APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 21
HCA/2017-000631/XC

Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST SENTENCE

by

IAN MCALLISTER GORDON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty, Gilroy (sol adv); Collins & Co (for Gilroy & Co, Solicitors, Glasgow)
Respondent: McSporran QC (sol adv) AD; Crown Agent

25 January 2018

Introduction

[1] This is an appeal at the instance of Ian McAllister Gordon.

[2] On 6 September 2017 the appellant went to trial in the High Court at Glasgow on a charge of the murder of his wife. Evidence was led for the Crown. On the morning of the

third day of the trial, 8 September 2017, the Dean of Faculty for the appellant tendered a plea of guilty to culpable homicide in these terms:

> "on 28 April 2016 at [an address in Troon], you IAN MCALLISTER GORDON did assault Patricia Ann Gordon, born 25 March 1953, your wife, then residing there, now deceased, and did place a pillow over her face, restrict her breathing and you did kill her."

[3] The advocate depute accepted that plea. The trial judge adjourned the diet for sentence until 11 September 2017 on which date he heard a full agreed narrative from the advocate depute of what the Crown accepted were the relevant facts of the case. The trial judge further adjourned the diet for sentence until 24 October 2017 in order to obtain and consider a Criminal Justice Social Work Report.

[4] On 24 October 2017, having heard from the Dean of Faculty in mitigation, the trial judge imposed a sentence of 3 years and 4 months imprisonment, that being discounted from a period of 5 years' imprisonment having regard to the appellant having offered to plead guilty to culpable homicide by way of a section 76 letter as early as 20 July 2016.

[5] The appellant now appeals that sentence. His grounds are: first, that in the exceptional circumstances of the case an alternative to a custodial disposal was appropriate; and, second, that in the event of it being held that there was no appropriate alternative to custody, the period of imprisonment selected was excessive.

The circumstances

[6] What follows is what we understand to have been accepted by the Crown as having been established by the evidence led during the first two days of the trial and otherwise in the course of its precognition of the case.

[7] The appellant is 67 years of age, having been born in 29 April 1950. He has worked all his life and was a self-employed painter and decorator until he stopped working during 2015 in order to support and care for his wife whose health was deteriorating. She was 63 years old when she died. She had retired on medical grounds from her job as a shorthand typist in 2006. A long term heavy smoker, she suffered from Chronic Obstructive Pulmonary Disease (COPD).

[8] The appellant and his late wife were married for 43 years. They had two children, a daughter, Mrs Gail Whyte, and a son, Gary Gordon. They were, as their children and other family members agreed, a devoted couple. The appellant loved, and would do anything for, his wife.

[9] We note (from the history contained in Dr Louise Ramsay's report of 8 June 2017) that from no later than April 2015 Mrs Gordon suffered from symptoms and exhibited signs of serious respiratory illness additional to what might be explained by COPD. She had a persistent cough. She was losing weight. These symptoms were investigated by conventional x-ray, CT scanning, bronchoscopy and lung biopsy. Eventually the results showed a shadow on her right lung and enlarged lymph nodes but the results of the biopsy were inconclusive.

[10] In addition to her respiratory illness Mrs Gordon suffered from a long-standing condition of serious anxiety. A particular anxiety related to hospitals and medical treatment. On 7 December 2015 she attended the clinic of Dr David Sword, consultant respiratory physician, at Ayr Hospital. Dr Sword gave evidence at the trial. He explained that Mrs Gordon had been extremely anxious and had taken a considerable amount of diazepam before attending the appointment (Mrs Gordon's requirement to take diazepam on the occasion of her hospital attendances had also been a feature of the investigative

procedures which had been carried out earlier in 2015). She had told him that her entire life had been blighted by chronic anxiety and that she had not enjoyed most of her life because of that. Dr Sword saw her three or four times, with the last appointment being in March 2016. The appellant was always present. Mrs Gordon assumed that she had cancer but could not cope with the thought of a formal diagnosis or with having further tests. She initially agreed to further tests but called the next day to cancel them. Dr Sword suspected that she had lung cancer. Her symptoms were lethargy, breathlessness, cough and sputum. Her symptoms deteriorated during the period of her attendance at the clinic. On the basis of the appearance of the scans which had been carried out, Dr Sword expressed the view that it was highly likely that Mrs Gordon had stage 3 B lung cancer with a 5 year survival rate of 5%, assuming that she was to receive the appropriate treatment.

[11] The general practitioner with whom Mrs Gordon was registered gave evidence of her attending appointments usually accompanied by the appellant, who was supportive of anything that the GP proposed. The GP confirmed that Mrs Gordon declined investigation and formal diagnosis at the end of 2015. She did not ask for advice in respect of ending her life. He did not recall any discussion in respect of pain relief. The GP attended Mrs Gordon at her house on the morning of 22 April 2016. He could not recall if pain was a feature of her presentation but she was aware that her health was declining. There was no discussion about the end of life and the GP did not consider that Mrs Gordon's health was so bad as to make that appropriate at that time.

[12] An on-call general practitioner made a house call on Mrs Gordon at 11.30am on Sunday, 24 April 2016. She was very anxious. She had considerable pain in her chest and lower back. He recommended that she go to hospital, as she needed specialist management. His primary concern was her deteriorating oxygen saturation. Mrs Gordon at first declined

hospital admission. There was a discussion about difficult experiences that she had had in hospitals in the past. She appeared to be in significant pain and was very anxious. She was however able to give a medical history and to discuss events. There was a discussion about the consequences of her not being admitted to hospital. The doctor stated that death was discussed but not within any particular time frame. He advised Mrs Gordon that if she decided to accept admission she should re-contact the on-call service or alternatively take a taxi to the hospital accident and emergency department.

[13] On the evening of 24 April 2016, much to her family's surprise given her aversion to hospitals, Mrs Gordon agreed to be taken to the accident and emergency department of Crosshouse Hospital. It seems that the severity of the pain she was experiencing was such as to overcome what her daughter was to describe in evidence as Mrs Gordon's "terror" of hospitals, and it would appear that when there she was initially made comfortable and was content to remain as long as the appellant could remain by her side.

