IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE NO.2 OF 1992

HUTTON LCJ

On Wednesday, 27 March 1991, the offender, Susan Christie, then aged 22, killed Mrs Penelope McAllister in Drumkeeragh Forest in County Down by cutting her throat with a knife.

Since July 1990 Christie had been carrying on an affair with Captain Duncan McAllister, an officer in the Army, who was the husband of Mrs Penelope McAllister. At all times during the affair Captain McAllister had made it clear to Christie that he would not leave his wife for her.

It appears that the affair was unknown to Mrs McAllister who was a blameless young woman aged 24 at the time of her death and who had acted in a friendly way towards Christie.

The affair between Christie and Captain McAllister had started when she was a private soldier in the Ulster Defence Regiment and had met Captain McAllister at an army diving club which he organised.

At her trial at the Crown Court in Downpatrick, where she was charged with the murder of Mrs McAllister, Christie was cross-examined as to why she had killed Mrs McAllister, and her answers were as follows:

"Q836. You now accept that you killed her?

A. Yes, my lord.

Q837. Do you know why you killed her?

A. No.

Q838. Well have you thought about that?

A. I have thought about it.

Q839. Well what are your conclusions on thinking about it, Miss Christie?

A. I would say that now I killed her for Duncan.

Q840. You would say you killed her for Duncan.

A. I would say that, yes.

Q841. To help Duncan?

A. I am sorry?

Q842. To help Duncan.

A. No.

Q843. Well what do you mean when you say that you killed her for Duncan?

A. I mean to get Duncan.

Q844. To get Duncan for whom?

A. For me.

Q845. For yourself?

A. Yes.

Q846. What would you regard that as?

A. I am sorry?

Q847. What do you regard that as? How do you describe that motive for killing? What is it?

A. That I was in love with him, I would have done anything.

Q848. Have you ever heard of jealousy?

A. Yes.

Q849. Did you kill this unfortunate woman out of jealousy?

A. I would say that jealousy had a part in it, yes.

Q850. Was it not that jealousy was the sole reason?

A. In my opinion, no.

Q851. Well what other reasons were there?

A. I have no other explanations but in my opinion, no, it was not solely for jealousy."

If those were the only relevant matters in respect of the killing of Mrs McAllister, members of the public would have expected that Christie would have been convicted of the murder of Mrs McAllister and sentenced to life imprisonment or, if she had not been convicted of murder but of the lesser crime of manslaughter, that she would have been very severely punished. But the facts which I have briefly summarised were not the only relevant matters. A very important factor in the case was that Christie raised a defence of diminished mental responsibility made available to her by an Act of Parliament. This defence was supported by the evidence of 2 psychiatrists, Dr Brown and Dr Lyons, who were called on her behalf. The jury, by a majority of 10 to 2, accepted this defence and found that Christie, to combine the effect of sections 1 and 5 of the Criminal Justice Act (Northern Ireland) 1966 -

"was suffering from an abnormality of mind induced by disease which substantially impaired her mental responsibility for her acts in doing the killing".

Having found that Christie was suffering from diminished mental responsibility they found her not guilty of murder but guilty of manslaughter, as they were obliged to do under section 5. After the jury had returned this verdict of manslaughter the learned trial judge, Kelly LJ, sentenced Christie to 5 years' imprisonment for manslaughter.

The jury's verdict of not guilty of murder but guilty of manslaughter by reason of diminished mental responsibility calls for 2 comments. The first is that I think that the degree of public concern about the sentence of 5 years imposed by the trial judge was substantially contributed to by the failure on the part of the public to appreciate that medical evidence had established to the satisfaction of the jury that at the time of the killing Christie was suffering from a mental abnormality which substantially impaired her mental responsibility for the killing and that accordingly, by virtue of the 1966 Act of Parliament, she was not guilty of murder but of the lesser crime of manslaughter. This failure on the part of the public to appreciate that this defence had been established with the consequence that Christie was guilty of the lesser offence of manslaughter, was caused by the failure of parts of the Press and the

media to make it clear in their reports of the case that Christie had been found not guilty of murder on the ground of diminished mental responsibility.

