two issues are raised in these three conviction appeals. The first is the nature and

extent to which a trial judge may interrupt the examination and cross-examination of an accused. The second is the adequacy of the judge's directions on antecedent plan concert.

[2] The second and third appellants challenge the level of the punishment parts, which were imposed in conjunction with the sentences of detention or imprisonment for life, on the basis of their relative youth.

General

[3] On 7 December 2018, at the High Court in Glasgow, the appellants were convicted of a number of offences including that:

> "(5) on 23 February 2018 at ... 19 Copland Quadrant, Glasgow, you … did assault James Watt, residing there and did strike him repeatedly on the body with knives …, strike him on the body with an unknown object or objects and a golf club and otherwise inflict blunt force trauma to his head and body, and you did murder him and you Paul Green did previously evidence malice and ill will towards him;…".

[4] On 29 January 2019 the trial judge imposed sentences of detention or imprisonment for life on each appellant. He selected punishment parts of 18 years for Mr Green, 21 years for Mr Noonan and 18 years and 5 months for Mr Brown.

The evidence in the Crown case

[5] Unfortunately, the trial judge has not produced a readily understandable, chronological account of events, as revealed in the Crown case. The narrative which follows is gleaned from his three different reports, the Closed Circuit Television logs and the parties' Cases and Arguments.

[6] At about 1.00pm on 23 February 2018 the deceased, namely James "Scudger" Watt, aged 40, assaulted John Mitchell, who was regarded by Mr Green as his father. Mr Green,

who was aged 30, arrived at the scene in his white BMW. He offered to take his father to hospital. His father was friendly with Pamela Troy, who was the mother of Mr Noonan and who also knew the deceased. Mr Green drove to Carmichael Street in order to look for the deceased. He had a knife and a pick axe shaft with him.

[7] The events which followed occurred in the vicinity of Carmichael Street and Copland Quadrant, whose gardens back onto each other. Mr Noonan, who was aged 20, lived with his mother in a ground floor flat at 130 Carmichael Street. The deceased lived in a ground floor flat at 19 Copland Quadrant. A great deal of the evidence which incriminated the appellants came from CCTV cameras which focused on: Carmichael Street itself; the front close entrance to no. 130; and the back garden of no. 130, which also showed the part of the Copland Quadrant gardens.

[8] At about 1.30pm Mr Green attacked the deceased in Carmichael Street by repeatedly striking him with the pick axe shaft. The assault ceased when Mr Green was told by a bystander that the person, whom he was attacking, was not "Scudger". This was not true. Having made some phone calls, Mr Green reversed his car, but remained in Carmichael Street.

[9] At about the same time, Mr Noonan and Mr Brown, who was aged 18, exited through a window at the rear of Mr Noonan's flat. Mr Noonan was wearing a scarf pulled up over his lower face. He was carrying a knife. Mr Brown was wearing a hoodie with the hood up and a scarf over his lower face. He too had a knife. Mr Noonan had acquired a golf club. They both made several sorties in the vicinity of the gardens before returning to the rear of the common close at no. 130. Shortly afterwards they came out of the front of the close, armed as before. This activity was not connected with Mr Green or the deceased. Mr Noonan and Mr Brown had had some form of confrontation with a group of workers,

who were carrying metal poles. Mr Green joined Mr Noonan and Mr Brown. He shook hands with them. The three went into Mr Green's car. After more comings and goings, Mr Noonan and Mr Brown were dropped off at no. 130 and Mr Green drove away.

[10] At 1.40pm Mr Noonan and Mr Brown again exited through the rear window. Mr Noonan still had a knife and the golf club. They had another confrontation with three other workmen, whom Mr Noonan persuaded to remove a padlock from a gable end at Carmichael Street in case "the polis are looking for me". Soon after, all three appellants were seen together entering the front of the close at no. 130 and, at various points, exiting into the back gardens. While engaged in conversation with Mr Green, Mr Brown pointed towards the deceased's close at no. 19 Copland Quadrant. Mr Green had a large kitchen knife. All three appellants jumped over a fence into the rear gardens of Copland Quadrant. Mr Noonan and Mr Brown had their lower faces covered. They met Alexander Donald, who was working on a dovecot. Mr Brown asked him for his hammer. Mr Donald refused to give him it. Mr Green asked him where the deceased lived, but Mr Noonan told Mr Green: "Don't ask any c… Ah know. Ahm the man".

[11] The three then went towards the common close at 19 Copland Quadrant. Mr Green and Mr Brown went into the flat of William Milligan, who lived opposite the deceased on the ground floor. Mr Milligan was in his toilet, which was invaded by Mr Green and Mr Brown. They left when Mr Green said that he knew Mr Milligan. Over a period of two minutes, the deceased was subjected to a violent and fatal attack. A voice sounding like Mr Noonan's was heard repeatedly shouting "Ya f...ing bam". Things were being thrown. A man was moaning in pain.

[12] The deceased sustained six stab wounds to his torso, one of which severed the aorta and was fatal. It had a track length of 23cms. Two were "through and through" with track

lengths of 7cms. Three of the non-fatal wounds would have required moderate to severe force. The curtains, behind the place where the deceased was found in the foetal positon, were slashed. The deceased had defensive injuries. There were blunt force injuries which were consistent with the use of weapons, fists and/or kicks. Blunt force trauma had fractured the deceased's skull. This was likely to have been caused by the golf club.

[13] All three appellants were seen returning to the close at no. 130. Mr Green had his hood up for the first time. Mr Noonan had the remains of the golf club, which he carried in a plastic bag. The head and part of the shaft were found in the deceased's flat. There were imprints of the club on the deceased's body. Mr Brown was carrying a foot stool, which, for some unknown reason, he had taken from the deceased's flat. Mr Green took it from him and put it in his car; later throwing it away. Spots of the deceased's blood were found on Mr Brown's trainers. Footprints from his trainers were visible on a settee in the room in which the deceased's body was found. Mr Brown was seen on the CCTV possibly carrying a knife when going back to no. 130.

[14] The trial judge summarised matters thus in his report on Mr Green's appeal:

> "[8] There was therefore overwhelming evidence that the appellant was armed with a knife and was in the company of others armed with knives. There was no evidence as to who struck the blows or for that matter who struck the fatal blow. The blunt force trauma blows were almost certainly the result of being hit by the golf club whose head and part of the shaft were found in the flat close to the body of the deceased. Lee Noonan was seen going to the flat with a golf club and leaving with what remained of the club. There was an inference that he had wielded the club."

The defence cases

Mr Green

[15] Because of the nature of the ground of appeal directed towards the extent and tone of the trial judge's interventions, Mr Green's evidence was transcribed and available in audio

format on CD. Mr Green said that he had been phoned about the injury to Mr Mitchell. He had found him with a cut to his head, which had been caused by a bottle. He asked Mr Mitchell who had attacked him. He was told that it had been "Scudger", a person whom he did not "really" know, but who had been pointed out to him in the past. He had a "rough idea" of what he looked like.