[14] Mrs Gordon remained in hospital overnight. The appellant was allowed to stay beside her. Mrs Gordon had breakfast the next morning, which was the first time she had eaten for about a week. There appeared to be signs of improvement. This improvement can be explained by the pneumonia which had caused the symptoms requiring her admission being brought under control by antibiotics. Mrs Gordon was transferred to a ward and by the morning of Tuesday 26 April 2017 she wished to leave the hospital. The consultant was content for her to do so. He gave her antibiotics but not any additional medication for pain relief. Mrs Gordon returned home on the afternoon of 26 April. She had no pain but was exhausted. After arriving home, she found a hospital discharge letter in the living room with the word "malignancy?" written at the bottom. This served to reinforce Mrs Gordon's conviction that she was suffering from lung cancer. She became distressed and anxious but,

while she believed she had cancer and would die as a result, she remained unwilling to undergo further investigative procedures. Because of her attitude towards hospitals she felt unable to undergo treatment even if a diagnosis was confirmed.

[15] Notwithstanding her state of anxiety, it was the Crown's position that at all relevant times Mrs Gordon was someone who was strong willed, knew her own mind and who had made the decision not to have a diagnosis or to undergo treatment on a fully informed basis.

[16] On Wednesday 27 April Mrs Whyte telephoned the appellant who advised that Mrs Gordon had back pain. He went on to say that if anything she had "gone backwards" and that the pain was now widely spread; Mrs Gordon had spent a very bad night. In a telephone phone call later that morning, the couple's son, Gary Gordon, heard his mother screaming in pain. Mrs Whyte visited her parents' house at 7.45pm on the evening of 27 April and found her mother in bed screaming and moaning, clearly in excruciating pain. However, Mrs Gordon was able to converse with her daughter. The appellant gave the deceased diazepam, co-codamol and tramadol as had been prescribed but the medication was providing only very short-term relief from pain. Mrs Whyte described the appellant as doing all he could to help. Mrs Whyte last saw her mother alive around 10.30pm, during one of the short periods when she was resting.

[17] The only direct source of how Mrs Gordon's life came to an end in the early hours of 28 April 2016 is the (consistent) account given by the appellant to his children and the members of the emergency services who attended the house. However, that account was supported by findings at post mortem examination and is accepted by the Crown as accurate. In particular the Crown accept that when the intolerable pain next returned, late on 27 April or early on 28 April, Mrs Gordon decided that she would end her life by taking an overdose of the pain relief medication that had been prescribed. The Crown further

accepts that the appellant knew that his wife had made a decision to end her life in this way and that was something that he had agreed to with a view to sparing her more pain. He brought the medication to her and it is likely that he assisted in its administration. To the extent that there was a "pact" between them, we would understand the Crown's view to be that beyond the appellant's promise to his wife that she would not die alone in hospital, any agreement between them was unspoken. However, the Crown accepts that such a promise was made in the knowledge that as far as Mrs Gordon was concerned such an end to her life would be the worst outcome possible.

[18] At 04.30 am on 28 April 2016 the appellant telephoned his daughter to tell her: "Your mum is away, I am sorry, can you come down." He then telephoned his son to say: "Hi Gary it is dad, your mum has gone, could you come down please". When Mrs Whyte arrived at her parents' house she went upstairs to find her mother lying in bed and her father in the bedroom. The appellant told Mrs Whyte that her mother had been in dreadful pain and had kept taking painkillers but was struggling to take them. He said: "I am going to jail" and started to cry, cuddling his daughter tightly. He went on to say:

> "The tablets were not working; I could not see her in that pain. I am not going to tell you what I did. I know I am going to go to jail, I do not know how long for but I do not have a single regret. There will be a post mortem and the cause of death will be asphyxia but she was in so much pain".

[19] Gary Gordon arrived at 5.30 am. He went upstairs to his parents' bedroom and entered the room. When he went inside he saw the appellant and his sister. She was sitting on the floor next to her mother who was in bed and the appellant was kneeling on the bed. The appellant got up and embraced his son. Mrs Whyte joined them in a group hug. The appellant started to break down and began crying. He got back on the bed and lay down next to his wife. The appellant told Gary Gordon that his mother had been in terrible pain

and that she had taken increasing amounts of diazepam and tramadol but that the painkillers were not working.

[20] His children told the appellant that he would have to phone the police, which he did. As they awaited their arrival he continually said that he was sorry. He seemed to be in a state of shock. Paramedics were first to arrive and found the deceased lying in the bed with the appellant lying on top of the bed covers beside her stroking her face. It was obvious that Mrs Gordon was dead. There were no signs of violence or disturbance and nothing to suggest that Mrs Gordon had not passed away naturally. Life was pronounced extinct at 7.10 am. Police officers arrived as the paramedics were leaving. The officers were taken to the bedroom and were joined there by the appellant and his children. The appellant was seen to be very distressed. There was nothing to suggest to the police officers that this was other than a natural death. The appellant asked his children to leave the room and stated:

> "I am only going to say this once. I put a pillow over her head to finish her off. We made a pact that I would help her out. That was at 3am. It only took a minute. That is it."

A short time later the appellant was detained as a suspect in respect of murder. He stated:

> "No matter what happens now, I loved my wife all the years I was with her and we had a pact that she would not go into hospital again due to all the circumstances I have explained to you, she is now free. Thanks".

When interviewed in the presence of a solicitor later that day the appellant became obviously upset and made full admissions to smothering his wife with a pillow, stating: "I did put a pillow over my wife's head and set her free". He was distressed throughout the interview, but fully co-operative and candid. He said that his wife was the only woman he had ever loved and that love was the reason he had done what he did. When charged with murder he replied: "I did it because she wanted me to. I loved her and still love her and that's all".

