Neutral Citation Number: [2012] EWCA Crim 2435

Case No: (1) 2012/03270; (2) 2011/04249; (3) 2012/00658; (4) 2012/01317; (5) 2012/04805
IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2012

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE HALLETT DBE VICE PRESIDENT OF THE QB DIVISION
LORD JUSTICE HUGHES VICE PRESIDENT OF THE CACD
LORD JUSTICE LEVESON
and
LADY JUSTICE RAFFERTY DBE

- -

Between :

David Oakes and Others	**Appellant**
- and -	
R	**Respondent**

- -
- -

Mr N L Lithman QC for the **Appellant (1) David Oakes**
Mr E Fitzgerald QC for the **Appellant (2) Danilo Restivo**
Mr A N Bajwa QC and Ms S Ward for the **Appellant (3) Michael John Roberts**
Mr B N O'Brien for the **Appellant (4) David Simmons**
Mr S Csoka QC for the **Appellant (5) Kiaran Mark Stapleton**
Mr D Perry QC and Mr L Mably for the **Crown**

Hearing dates: 10th October 2012

- -

Approved Judgment

The Lord Chief Justice of England and Wales:

Introduction

1. The present appeals heard before a special constitution of the Court of Appeal Criminal Division are directed at sentences which were imposed on different occasions following very grave crimes. Three of the appellants were convicted of murder, and two of rape and associated sexual crime. For those convicted of murder the mandatory sentence of life imprisonment was imposed: for those convicted of rape and sexual crime discretionary life sentences were imposed. There is no appeal against the mandatory life sentence of life imprisonment following conviction for murder. The imposition of a discretionary life sentence may be the subject of an appeal but that issue does not arise in either of the present cases where it was imposed. These orders ensure the long term protection of the public. We should perhaps emphasise at the outset that each of these appellants is dangerous, and on the available evidence, likely to remain dangerous for the indefinite future. At present it is difficult to see how it will ever become safe for any of them to be released from custody.

2. The appeals are confined to the second distinct element of the sentences, that is the judicial assessment of the minimum term to be served by the appellants for the purposes of punishment and retribution before the possibility of their release may be considered. In four of these appeals (two of murder and two of rape), whole life terms were ordered, and in the fifth case, (another case of murder) the minimum term was assessed at 30 years. This element of sentence, whether imposed following a mandatory or a discretionary life sentence, is discretionary.

3. Dealing with it very briefly for the moment, the jurisprudence of the European Court of Human Rights distinguishes, for reasons which are clearly apparent, between three different types or classes of sentences of life imprisonment. They are:

> "(i) a life sentence with eligibility for release after a minimum period has been served;
>
> (ii) a "discretionary sentence of life imprisonment without the possibility of parole"; and
>
> (iii) a "mandatory sentence of life imprisonment without the possibility of parole".

In the context of this jurisprudence, the whole life terms on four of these appellants represented discretionary sentences of life imprisonment without parole, that is, type (ii) and the mandatory sentence of life imprisonment with a minimum term assessed at 30 years fell within the ambit of type (i). None fell within type (iii), and in this jurisdiction such a sentence cannot be imposed.

The whole life minimum term

4. It is unnecessary for this judgment to revisit the steady development of sentencing practice which followed the abolition of the death penalty and its replacement with the mandatory life sentence. This included the transition of the so-called "tariff" period designed to reflect punishment and deterrence into the formalised arrangements for assessing the appropriate minimum term now encompassed in statute, and the transfer to the court of the responsibility of the Secretary of State for the Home Department to determine how long a period should actually be served. It is now exclusively for sentencing judges (and where necessary, this court) to decide the minimum term which it is appropriate for the defendant who subjected to a sentence of life imprisonment to serve before his release. Express statutory provision is made in Schedule 21 of the Criminal Justice Act 2003 vesting the court with jurisdiction, in an appropriate case of exceptionally high seriousness, to order a whole life minimum term. It is submitted by Mr Edward Fitzgerald QC on behalf of the appellant Restivo that this provision contravenes Article 3 of the European Convention of Human Rights.

5. Every civilised country embraces the principle encapsulated in Article 3. This provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

6. Simultaneously, however, every civilised country also embraces the principle that just punishment is appropriate for those convicted of criminal offences. These issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement. The assessment of what should be deemed to constitute just punishment or inhuman or degrading punishment in a particular circumstance can legitimately produce different answers in different countries, and indeed different answers at different times in the same country. All these are at least in part a consequence of the history of each country. The question whether the whole life order constitutes a breach of Article 3 of the Convention, or indeed of the long established common law principle that the sentence should be proportionate in all the relevant circumstances of the offence and the criminal who has committed it, has been well debated.

7. There are those who view the whole life order with grave disquiet. In this jurisdiction the argument was reflected in the judgment of Laws LJ in *R (Wellington) v Secretary of State for the Home Department* [2007] …

> "… a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use incarceration as time for amendment of life, his punishment is only exhausted by his last breath … The supposed inalienable value of the prisoner's life is reduced, merely to his survival: to nothing

> more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it".

8. In the European Court of Human Rights, the same concern is clearly underlined in the recent joint partly dissenting opinion of Judges Garlicki, David Thorbe Jorgivsson and Nicolaou in *Vinter and Others v United Kingdom* (applications nos. 66069/09 and 130/10 and 3896/10). Particular concern was expressed about the

> "hopelessness inherent in a sentence of life imprisonment from which, independently of the circumstances, there is no possibility whatsoever of release while the prisoner is still well enough to have any sort of life outside prison".

These are examples of many occasions when similar judicial observations have been made.

9. Be all that as it may, in the context of the whole life term, contrary views have been expressed by eminent jurists, not least, Lord Bingham of Cornhill CJ in *R v Secretary of State for the Home Department, ex parte Hindley* [1998] QB 751 at 769:

> "I can see no reason, *in principle*, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving life long incarceration for purposes of pure punishment."

It is not without importance that, as the then Lord Chief Justice, he went on to reflect that in the context of whole life tariffs, "Successive Lord Chief Justices have regarded such a tariff as lawful, and I share their view". In expressing himself in this way, he was, of course, addressing the situation which obtained when assessment of the penal period to be served by the defendant was made by the Home Secretary, in the light of any judicial recommendations.

10. Hindley's appeal to the Court of Appeal was dismissed, and the House of Lords, too, supported the decision of the Divisional Court. Giving the leading judgment, Lord Steyn addressed the observation of Lord Bingham, and agreed that some crimes would be sufficiently heinous to deserve life long incarceration for the purposes of pure punishment. He continued:

> "There is nothing logically inconsistent with … saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence".

At the time when this case was making its way through the courts, the whole-life tariff was not based on an express statutory provision. Nevertheless Lord Bingham and Lord Steyn were expressing views which affirmed support for the principle that there

had been and no doubt would continue to be cases in which a whole life order represented just punishment.

11. Perhaps the need to give due recognition and respect to legitimate but inconsistent views on this issue is encapsulated in the observations of Baroness Hale in *R (Wellington) v Home Secretary* [2009] 1 AC 335, at paragraph 53, where, in the context of extradition to a jurisdiction which embraced the whole life minimum term principle, she observed:

> "I do understand the philosophical position, that each human being should be regarded as capable of redemption here on earth as well as hereafter. To those who hold this view, the denial of the possibility of redeeming oneself in this life by repentance and reform may seem inhuman. I myself was brought up in that tradition. But … that is not the only tenable view of the matter. … there are many justifications for subjecting a wrongdoer to a life in prison. It is not for us to impose a particular philosophy of punishment upon other countries".