[16] Mr Green set off in search of the deceased. He was "raging". After further enquiries, he was told that the deceased was in Carmichael Street. As he drove down that street, he saw the deceased. He had been given a description of what the deceased had been wearing by the person who had phoned him originally. At this point in his examination-in-chief, the following exchange took place:

> "TRIAL JUDGE: Is that your evidence, that you had been given a description of what he was wearing.? – Yeah.
>
> I don't recollect that that was elicited in chief, that was supplied by you, I think.
>
> COUNSEL: My Lord, perhaps not.
>
> TRIAL JUDGE: Yes.
>
> COUNSEL: But that's your evidence? – Yeah."

[17] Mr Green resumed his testimony by saying that he got out of his car and hit the deceased repeatedly with the pick axe shaft which he kept in his car. The reason for this was that he was angry and annoyed with him. The deceased had denied hitting Mr Mitchell. Mr Green retrieved a "small" knife from his car with a view to scaring the deceased. The deceased walked off.

[18] Mr Green then saw two masked people (the other two appellants) running out from 130 Carmichael Street; one had a knife and the other had a knife and a golf club. Mr Noonan, recognised Mr Green as his mother's friend's son. Mr Green denied ever having previously met either Mr Noonan or Mr Brown. The encounter was coincidental;

Mr Noonan and Mr Brown having been involved in an unconnected altercation with others at the same time. Nevertheless, they all got into Mr Green's car. Mr Green explained what he had been doing. Mr Noonan offered to go with Mr Green to see the deceased. Mr Noonan knew where the deceased lived. Mr Green wanted to find out why the deceased had attacked Mr Mitchell. The search for the deceased in a different street failed. Mr Green dropped the other two off and went home.

[19] Half an hour later, Mr Green received a call from a friend who ran a local garage to the effect that Mr Noonan and Mr Brown were in Carmichael Street. They were looking for him because they had discovered the deceased's correct address. Mr Noonan wanted to confront the deceased. Mr Green joined them in the close at no. 130. Mr Noonan came out of his flat with a "large" (8 to 10 inch) kitchen knife, which, in the presence of Mr Brown, he gave to Mr Green to hold. Mr Green gave it back to him later. The three met Alexander Donald. Mr Donald pointed to where the deceased's flat was. Mr Noonan had said "Don't ask any c…, I'm the man; I know where he stays". The three jumped over the fence between the back gardens. Mr Noonan went into the rear of the close, where the deceased's flat was thought to be. He was followed by the other two. Mr Brown went first into Mr Milligan's flat and opened the toilet door. Mr Green knew Mr Milligan, so the two apologised and left. Mr Green said that he had not gone into the deceased's flat at all. He left the close, followed by Mr Noonan and Mr Brown who were shouting "run".

[20] At this point, there was an interruption from the dock. Mr Brown shouted: "F...ing liar. F...ing full of it". The judge describes the outburst as one delivered "with a great vehemence and evident anger". It startled everyone in court. Otherwise, the evidence up to this point occupied 65 pages of transcript with no significant interventions from the trial judge other than that quoted.

[21] Mr Green continued by saying that Mr Brown was carrying a foot stool and Mr Noonan had half of a golf club. Mr Green put his hood up and ran through the close at no. 130 into his car. He took the foot stool from Mr Brown "because I didn't want Robbie in my car". The trial judge intervened:

> "TRIAL JUDGE: I'm sorry, I just don't follow that. You took it off Robbie because you didn't want Robbie in your car. - Yeah.
>
> Explain that. - …it will come out later but the boy's house that… me and Robbie had ran in tae, … he couldn't have probably picked a worser flat in Govan to have ran into. Meaning the boy's family who he's related to.
>
> COUNSEL: Sorry, are you talking about William Milligan? - Yeah.
>
> But what did the foot stool have to do with that? - Nothing.
>
> So, his Lordship's question was can you explain why… - Yeah, why did Robbie Brown not come in my car?...Because I'm raging wae Robbie Brown for running into William Milligan's house.
>
> …
>
> TRIAL JUDGE: I am still struggling to follow your answer. So, you took this foot stool off of Robbie Brown because you didn't want Robbie in the car? I don't understand.
>
> COUNSEL: …you've explained… why you were angry with Robbie Brown…but why did you end up with the foot stool in the car? - I don't know. He gave me it. I took it".

[22] Mr Green dropped Mr Noonan off in Govan Road. Prior to that, Mr Noonan had said that he had given the deceased "a kicking". He had later thrown the foot stool out of the car in Orkney Street. The following question was then posed:

> "TRIAL JUDGE: You will have to explain that one to me… It looks to me as though Orkney Street is on the route to that part you've described as Govan Road… Is that wrong? … have you got the map in front of you? …You see Orkney Street… I am just a little bit confused because it would look as though you would go through or past Orkney Street before you got to Govan Road, but that would be wrong?"

At this point the appellant apparently went pale and looked as if he was about to faint, although he did not do so. This was only a few minutes after Mr Brown's outburst. The trial judge attributes Mr Green's condition to stress caused by the outburst. It could not, he

reports, have been caused by his questions about the layout of the streets. Medical assistance was summoned. On the court resuming outwith the presence of the jury, Mr Green said that he did not want to continue to testify because "it just makes me look guilty". The trial was adjourned over a weekend.

[23] The appellant continued with his evidence. He explained that the reference to having been given a description of the deceased was to a person who had not given evidence. Some time was taken up in going through the CCTV images and explaining what, from the appellant's perspective, they showed. The question of why Mr Green had taken the foot stool was returned to, with the trial judge saying that he still did not understand the answer that this was because he did not want Mr Brown in the car. Mr Green surmised that he had taken the foot stool because it had come from the deceased's house and he had wanted to get rid of it. The examination concluded, still without any significant interventions from the trial judge, other than a few occasions on which he asked for certain matters to be clarified.

[24] Much of the initial stages of the cross-examination on behalf of Mr Noonan consisted of repetition of examination-in-chief or matters unconnected with the libel. Eventually it turned to the point at which the appellants shook hands. The following took place:

> "COUNSEL: You told them you were looking for Scudger Watt before they got into your car? - I wasn't looking for Scudger…. I saw him, I've dealt with it so why am I looking again for him?
>
> Are you [saying] that you didn't tell Lee Noonan and Robbie Brown that's why you were in Carmichael Street? - Yeah, that's why I was there but I'm certainly not continuing looking for Scudger.
>
> Did you tell them that you'd been looking for Scudger Watt? - Scudger, yeah, not Scudger Watt?
>
> TRIAL JUDGE: Sorry, I just didn't catch that. You said a moment or two ago, 'I didn't tell Lee Noonan that I was looking for Scudger Watt'. Are you now saying

> you did tell them? - I told them that's why I was in the street but I'm not continually… looking for them (*sic*) now at that point".