The second comment which it is appropriate to make is that where a jury returns a verdict of not guilty of murder but guilty of manslaughter on the ground of diminished mental responsibility the verdict faces the trial judge with one of the most difficult tasks in sentencing which a judge can face, because he has to strike a balance between recognizing on the one hand that the accused had committed an unlawful killing and recognizing on the other hand that the accused had carried out the killing because he or she was suffering from an abnormality of mind induced by disease which substantially impaired his or her responsibility for the killing. That task was made all the more difficult by the particular circumstances of this case.

The Attorney General has now brought a reference before this Court under section 36 of the Criminal Justice Act 1988 to review the sentence on the ground that it was unduly lenient. Section 36 provides as follows:

"(1) If it appears to the Attorney General -

(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and

(b) that the case is one to which this Part of this Act applies,

he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may -

(i) quash any sentence passed on him in the proceeding; and

(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him".

Therefore on a reference by the Attorney General the judges of the Court of Appeal must direct their minds to the question whether the sentence passed was unduly lenient .....

Where a jury returns a verdict of not guilty of murder but guilty of manslaughter on the ground of mental abnormality which substantially impaired the accused's mental responsibility for the killing, two duties must be discharged by the trial judge. The first duty is that he must accept the jury's verdict and proceed to sentence on the basis that the accused did kill the victim when his or her mental responsibility for the killing was substantially impaired by mental abnormality. The judge is not entitled to impose a sentence on the basis that he disagrees with the jury's verdict.

This was made clear by the judgment of the Court of Appeal in England in R -v- Norman [1981] 3 Cr.App.R (S) 377 where Watkins LJ stated at 379:

"We think it needs to be said, however, that once the decision has been taken to accept a plea to manslaughter on the ground of diminished responsibility, full effect must be given to it and remarks made thereafter, such as, 'This is as near to murder as it is possible to go', and the like, are inappropriate and liable to be misleading when thought is being given to the appropriate sentence for it. The determining factor upon sentence is in our view, in such a case as this, having regard to the circumstances in which the victim met her death, and especially to the state of mind of the defendant at that time, the extent to which by reason of the state of his mind his responsibility for an unlawful killing was diminished. Unfortunately, that is not how the judge, so we think, regarded the matter and he erred, therefore, in principle, probably due to his unease about accepting the tendered plea. Accordingly, we must apply our minds, with proper regard to what we believe to be the right principle, to the facts of this case and the condition of this man when his responsibility was, as it is acknowledged, diminished, for the dreadful deed he committed".

The second duty of the judge, whilst accepting the verdict of the jury that the accused's mental responsibility was substantially impaired, is to assess himself the degree of mental responsibility retained by the accused, and the cases make it clear that this degree of residual responsibility can be very considerable. In R -v- Chambers [1983] 5 Cr.App.R (S) 190 Leonard J delivering the judgment of the English Court of Appeal stated at 194:

"In cases where the evidence indicates that the accused's responsibility for his acts was so grossly impaired that his degree of responsibility for them was minimal, then a lenient course will be open to the judge. Provided there is no danger of repetition of violence, it will usually be possible to make such an order as will give the accused his freedom, possibly with some supervision.

There will however be cases in which there is no proper basis for a hospital order; but in which the accused's degree of responsibility is not minimal. In such cases the judge should pass a determinate sentence of imprisonment, the length of which will depend on 2 factors: his assessment of the degree of the accused's responsibility and his view as to the period of time, if any, for which the accused will continue to be a danger to the public.

...