12. Whatever the judicial views about the whole life minimum term, it was incorporated in express legislative terms in the 2003 Act. This statutory provision reflects the settled will of Parliament. Simultaneously, the legislation removed the possibility of imposing it from the executive and placed it full square in the hands of the judiciary, we emphasise, as a discretionary element of sentencing. The issue of the whole life order, in the context of Article 3, has been reflected in a number of decisions in the courts both domestically and in Europe.

13. In *R v Bieber* [2009] 1 WLR 223 this court quashed a whole life order following Bieber's conviction for murdering one policeman, and attempting to murder two others, in an incident which lasted eight seconds. It was argued that the facts did not justify the imposition of a whole life order, which violated Article 3. Particular reliance was placed on the decision of the Grand Chamber in the European Court of Human Rights in *Kafkaris v Cyprus (Apps No: 201906/04)*. At that date in Cyprus, premeditated murder was followed automatically by a mandatory sentence of life imprisonment, in effect a full life term, which was not thereafter considered by any judicial body. Accordingly the question whether a whole life term would in fact follow the conviction was not decided by a judge. The President of Cyprus, however, was vested with a discretion to remit, suspend or commute the life sentence, provided the Attorney General, who was responsible for the original prosecution, agreed with the President. The ECHR held that there was no breach of Article 3 because of this limited possibility of release.

14. In *Bieber*, acknowledging that the United Kingdom did not rank among member states which considered that there was a maximum level of imprisonment which could be justified by way of punishment, after which humanity required the defendant's release, the court concluded:

> " … Schedule 21 of the 2003 Act proceeds on the premise that some crimes are so heinous that they justify imprisoning the offender for the rest of his life, however long that may be".

15. The court concluded that it did not follow from the decision of the majority of the Grand Chamber that an irreducible life sentence imposed "to reflect the appropriate punishment and deterrence for a serious offence" was necessarily in conflict with Article 3. The court also reflected on the power of the Secretary of State to release a life prisoner under s.30 of the Crime (Sentences) Act 1997, and considered that if the time should come when the continued detention of a prisoner subject to a whole life order would, of itself, amount to "inhuman or degrading treatment", the discretionary release of the prisoner would fall within the ambit of the powers of the Secretary of State.

16. *Vinter and others v United Kingdom* (Applications Nos. 66069/09 and 130/10 and 3896/10) was a decision of the fourth section of the European Court of Human Rights, subsequently referred to the Grand Chamber, in which the court, following the observations of the House of Lords in *R (Wellington)*, doubted whether the statutory power of release under s.30 of the 1997 Act was as broad in its effect as this court had suggested in *Bieber*. Nevertheless the court concluded that in the three cases then under consideration, the continued detention of three defendants who had been made subject to a whole life tariff did not violate Article 3 because the "requirements of punishment and deterrence could only be satisfied by a whole life order". This was a legitimate penological purpose. The court went on to hold that if a discretionary life sentence without the possibility of parole was imposed by a court after due consideration of all relevant mitigation and aggravating factors, an Article 3 issue would not arise at the moment when it was imposed, but only when it could be shown that the defendant's continued imprisonment could not longer be justified on any legitimate penalogical grounds (such as punishment, deterrence, public protection of rehabilitation); and the sentence is irreducible de facto and de jure.

17. The court rejected the contention that a mandatory sentence of life imprisonment without the possibility of parole was of itself incompatible with the Convention, despite an acknowledgement of the trend in Europe generally against such sentences. Unsurprisingly the court believed that such a sentence would be likely to be grossly disproportionate if the sentencing court was required to disregard in particular mitigating factors, such as youth or severe mental health problems which would provide for a significantly reduced level of culpability on the part of the defendant, In short the alleged violation of rights under Article 3 was rejected on the basis of the seriousness of the crimes which had been committed, and the sentences imposed for the purpose of deterrent and punishment justified continued incarceration.

18. The issue of the whole life order and Article 3 considerations have also been examined closely in the context of extradition. In this jurisdiction the decision of the Divisional Court in *R (Wellington)* was considered in the House of Lords. The request for extradition related among other charges, to two charges of first degree murder, for which the prescribed penalties were death or imprisonment for life

without eligibility for probation, parole or release except by the act of the State Governor. In fact the prosecuting authority gave an undertaking that it would not seek the death penalty. The extradition to the United States was upheld.

19. Lord Hoffmann agreed with the decision in *Bieber*, in particular that any complaint that the whole life term contravened Article 3 of the Convention should be made if and when the time came when it could be argued that the continued detention of the prisoner infringed Article 3. Lord Scott suggested that Article 3 was "prescribing a minimum standard of acceptable treatment or punishment below which the signatory nations could be expected not to sink but not as high a standard as that which many of those nations might think it right to require for every individual within their jurisdiction, and therefore entitled, even if only temporarily, to their protection. Article 3 was prescribing the minimum standard, not a norm. It must be open to individual states to decide for themselves what, if any, higher standards they would set for themselves". Although Lord Brown of Eaton-under-Heywood doubted the efficacy of the compassionate release provisions in s.30 of the 1997 Act referred to in *Bieber*, he concluded that a whole life minimum term was not objectionable provided at the date when it was being fixed, all the circumstances were considered, and the crime was of sufficient seriousness to merit such draconian punishment.

20. In *Harkins and Edwards v United Kingdom* (App. Nos. 9146/07 and 32650/07, judgment on 17th January 2012), in the context of Article 3 of the Convention, the European Court of Human Rights addressed the possibility of extradition to a jurisdiction where a life sentence might be imposed without the possibility of parole. Significantly the court held that no distinction could be drawn in principle between the assessment of the minimum level of severity required in the domestic context, and the same assessment in the extra-territorial context. The court was prepared to accept that in principle matters of appropriate sentencing largely fell outside the scope of the Convention, but, understandably, that a "grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition". The "gross disproportionality" test would only be met on "rare and unique occasions". Addressing the issue of the whole life term imposed as a discretionary element of a sentence attached to a sentence of life imprisonment, the court observed that such a sentence would normally be imposed for an offence of the utmost severity such as homicide. Expressly agreeing with the decisions of this court in *Bieber* (presumably subject to the reservations about the s.30 issue) and *R (Wellington)* the court concluded that an Article 3 issue would only arise if it could be demonstrated that the continued incarceration could no longer be justified on any legitimate penological grounds, such as punishment, deterrence, public protection or rehabilitation and, that the sentence would be irreducible de facto and de jure. Much greater scrutiny was required to be directed against the potential vice of any mandatory whole life sentence type (iii), which in effect deprived the defendant of any possibility of putting forward mitigating factors before the sentencing court. Such a sentence would condemn the defendant to spend the rest of his days in prison, irrespective of his culpability, and indeed whether or not the court considered the sentence to be justified. That, of course, is not the situation which obtains in the orders which are currently under consideration.

21. In *Babar Ahmed and others v United Kingdom* (Applications Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), in the context of prison conditions, the fourth section, which included three members of the constitution of the fourth chamber who had dissented in *Vinter and others*, once again addressed the question whether and at what point in the course of a life or other very long sentence an Article 3 issue might arise. Towards the end of the judgment, starting at paragraph 235, the court directly addressed the views expressed by the House of Lords in *Wellington* and the Court of Appeal in *Bieber* in the context of the decision in *Kafkaris*. Consistent with the reasoning in *Harkins and Edwards*, the court distinguished between a mandatory whole life sentence type (iii) and a discretionary sentence of life imprisonment without the possibility of parole type (ii) which, obtains in this jurisdiction. The court reflected broadly that a whole life mandatory sentence was not, of itself, incompatible with the Convention, although the trend in Europe militated against the imposition of such sentences. Such a sentence "would be much more likely to be disproportionate than any other type of life sentence, especially if it required the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant such as youth or severe mental health problems". Reflecting on the discretionary whole life order (ii) the court observed:

> "… normally such sentences are imposed for offences of the utmost severity, such as murder or manslaughter. In any legal system, such offences, if they do not attract a life sentence normally attract a substantial sentence of imprisonment, perhaps of several decades. Therefore, any defendant who is convicted of such an offence must expect to serve a significant number of years in prison before he can realistically have any hope of release, irrespective of whether he is given a life sentence or a determinate sentence. It follows, therefore, that, if a discretionary life sentence is imposed by a court after due consideration of all relevant mitigating and aggravating factors, an Article 3 issue cannot arise at the moment when it is imposed. Instead, the court agrees with the Court of Appeal in *Bieber* and the House of Lords in *Wellington* that an Article 3 issue will only arise when it can be shown:
>
> (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and
>
> (ii) as the Grand Chamber stated in *Kafkaris…* the sentence is reducible de facto and de jure".