[25] A challenge was made to Mr Green's contention that he had been asked to return to Carmichael Street by Mr Noonan. Reference was made to what Mr Green had said in his testimony before the weekend adjournment, to the effect that he had been phoned because Mr Noonan and Mr Brown had found out where the deceased lived. The trial judge intervened to say what his note was; that Mr Green had been told that they knew where the deceased stayed. It was suggested that the appellant had previously said that in the phone call he had only been told that two boys were looking for him. It was put to Mr Green that this part of his account (ie that it was Mr Noonan alone who was looking for the deceased) was fabricated. This passage continued:

> "COUNSEL: Lee Noonan had no reason whatsoever to be looking for Scudger that afternoon. That's right, isn't it? - You'd have to ask him.
>
> … you were with him…
>
> TRIAL JUDGE: … you're being asked the question, try and address it, please - Okay".

Slightly later on, the cross continued:

> "COUNSEL: But you [said] that the phone call gave you information that they were phoning you because they knew where Scudger was. - Yeah but they couldn't have spoke to Scudger.
>
> But why did you then go to [Carmichael Street]? - I went to see Lee.
>
> Why? - Why not?
>
> TRIAL JUDGE: … answer the question again, not with an answer (*sic*, ? question) but with an answer, a proper answer. Why did you go? - Cos he was looking for me."

The question of who was looking for the deceased was returned to:

> "COUNSEL: So could it be because you were looking for Scudger Watt? – We were going in that direction looking for Scudger Watt, but I wasn't personally looking for him.

TRIAL JUDGE: … if you weren't with the group looking for him, how are you not personally looking for him: You were there, it was you that was doing… - What I mean, it wasn't my idea to go looking for him.

Okay. So it wasn't your idea but you were involved in the search for him, is that what you're saying? – Yeah, yeah.

Right."

[26] During the cross-examination on behalf of Mr Brown, the trial judge asked Mr Green on one occasion to try and answer the question being posed. The phone call was raised again as follows:

"COUNSEL: So did you say [to the garage owner (*supra*)]… 'Give one of them the phone so I can see what they want'? – No.

No. Why not? – Cos he just said 'Come round'.

TRIAL JUDGE: No, but answer the question, please. You're being asked why… - No, I, didn't…

Listen now. You're being asked why not. Answer the question. – I don't know."

[27] In cross-examination by the advocate depute, the issue of whether Mr Green had shown his knife to the deceased was referred to. The following exchange occurred under reference to the CCTV images:

"ADVOCATE DEPUTE: … let's look back at it and you can [say] where it is that you show him this knife. Just go back maybe about… - I'm sure he can see there.

Pause it, now play it on. What I'm asking is what you do to show him it. – He's…

TRIAL JUDGE: Is there not a vehicle between you and, and [the deceased] at that point? I mean your vehicle's parked quite tight up to either, what is that, a people carrier or … something of that nature there. … Just play that again, please. - …Clearly he's seen something. He's noticed that I'm doing something. He knows I've put the bat back.

Mmm. … - At this point here he must know that I'm doing something…

Yeah. Can I put something to you for your comment? I mean is it, would it be incorrect to look at that and imagine that what it shows is you removing a knife from a cloth or some kind of covering and transferring it to your pocket? – Yeah.

Is that what it shows? – Yeah.

Right, okay".

The fatal incident was considered. The following then occurred:

> "ADVOCATE DEPUTE: Well, why then did you run into someone's house? – I've already answered that.
>
> Well, I'm asking…
>
> TRIAL JUDGE: Well, answer it again. – Cos I followed Robbie Brown into William Milligan's house.
>
> ADVOCATE DEPUTE: So there might not have been a plan to run into Mr Milligan's house, that was a spontaneous event, the two of you doing it together, should I understand that? – Yeah.
>
> Yeah, okay. But insofar as the plan was concerned, it was to have this polite conversion with Mr Watt at his front door. – No I didn't, I didn't word it like that, no.
>
> Well, how would you…
>
> TRIAL JUDGE: How…would you word it then? – Not a polite conversation."

[28] At this point (page 217 of the transcript of that day's testimony), counsel for Mr Green raised the matter of the challenging content and sceptical tone of the trial judge's interventions. The trial judge replied that he had said very little. The difficulty was that the appellant was not answering questions directly. The judge had been intervening with a view to ensuring that he did so. Very soon after this, the trial was adjourned until the following day when Mr Green's testimony was rapidly concluded.

Mr Noonan

[29] Mr Noonan's evidence was not transcribed. He did not complain about the trial judge's interventions. The trial judge does not provide any narrative of Mr Noonan's testimony in his report. Mr Noonan's position was summarised by the judge in his charge to the jury. It had been Mr Green and Mr Brown who had entered the deceased's flat. He had not done so.

Mr Brown

[30] Although he did not testify, it was Mr Brown's position that the evidence did not demonstrate that he had played an active part in the attack. He could not reasonably have foreseen that the deceased would be attacked. Alternatively, the jury could find him guilty of culpable homicide on the basis that the appellant could not reasonably have foreseen that lethal violence would be used.

Charge to the jury

[31] The trial judge gave the jury the standard directions on how to approach the testimony and to determine issues of credibility and reliability. He referred to the presumption of innocence, the burden and standard of proof and corroboration. He directed the jury that, in the case of Mr Green and Mr Noonan, if anything that was said by them, or any other evidence in the case, caused them to have a reasonable doubt, then they had to acquit. If they accepted the evidence of either appellant, then they required to acquit him. Even if they did not completely believe him, if his evidence left a reasonable doubt, they would still have to acquit.

[32] The trial judge turned to the question of concert. He followed the terms of the Jury Manual closely as follows:

> "... normally ... you're only responsible for your own actions and not for what somebody else does. But, if people act together in committing a crime, each participant can be responsible not only for what he himself does but for what everyone else does while committing that crime. And that arises ... if, firstly, people knowingly engage together in committing a crime; secondly, if what happened was done in furtherance of that purpose; and thirdly, if what happened didn't go beyond what was planned by or was reasonably anticipated by those involved."

[33] Again following the Jury Manual, the trial judge provided examples of situations involving concert, including the bank robbery, the spur of the moment street fight and the

housebreaking in which the occupier is killed. He reverted, once more adopting the phraseology of the Manual, to the street fight as follows:

> "... Suppose the initial attacker, unknown to the others, had a knife and stabbed the victim. Now, in that situation, all three would be guilty of assault by punching but only the first would be guilty of assault by stabbing, and that's because in using the knife he was doing something that wasn't expected by the others. But ... if the other two saw the knife was being used or must have known that it was being used and continued punching the victim, they would also be guilty of assault by stabbing because they had accepted the escalation of violence in the joint criminal purpose. So, an unarmed attacker can be responsible for an attack with a weapon if he knew or must have known that the co-accused was armed and continues his attack."