In a passage, which has been the subject of criticism by counsel, the judge said, at page 33A of the transcript: 'I have to punish you in accordance with my view of the measure of ... mental responsibility which you retained'. At D he added, 'I accept that your mental responsibility was impaired and I have no doubt that a very

substantial amount of mental responsibility remained with you also'. This Court finds no basis for criticism of those propositions.

There was further criticism of the judge's earlier remarks at page 32G, where he said 'You deliberately did that young woman to death and you escaped a conviction for her murder because the doctors have taken the view that at the time you committed those acts you were suffering from a mental illness given as 'an anxiety depressive state'. That illness was such that it substantially impaired your mental responsibility for what you did'. It was submitted that the learned judge, having agreed to the acceptance of the plea of guilty to manslaughter (I quote from the grounds of appeal), 'expressly refuted the presence of diminished responsibility'. This Court entirely rejects that submission.

The facts of this case indicate that the appellant bought a knife with which he stabbed his wife. He telephoned her and thus discovered that his mother-in-law was with her. He then arranged for the mother-in-law to be lured away from the premises so that he could go there and carry out the violent attack which killed his wife when no one else was present. These matters indicate a considerable degree of preparation.

In the judgment of this Court the learned trial judge was right to conclude that the appellant retained a very substantial amount of responsibility for his acts. His view was not inconsistent with the medical evidence that the appellant's responsibility was substantially impaired by the anxiety-depressive state from which he was suffering at the time of the killing".

In R -v- Woollaston [1986] 8 Cr.App.R (S) 360 at 364 Mustill LJ (as he then was) delivering the judgment of the English Court of Appeal stated at 364:

"What the learned judge had to do was decide the appropriate level of culpability given the hypothesis that, at the time of the act, the appellant was suffering from an abnormality of mind which had impaired his responsibility for his acts, and given also the common ground between the doctors that this particular state of abnormality no longer existed. Where in the entire length of possible sentences (the sentence of life imprisonment being at the far end) should this particular sentence be pitched?"

It is also particularly apposite in the context of the present case to have regard to the words of Watkins LJ in R -v- Davis at 427:

"We think it right to reiterate that, although psychiatrists genuinely and properly bring to the notice of the court their assessment of responsibility for the killing by one person of another, in the end it is for the court, bearing that opinion well in mind, to make its own assessment in the light of the whole of the

circumstances of the responsibility which the person found guilty of manslaughter must bear for the crime".

In determining the length of the sentence where the degree of residual responsibility is considerable I consider that, in addition to taking account of the substantial impairment of the accused's mental responsibility at the time of the killing, the judge should also take account of the need to reflect society's concern for the sanctity of human life. In R -v- Woollaston Mustill LJ stated at 364:

"The learned judged, after listening to what had been said, emphasised that he had borne in mind the provocation and threats which he said he accepted had brought the appellant to a state of fear. However, he said that the appellant's degree of responsibility could not be said to be minimal. He accepted the opinion of Dr Bluglass that the appellant was not a future threat to the public, but then he concluded: ... I have to bear in mind when passing sentence upon you that it must be such a sentence as will reflect society's concern for the sanctity of human life, and such a sentence as will indicate that, whatever the threats or whatever the fear they induce, a killing such as this will not be tolerated.

On any view, this is a sad case. It is a sad case for the appellant because on any view of the appropriate level of the sentence, he would be bound to spend a long period of time in prison. However, it is also a sad case for the deceased, someone who is occasionally overlooked in cases of this kind. The interests of those 2 parties and the interests of society as a whole have to be reflected in any sentence passed on an occasion like this".

In the test stated by Lord Lane the trial judge must apply his mind to all the relevant factors. In the present case I consider that there were two groups of relevant factors which pointed clearly to a very considerable degree of residual responsibility on the part of the accused which called for a severe sentence, notwithstanding that the jury had found substantial impairment of her mental responsibility. The first group of factors related to the nature of the disease of the mind from which the offender suffered. The second and more important group of factors related to the degree of premeditation and preparation for the killing on the part of the offender, and the steps which she took immediately after the killing and for some days thereafter to cover up the fact that she had killed Mrs McAllister .....