22. From this analysis of the authorities in the European Court, it seems to us clear that the Court has proceeded on the basis that, provided the court has reflected on matters of mitigation properly available to the defendant, a whole life order imposed as a matter of judicial discretion as to the appropriate level of punishment and deterrence following conviction for a crime of utmost seriousness would not constitute inhuman or degrading punishment. In short, it is open to the individual state to make statutory

provision for the imposition of a whole life minimum term, and in an appropriate case, as a matter of judicial discretion, for the court to make such an order.

23. In this jurisdiction the relevant provision is found in paragraph 4 of Schedule 21 of the Criminal Justice Act 2003 (the 2003 Act). This identifies cases which would "normally" fall within the category of exceptionally high seriousness, justifying a whole life order (ii). These include:

> "…(a) the murder of two or more persons, where each murder involves any of the following -
>
> (i) a substantial degree of pre-meditation 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 or ideological cause, or
>
> (d) a murder by an offender previously convicted of murder".

24. No one doubts that a whole life minimum term is a Draconian penalty, or indeed that it is the order of last resort reserved for cases of exceptionally serious criminality. In *R v Jones* [2006] 2 Crim. App. R(S) 19, Lord Phillips CJ presiding in this court observed, at para 10:

> "A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life. Often, perhaps unusually, where such an order is called for the case will not be on the borderline. … To be imprisoned for a finite period of 30 years or more is a very severe penalty. If the case includes one or more of the factors set out in paragraph 4(2) of Schedule 21 it is likely to be a case that calls for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term will not be sufficiently severe."

In *R v Wilson* [2010] 1 Cr. App R(S) 11, the court repeated the constant principle, that a whole life order would be very rarely made.

> "It remains a sentence of last resort for cases of the most extreme gravity".

25. Time without number the court has underlined that the language of Schedule 21 is not prescriptive. No statutory provision requires the judge to impose the order if the interests of justice do not require it.

26. What the Schedule provides is an indication of appropriate starting points which apply to the assessment of the seriousness of the offence of murder, or its combination with other offences associated with it. It recognises that the level of seriousness may be so exceptionally high that the court should consider whether a whole life order would be appropriate. It is also clear from a series of decisions in this court that the statute does not create a sentencing straightjacket, nor require that a mechanical or arithmetical approach to the problem of the assessment of the minimum term may be taken. *R v Height and Anderson* [2009] 1 Cr. App. R(S) 117 provides the necessary emphasis:

> "We have lost count of the number of times when this court has emphasised that these provisions are not intended to be applied inflexibly. Indeed, in our judgment, an inflexible approach would be inconsistent with the terms of the statutory framework. No scheme or guidance or statutory framework can be fully comprehensive, and any system of purported compartmentalisation or prescription has the potential to induce injustice. Even when the approach to the sentencing decision is laid down in an apparently detailed, and on the face of it, intentionally comprehensive scheme, the sentencing judge must achieve a just result".

27. This principle has been repeated on numerous occasions. For example in *Inglis* [2011] 2 Cr. App. R (S) 13, a case of murder committed as a "mercy killing" where the offender was the victim's mother and in a position of trust, but carefully planned the killing of a particularly vulnerable son (all features of aggravation) the court was satisfied that, notwithstanding that these facts would normally aggravate the offence of murder, they should not:

> "… be taken to aggravate a murder committed by an individual who genuinely believes that her actions in bringing about the death constitute an act of mercy".

28. In *R v M, AM and Kiki* [2010] 2 Cr. App. R(s) 19 the court emphasised:

> "… the question for the sentencing judge in the end is not for compartmentalisation of the specific offence within this or that paragraph of the Schedule but the proper judicial assessment of the appropriate sentence to reflect the facts of the individual case and its seriousness and such mitigating features as there may be. Justice simply cannot be done by a mechanistic filling in of "tick boxes" and unconsidered assignment of cases into compartments …".

29. The result is that the whole life order, the product of primary legislation, is reserved for the few exceptionally serious offences in which, after reflecting on all the features of aggravation and mitigation, the judge is satisfied that the element of just punishment and retribution requires the imposition of a whole life order. If that conclusion is justified, the whole life order is appropriate: but only then. It is not a mandatory or automatic or minimum sentence.

30. In these circumstances the provisions of Schedule 21 of the 2003 Act, and paragraph 4 in particular, which enabled the court to make a whole life order in a case of exceptional seriousness are not incompatible with and do not contravene Article 3 of the Convention.

David Oakes

31. On 11 May 2012 in the Crown Court at Chelmsford before Fulford J and a jury David Oakes (DO) was convicted of two counts of murder. He was sentenced to life imprisonment with a whole life term as the specified minimum sentence.

32. DO was born in May 1961. Christine Chambers was born in December 1973. They started to see each other in July 2005. They began to live together. She had three older children, one of whom, CC, lived with her. Their child, Shania Chambers, was born in October 2008.

33. The relationship was stormy. It is clear that DO was a violent, domineering man. As a result Christine Chambers made an application to the court for a non-molestation order. On 21st April 2011, on the basis of a number of allegations of significant violence, the order was made. Thereafter he was in constant breach. She was advised to make a formal complaint against him, and indeed he was warned by the police against these continuing breaches.

34. Shortly before midnight on 5th/6th June 2011, uninvited and unexpected, DO went to the home where Christine Chambers and her two daughters were living. They were in bed. He entered, using a key in his possession. He carried a bag which contained an axe, a bottle containing petrol and various other implements including a Stanley knife and pliers. He was also carrying a double barrelled shotgun together with numerous cartridges for use in the gun.

35. DO went to the bedroom and turned the light on, waking the two girls. When Christine Chambers told him to get out, he opened the bag and took out the axe. He showed them the shotgun and cartridges. He said he would burn the house down and that he had petrol in a blue bottle together with a lighter. He punched Christine Chambers in the eye and struck her with the butt of the gun. CC tried to use her mobile phone to get help, but he snatched it from her and broke both her phone and her mother's phone.

36. The precise sequence of events thereafter is not entirely clear but Christine Chambers was certainly subjected to a series of degrading and humiliating assaults. She was ordered to cut off her hair with a pair of scissors which he took from the bag. He made her remove her upper clothing and ordered her to walk about without a bra. He made her hug and kiss him, and say that she loved him. She implored him not to touch her or the children, saying that she would do anything. He ordered CC to go upstairs, threatening her with a knife. She heard him threaten to blow Christine Chambers' leg off and rip off her nipples with pliers. CC managed to make her escape and climbed out of a bedroom window onto a flat roof where she jumped down and ran for help to her father, who lived near by. The police were called.

37. In the meantime Christine Chambers was subjected to an attack of horrifying violence. An axe or meat cleaver cut deeply into her scalp and a sharp instrument, such as a Stanley knife, was used to disfigure her. DO inflicted a deep incised wound into her left eyebrow, to which he applied glue, and a Y shaped laceration to the bridge of the nose, and virtual detachment to the lower part of the left ear. She sustained what can reasonably be described as slash marks on both sides of her face, and a similar cut running along the mid-line from the lower abdomen to the vulva. She was shot in the left thigh, as she was lying on the ground. She was shot, again, in the right knee. The fatal wound was a gun shot to the left side of her chest, which caused fatal damage to the upper abdomen/chest and a transection of the aorta. A few minutes after killing Christine Chambers, DO shot his daughter in the left side of the forehead, just above the left eyebrow, and killed her.