[21] Post mortem examination confirmed that Mrs Gordon had been suffering from lung cancer with what was described as an extensively necrotic high grade malignant tumour; a type of cancer carrying a poor prognosis even when detected at an early stage. There was found to be a single tiny tooth abrasion within her mouth typical of pressure having been applied to the mouth. There were no asphyxial signs (that is no evidence of a conscious person struggling against attempts to asphyxiate her) and no evidence of further injury, in particular no evidence of any injury from restraint or of a defensive type. Having regard to the evidence of the pathologists and the whole circumstances, the Crown accepted that the deceased did not struggle against the pillow being placed over her mouth. She must have then been barely conscious, or unconscious. While there was no positive evidence at autopsy to indicate that her breathing had been obstructed, the findings were consistent with the appellant's account of his having smothered her with a pillow. Toxicology identified the presence only of prescription drugs, the concentrations of pain relief drugs being in a range associated with fatalities. While definitive interpretation of the effects of high doses of painkillers is not possible, ingestion of the drugs by the deceased may have produced significant sedative or tranquilising effects which would explain the lack of any injuries or other evidence of struggle. The pathologists expressed the opinion that it is also possible that these drugs could have been a significant factor in, or even account for, the deceased's death.

[22] Thus, but for the appellant's confession to having smothered his wife with a pillow, the available medical evidence would not have led to the conclusion that he had done so. The level of prescription drugs identified at post-mortem would have been sufficient to explain her death.

The psychiatric evidence

[23] Those acting on behalf of the appellant instructed Dr Louise Ramsay, consultant forensic psychiatrist, to carry out an evaluation of the appellant's mental state. Given that Dr Ramsay interviewed the appellant on 24 May 2017 we would assume that she received her instructions shortly before that date. She produced a report which was made available to the Crown. The trial judge records that report as being dated 13 June 2017, whereas we were provided with a report dated 8 June 2017. We have not supposed that anything turns on this apparent discrepancy.

[24] In concluding her report Dr Ramsay stated that:

> "From my examination of Mr Gordon it is my opinion that there is now evidence to suggest that at the time of the alleged offence he was unable by reason of mental disorder to appreciate the nature or wrongfulness of any conduct.
>
> It is my opinion that at the time of the alleged offence Mr Gordon was suffering from a depressive episode, this in my opinion constitutes an abnormality of mind. Mr Gordon was suffering from low mood, problems with disturbed sleep, reduced appetite and reduced energy during a period where he was caring for his wife. He did not seek medical attention during this period as he viewed these as a normal response to his situation. ...It is my opinion that his depressive disorder was likely to have a bearing on his conduct. It would be my opinion in (sic) that it would be appropriate to put to a jury whether the severity of this mental disturbance was sufficient to reduce his responsibility from full to partial and constitute diminished responsibility."

The Crown's position

[25] On 8 September 2017, having accepted the re-tendered plea of guilty, the advocate depute explained the evolution of the Crown's thinking over the history of the case. Prior to service of the indictment those representing the accused had discussed with Crown Counsel whether a plea to culpable homicide would be acceptable. A section 76 letter had been tendered on 20 July 2016. The Crown had therefore understood from an early stage that the accused accepted that he had caused the death of his wife and that the

issue at trial would be whether the appellant was guilty of murder or culpable homicide. On the basis of the available evidence, and in the absence of any information to suggest that diminished responsibility was a factor, the appellant was indicted on a charge of murder.

[26] The Crown's decision to indict for murder was a decision that the advocate depute stood by on his understanding of the law on homicide. A psychiatrist instructed by the Crown had examined the appellant shortly after his first appearance on petition on 29 April 2016. The initial report of the Crown psychiatrist did not disclose a basis for a plea of diminished responsibility.

[27] The trial had originally been fixed for 16 June 2017 but shortly before that date a copy of Dr Ramsay's report had been tendered to the Crown. The Crown moved to adjourn the trial in order that the report might be considered in the light of advice from the Crown psychiatrist. Following receipt of the Crown psychiatrist's supplementary report, and consultation with that psychiatrist, Crown Counsel concluded that there was no proper basis upon which to conclude that the accused acted as he did by reason of diminished responsibility. There remained a question, which it was thought would require to be considered in light of the evidence, as to whether the appellant's depressive illness (being an abnormality of mind), albeit undiagnosed and not apparent even to the accused himself, was sufficient to have substantially impaired his ability, as compared with a normal person, to determine and control his acts.

[28] The advocate depute changed his view of the case once he had led the evidence of the appellant's daughter, Mrs Whyte. As he explained to the trial judge, against the background of what had been said by the medical witnesses as to the particular difficulties arising in the care, diagnosis and continuing treatment of Mrs Gordon, the evidence given by Gail Whyte as to the dynamics within the household and the relationship between the

appellant and his wife, and the likely effect upon the accused's mental state (and, importantly, the likelihood that he would conceal from others and even from himself the fact that he was suffering mentally) required the advocate depute to revisit the opinions offered by the psychiatrists. He took the view, as a prosecutor in the public interest, that rather than leave to the jury the question of whether, on the balance of probabilities, diminished responsibility had been established, he should take the responsibility of considering whether it had been. Having done so the plea previously tendered was accepted.

The sentencing diet

[29] The trial judge reports that on 24 October 2017 the Dean of Faculty, on behalf of the appellant, advanced the following mitigation prior to the imposition of sentence.