The trial judge then spoke specifically about the case which was being tried, but again using in large part the terms of the Jury Manual:

> "Now, in this case, the Crown are not alleging that the concert emerged spontaneously. The Crown's position here is that this was planned and, when there's a planned crime, acts done that are part of the plan are the responsibility of everyone involved who was party to that plan. Acts that are outside the plan or beyond the plan are the responsibility only of whoever committed them. Now, that is an issue that ... is going to have to be judged according to an objective test. So, you've got to ask yourself, 'What was foreseeable as likely to happen?' Now, here, the Crown says that there is evidence showing a joint or common purpose in the commission of this crime and you can infer each accused's actions came within that common purpose."

[34] The trial judge embarked upon a summary of each party's position. He described the essence of the Crown case as being that all three appellants were looking for the deceased. All three were seen trying to find the deceased's flat. All three walked towards it. All three were armed or, if not armed, each was aware that one or other of the group had a lethal weapon. Based on the evidence of what went on before the attack and what happened thereafter the Crown alleged:

> "That the picture that emerges is that of a planned attack in concert where extreme violence was reasonable foreseeable given the presence of the weapons beforehand. And the Crown say that the inability of the Crown to say who struck the lethal blow or even who struck which blow and with what weapon is immaterial. The Crown allege that they acted together with a common purpose where it was known that all

> or some of them was armed and that serious violence was foreseeable and, on that account, the Crown invite you to convict all three of murder."

[35] The trial judge summarised the position of each appellant. Having done so, he adopted the terms of the Jury Manual once more as follows:

> "So,... you should approach the matter in stages. You firstly decide what the evidence against each accused is separately. Secondly, if there is sufficient evidence to implicate each one, you decide firstly if there was a common criminal purpose among them and, secondly, if there was, what it was. Then, thirdly, with each accused, you must decide if he was party to that and, if so, to what extent. If he was, he's responsible with the other participants. If he wasn't, you can only convict him of what he himself did. So, depending on the degree of the individual accused's criminal responsibility, you could either convict all of the accused of this charge or only two of them or an accused only for what he did himself."

[36] Having defined murder, the trial judge dealt with the submission which had been made to the effect that an alternative verdict of culpable homicide was open. Again following the Jury Manual, he said:

> "Culpable homicide is causing someone's death by an unlawful act which is culpable or blameworthy. It's killing somewhere where the accused didn't have wicked intention to kill and didn't act with such wicked recklessness as to make him guilty of murder. The unlawful act must be intentional or at least reckless or grossly careless. Recklessness or gross carelessness means acting in the face of obvious risks which were or should have been appreciated and guarded against or acting in a way which shows a complete disregard for the potential dangers which might arise. It's immaterial whether death was a foreseeable result or not. So you would need to be satisfied ... that the accused committed an unlawful act, that the act must have been intentional or reckless or grossly careless in the sense that I have defined it and that the death was a direct result of the unlawful act."

[37] The trial judge made it clear that the jury could return different verdicts in respect of different accused and that, in relation to each of the accused, the verdict of culpable homicide remained an option.

Submissions

Mr Green

[38] The first ground of appeal was that the nature, extent and tone of the trial judge's interruptions of the appellant had led to a miscarriage of justice. A sound recording of the testimony having been produced, the issue of tone was raised only in respect of one relatively insignificant matter. It was submitted that the interruptions had had an impact on the appellant, as was demonstrated by him almost fainting on being asked by the trial judge about the route which he said he had taken after the incident. The contention was that a judge should not interrupt in a situation in which the matter could be clarified by either the examiner or in subsequent cross-examination. The judge should wait until the conclusion of the cross-examination before asking any questions which were required for the purposes of clarification. It was not for the judge to ask questions which were being, or would be, put by the parties' legal representatives. Some of the interruptions (such as that asking the appellant to "explain that") constituted a challenge to the evidence being given. The judge had simply misunderstood the route taken by the appellant as disclosed in the CCTV images. He had also misunderstood the point about whether the Crown case had revealed that the appellant had been given a description of the deceased.

[39] The testimony of an accused was different from that of a witness. A trial judge had to take greater care before engaging in questioning an accused, especially prior to the stage at which all parties had asked such questions as they had deemed fit. The judge had courted the risk of creating an unfavourable impression of the appellant as a result of his regular interruptions. This was so, even although it was accepted that the reported legal precedents had involved far more egregious interruptions. The fair-minded and informed observer might conclude from the nature of the questioning that there was a real possibility of the

judge being biased (*Porter* v *Magill* [2002] 2 AC 357; *Pullar* v *United Kingdom* (1996) 22 EHRR 391; *Clark* v *HM Advocate* 2000 JC 637).

[40] The remaining grounds of appeal on conviction were that the trial judge had erred in failing properly to direct the jury that, if they failed to find satisfactory proof of concert, they were bound to acquit the appellant. The judge had failed to direct the jury on what to do if they accepted the evidence of the appellant that he had gone with Mr Brown into the correct tenement block, but had entered the wrong flat. The judge failed to provide adequate directions about antecedent concert in murder. The charge as a whole lacked the clarity which might be expected in directions on such important issues, given the cross incriminations (see *Barrie* v *HM Advocate* 2002 SLT 1053 at para [7]).

Mr Noonan

[41] Mr Noonan submitted that the directions in relation to concert were inadequate. Clear directions on what was required in order to constitute a concerted antecedent plan to commit murder were required; ie that there was a joint purpose, which either involved killing the deceased or carried an obvious risk that he would be killed. The judge did not define common criminal purpose in the context of the murder charge and the directions were accordingly difficult to follow (see *Perfinowski* v *HM Advocate* 2014 SCCR 30 at paras [22]-[26]; *McKinnon* v *HM Advocate* 2003 JC 29 at paras [29]-[40]). No specific directions were advanced as having been omitted by the judge.

[42] The trial judge had misdirected the jury on the availability of a verdict of culpable homicide. He did not explain how culpable homicide could be applied in the circumstances, standing the explanation provided by the appellant in his evidence. The omission of a clear direction on the applicability of culpable homicide constituted a miscarriage of justice

(*McKinnon* v *HM Advocate* (*supra*) at para [41]; *Docherty* v *HM Advocate* 2003 SCCR 772 at 777-778; and *Stewart* v *HM Advocate* 2012 SCCR 728 at paras [11]-[12]).

Mr Brown

[43] Mr Brown submitted that the trial judge had failed to direct the jury clearly on the position if there was no satisfactory proof of concert. He had not directed the jury about what was to be done if they were not satisfied that the appellant had actively participated in the attack upon the deceased. There was no specific direction that, in the event of a failure to prove concert, acquittals had to follow (*Docherty* v *HM Advocate* 1945 JC 89 at 99; *Shaw* v *HM Advocate* 1953 JC 51). The case could have been decided on the basis of the actings of at least some of the individual appellants, but the Crown chose to proceed on the basis that concert was the only means upon which it sought convictions against all three appellants, as it could not identify who had struck the fatal blow. If the issue had been live and obvious, the trial judge ought to have directed the jury on individual responsibility (*Gardener* v *HM Advocate* 2010 SCCR 116 at para [17]). Instead, he chose to direct the jury simply on the Crown's approach to concert. The jury could only determine the case on that basis. The trial judge had failed to direct the jury on the course which they had to take in the event that it was not proved that the appellant had actively participated in the attack. There was a lack of direction on the circumstances in which the appellant could be acquitted, rather than upon the circumstances in which he might be convicted. The directions failed to give any hint of the basis upon which the jury would be entitled to convict any accused individually. The failures of the judge were sufficiently material as to justify quashing the conviction (*Mills* v *HM Advocate* 1935 JC 77 at 82-83).