38. DO then shot himself in the face. In total he had fired 7 shots, loading and unloading his gun at least 4 times.

39. He was arrested in hospital on 19th June, and in due course charged with the murder of Christine Chambers and their daughter.

40. A search of the victims' home revealed a shotgun, pieces of a broken gun handle, a wooden handled axe, a pair of blue handled cutters or pliers, a home made noose made from wire, and many cartridges, as well as petrol.

41. Passing sentence at the end of the trial, in detailed and carefully reasoned sentencing observations, Fulford J described some of the background. He concluded that DO had killed Christine Chambers and his daughter simply because he was unable to accept that Christine Chambers could no longer bear to be with him and wanted to start a new life. His reaction had been purely selfish, self-pitying and extremely violent. On more than one occasion he had said that no other man would be her partner, or would act as the father to his daughter. If the family life was coming to an end, they would pay for leaving him with their lives. The judge was satisfied that DO had decided that the last hours of their lives would be terrifying and in the case of Christine Chambers, agonisingly painful. The deaths were planned in elaborate detail. He had collected a set of implements for the sole purpose of torturing Christine Chambers and then killing her and their daughter. He had entered the house and then remorsely executed

his plan, and while inflicting cruel and substantial injuries on her, he made her beg and express her love for him. At the same time he had been in clear control and knew precisely what he was doing as he did it.

42. The judge emphasised two further aspects of the case. First, it was apparent that Christine Chambers died in agony. The head injuries and the shotgun wounds would have been excruciatingly painful. In his judgment the delay in delivering the fatal gunshot was an act of deliberate sadism. Her daughter was fully aware of part of her mother's ordeal, and their daughter was awake throughout the ordeal and had witnessed at least some of these dreadful events and been perfectly well aware of her mother's pain and tears. The child, too, must have been terrified and was heard crying at least five minutes after her mother had been shot. Then DO killed her. Two people had been killed in truly shocking circumstances.

43. There was not a shred of mitigation. The seriousness of the case was exceptionally high. Given that the deaths were planned well in advance and executed, in the case of the mother with a significant degree of sadism, the judge concluded that a whole life term was appropriate.

44. The appeal is directed at the minimum whole life order. It is not suggested that the sentence was "grossly" disproportionate to the crime, but it is said that it was disproportionate. It was artificial for the murder of his former partner and his daughter to be taken as if they were separate events, both of which involved a substantial degree of premeditation and planning. His objective was to kill his family and then himself. This situation is not unique. He had temporarily lost any sense of rational and decent behaviour or hope. Reflecting on paragraphs 4 and 5 of Schedule 21 to the 2003 Act, which referred to the murder of two or more persons, and the use of sexual or sadistic conduct, this case was a borderline case, and not one which certainly fell within the exceptionally serious category. Therefore the appropriate minimum term should have been based on a 30 year starting point.

45. We have reflected on these submissions. It seems to us clear that DO did not simply explode into violence as a result of the stresses and strains of the breakdown of his relationship. Rather, he decided to revenge himself on Christine Chambers. He did not merely plan to kill her and their daughter, but he planned and then carried out his deliberate intention to make the death of his former partner the most terrifying and agonising ordeal that he could envisage, and this was exactly what he did. He was utterly merciless, and took pleasure at her prolonged suffering. Thereafter, quite deliberately, and in cold blood, he deliberately executed their daughter, as she was screaming with fear at witnessing what he had been doing to her mother. Although two people were killed, one after the other in the same place, this was not to be regarded as a double murder which arose from a single incident: it was a pre-meditated double murder, with two intended victims, when there was ample opportunity after the murder of the first, for this appellant to allow a moment of compassion for his child to divert him from his plan.

46. We agree with the judge that there was not a shred of mitigation. The analysis made by the highly respected judge is not open to criticism. There is no reason to interfere with this sentence.

Kieran Mark Stapleton

47. Stapleton (KS) was born in January 1991. On 26th July 2012 at the Crown Court at Manchester before King J and a jury he was convicted of murder. He was sentenced to life imprisonment and the minimum term was specified at 30 years.

48. The facts are simple, but stark. A young man, aged 23, a post-graduate at Lancaster University, decided with his friends to spend the Christmas period in Manchester. The students set off from their hotel on foot in the early hours of 26th December 2011 to travel to the City Centre to queue up for the Boxing Day sales. The victim of the murder was Anuj Bidve, who happened at the fatal moment to be at the back of this group. While walking in Salford they saw KS, together with a friend, walking on the other side of the road. KS crossed the road and approached the group, and asked them what the time was. One of them responded that it was 1.30.

49. Without any warning, KS produced a silver gun and shot Mr Bidve from very close range in the head. Before he produced the gun there had been no threats or abuse, indeed nothing which might trigger off even the most minor altercation. He then laughed or smiled before running off with his friend. Mr Bidve was rushed to hospital, but was pronounced dead. The cause of death was extensive brain injury.

50. Earlier in the evening KS had threatened to kill someone who had insulted his former girlfriend, and he had been complaining that he had had a terrible year, during which he had lost his relationship, his house and his driving licence.

51. After the killing KS went to stay in Wigan, but he returned to Salford on 27th December, booking in to a hotel which was a short distance from the crime scene. On the following day, he arranged for a teardrop to be tattooed onto his cheek which, among other things, can signify and in this case was undoubtedly intended to signify that the person with such a tattoo has killed someone, and his pride in doing so. He was arrested on 29th December. When he did speak, he was flippant. When he appeared at court, and was asked his name, he gave it as “Psycho Stapleton”, and when he saw a friend in the public gallery he shouted out that “Ryan (that is the friend who was walking with him at the time of the killing) had made a statement.”

52. A psychological report from Dr Sonya Krljes dated 17th May 2012 was served on KS’ behalf. It was said that he was suffering from an anti-social personality disorder, characterised by anti-social and psychopathic traits, likely to have a neuro-biological underpinning, which would affect his ability to empathise with others.

53. A psychiatric report from Dr Nigel Eastman dated 2 June 2012 supported the conclusion that KS exhibited a severe personality disorder, satisfying the criteria for

ASPD, and within that, psychopathy. He could not normally experience empathy, and would be likely to be abnormally sensitive to the behaviour of others. Dr Eastman believed that KS was fit to plead. In relation to diminished responsibility the question for decision was whether on the instant occasion, KS' capacities had been so affected by his personality disorder that his ability to exercise self-control was substantially impaired. In the context of the present case, if the group of students had ignored him as they walked down the road in opposite directions, his severe personality disorder may have read this as provocative.

54. Dr John McKenna provided a psychological report dated 12th June 2012. He agreed with Dr Krljes that KS showed no emotional response and had poor reflective capacity. However as to events at the time of the killing, KS's own account was that his disposition and circumstances were unremarkable, and he specifically denied that he was in a negative frame of mind or that he had been provoked. Dr McKenna agreed that KS had a severe personality disorder, but his condition did not meet the criteria for psychopathic disorder. There were good clinical grounds to suggest that KS was capable of behaving impulsively and with reduced self-control, but he had in the past demonstrated both impulsive "defensive" aggression (a reference to a road rage incident) and "appetite aggression" (a reference to an assault on a fellow prisoner) which involved a degree of planning. This second incident represented controlled aggression or "considered purposeful violence". As to the possibility that he may have experienced "slow burn" provocation he had himself denied the account given by his companion about his earlier state of mind. He maintained that he had felt quite normal, and his own account of his mental state at the relevant time was sparse, and did not include any awareness of feeling irritated or provoked. He was fit to plead.