[30] Evidence had been led in the case. It was therefore unnecessary, so the Dean of Faculty submitted, to advance a long plea in mitigation. The court had heard the whole story. Such had been the Crown's fairness that the key witness in the case, Mrs Whyte, had not required to be cross-examined. Mrs Whyte had described the pain that her mother had suffered. This was an extremely close and loving family. Dr Sword had provided a clear picture of the medical events and the level of the consequential pain. The Dean referred to the many testimonials tendered on behalf of the appellant prior to sentence. One, from a Dr Russell, described what the appellant had done as a "final act of love" and compassion, without malice and with kindness. The Dean then referred to the health of the appellant. He had an enlarged heart. Investigation to date had not taken matters further forward. He was awaiting further procedures. He had a very bad back and a disc problem and awaited a scan, but hoped that no operation would be necessary. The appellant had stopped taking antidepressants during the trial in order to maintain concentration. He had now returned to

using them. The terms of the Criminal Justice Social Work Report did not support the imposition of a custodial sentence. Custody would put "tragedy on tragedy". The family was united behind the appellant. Up to date statements from his son and daughter had been made available. They had been unable to engage in the grieving process; they wished to spend time with their father. It would be terrible for them if he was to be sent to prison. The Dean referred to a reference from the appellant's brother in law, which was also supportive. The Dean referred to a similar case that he had been involved in earlier in 2017 in which Lady Rae had not imposed a custodial sentence. The family in the present case had suffered greatly and the character of the appellant was not in doubt.

[31] The trial judge goes on to explain that in the course of imposing sentence on 24 October 2017 he addressed the appellant in terms of a sentencing statement which he reproduces in his report. It was as follows:

> "I have considered in detail and with care the terms of the many supportive letters and character references tendered on your behalf prior to this sentencing hearing, and have studied with the same care the Criminal Justice Social Work Report which has been made available, the terms of which are also significantly in your favour and in which the author has invited the court to impose a community based disposal in your case, a course commended to the court this morning by the Dean of Faculty on your behalf.
>
> You are a 67-year-old first offender, who has lived an exemplary life within your community in partnership with your lifelong companion, your wife, the deceased. You continue to have the very real, united and affectionate support of your entire immediate and extended family and friends, including the brother of the deceased. These are all factors which are highly in your favour. You have also, I am aware, spent a week already in custody in respect of this matter, from 29 April to 6 May 2016.
>
> Turning now to the offence for which I must sentence you this morning, namely the culpable homicide of your wife, you will well understand that in pleading guilty to this offence you have accepted that your own conduct was the immediate and direct cause of her death, and that, in terms of the plea which you tendered, you on 28 April 2016 assaulted your wife and placed a pillow over her face, restricted her breathing and killed her. In the hours immediately after doing this you told your daughter: 'I know I'm going to go to jail I don't know how long for but I don't have a

> single regret.' Perhaps in making that comment you had even then an insight into the likely outcome in a court of law of the course that you had chosen to take that night. One of your character referees, who is medically qualified and has known you for over 25 years, has described your conduct on the night of your wife's death as a 'final act of love'. That may very well be so, and indeed I do not doubt that you have no regret in respect of what you did. But, as you understood the position in speaking to your daughter in the hours following the offence, and perhaps as you understand matters even now, you have taken her life in a way that the Crown late in the day chose to accept was not a murderous attack, but was one reduced from the crime of murder to the still serious offence of culpable homicide, on the basis of diminished responsibility.
>
> The task of sentencing in cases of culpable homicide is not straightforward, as there is a range of culpability to consider, depending of course on the particular circumstances of each case. In your own case I assess your culpability, in the whole circumstances before the court, as lying in the upper part of the lower half of that range, and certainly below the middle. Nevertheless, you, to use the term used by your daughter in her evidence before the jury, smothered your wife by placing a pillow over her face, restricted her breathing and killed her, and for that you must now face the consequences in this court.
>
> In these circumstances, I have determined that in the exercise of my public duty and in the public interest only a custodial sentence is appropriate in your case. Nevertheless, standing the powerful and indeed moving mitigatory factors which I have attempted to outline earlier in these remarks, I propose to restrict that sentence to one of three years and four months imprisonment, to run from today. That sentence is a heavily discounted one, to take into account the fact that the same plea has been tendered on your behalf from the very outset of these proceedings. But for that, the sentence would have been one of five years imprisonment."

Submissions on appeal

[32] Before this court the Dean of Faculty submitted that there was no public or private interest in imprisoning the appellant; it was not appropriate that he should have gone to jail. He did not develop that proposition by reference to general principle. Rather the Dean's approach was to refer again to the points that he had relied on as mitigation before the trial judge. A written argument had been lodged at the request of the court, but it was simply of the nature of a loosely structured speaking note or aide-memoire, and was used as such by the Dean (he used the expression "route map" to refer to it). He reminded the court that

there was no factual dispute between the parties; they were agreed. This was not just a case of diminished responsibility; that factor alone would not point away from custody, but it was true to say that Dr Ramsay, a very experienced forensic psychiatrist, had supported the appellant's diminished responsibility. What was more important was the state of health of the appellant's wife and her fear of medical intervention. The Dean reminded the court of the account of the deceased's last days as they had been described in evidence by Mrs Whyte and confirmed in the Crown narrative. It was noteworthy that had the appellant not told the police what he had done it is unlikely that there would ever have been a prosecution. To say, as the trial judge had, that a starting period of 5 years' custody was appropriate was simply wrong when one considered the sorts of offending which might attract such a sentence. There had been instances in the past where a custodial sentence had not been imposed in circumstances which were broadly similar to those in the present case. One of these was very recent. Lady Rae had seen no need to impose a custodial sentence following a period of deferral of 6 months in the case of Susanne Wilson where, on 9 January 2018 in Glasgow High Court, the accused was admonished in respect of the culpable homicide of her husband. The Dean had a recollection of another case in which he had acted where the Crown had accepted a plea of guilty of culpable homicide where the accused had killed his brother who was suffering from Huntington's Disease and where Lord Macfadyen had disposed of the matter with an admonition (Paul Brady, report in *The Herald* 15 October 1996). There were reasons why the law should not permit assisted suicide but that was not to say that the court could not be sympathetic in a particular case. The judge at first sift had missed the point when refusing leave to appeal under reference to the recent decisions of both the Holyrood and the Westminster Parliaments not to legalise assisted suicide. The

court had to ask itself the question, what is the good reason for the appellant remaining in custody?