Crown

[44] In relation to the interruptions, the test was whether the circumstances were such as would create in the mind of a reasonable man a suspicion that he was not impartial. Justice had to be seen to be done (*Bradford* v *McLeod* 1986 SLT 244; *Porter* v *Magill* [2002] 2 AC 357 at paras 102 -103). The court should have regard to all the relevant factual information and keep in mind the need for the possibility of bias being "real". Although there had been a number of interventions during the evidence of Mr Green, these were for the purposes of clarification, or with a view to Mr Green answering questions properly asked. No concerns had been raised until towards the end of Mr Green's evidence. No miscarriage of justice had occurred.

[45] The directions on concert were sufficient. The principles were set out in *McKinnon* v *HM Advocate* (*supra*). The nature and scope of a common criminal purpose was to be determined on an objective basis; the question being whether, in the case of an individual accused, what had happened had been foreseeable. A charge should not be an academic exposition of the law, but tailored to fit the circumstances of the case, including the speeches (*Elsherkisi* v *HM Advocate* 2011 SCCR 735 at para [13]). A charge should not be encumbered by unnecessary directions (*Ferguson* v *HM Advocate* [2015] HCJAC 89 at para [10]). A charge was not defective because it failed to state the obvious (*Moynihan* v *HM Advocate* 2016 SCCR 548 at para [22]). The absence of words that could have improved the charge did not mean that there had been a misdirection (*Kerwin* v *HM Advocate*, unreported, High Court of Justiciary, 30 March 2016 (HCA/2015/002694/XC)). The charge had to be considered as a whole and in context of the totality of the trial (*Gubinas* v *HM Advocate* 2017 SLT 663 at para [40]). If there was insufficient evidence for an alternative case based on individual responsibility, a judge did not require to direct on that alternative case (*Gardener* v *HM*

Advocate (*supra*) at paras [17]-[21]). The judge gave comprehensive and accurate directions on concert. He made it plain to the jury that they had to be satisfied that there was a common plan and that each appellant would only be responsible for the consequences of conduct which was within the scope of that plan. Active steps to facilitate the plan were necessary. Mere knowledge of the conduct was insufficient. The violent attacks on the deceased could only be characterised as murderous. If the appellants were acting in concert, then the only verdict open was murder.

[46] The real issue was whether any misdirection had had a practical significance (*Thomson* v *HM Advocate* 1998 SCCR 683 at 685; *Johnston* v *HM Advocate* 2012 JC 49; *Crombie* v *HM Advocate* 2015 SCCR 29 at para [22]). If there was a misdirection, standing the strength of the Crown case, no miscarriage of justice arose.

Decision

Judicial Intervention

[47] In *Livingstone* v *HM Advocate* 1974 SCCR (Supp) 68, the contention was that the sheriff had acted oppressively by frequently interrupting the appellant's evidence to put questions himself: "thereby disclosing that he was adversely inclined towards" him. It was accepted by the court that, although there were occasions in which the sheriff was "merely trying to clarify points in evidence", there were others which "savoured more of the role of cross-examiner than a presiding judge". Although the appeal on this point failed, as no miscarriage of justice had been demonstrated, the Lord Justice Clerk (Wheatley) delivered what the SCCR reporter describes as an "informal opinion of the court" containing the following (at 69):

> "… I must deprecate the practice of such constant interruptions by a presiding judge. Basically his function is to clear up any ambiguities that *are not being* cleared up either by the examiner of the cross-examiner. He is *also* entitled to ask such questions as he might regard relevant and important for the proper determination of the case by the jury, but *that* right must be exercised, with discretion, and only exercised when the occasion requires it. It should not result in the presiding judge taking over the role of examiner or cross-examiner. *Normally* the appropriate time to put such relevant questions as he may think necessary for the proper elicitation of the truth is at the end of the witness's evidence, and not during the course of examination or cross-examination (emphases added)."

[48] This statement was approved in *Nisbet* v *HM Advocate* 1979 SLT (notes) 5 (Lord Thomson, delivering the opinion of the court, at 5), in which the appeal was allowed. It is worth commenting that, in *Nisbet*, the totality of the appellant's evidence was 38 pages of transcript, 15 of which consisted of the sheriff's questioning. That length of that testimony is in sharp contrast to the lengths of examination and cross-examination in the modern era, especially in the High Court. In this case, Mr Green's testimony alone occupied over 300 pages of transcript.

[49] The *dicta* in *Livingstone* v *HM Advocate* (*supra*) was adopted in *Dobbins* v *HM Advocate* 1980 SCCR (Supp) 253 (LJG (Emslie), delivering the opinion of the court, at 255), in which the appeal failed despite the judge's interventions being described as more than "generally desirable". It was also, by inference at least, accepted in *Tallis* v *HM Advocate* 1982 SCCR 91 (LJG (Emslie) at 99), in which it was held that the sheriff had failed "to demonstrate and maintain his complete impartiality upon the vital issue which was for the jury to resolve" and had, in influencing the jury, acted oppressively.

[50] It is important to understand exactly what the Lord Justice Clerk said in *Livingstone* v *HM Advocate* (*supra*) in relation to the extent of a judge's powers of intervention. He or she is first entitled, if not required, to clear up any ambiguities that *are not being* cleared up either by the examiner or the cross-examiner. Such clarification would normally be made at or

about the time when the ambiguity arises. It is true to say that, as a generality, a judge should wait to see if the ambiguity, which he or she has perceived, will be cleared up by the questioner rather than intervening precipitately. However, there are many instances in the course of a trial when it is relatively clear that counsel are aware of what a witness, including an accused, means because of their knowledge of the background circumstances as derived from the statements or precognitions. Neither the judge nor the jury have that background knowledge. The judge may require to interrupt examination or cross-examination at the time in order to clarify to what the witness is referring. Storing up a list of ambiguities until the conclusion of cross-examination, or perhaps even re-examination, would be a highly artificial exercise and has the potential to re-open the cross-examination or re-examination of the witness unnecessarily. This is especially so in a situation in which the testimony of an accused has, as it was in Mr Green's case, been lengthy. Such a practice is not required by the *dicta* in *Livingstone* and it is not a desirable one.