55. The final psychological report, from Dr Adrian West, was dated 18th June 2012. He agreed with Dr McKenna that KS had an anti-social personality disorder, with psychopathic traits, falling short of psychopathy. He also agreed with the analysis of the road rage incident as "defensive aggression" and the prison attack as "predatory aggression". The present incident was another such incident. The facts indicated that KS may have had a generalised and pre-meditated murderous intent. Dr West disagreed with both Dr Eastman and Dr Krljes. The psychopathic traits had not impaired KS' ability to understand that he was in possession of the gun and had lethal means to kill someone. The attack was carried out purposefully, with considerable cognitive motor effort and accuracy. KS himself denied any earlier upset or humiliation, and he had carried out the shooting in full conscious awareness and with self-control.

56. Passing sentence at the end of the trial King J considered the evidence of KS' anti-social personality, but concluded that the disorder did not lower his culpability for this offence. The judge acknowledged the evidence of his disturbed background and disjointed education, and the fact that he lacked full maturity, given that he was 20 years old when the offence was committed. As against this mitigation there was significant pre-meditation, although this was not personally directed at the victim, the killing had taken place on a public highway, and KS was already on bail awaiting sentence following a road rage incident the previous year.

57. The judge described the killing as a "cold-blooded murder" committed in the most harrowing circumstances. He was satisfied that notwithstanding KS' evidence at trial, he knew perfectly well that the gun was loaded, and he had left a party intending to find a victim to satisfy his desire to shoot and kill someone. Although the choice of victim was entirely random, there was a significant degree of pre-meditation and he was sure that KS' intention was to kill and that at all material times he was fully in control of his actions. This was cold-blooded controlled aggression. He had shown not the slightest remorse. He had laughed and smirked as he ran off after the killing, and indeed during the trial. The tattoo and what he said at the Magistrates Court amounted to boasting of the murder.

58. The submission in support of the contention that the minimum term was excessive involves criticism of the judge for taking into account two features of aggravation, first that the killing occurred in a public place, and second that the killing involved an element of planning beyond that involved in the premeditation involved in carrying a loaded firearm. It is also suggested that the judge failed to attach sufficient importance to the mitigation provided by the defendant's relative youth and the medical condition, which was examined in close detail during the trial.

59. It is clear from his sentencing remarks that the judge was acutely aware of KS' age and his personality disorder, and he was also aware that he had only recently been bailed in connection with another offence. It takes very little imagination to reflect on the impact that this offence would have had in the locality; a young man, utterly blameless, simply gunned down as he walked down the street, and perhaps the most chilling feature of all was the sheer randomness with which he was chosen to be the victim. KS had decided that he was going to kill someone, and he organised a loaded firearm, carried it, and executed his plan. His attitude to the offence is chilling. He has revelled in it. That adds significantly to the seriousness of this crime.

60. There is no reason to interfere with this sentence.

Danilo Restivo

61. (DR) was born on 3 April 1972. On 29 June 2011 in the Crown Court at Winchester before Burnett J and a jury he was convicted of murder. On the following day he was sentenced to life imprisonment, with a whole life specified minimum term.

62. On 24 July 2012 the full court refused his application for leave to appeal against conviction (2012 EWCA Crim 1848).

63. In considering his appeal against sentence, we do not proposed to reiterate the reasons for refusing his application for leave to appeal against conviction.

64. The murder of Heather Barnett took place on 12 November 2002. Heather Barnett was a 48 year old, single mother, living with her children at an address in Bournemouth. At 8.30 a.m. on 12 November she drove the children to school. She returned to her home and parked her car at about 8.40 a.m. When the children returned from school at 4.04 pm, her son, aged 14 years, discovered his mother's body in their bathroom.

65. There were no signs of forced entry into the victim's home. The attack took place in the workroom, adjacent to the patio door, sometime between 8.30 a.m. and 10.56 a.m.

66. Heather Barnett died as a result of multi-impact to her head with an implement such as a hammer. There were at least 10 lacerating blows, causing skull fractures. There were also defensive wounds to the left hand.

67. After the fatal attack further injuries were inflicted on her. Her throat was cut from ear to ear, cut down her spine and both her breasts were cut off. The zip of her jeans was unfastened and her underwear and part of her pubic hair exposed. A hank of cut hair was found in the palm of her right hand which lay over her stomach near her groin. This hair came from someone else, but the victim's own head hair was cut and some was placed in her left hand, and some left on the floor.

68. When her children left their home to find help, DR and his then girlfriend saw their distressed state. DR purported to offer comfort, when he knew perfectly well that he had killed their mother.

69. Police enquiries revealed that DR admitted that he had visited his victim on the morning of 6th November, in order to make an inquiry about whether she would make some bedroom curtains for him as a surprise Christmas present. Following that visit she indicated to friends that she believed that he had taken her key. As there was no forced entry into her home that was plainly right. When he entered he must have been armed with both a hammer and a knife. The weapons which caused the fatal injury and the post mortem injuries were not found, and he must have removed them.

70. There was a good deal of further evidence to suggest that DR had a sexual obsession with the hair of females, and from time to time he followed women who were on their own. However the more significant feature of the present case arose from events which took place much earlier in September 1993 in Potenza in Italy. A young 16 year old woman disappeared in September 1993. She was murdered, and her body was left in the loft of the church of the Most Holy Trinity. It was not discovered until March 2010. Examination revealed that her bra was broken in the same way as Heather Barnett's bra. Her trousers were damaged and disarranged in the same way. Her hair was cut shortly after she had died and the body placed in the loft, and remnants of her hair were left with the body. As in the present case, the last person known to have seen the victim alive was DR, and his victim was acquainted with him just as Heather Barnett was acquainted with him. The circumstances of these two

offences which took place in two different countries, and were separated by nearly a decade, were strikingly similar.

71. The evidence relating to Elisa Clap's death was admitted before the jury at Winchester Crown Court as part of the evidence to prove that DR was guilty of the murder of Heather Barnett. At that date, he had not been convicted in Italy of the murder of Elisa Clap: he had been convicted simply of lying to an inquiry in Italy about the circumstances of her disappearance and how he had received a cut to his hand at about that time. Subsequent to the conviction and sentence at Winchester Crown Court, DR was convicted in his absence of the murder of Elisa Clap in Italy. That, however, as we understand it, does not constitute a final conviction, in the same way as the conviction by a jury in this jurisdiction would be.

72. The psychiatric report from Dr Joseph dated 6 January 2011 recorded an account by DR of a happy early childhood, but of bullying by other children in the sense of being neglected by his parents when they moved to Potenza. He referred to an occasion when he responded aggressively to bullying when he was 13 years old. He admitted to voyeurism and that from the age of 15 he like to touch and smell women's hair, and started to cut hair secretly. However he claimed he was able to stop this when he realised it was becoming a problem. He came to England after chatting to his future wife on the internet, and they married in 2004. He loved her.

73. The report observed that if, contrary to Restivo's assertion, he had indeed killed Heather Barnett, he chose to kill a mother in circumstances which would leave her children to fend for themselves and he may have seen parallels between his life as a teenager and directed his anger at his mother onto Heather Barnett. The hair cutting was sexually driven and sadistic, and the murder itself was a sexually sadistic act. He was fit to stand trial, but he suffered from a severely disordered personality amounting to an abnormality of mind. There might therefore be a defence to murder on the grounds of diminished responsibility.

74. DR elected not to advance any such defence. At trial he denied responsibility for Heather Barnett's death. The Crown called overwhelming evidence of guilt. The application for leave to appeal against conviction was based on criticism of the decision to admit as similar fact the evidence relating to the death of Elisa Clap. This was refused for reasons given in the judgment [2012] EWCA Crim. 1848.