[33] We asked the advocate depute whether there were any observations that he wished to make, while recognising that in our practice the role of the Crown in relation to sentencing is a limited one. The advocate depute was able to identify the case of Brady which had been referred to by the Dean but had not been able to find any record of the basis upon which the plea in that case had been accepted. The advocate depute reminded the court that issues surrounding decisions to prosecute what can be described as cases of "assisted suicide" had been discussed in *Ross* v *The Lord Advocate* 2016 SC 502. The advocate depute had appeared for the Crown at trial in the present case and had been instrumental in the decision to accept a plea of guilty to culpable homicide. He was diffident about expressing what inevitably would be a personal view, but it did seem to him that the present case was more deserving of sympathy than, for example, the case of Brady. He would associate himself with what the Dean had said as to mitigatory effect of the circumstances in the present case. He agreed that Mrs Gordon's phobia of hospitals was an important, perhaps unique, factor. He acknowledged the powerful effect of the evidence given by the deceased's daughter, Mrs Whyte.

[34] In a brief second address the Dean of Faculty acknowledged that in the case of Paul Brady, while there had been "no peg on which to hang it, everyone thought it was the right thing to do."

Discussion and decision

[35] By tendering a plea of guilty of culpable homicide the appellant acknowledged that what he had done was criminal according to the law of Scotland and it would appear that

from what he is reported as having said immediately after the death of his wife, he was fully aware of that at the time. The appellant was right about that. There are circumstances in which intentional killing is justifiable and therefore not criminal but such circumstances are far removed from those in the present case (cf Gordon *Criminal Law* (4th edition) paras 30.34 to 30.40). Neither the attitude of the victim of a homicide (*HM Advocate* v *Rutherford* 1947 JC 1 at 5) nor the fact that he was suffering from a terminal disease (Hume, *Commentaries* (4th edition) vol I p183) nor the compassionate motives of the perpetrator in killing him, are of any relevance to the question of criminal responsibility.

[36] We emphasise this because what the appellant pled guilty to was what is often described as a "mercy killing", in other words the termination of a life motivated by the wish to spare the deceased further suffering. We are conscious that there may be differences of opinion about the propriety of such an act when viewed from a moral standpoint, but the legal position is unambiguous. The law of Scotland as it relates to homicide is not the same as the law of England but we would see the English Law Commission's analysis, as contained in its Report on Murder, Manslaughter and Infanticide (2000) Law Com. Pt 7 304 (quoted in *R* v *Inglis* [2011] 2 Cr App R (S) 13) to be applicable in this jurisdiction (cf *Ross* v *Lord Advocate* 2016 SC 502, Lady Dorrian at para [44]). The relevant passage is as follows:

> "All 'mercy' killings are unlawful homicide.
> …
> 7.4 The law … does not recognise either a tailor-made defence of 'mercy' killing or a tailor-made offence, full or partial, of 'mercy' killing. Unless able to avail him or herself of ... the partial defence of diminished responsibility ... if the defendant intentionally kills the victim in the genuine belief that it is in the victim's best interest to die, the defendant is guilty of murder. This is so even if the victim wished to die and consented to being killed …
>
> 7.6 The current law does not recognise the 'best interests of the victim' as a justification or excuse for killing. ...

> 7.7 Under the current law, the compassionate motives of the 'mercy' killer are in themselves never capable of providing a basis for a partial excuse..."

[37] The advocate depute explained to the trial judge that, given the information then available to the Crown, the decision to indict the appellant in the present case on a charge of murder was consistent with his understanding of the law. We have no reason to doubt that the advocate depute was correct in his understanding of the law. As was said by Lord Hardy delivering the opinion of the court in *Elsherkisi* v *HMA* 2011 SCCR 735 at paragraph [12] (noted in Gordon (4th edit) vol II para 30.13):

> "...where intention to kill is either admitted or proved ... in the absence of any legally relevant factor capable of justifying or mitigating the accused's actions, the jury should be directed that they must convict of murder."

[38] The appellant in the present case admitted that he had intentionally smothered his wife. As we have already observed, as a matter of law, neither the state of the deceased's health, nor her wishes, nor the appellant's compassionate motives, justified or mitigated (in the sense of reducing the degree of criminal responsibility) the appellant's actions. In *R* v *Inglis* at paragraph 37 the Lord Chief Justice (Lord Judge) underlined that "the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love". The Crown's initial position in the present case was therefore entirely understandable.

[39] What caused the advocate depute to alter his assessment of the case and to accept the plea of culpable homicide was Dr Ramsay's opinion on the state of the appellant's mind and the factual underpinning given to that opinion by the testimony of Mrs Whyte. That evidence persuaded the advocate depute that at the relevant time the degree of the appellant's responsibility should be regarded, as a matter of law, as only partial or diminished, not because of his motives but because by reason of an abnormality of mind the

ability of the appellant to determine or control his actings, as compared with the ability of a normal person, was substantially impaired. That formulation is taken from the final point in the summary analysis of the law of diminished responsibility contained in paragraph [54] of the opinion of the full bench in *Galbraith* v *HM Advocate (No 2)* 2002 JC 1. The law which provides that a person who would otherwise be convicted of murder may instead be convicted of the lesser crime of culpable homicide is now found in section 51B of the Criminal Procedure (Scotland) Act 1995 as inserted by section 168 of the Criminal Justice and Licensing (Scotland) Act 2010 but, as is made clear by the Explanatory Notes to the Bill which became the 2010 Act, the test for the now statutory plea is modelled on the common law as set out in *Galbraith*. As stated in section 51B the test is that:

> "the person's ability to determine or control conduct for which the person who would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind."

[40] By deciding as he did the advocate depute took the question of whether the appellant's responsibility for his actions was diminished, away from the jury. That was his prerogative as a prosecutor acting in the public interest. It is no part of our function to review that decision; we must simply give it effect. It is however our impression from a consideration of the available material that the Crown's discharge of its duties in this case has been scrupulous.