[51] It is the second category of judicial intervention that *Livingstone* v *HM Advocate* (*supra*) directs should "normally" await the conclusion of questioning by the parties. This is where the judge decides that questions, which are relevant and important for the proper determination of the case, remain unanswered. The judge may have thought that there was some obvious question which has not been asked, but which ought to be answered before the jury should be asked to consider their verdict. These situations ought to be rare. A judge ought to be very careful before asking a question about some new matter, which the parties may have deliberately not probed. As the Lord Justice Clerk said in *Livingstone*, the judge must act with discretion and only when the occasion *requires* it. The overarching principle nevertheless remains that the judge may, and in some situations ought to,

intervene "as he may think necessary in the interests of justice" (*McLeod* v *HM Advocate* 1939 JC 68, Lord Carmont at 71).

[52] The judge should not take over the role of examiner or cross-examiner. Nevertheless, provided that the judge does not stray into the realms of cross-examination, and thereby be perceived by the informed and impartial observer as having an adverse view on the accused's credibility or reliability, it will be difficult for an accused to demonstrate that the interventions have been so oppressive as to constitute a miscarriage of justice either by destabilising the accused or indicating apparent bias.

[53] In Mr Green's case, the trial judge's interventions do not approach the standard required before it could be said that such a miscarriage has occurred. First, the interventions which he made were relatively few, when the totality of Mr Green's testimony is taken into account. They were far from "constant". Secondly, although at times the judge asked pointed questions, he did not take over the role of examiner or cross-examiner. Thirdly, although the judge did press the appellant to answer the questions which he was being asked, his questions did not display any adverse view of the appellant's credibility or reliability.

[54] Specifically, the judge did make a comment, apparently to counsel, about the appellant saying that he had been given a description of the deceased before going to look for him in Carmichael Street. This had not been something which had been adduced in the course of the Crown case. The judge expressed his concern about this. He was entitled to do so, even if the answer to his concern was that the person, who was said to have provided this description, had not been called by the Crown. This was covered in subsequent questioning of Mr Green.

[55] The trial judge intervened in an attempt to understand the appellant's reason for taking the foot stool from Mr Brown. This was a legitimate interruption in circumstances in which the appellant was not providing a coherent explanation for doing so. This was a classic case of a judge seeking to clarify matters. The appropriate time for doing this was at the time when the ambiguity arose. The length of time between the ambiguity arising and the judge intervening will be a matter for the judge's discretion in the particular circumstances. As touched upon previously, it is normally prudent to wait to see whether counsel addresses the ambiguity, but it can seldom be conducive of a miscarriage of justice if the judge steps in prematurely. In this situation, which arose again later, counsel still did not manage to clarify the appellant's position beyond the appellant's ultimate statement that he did not know why he had taken the foot stool.

[56] The contention that the trial judge's questioning of the appellant, about his route away from the scene, had destabilised the appellant and brought about his indisposition, is speculative. The trial judge rejected it in his report; attributing the problem to the outburst from Mr Brown. Whatever the situation may be, the trial was adjourned, the appellant attended to medically, and the examination resumed after the weekend. During cross-examination on behalf of Mr Noonan, the judge attempted to clarify whether or not the appellant had told his two co-accused that he was looking for the deceased when he met them in Carmichael Street. Mr Noonan's counsel was pursuing this point with some vigour. The judge intervened on occasion, when he considered, correctly, that the appellant was not answering the questions posed. This is an essential function of the judge in ensuring the fairness of the trial for all concerned and maintaining adequate control over the proceedings.

[57] The trial judge intervened during the advocate depute's cross-examination when he considered that the questioning did not take account of what was apparent from the CCTV

images. It may have been unnecessary, and perhaps imprudent, for him to do so, but the intervention was an example of the judge's legitimate concern about the accuracy of the evidence. It was not such as to display any bias.

[58] There is ultimately very little of substance in this ground of appeal. It is accordingly rejected.

Charge on concert

[59] The context of the directions on concert was the un-contradicted evidence that, following upon some form of discussion between them, the three appellants had headed towards the deceased's close. They were either all armed with knives and other weapons or must have known that their co-accused, or one or other of them, were carrying such weapons. Mr Brown asked for Mr Donald's hammer. At the very least, each must have been aware that there was to be some form of violent confrontation with the deceased. There was clear evidence of some form of antecedent concert. The question is: what directions ought to have been given to the jury in that situation, given that the deceased was undoubtedly murdered by one of the appellants as the principal actor who severed his aorta with a knife?

[60] It is correct to say that the Crown proceeded against each appellant solely on the basis of art and part responsibility. If that were the only basis upon which guilt could have been established against any one of them, a direction that the failure to prove concert must result in an acquittal ought to have been given. That is the *ratio* of *Docherty* v *HM Advocate* 1945 JC 89 (Lord Moncrieff at 94 and 97, Lord Carmont at 101) in which there was no evidence of either concert or of which one of two men (the accused and an unknown person) had killed the deceased in the appellant's one-apartment flat. That is not the situation in this

case. First, contrary to the Crown's position, it would have been open to the jury to convict any one of the accused, or at least either Mr Green or Mr Noonan, as principal actor. If, for example, the jury had not been satisfied of Mr Brown's involvement but had believed Mr Green, they could have convicted Mr Noonan on his own. If they had believed Mr Noonan, they could have convicted only Mr Green.

[61] Secondly, in this case there was ample evidence of antecedent concert. The true issue was the nature and extent of the common criminal purpose. The present case is closer, but by no means identical, to *McKinnon* v *HM Advocate* 2003 JC 29. In *McKinnon* there was a pre-planned discussion about going to the deceased's house armed with knives, albeit for the purpose of assault and robbery. *McKinnon* (LJG (Cullen), delivering the opinion of the court) is authority for the proposition, derived from Hume: *Crimes* (I, 264 *et seq*) and Lord Moncreiff's *dicta* in *Docherty* v *HM Advocate* (*supra*), that a participant in a common criminal purpose will be guilty of a murder committed by another:

> "[15] ... if the participant is one of a number of persons who ... 'have reason to expect' the use of a lethal weapon and have 'joined together in an act of violence apt to be completed by its use'. ... Whether the use of a weapon was expected, and whether the violence intended by the parties was liable to lead to its use, did not depend on the subjective understanding of the participant ... but on objective evidence as to the circumstances, including what must have been obvious to that participant ... [T]he participant will be held responsible for murder committed by one of the party whom he was supporting where there was an obvious risk that the weapons carried by them for carrying out the criminal purpose might be used to commit murder."

[62] The Full Bench in *McKinnon* v *HM Advocate* (*supra*) overruled the principle in *Brown* v *HM Advocate* 1993 SCCR 382 that, before a particular accused could be convicted of murder on the basis of concert, it was necessary to prove what he or she had in contemplation at the time of the attack. In so doing, the Lord Justice General (Cullen) continued, albeit rather tentatively, that:

> "[23] ... if an accused contemplates that a weapon may be used to inflict serious injury, in pursuance of a criminal purpose, there may well be an obvious risk of the victim dying as a result of the use of the weapon.
>
> ...
>
> [25] ... While there may be cases in which no other conclusion can reasonably be reached, it is for the jury to decide whether a person who participates in the carrying out of a common criminal purpose which leads to a fellow participant committing murder should be held criminally responsible for the murder on the basis that he knew that a weapon which could readily be used to kill was being carried for use in furtherance or that purpose, so that there was an obvious risk of murder. In such a situation it would be immaterial whether he knowingly ran that risk or was recklessly blind to it.
>
> ...
>
> [27] ... if the relevant concert is established, there is no separate question as to whether the individual accused had the necessary criminal intent which is required for the finding of guilt of that crime. In short, he or she is responsible for that crime in the same way as if he or she had personally committed it.
>
> ...
>
> [31] Where an individual accused knows that weapons are being carried for use in order to carry out a common criminal purpose, and these are weapons of such a nature that they can readily be used to kill, it is open to the jury to convict him or her of murder on the basis that it was foreseeable that such weapons were liable to be used with lethal effect ...".