75. In his sentencing remarks the judge observed that the evidence relating to the murder of Elisa Clap proved "without doubt" that DR was responsible for her murder. However he continued "you have not been convicted of that murder and I do not sentence you in respect of it. But it is important background, because I approach this sentence on the basis that you had killed before. It would be quite unrealistic to pretend that you had not".

76. The judge carefully addressed the specific features of the murder of Heather Barnett. He recorded that it was carefully planned, and that a false alibi had been prepared.

The appellant appreciated the family arrangements, and nevertheless persisted with the plan to kill Heather Barnett, knowing "that an 11 year old girl and a 14 year old boy would find their mother butchered on the bathroom floor". The judge was satisfied that whatever the reason for the selection of Heather Barnett as a victim, the evidence showed that DR was a cold, depraved, calculated killer "who murdered Heather to satisfy a sadistic sexual appetite". The mutilation of the body of the victim was "shocking". Taking all these features into account, together with "the previous killing of Elisa Clap", he was driven to the conclusion that a starting point of 30 years imprisonment as the minimum term would not be appropriate. The order would be a whole life order.

77. Focussing on the whole life order made in the particular circumstances of this crime, rather than on the submission that a whole life term was always inappropriate whatever the circumstances, (a submission with which we have dealt with in paragraphs 4-30), Mr Edward Fitzgerald QC on DR's behalf advanced a number of different grounds of appeal. The most important criticism was directed at the judge's consideration of the murder of Elisa Clap as a feature of the sentencing decision. Furthermore, he failed to take fully into account that this murder was committed in 2002, before the new provisions of Schedule 21 of the 2003 Criminal Justice Act had come into effect. In accordance with the practice followed at that time a "whole life" tariff would not have been ordered by the Secretary of State. Accordingly Mr Fitzgerald submitted that the whole life order retrospectively increased the penalty, because even if such an order had been made by the Secretary of State, it would have been subject to a duty of regular review, and the sentence was therefore wholly disproportionate and wrong in principle. The case did not fall within any of the provisions of paragraph 4(2) of Schedule 21 which would normally justify a whole life order. Even if these provisions did not include an exclusive list of categories, there was nothing further in the aggravating features of the case to require it, and in any event insufficient attention was paid to the evidence relating to DR's psychological disorder.

78. When the judge summed the case up to the jury, he directed them, quite correctly, that the only court with jurisdiction to try DR for the murder of Elisa Clap and to convict him of the offence was an Italian court. It is also clear that there was a vast body of evidence which provided strong evidence that he was indeed guilty of that murder. (See pp 65-97 of the summing up). However, as the case was left to the jury, it was clearly open to them to convict DR of the murder of Heather Barnett even if they were not sure that he had murdered Elisa Clap. In short, therefore, DR was not tried for or convicted of the murder of Elisa Clap (a murder which he denied), and the verdict did not and could not carry with it the inevitable conclusion that the jury must have been sure that he had murdered her. At the same time, the trial judge, presiding over this sensitive trial, plainly did reach the sure conclusion that he was indeed guilty, and therefore was not prepared to ignore it as a feature bearing on the sentencing decision. However, if he was entitled to have regard to it, then the first question which arises is whether the case fell within the starting point in paragraph 4(2)(d), that when convicted and sentenced for the murder of Heather Barnett the offender had "previously" been "convicted" of murder. Plainly he had not. That leaves open the question whether a whole life order was nevertheless the appropriate discretionary term. This is linked to the question whether in assessing the appropriate minimum

term, the judge was entitled to take into account his own assessment, made during the trial that the appellant had committed another earlier murder with which he was not charged and of which he had not been convicted. This raises an issue of sentencing principle.

79. Dealing with it generally, it is axiomatic that, provided the verdict returned by the jury or the plea accepted by the Crown has been loyally respected, the sentencing judge is not merely entitled, but required to reflect on and balance all the relevant aggravating and mitigating features of the offence or offences of which the defendant has been convicted. This includes any features of aggravation or mitigation which have emerged during the course of the trial, including the judge's assessment of the personality, character, maturity and attitude of the defendant to the offence. This will often include making findings of fact on disputed points. Such findings may well include, for example, that in the course of the offence of which he has been convicted, the defendant committed other offences; the indictment is not required to be overloaded with charges. Where for example the conviction is for an offence of conspiracy, the judge may need to make findings for the purpose of sentence about which of the overt acts the defendant has been shown to have committed. There will be other situations in which it is conceded that sentence should be passed which reflects offences beyond those charged; the indictment may contain charges which have been treated by consent as samples of a course of conduct, or the defendant may ask the court to take into consideration other specific offences. However, it is equally axiomatic that, situations such as these apart, a defendant cannot simply be sentenced for offences of which he has not been convicted, or on the basis that he has in fact committed them. The ability of the judge to make findings that other offences have been committed does not extend to reaching a non-jury verdict about allegations put before the jury by way of similar fact evidence, at least unless the jury must have been satisfied that they were proved, or unless the defendant has been convicted of them in the past.

80. The principle is starkly expressed by Lord Steyn in *R v Home Secretary, ex parte Hindley* [2001] 1 AC 410:

> "… in deciding on her tariff the Secretary of State was not entitled to increase it as retribution and deterrence for murders of which Hindley had not been convicted."

However the Secretary of State was entitled to take into account the fact that, on the basis of her post trial confession, Hindley in effect invited additional criminality of which she had not been convicted at trial to be taken into account.

81. This observation was not newly minted for the purpose of that particularly notorious case. Much earlier in *Anderson v DPP* [1978] AC 964, the court was concerned with the making of a criminal bankruptcy order in which the jurisdiction to make the order depended on the loss resulting from the offences exceeding £15,000. As it happened the defendant was convicted of thirteen counts, for which the total loss was less than £15,000, but evidence was called at trial to establish system based on twenty

occasions in all, for which the total loss exceeded £15,000. The House of Lords quashed the criminal bankruptcy order made at trial and upheld in the Court of Appeal. The decision was wrong. This was because the defendant had not admitted any offence in relation to the twenty similar instances given in evidence which were not subject of any count in the indictment. Therefore the judge "clearly had no right to take them into consideration in determining the sentence".

82. This reasoning was followed in *R v Clark* [1996] 2 Cr. App. R 282. After a close examination of a substantial number of inconsistent earlier authorities, the court observed:

> "It seems to us that it is one thing to permit the judge to sentence on his view of the gravity of the ingredients of the offence of which the jury have convicted (even if some of those ingredients were capable of being free-standing criminal offences), and quite a different thing to allow him to sentence on the basis that unproved, separate and distinct offences "aggravate" the offence of which he is convicted".

83. Shortly afterwards, in *R v Bradshaw* [1997] 2 Cr. App. R(S) 128, once again this court appeared to cast doubt on the decision in *Clark*. The difficulties were finally resolved in, *R v Kidd, Canavan and Shaw* [1998] 1 WLR 604 where, sitting with Rose LJ, the Vice-President of the Court of Appeal Criminal Division and Jowitt J, a judge with unrivalled experience of the criminal justice system, and reflecting what were described as basic principles, Lord Bingham CJ observed that it was

> "not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit … we think it inconsistent with principle that a defendant should be sentenced for offences neither admitted or proved by a verdict".

After examining the authorities the court upheld the decision in *R v Clark* and indicated that to the extent that it was at variance with other authority, it was "to be preferred". This is an end of the controversy.