[41] The Crown's acceptance that this is a case of culpable homicide and not murder has a very significant impact on the sentencing process. In the event of a conviction for murder there is only one sentence available to the court and that is imprisonment for life: Criminal Procedure (Scotland) Act 1995 section 205. A sentence of imprisonment for life is just that, a sentence which is conterminous with the life of the person subject to the sentence. However, where section 2 (4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 applies,

the Secretary of State shall, if so directed by the Parole Board for Scotland, release a life prisoner from custody on licence. The Parole Board shall not give such a direction unless the Secretary of State has referred the life prisoner's case to the Board and the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. However, section 2 (4) applies, with the result that such a direction may be made by the Parole Board, only after the life prisoner has served in custody in a period of time which, in section 2 (2) of the 1993 Act is referred to as "the punishment part" of his sentence. The punishment part is that part of the life prisoner's sentence which the court has specified in the order which it is obliged to make by section 2 (3) of the 1993 Act. That is the period which the court considers to satisfy the requirements for retribution and deterrence, taking into account: the seriousness of the offence, any previous convictions of the life prisoner and, where appropriate, the stage in proceedings when an intention to plead guilty was intimated. In fixing the punishment part the court is to ignore any period of confinement which may be necessary for the protection of the public: section 2 (2A) of the 1993 Act.

[42] Sentencing in a case of murder is therefore a process which must follow a particular statutory structure. That structure requires the imposition of a sentence of imprisonment for life; and a sentence of imprisonment for life assumes custody (or "confinement") for, at a minimum, the period of the punishment part. The court has a discretion in fixing the punishment part but, again, it is a discretion which must be exercised within the structure imposed by section 2 (2) of the 1993 Act. Section 118 (7) of the 1995 Act confers power on the Appeal Court in any case before it to provide general guidance by pronouncing an opinion on the sentence or disposal which might be appropriate in similar cases. The Appeal Court has exercised that power in relation to fixing the punishment part in cases of murder. In

HM Advocate v *Boyle, HM Advocate* v *Kelly* 2010 SCCR 103 where at paragraph [14] the Lord Justice General (Hamilton), giving the opinion of the Court as constituted by a bench of five judges, said this, under reference to what had been stated in the earlier case of *Walker* v *HM Advocate* 2002 SCCR 1036:

> "The first sentence of paragraph 8 of Walker may carry the implication that a punishment part of 12 years is the norm or starting-point for determining the punishment part in most cases of murder: the reference to '12 years or more, depending on the presence of one or more aggravating features' might be read as suggesting that 'in most cases' the period would be longer than 12 years only if there was one or more aggravating features. We doubt whether it was the court's intention to set any such norm. In any event we would not regard 12 years as an appropriate 'starting-point' for 'most cases of murder'. A substantial number of murders—we have in mind in particular those arising from the use by the offender of a knife or other sharp instrument with which the offender has deliberately armed himself (discussed below)—would justify a starting-point of a significantly longer period of years. A punishment part as low as 12 years would not be appropriate unless there were strong mitigatory circumstances, and a punishment part of less than 12 years should not be set in the absence of exceptional circumstances—for example, where the offender is a child."

[43] Thus, while we would see that the circumstances in which the appellant came to kill his wife to be "exceptional" in the sense envisaged by the Lord Justice General in *Boyle and Kelly*, had the present case fallen to be dealt with as a case of murder, not only would it have attracted the imposition of a mandatory sentence of life imprisonment but the associated punishment part of that sentence would have been likely to be measured in a substantial number of years. There is no analogous Scottish precedent of which we are aware but in England cases having the character of mercy killings resulting in verdicts of guilty of murder have resulted in the imposition of not insignificant minimum terms as provided for by section 269 of the Criminal Justice Act 2003 (the English equivalent of section 2 of the 1993 Act). We have mentioned the case of *R* v *Inglis*. There, the appellant had been convicted of the murder of her adult son who was in a persistent vegetative state consequent on his having suffered catastrophic head injuries. She had injected him with a fatal dose of

heroin in the belief that his situation was hopeless and that he was suffering extreme pain and indignity with only the prospect of death through the withdrawal of nutrition and hydration. There were aggravating as well as mitigating features. Significantly, the appellant had made a previous unsuccessful attempt to kill her son which had produced a deterioration in his condition, but the Criminal Division of the Court of Appeal presided over by the Lord Chief Justice (Lord Judge), accepted that there was no doubt about the genuineness of the appellant's belief that what she did represented an act of mercy; the circumstances in the case were, as the Chief Justice put it, "far removed from the ordinary case of murder". The trial judge in *Inglis* had fixed the minimum term at 9 years. The Court of Appeal reduced that period to one of 5 years. In *R* v *Douglas* [2015] 1 Cr App R (S) 28 where the appellant, who had been drinking, smothered her mother, who was 73 years old and in failing health, in what the trial judge was a genuine, albeit briefly held, belief that what she was doing was an act of mercy, the Court of Appeal reduced the minimum term from the 12 years fixed by the trial judge to 7 years.

[44] Where, as here, the appropriate sentence has to be determined in a case of culpable homicide, the process of doing so is much less structured than in a case of murder. There are no Scottish guideline cases and the work of the Scottish Sentencing Council is at much too early a stage to look for guidance in that direction. Therefore with a view to determining how what we consider to be a very difficult sentencing exercise might be approached we have turned for assistance to the judgment of the English Court of Appeal (Criminal Division) in the case of *R* v *Webb* [2011] 2 Cr App R (S) 61.

[45] *Webb* was an appeal against a sentence of 2 years imprisonment in respect of a conviction for manslaughter by reason of diminished responsibility following trial on an indictment for murder. Although the case had gone to trial, the judge allowed a full

discount of one third from the 3 year sentence he would have otherwise considered appropriate because the appellant had immediately told the police what he had done and never denied that he was responsible for the death of his wife. At the time of the hearing of the appeal the appellant had served the equivalent of a sentence of 6 months' imprisonment.