[63] The trial judge followed the precise terms of the Jury Manual, up to a point. However, as was said in *McGartland* v *HM Advocate* 2015 SCCR 192 (Lord Malcolm at para 31):

> "in general the jury manual does not remove the trial judge's duty to tailor the charge to the specific circumstances of the case, all with a view to giving proper and clear directions to the jury. Simply to repeat the terms of the manual is no guarantee against a misdirection appeal ... The manual is no more than a first port of call ... Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial".

This is so, even if the Jury Manual is intended to encapsulate sound law and good practice and should be followed unless circumstances dictate otherwise (*Daniel* v *HM Advocate* 2019 SCCR 55, LJG (Carloway) delivering the opinion of the court, at para [20]).

[64] In a case of concert, although the Jury Manual provides specific examples of the concept, there is no need to rehearse all of these. It may not be desirable to do so if the example is far removed from the case before the jury. The problem in this case is that the trial judge did not follow through on his use of the Manual by quoting from the specific direction recommended in cases of antecedent concert in murder. This is as follows:

> "If you're satisfied that:
>
> (1) those involved were acting together with the joint purpose of committing this crime;
>
> (2) their purpose involved killing the deceased, or carried an obvious or foreseeable risk that he would be killed;
>
> (3) in carrying it out one of the accused killed the deceased;
>
> then each of the other accused would be guilty of murder if they each actively associated themselves with that joint purpose, by word or action.
>
> (*Where appropriate*) If an accused didn't associate himself actively with that purpose, or if he participated in a less serious common criminal purpose in course of which (the person named in the charge) died, you could find him guilty of culpable homicide, irrespective of whether you find any other accused guilty of murder."

Giving such a direction would have focused, with much greater clarity, the issue of whether one or other appellant associated himself with the joint purpose of either killing the deceased or doing such violence to him as carried an obvious or foreseeable risk that he would be killed. The absence of this focus is a misdirection. The next question is whether it has resulted in a miscarriage of justice.

[65] Returning to the context of the trial in which the charge was given, the uncontradicted evidence demonstrated that there was a common criminal purpose, involving all three appellants, to engage in a violent confrontation with the deceased. Each appellant either carried a lethal weapon or knew that one or other or both of his co-appellants did so. In that state of affairs, had the trial judge's sound general directions on concert been supplemented by that recommended for cases of antecedent concert in murder,

the jury would have been bound to convict each of murder. No miscarriage of justice has occurred on this ground.

Charge on Culpable Homicide

[66] The trial judge adopted the Jury Manual directions which define culpable homicide. Although these directions may be correct as a generality, they are not apt to cover the situation, such as that which existed in this case, where what is under consideration is a death which was brought about by an assault; ie a deliberate attack. Concepts such as recklessness or carelessness have no relevance in such a situation and ought to form no part of the jury directions. Culpable homicide is simply defined, in the circumstances of this case, as occurring when an assault, which is not classified as murderous, causes death. A deliberate, and not a reckless or grossly careless act, is required before there can be an assault. However, the jury did not convict any of the appellants of culpable homicide. The misdirection was not a material one in a situation in which the jury considered that each accused was responsible, art and part, for the murder.

[67] The appeals against conviction are refused.

Sentence

Mr Green

[68] At the commencement of the appeal hearing, Mr Green abandoned his appeal against sentence. Having regard to the need for comparative justice, it remains necessary to set out the basis for the judge's selection of the punishment part in his case. Mr Green was aged 30 at the time of the attack. He was also convicted of the initial assault on the deceased by striking him repeatedly on the body with the pick axe shaft, whilst on bail, and having an

offensive weapon, notably the shaft and a knife, contrary to the Criminal Law (Consolidation) (Scotland) Act 1995, section 47(1), again whilst on bail. He was on bail at the time of the murder. He had a number of road traffic offences on his record, but also an assault by the use of a glass in 2016, which attracted a community payback order with 180 hours unpaid work. He had a conviction for a racially aggravated contravention of the Criminal Justice and Licensing (Scotland) Act 2010, section 38(1), in 2016.

[69] Mr Green lived on his own in Govan, having been there for about eight years. He had had a difficult and unsettled childhood. This included periods in foster care. He has a son, now aged 10. He has had a reasonably good employment record; latterly working as a maintenance worker with Scotrail. He has not had any alcohol or drug addiction problems.

Mr Noonan

[70] Mr Noonan was aged 20 at the time of the offences. He was also convicted of having an offensive weapon, notably the golf club and a knife, contrary to section 47(1) of the 1995 Act. He pled guilty to assault to severe injury on another complainer on the day after the murder, by striking him repeatedly with a metal pen, which was also an offensive weapon in terms of the 1995 Act. Mr Noonan had a significant criminal record involving: an assault and robbery in 2012; an assault to severe injury and robbery in 2013 with a racial aggravation; another contravention of section 47(1), by having a blunt object with him, in 2014; and an assault to injury in 2015. He had been incarcerated for some of these offences. He had another conviction for possession of an offensive weapon in 2016, this time a baseball bat. In 2017 he had contravened the Police and Fire Reform (Scotland) Act 2012, section 90(1)(A), for which he received a 3 month sentence.

[71] Mr Noonan's father had been convicted of murder in 2004. He is currently serving a life sentence in HM Prison, Durham. Mr Noonan had maintained contact with his father. He had positive and supportive relationships with his mother and sisters. He had been in a relationship for five years, but his frequent custodial sentences had "impacted negatively" on this relationship, which had ended. He had attended schools for children with behavioural problems and had been made the subject of a compulsory supervision order between the ages of 10 and 16, when he had received his first custodial sentence. Although he has no qualifications or experience of employment, he has expressed an interest in engaging in education and securing employment in due course. He had been under the influence of alcohol when he committed the offences. He had problems with illicit drugs, including cannabis and diazepam.

[72] The trial judge reports that he imposed a higher punishment part on Mr Noonan because of his significantly worse record. It was a factor that the appellant had had no reason for joining in this attack. He had played a more prominent role than the others in the attack; using his local knowledge and contacts to track down the deceased. The incident had been on his "home turf". The punishment part had included an increment of one year in connection with the assault to severe injury which he had committed on the following day. The judge considered that 3 years imprisonment would have been appropriate in respect of this charge. He attributed 2 years to considerations of retribution and deterrence and then halved it to take into account early release.