84. In the present case DR could not be charged in this jurisdiction with the murder of Elisa Clap. It was justiceable in Italy, not here. If the murder had been committed in England, it would almost certainly have formed a second count on the indictment. If DR had been convicted of the Elisa Clap offence before his trial for the murder of Heather Barnett, or indeed during a joint trial of both murders, this would have provided an essential feature for the assessment of the minimum term for that murder. The judge properly and expressly rejected the notion that he should pass sentence for the murder of Elisa Clap. Nevertheless, he undoubtedly took into account his belief that the appellant was guilty of that offence in deciding that a whole life term was appropriate. In other words, although the appellant denied this distinct and separate offence, was not on trial for it and not convicted of it, the judge's view that he was in

fact guilty, was treated as a significant piece of aggravation. The principle is clear. Even when evidence which serves to establish the defendant's guilt of an offence charged on the indictment is deployed as similar fact evidence, the sentencing decision cannot proceed on the basis that he is guilty of a distinct and separate offence of which he has not been convicted and which he denies. Although we sympathise with the judge's approach, it was inconsistent with what is now an axiomatic principle that, subject to considerations like those identified in para 79 the ambit of the sentencing decision cannot extend to reflect a specific, distinct offence of which the offender has not been convicted.

85. We have reflected whether it is now open on this appeal against sentence, to take account of the appellant's conviction, subsequent to the present sentence in Italy. That would be problematic. Quite apart from the question whether in accordance with the law of Italy, the recent conviction, reached in the absence of the appellant, is to be regarded as a final conviction, when the sentence imposed in the Crown Court is based on a misapplication of principle, it should be corrected. We must take the principled approach and proceed on the basis that it may at some future unspecified date be for the judicial authorities in Italy to decide what the appropriate sentence on the appellant should be for the murder of Elisa Clap. In reality that is most unlikely to happen. As we have already indicated, we think it highly improbable that it will ever be safe for DR to be released from custody. Moreover although a whole life term must be quashed, the minimum term, to which we now turn, must be very substantial indeed.

86. The appellant fell to be sentenced in accordance with the transitional provisions in Schedule 22 of the 2003 Act, as illuminated for guidance purposes by the relevant Practice Direction. Where the offence was committed after 31st May 2002 and before 18th December 2003, where the offender's culpability is exceptionally high, a starting point of 15/16 years would be appropriate, but to allow for significant aggravating features of the case, a minimum term of 30 years might be appropriate, and indeed in cases of most exceptional gravity, a whole life term could be imposed. Omitting from consideration the appellant's involvement in the murder of Elisa Clap and reflecting on the horrific circumstances of the murder of Heather Barnett, there are a number of aspects of the killing which are profoundly disturbing. We note in particular the extensive preparation for the killing (which included careful measures to avoid detection) and the display of sexual perversions and sadism, not least the appalling mutilation of the body, when the appellant knew perfectly well that it would be found by the victim's children. Thereafter, he was capable of brutal hypocrisy in his purported expressions of concern and assistance offered to them. A combination of all these factors leads us to the conclusion that the minimum term should be fixed at 40 years. This will replace the whole life term.

Michael John Roberts

87. Michael John Roberts (MR) was born in April 1966. He has many previous convictions, including a conviction for robbery in 1995 for which he was sentenced to

6 years imprisonment, and robbery again, in May 2005 when he was sentenced to life imprisonment.

88. The offences of which he was convicted on 20th December 2011 in the Crown Court at Southwark before His Honour Judge Robbins and a jury pre-date the robbery convictions. He now appeals against the sentence imposed on 12 January 2012. They were:

> Burglary, rape and causing grievous bodily harm in December 1988 to EM, life imprisonment for rape, 15 years imprisonment for causing GBH, and 10 years imprisonment for burglary;
>
> Rape, indecent assault and burglary in September 1989, where the victim was GM. Life imprisonment for rape, and 10 years imprisonment for indecent assault and burglary;
>
> Rape, buggery, indecent assault and burglary, life imprisonment for rape and buggery, and 10 years imprisonment for burglary and indecent assault. These offences took place in October 1989 and the victim was AM;
>
> Causing grievous bodily harm and burglary, 15 years imprisonment and 10 years imprisonment (respectively). The victim was . . .

All offences were ordered to run concurrently. So far as the sentences of life imprisonment were concerned, a whole life order was imposed as the minimum term.

89. The victims in all these offences were women, no longer young, living alone, who were attacked in their homes.

90. The victims in Counts 1-3 was a 57 year old virgin, already suffering from a degree of disability, who returned home on Boxing Day after spending Christmas with her family. She recalled finding a man in her house who had struck her repeatedly. She sustained multiple injuries to her face, which included a broken jaw, haematomas on both eyes, and a fractured eye socket. There was a deep 10cm cut above her right eyebrow. Her torso, notably around her left breast and shoulders were bruised. There were defensive injuries on both hands. Her thighs were bruised, with dried blood smeared over the entire surface of the thighs and lower legs, particularly to the front, and marks around this area consistent with bruising caused by finger pressure. There was a 1.5cm laceration found in the vagina running down towards the perineum, with further bruising and lacerations in this area, and on further examination, bleeding was noted from higher up the vagina vault. Due to the distress caused by this part of the examination, it was halted, but these findings were consistent with sexual penetration. Obviously she had been subjected to a violent physical assault. The majority of the blows to her head were caused by a clenched fist. The injuries to her jaw and eye sockets were caused by separate impacts, possibly by punches or blows from a soft heeled shoe. The injuries above her right ear were more consistent with kicks, but

could also have been caused by repeated fist blows. The other injuries were consistent with having been gripped and having her thighs forced apart during forcible sexual assault.

91. The victim in counts 4-6 lived only a few yards away from the victim in counts 1-3. She was 77 years old, a frail elderly woman with advanced arthritis. Some 10 days or so before the attack, MR had appeared in her sitting room, claiming that he had been chased out of a pub, but on that occasion the victim was able to call out to a neighbour and he ran away.

92. On 11th September 1989 MR again entered her sitting room, demanding to know where her money and jewellery were. He told her not to look at him or her face and then ordered her to take off her clothes, threatening her with his fists if she did not. He made her lie on the bed. He tried to penetrate her vaginally, and then anally. She told him she was single and had never had sex, and she did not want it now. Her pleas were ignored. He inserted his finger into her vagina and put his penis in her mouth. He then tried to make her kneel on the floor but she told him because of her arthritis she could not do so, so he ordered her back to the bed. He made her remove her dentures and suck his penis before putting his finger into her anus. He then left her, taking £5 from her handbag in the kitchen.

93. On examination the victim had bruising on her arm, her vagina was exquisitely tender and bright red. These findings were consistent with recent digital penetration and attempted penile penetration.

94. The victim in count 7-10 was attacked approximately one month later, on 7 October 1989. Her flat was just over 300 yards from MR's then new address. Shortly after her nephew had left the premises, MR entered, grabbing her from behind and putting his hand over her nose and mouth. He pushed her into the sitting room, and ordered her not to speak and told her he could be violent. She said that her son would be coming back at any moment, and he told her that she was lying. He told her that he wanted money, and ordered her to take off her clothes. When she refused he started to pull her dressing gown off, and, because she was not strong enough to resist, and terrified, she took off her remaining clothes. The appellant touched her breasts, and then licked and sucked them. He made her go through to her bedroom where he committed various sexual offences, including attempts to penetrate her vaginally and anally with his penis, and then tried to make her suck his penis by pushing it in her mouth. He placed his fingers and then his tongue in her vagina. She was heaving, shaking and crying, and begged him to leave. She persuaded him to let her make some tea, in the hope that it would bring him to his senses. But after a drink from a tap he again returned and attempted vaginal and anal rape and then forced her to masturbate him and tried to make her take his penis in her mouth. This was followed by vaginal rape and ejaculation. The ordeal lasted for 3 hours, and after MR had sought to remove all trace of his presence in the flat, he cut the telephone wire.

95. The victim in counts 11-12 was an 84 year old woman, living alone in a ground floor flat, close to the address of the last victim. She was severely assaulted by MR at the end of February or beginning of March 1990, when, due to a recent hip operation she had difficulty walking.