[46] The facts in *Webb* have quite close similarities with the facts in the present case. The appellant, who was aged 73, had married his wife in 1961. They had no children. In the years before her death, the appellant's wife suffered from various mental and physical illnesses and the appellant gave up work to look after her. The appellant's wife became convinced that a cancer for which she had been treated in 2002 had returned and was causing serious symptoms. She was convinced that she was likely to suffer a major stroke at any time. The appellant developed a psychiatric condition diagnosed as an adjustment disorder. He had a history of depressive symptoms. The appellant's wife said on many occasions that she wished him to step in, if it became necessary, to finish her life. On the day of her death the appellant's wife told her husband that she was firmly resolved to end her life that day. She asked the appellant not to let her wake up. She took a large dose of Lorazepam, together with brandy. She fell into a deep sleep. When the appellant's wife's sleep became lighter, fearing that she would wake, the appellant took a plastic bag and a towel and smothered her. The cause of death was an upper airway obstruction which had lasted for at least a minute. The overdose she had taken did not contribute to her death. When police officer arrived the appellant told them "she has been asking me to do this for ages but I couldn't do it". The jury's verdict meant that it accepted that, as a matter of law, the appellant's mental responsibility for his actions at the time he killed his wife was substantially impaired. Having summarised the facts, at page 358 of his judgment the Lord Chief Justice (Lord Judge) concluded that "It is clear …that the mental turmoil

engendered by the impossible situation in which [the appellant] found himself must have been intolerable."

[47] The appeal in *Webb* was allowed to the extent of substituting a sentence of 12 months' imprisonment suspended for 12 months. To that was attached a supervision order. The rationale of selecting the substituted sentence can be seen in paragraph 26 of the Chief Justice' judgment:

> "In the unusual and particular circumstances of this case we do not believe that the principle of the sanctity of human life would be undermined if the sentence imposed on the appellant were now reduced to one of 12 months' imprisonment, suspended, so that this lonely old man may receive the help that he will need to come to terms with the disaster that has overtaken him."

[48] The Chief Justice's reference to the sanctity of human life picks up on the sentencing judge's concern (noted at page 359) that to impose a sentence short of immediate custody, even in the circumstances of the case before him, would give a wholly erroneous indication that such killings did not warrant punishment. By "such killings" the sentencing judge meant an unlawful killing (in contradistinction to an assisted suicide) where the accused's responsibility was diminished but not extinguished; it being the case that the accused knew what he was doing was unlawful and the possible consequences of what he was doing when he was doing it. Subject to the qualifications which we mention below, we would see the sentencing judge's concern as legitimate. We do not see it to have been rejected by the Court of Appeal. The deliberate taking of a human life is a matter of the utmost seriousness. As we have already stressed, in almost every case and certainly in the sort of case of which *Webb* and the present appeal are examples, it is criminal. One of the functions of criminal sentencing is denunciation, in other words the clear and public expression of society's disapproval of certain acts. As we have already acknowledged, there are different views about the acceptability of what can be described as mercy killing, but until Parliament

intervenes to change the law it is the duty of the court to make clear that it is unlawful. Among the ways of doing that is to impose a custodial sentence. However, in allowing a place for denunciation it is to be kept in mind that denunciation is merely one among a number of objectives in sentencing. Moreover it is an objective that can be achieved without necessarily imposing a custodial sentence.

[49] As the Chief Justice emphasised (in paragraph 25 of *Webb*), the context in which the appellant in that case fell to be sentenced was that of a man whose responsibility, if not altogether extinguished, was substantially reduced. The Chief Justice continued:

> "We accept the submission that if he had not been in the situation in which he was and suffering from the condition from which he did suffer, it is most unlikely that this killing would have occurred. We remind ourselves of the turmoil which he must have suffered the last fatal act."

It was within that context that all available features of mitigation, including those which bore directly on the appellant's diminished responsibility, had to be given effect.

[50] Where we would take issue with the approach of the trial judge in the case before us is the weight it gave to the elements of denunciation and retribution when determining the appropriate sentence. This led to an undue concentration on the nature of the act as a measure of culpability or blameworthiness at the expense of an appropriate regard to the abnormal state of mind of the actor at the relevant time. That can be contrasted with the approach of the Chief Justice in *Webb* and, in our opinion, amounts to an error on the trial judge's part.

[51] In what is an otherwise full report to this court, the trial judge does not articulate the rationale for his sentencing decision. Such explanation as there is of the reasoning which led the trial judge to fix on 5 years' imprisonment as the appropriate sentence (prior to discount for an early plea) must be found in his sentencing statement, which he reproduces in the

body of his report. There he acknowledges the appellant's good character, the continued support of his family and the favourable terms of a Criminal Justice Social Work Report which recommended a community disposal. The trial judge describes the offence which he summarises as not involving a murderous attack but nevertheless constituting "the still serious offence of culpable homicide, on the basis of diminished responsibility." We see him as underlining what he considers to be the gravity of the offence in a passage which includes the words "you …smothered your wife by placing a pillow over her face, restricted her breathing and killed her, and for that you must now face the consequences in this court". This, he explains, has led him to assess culpability as "lying in the upper part of the lower half of [the range of culpability in cases of culpable homicide] and certainly below the middle."

[52] The way in which the trial judge expressed his conclusion on the degree of the appellant's culpability would suggest a level of precision which is not really possible for the Scottish sentencer in the absence of the sort of structured guideline which may in time be issued by the Scottish Sentencing Council. However, we see the trial judge's meaning to be clear. The offence of culpable homicide embraces a broad spectrum of acts with a corresponding broad spectrum of degrees of culpability from the very substantial to the minimal. Generally speaking, the more culpable the offence, the more severe will be the sentence. Surveying all possible cases of culpable homicide the trial judge considered that more than half of all cases would be more culpable than the present case and less than half of all cases would be less culpable. Thus, in the opinion of the trial judge, the appellant's culpability fell to be regarded as falling somewhere below (but not far below) the mid-point.