[73] It was submitted that the punishment part selected was excessive, having regard to the age of the appellant, which was on that spectrum which called for a special approach (*Kinlan* v *HM Advocate* [2019] HCJAC 47 at paras [16]-[18]). Mr Noonan had found it

difficult to comprehend why he had been given a significantly higher sentence than those of his co-appellants.

Mr Brown

[74] Mr Brown was just 18 at the time of the murder. He pled guilty to possession of an offensive weapon, namely the knife, contrary to section 47(1) of the 1995 Act. He pled guilty to stealing the foot stool and to providing a false name, date of birth and address to the police. This was after he had contravened section 90(1)(A) of the Police and Fire Reform (Scotland) Act 2012 by threatening and behaving aggressively towards the police. Despite his youth, he had already acquired significant previous convictions for violence. These included: assault and robbery with the use of a knife in 2015, for which he was detained for 17 months; assault in 2017, involving a custodial term of 4 months; and, finally, a breach of section 38(1) of the 2010 Act, involving a sexual element, for which he was on deferred sentence at the time of the murder.

[75] Mr Brown was from Edinburgh. His father had died when he was 2 years old. His mother had entered into a relationship which was characterised by domestic violence and substance abuse. According to Mr Brown, he had been physically abused and neglected. His mother had died in 2008 from cancer. He had been in a large number of residential institutions over the years, such that, since reaching the age of 11, he had only been living in the community for about 18 months. He had had difficulties co-operating with staff in these institutions. His behaviour had deteriorated and he was sent to secure unit schools. Due to the chaotic nature of his childhood, he had attended five primary schools. His grandmother had then enrolled him in George Heriot's School, as she felt that he had potential. Although he had no problems in his first year, he was suspended a year later for possession of

cannabis. His secondary education was equally disruptive. He was known to bully younger pupils. He used illegal substances. He was thereafter educated in non-mainstream establishments and secure units. Although he had been able to obtain qualifications in maths and art, and had taken a number of practical courses, he had not worked other than for short periods. He said that, at the time of the murder, he had been engaged in stealing from a local builders' yard when he and his friend, Mr Noonan, had been approached by Mr Green. He had been heavily under the influence of alcohol and Valium.

[76] The trial judge reports that he took into account, in particular, the appellant's youth in selecting the appropriate punishment part. He noted, however, that the appellant had offences of violence on his record. He had essentially attacked a stranger at the behest of a stranger.

[77] Under reference to *Kinlan* v *HM Advocate* (*supra*) it was submitted that the punishment part was excessive. It was not clear how the trial judge had taken into account the appellant's youth in selecting the appropriate punishment part.

Decision

[78] This was a pre-planned and brutal assault on the deceased. Victim statements from the deceased's father and mother paint a poignant picture of the loss of their only son. His father had lost the tenancy of the flat, where he had lived with his own parents and his son, because of the memories it held in relation to the death of the deceased.

[79] A sound starting point in the assessment of the reasonableness of the punishment parts on Mr Noonan and Mr Brown is that imposed on Mr Green, who, at the age of 30, was an adult to whom the normal principles of sentencing would apply. He had a not insignificant criminal record, including an assault and a section 38 contravention (statutory

breach of the peace). He had a good employment record. On the other hand he had been on bail at the time of the murder. It was he who put in train the events which would lead to the murder by setting out, armed with the pick axe shaft and a knife, with the clear purpose of revenge, which he initially exacted. He did not let matters rest, but returned to attack the deceased in his own house. Applying *HM Advocate* v *Boyle* 2010 JC 66, which set a norm of 16 years for murders involving the carrying of knives in public, and having in mind the aggravating factors (record, pre-meditation, bail and previously evinced malice) and those in mitigation (personal circumstances), the trial judge's selection of 18 years can be seen as reasonable.

[80] It is then not just an exercise of comparing the personal circumstances of the other appellants and selecting an appropriate tariff. Mr Noonan was only 20 at the time of the murder and Mr Brown was just 18. Although both were technically adults, their relative lack of maturity is a significant factor. The custodial regimes correctly treat those under 21 differently from those who have reached that milestone in life (see Scottish Sentencing Council: *Literature Review of youth offending and sentencing in Scotland and other jurisdictions* para 3.6 "The different stages of brain development" (suggesting a "young adult" stage of between 18 and 25)).

[81] As the court emphasised in *Kinlan* v *HM Advocate* [2019] HCJAC 47 (LJG (Carloway) at para [1] (see also *Campbell* v *HM Advocate* 2019 SLT 1127 at para [18]):

> "… as with all decisions which fix punishment parts in murder cases, the sentence of the court is detention or imprisonment for life. The punishment part sets a period which the court considers will satisfy the requirement, in the sentencing equation, for retribution and deterrence. The court is directed by Parliament 'to ignore any period of confinement which may be necessary for the protection of the public' (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(2) and (2A)). The determination of the punishment part does not constitute a recommendation or suggestion by the court that the offender ought to be released upon the expiry of the punishment part.

> It simply establishes a period during which the offender cannot apply for parole. Thereafter, he may only be released if the Parole Board 'is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined' (*ibid* s 2(5)). Even if he is released on parole, he will remain on licence, and subject to any conditions which may be deemed appropriate, indefinitely."

[82] In both *Kinlan* and *Campbell*, the court was specifically concerned with offenders who were under 18 at the time of the offence. Nevertheless, having regard to *H* v *HM Advocate* 2011 JC 149 (LJG (Carloway), delivering the opinion of the court, at 154), the court had regard to punishment parts which were selected for adult offenders, albeit that it recognised that the exercise did not involve a direct, or arithmetical, equation. In the cases of Mr Noonan and, especially, Mr Brown, although not all of the same considerations as may be taken into account for child offenders will apply, their youth, relative to that of Mr Green, must be a material factor in the sentencing exercise.

[83] Had Mr Noonan and Mr Brown been ages with Mr Green, it may well be that the trial judge's selection of their punishment parts could be seen as reasonable. However, although the judge does report that he took Mr Brown's youth into account, the degree to which he did so in both these appellant's cases is not clear. Especially when considering lengthy punishment parts, comparative youth must play a significant part in the equation. The punishment parts selected are very high for convicted persons of this age, even against a background of other offences and significant criminal records. Having regard to their youth, the court will reduce the punishment part for Mr Noonan to 18 years and that for Mr Brown to 16 years. As always in such cases, the court emphasises that it is not recommending or suggesting that any of the appellants should be released upon the expiry of these terms. It is only establishing, as required by Parliament, the period during which the offender cannot apply for parole. The court's sentence for each appellant is the mandatory one of

imprisonment or detention for life. After the expiry of the punishment parts, the appellants will only be released if the Parole Board is satisfied that their continued confinement is not required for the protection of the public. Even if released, each appellant will remain indefinitely on licence.

[84] The appeals against sentence are allowed to this extent.