96. She was found, on 2 March 1990 by her "home-help" with serious injuries to her fact, unable to speak or describe anything of what had happened to her. Medical examination revealed that her upper jaw was fractured in one place, and the lower jaw in two places. The left side of her face was severely swollen, blackened and bruised. There was no evidence of sexual assault. Her telephone wire had been cut.

97. MR's responsibility for these offences was established following what are known as "cold case reviews". He was produced from HMP Wandsworth where he was a serving the sentence imposed in June 2005. On his arrest he replied "you are having a joke, aren't you?"

98. Psychiatric reports, prepared in the context of his appearance following conviction for robbery in 2005, were made available to the sentencing judge. The psychiatrists were, of course, unaware of the offences with which we are concerned.

99. They recorded a history of drink and drug abuse, and an earlier diagnosis of excessive compulsive disorder and depression. On the basis of his numerous previous convictions, MR could properly be regarded as having a personality disorder, or in legal terms, a psychopathic disorder. His then recent offending and behaviour suggested a deterioration in behaviour, possibly secondary to the abuse of alcohol and drugs. Treatment for his mental state could be given in custody, and did not merit transfer to a psychiatric hospital for assessment or treatment. It was clearly indicated that he could not be regarded as anything other than "a danger to the public" and treatment for his condition, even after "the most arduous efforts" were not assured because treatment for such conditions "is notoriously unsuccessful".

100. In his sentencing remarks Judge Robbins clearly directed himself about the appropriate criteria for discretionary life sentences, and came to the conclusion that on the facts here, such a sentence was right. He then went on to examine the appropriate minimum term. MR broke into the homes of his victims and subjected them to degrading sexual attacks, and the offences were aggravated by terrible violence, far over and above whatever pressure would have been needed to perpetrate the sexual offences. As a result, the entire community in South London had been terrified. There were multiple aggravating features. These were most vulnerable elderly women living alone, who were deliberately targeted, subjected to violent sexual attack, and completely terrorised. The victim impact statements showed how much their lives had been ruined. Their last years were utterly blighted. None would ever recover. MR himself had shown no pity or remorse. These offences, together with some of his earlier convictions, confirm that he was cruel and ruthless and a real and continuing danger especially to vulnerable people. The judge concluded that a whole life term was appropriate.

101. The essential argument advanced in this appeal is that although this was an extremely serious series of offences, in which the interests of public safety amply justified the imposition of a discretionary life sentence, the whole life order was inappropriate and wrong in principle. In summary, among the cases where whole life orders had been imposed, none could be found in the context of sexual crime where one or more of the victims had not been murdered. Without in any way seeking to trivialise the ordeals of the victims, it was submitted that the whole life order should be reserved for cases where the criminal went even further than MR had gone on any of these occasions.

102. Like the Crown, which accepted that notwithstanding the seriousness of the offences a whole life order was inappropriate, we agree that there is force in this submission. It is regrettably possible to envisage, and there have been cases, where dreadful sexual assaults have been followed by murderous violence. The whole life order is reserved for the most exceptional cases. Without suggesting that the court is prohibited from making a whole life order unless the defendant is convicted of at least one murder, such an order will, inevitably be a very rare event indeed.

103. The whole life order must be quashed. In its place, to allow for MR's criminality and his previous convictions, we shall substitute a minimum term of 25 years, the equivalent of a 50 year determinate sentence. In doing so we are not to be taken as implying that MR is anything less than highly dangerous, and on the evidence before us at the moment it seems highly improbable that he will, after the expiry of 25 or 30 or more years, or indeed ever be safe for release.

David Martin Simmons

104. David Simmons (DS) was born in March 1972. On 17th February 2004 he pleaded guilty to rape and false imprisonment, and on 9th December 2004 before His Honour Judge Foley he was sentenced to life imprisonment on each count. It is open to question whether the judge positively ordered that he should be subject to a whole-life term. What is certain is that he did not specify any lower or specific term. Shortly after sentence, DS was transferred from prison to Broadmoor Hospital, and in 2010 he was transferred back to HMP Bristol. There he was told, for the first time, that in the absence of any tariff sentence, he was regarded as a whole-life prisoner. He requires an extension of time of over 7 years in which to seek leave to appeal against sentence. In view of the uncertainty of the true effect of the judge's sentencing remarks, the confusion is understandable, and in these exceptional circumstances leave was granted.

105. The facts of this case are uncomplicated. It was just after midnight on 25 August 2003 when the complainant accepted a lift from DS. Shortly afterwards he produced a knife and held it to her throat. He then drove to an industrial estate. He tied her hands behind her back and blindfolded her. The passenger seat was reclined. She was forced to lie back. Her footwear, jeans and knickers were removed. The appellant penetrated her digitally, and then, using a condom, got on top of her and unsuccessfully attempted to penetrate her. Frustrated he then used great force to

penetrate her vagina and ejaculated inside her. He then removed her from the vehicle, washing her vagina and anus with wine, before putting her jeans back on, tying her to the passenger seat, and driving her, blindfolded, to another industrial estate. There she was taken from the car. Her jumper was placed over the back of her head. Some of it was put in her mouth as a gag and it was secured with a rope. He said he would "slit her throat", saying that he would go and get a bigger knife, and he left. He did not return. Eventually the complainant was able to make contact with a security officer and the police were contacted.

106. DS was arrested and interviewed on a number of occasions. He said that he had been with a prostitute and agreed a price for certain sex acts, adding that he had "lost the plot". Although he could not remember what had happened he did not accept that he had threatened the victim or done anything against her will.

107. DS had a number of previous convictions, including two in 2000 for an indecent assault and robbery. The 2000 offences had many similarities to the present case. The victim was a working prostitute. He forced her to perform oral sex and masturbate him. He threatened her with a knife held to her throat. He inserted his fingers into her vagina. The victim in the offence of robbery was a woman in the street whom he grabbed from behind. He told her he had a knife and he would kill her if she did not shut up.

108. DS refused to attend for interview for the purposes of a pre-sentence report. In view of the high risk he posed to women, a life sentence was recommended.

109. In brief sentencing remarks the judge expressed himself satisfied that DS presented and posed "a significant risk to women". He imposed a discretionary sentence of life imprisonment. He said that it was the wish of the court that he "could not be released until (he) ceased to be such a risk." DS was a person of "unstable character likely to commit similar offences," and he was "a danger". He then said that the court was not required to specify a period "if it is of the opinion that no period should be specified", and he expressed himself so satisfied on the basis of the overall seriousness of the offences, the antecedent history, and the reports on him. The sentencing remarks culminated: "Accordingly there will be a sentence of life imprisonment".

110. Given the appellant's previous convictions, and the circumstances of this very serious sexual offence, unsurprisingly, it was not argued on his behalf that the discretionary life sentence was inappropriate. The judge was entitled to conclude that for the indefinite future DS posed a substantial risk to public safety.

111. The criticism is that the judge, concerned with the element of public protection, failed sufficiently to appreciate that the assessment of the minimum term represented a separate and distinct element of the sentencing decision, designed to reflect the appropriate level of punishment. The Crown agrees that the whole life order was inappropriate.

112. As it seems to us, profoundly disturbing as this offence certainly was, it was not an offence of the extreme level of seriousness to justify a whole life order. It was submitted that the appropriate minimum term would be between 10-12 years. The appropriate minimum term, which will replace the whole life order, is 10 years, the equivalent of a 20 year determinate sentence. As the offence took place before the introduction of s.240 of the 2003 Act, we have taken account of s.67 of the Criminal Justice Act 1967 in assessing the minimum term. As with MR, in quashing the whole life order, we emphasise that we are not suggesting for one moment that DS will be safe to be released at the conclusion of the 10 year period. We note that it has been necessary for him to spend time in Broadmoor Hospital, and we suspect that his release is most unlikely.