[53] We would agree that it was proper for the trial judge to attempt to locate the degree of the appellant's culpability by reference to other cases. Comparative justice requires that

sentences should be proportionate. It follows that it is to be expected that a sentencer will come to a view on the seriousness of the instant case relative to those of a broadly similar nature. We therefore do not criticise the trial judge for applying his mind to an assessment of relative culpability, although he does not acknowledge a particular difficulty in relation to cases of culpable homicide which is that whereas all such cases will involve an instance of unlawful killing, some will merit a verdict of culpable homicide because the killing was unintentional whereas others, such as the present, will be instances of intentional killing but will merit a verdict of culpable homicide because of the abnormal state of mind of the killer. It would seem that in contemplating the whole range of cases the trial judge was attempting to compare the culpability of the appellant, who intended to kill but was not fully responsible for his actions, with that of those who did not intend to kill but were fully responsible for their actions. As we have already indicated, the trial judge did not appear to recognise the difficulty of that exercise. Allied to that, there is little recognition in the sentencing statement of the critical factor, accepted by the Crown, that at the relevant time the appellant was someone who was not fully responsible for his actions. True, the trial judge records that the appellant's "attack" on his wife was "one reduced from the crime of murder to the still serious offence of culpable homicide, on the basis of diminished responsibility" but that is it. There is nothing to suggest that the trial judge has really given thought to the relevance of the appellant's mental condition at the time he killed his wife.

[54] The Dean of Faculty submitted that to say, as the trial judge had, that the starting point in the present was a sentence of imprisonment of five years was "wrong" when one considered the cases of "others who do bad things". We agree. It was at this point in his submission that the Dean mentioned the cases of Paul Brady and Susanne Wilson, to which we have already referred. These were cases of pleas of guilty of culpable homicide in

circumstances which were accepted as being mercy killings and where the convicted person had merely been admonished. Another case in that category is *HMA* v *Edge* 2005 GWD 20-36, Morrison Sentencing Practice C8.0016.

[55] Noticing other cases where persons convicted of culpable homicide have been admonished in comparable circumstances is not the same as saying that admonition will always be the appropriate sentence where the killer believed that what he was doing was an act of mercy, but the cases mentioned do illustrate that admonition may be appropriate where the killer's degree of responsibility is much diminished and the whole circumstances of the case point in the direction of a non-custodial disposal.

[56] In the present case the appellant was suffering an abnormality of mind constituted by a depressive disorder with low mood, problems with disturbed sleep, reduced appetite and reduced energy during a period where he was caring for his wife. To that there was added the stresses of witnessing his wife in extreme pain by reason of what she understood to be (and which was) a terminal illness, an inability to reduce that pain using such medication as was available, the knowledge that his wife had a terror of any intervention which involved hospital admission, and the belief that his wife wished him to end her life. In Dr Ramsay's opinion the appellant was unable by reason of mental disorder to appreciate the nature or wrongfulness of any conduct. In our opinion that very much reduces the culpability of what the appellant pled guilty to.

[57] While the court in *Webb* recognised that the case was one of manslaughter and not assisted suicide it was clearly impressed by features of the case which brought it close to an assisted suicide. We have been less inclined to attach weight to that aspect of the case before us, although we cannot ignore that the appellant acted in compliance with what he understand to be Mrs Gordon's wishes. On the facts the present case is even further from

assisted suicide than *Webb*. As we have understood the appellant's actions in smothering his wife, they were his response to what appeared to him to be a sudden and otherwise unmanageable crisis whereas in *Webb* the death was more the result of a settled plan; the victim had got into her bed having told her husband that she was firmly resolved to end her life. Moreover, assisted suicide has connotations and consequences in England which it does not have in Scotland. In England a person who assists the suicide of another commits the specific statutory offence set out in section 2 of the Suicide Act 1961 (see *Ross* v *Lord Advocate* para [9]) whereas in Scotland it is not a crime to "assist" another to commit suicide, although the deliberate commission of an act which has a person's death as its immediate and direct cause will, depending upon the nature of the act, constitute murder or culpable homicide (see *MacAngus* v *HM Advocate sub nom Kane* v *HM Advocate* 2009 SCCR 238, *Ross* v *Lord Advocate* paras [29] and [69]).

[58] Where the facts in the present case essentially coincide with those in *Webb* is in the description that can be applied to the appellant. He is of mature years. He is of good character. He had an impeccable employment record which came to an end when he retired in order to care for his wife. Moreover, as someone of good character with no previous convictions, he enjoyed the benefit of section 204 (2) of the 1995 Act which provides that the court shall not pass a sentence of imprisonment unless the court considers that no other method of dealing with him is appropriate.

[59] The trial judge determined that in the exercise of his public duty and in the public interest only a custodial sentence was appropriate in the appellant's case. We do not consider that he was right about that. The Dean of Faculty invited us to ask ourselves the question: what is the good reason for this man to stay in jail? We see no good reason. The objectives of rehabilitation and individual deterrence have no application. Similarly, given

the very particular circumstances of the present case, we see no requirement for general deterrence which has to be met. The appellant is not a risk to the public. The author of the Criminal Justice Social Work Report puts it this way: "Mr Gordon does not present a risk of harm to another person and his involvement in the current offence was born out of love and loyalty to his wife, rather than intent to do harm to her." That, as we have been at pains to point out, does not mean that he was not guilty of a crime or that he should not have been prosecuted. It is in the public interest that all cases of homicide should be carefully investigated and, where there is sufficient available evidence, prosecuted at the appropriate level. However, that has been done. There is also a public interest in making clear what must be regarded as society's disapproval of criminal conduct. That is what we have referred to as denunciation. However, we see that as having been achieved by this prosecution and the public recording of a guilty verdict. We see no benefit as accruing to the appellant from his continued incarceration. Rather, it can only add to his distress and that of his family, particularly his children, as is evident from the letters from Gary Gordon and Mrs Whyte which were provided to the court. The Dean of Faculty referred to the imposition of a custodial sentence as "putting tragedy upon tragedy". We see the force of that observation.

[60] We shall accordingly quash the sentence imposed by the trial judge and substitute it with an admonition.