Neither the English Court of Appeal nor this court has laid down "guidelines" for sentencing in cases of diminished responsibility. The sentences which have been imposed since 1981 in the reported cases of diminished responsibility referred to in Thomas' Current Sentencing Practice vary from 2 years to 8 years in respect of cases which vary very greatly in their particular circumstances, but the English Court of Appeal have rejected the argument that a sentence of 10 years was more than the accepted maximum. In R -v- Chambers in delivering the judgment of the English Court of Appeal, Leonard J stated at 195:

"In all the circumstances, while entirely approving the learned trial judge's approach to the sentencing problem, and rejecting the submission that the sentence of 10 years' imprisonment was more than the accepted maximum in such a case, this Court has come to the conclusion that it is possible to reduce the sentence to one of 8 years".

And in R -v- Poole and Scott [1989] 11 Cr.App.R (S) 382 Tudor Evans J in delivering the judgment of the English Court of Appeal stated at 387:

"In the course of argument, we were referred to authority in support of the proposition that a sentence of 7 or 8 years is the maximum sentence in cases of diminished responsibility where a defendant is not a danger to the public. An argument that the maximum was 7 years was advanced in Norman [1981] 3 Cr.App.R (S) 377 but the Court expressed no view, although a sentence of 9 years was in fact reduced to 5 years. In Yeomans [1988] 10 Cr.App.R (S) 63, the Court again expressed no opinion as to whether 8 years was the maximum. Some support for the arguments is derived from Ali [1988] 10 Cr.App.R (S) 59, a case to which we must refer again, where Drake J delivering the judgment of the Court, said at p.62:

'8 years for this manslaughter was perhaps at the top end of the range of the correct sentencing for a case of this nature'.

But in Chambers (supra) an argument that the accepted maximum was 10 years was rejected by the court. We consider that the observations of Drake J in Ali were directed to the facts of that particular case. We reject the argument that the maximum sentence in cases of diminished responsibility is 7 or 8 years. The precise sentence will depend upon the assessment of the accused's responsibility and the time, if any, for which he is thought to be a danger".

In R -v- Secretary of State for the Home Department Ex Parte Handscomb [1988] 86 Cr.App.R 59 at 76 Watkins LJ stated:

"Determinate sentences vary in respect of every class of crime. They vary infinitely in respect of the crime of manslaughter. The range of sentences passed for all serious crime is very broad. Sweeping generalisations made about them are apt to be very misleading. However, useful impressions of what sentence in given circumstances is likely to be thought appropriate by most judges can be gained by studying reported cases, especially guideline cases and records of sentences passed upon a single class of crime basis.

Records of sentences passed for manslaughter with diminished responsibility from 1971 to 1985 reveal that no determinate sentence in excess of 10 years' imprisonment has been imposed since 1978. Sentences in excess of 10 years were passed in only 8 cases between 1971 and 1978. They represent 0.6 per cent, of all

sentences, a total of 1,287, passed for this class of crime during the whole period I have referred to".

It appears, therefore, that determinate sentences of 10 years have been imposed in diminished responsibility cases.

I consider that the way in which, prior to the killing, Christie carried on her daily life without herself seeking, or anyone suggesting that she should seek, psychiatric help, the planning and premeditation shown in taking the knife to Drumkeeragh Forest, and the determined and sustained efforts to evade detection after the killing, were relevant factors which showed a very considerable degree of residual mental responsibility on the part of Christie. I further consider that the factors to which I have referred, and particularly the efforts to evade detection, make this case a worse case in relation to the residual mental responsibility of the offender than any of the reported cases.

Whilst in some of the reported cases sentences of 2 years or 3 years were imposed, I consider that sentences of such length would have been wholly inappropriate for the offence committed by Christie. Applying one's mind to all the relevant factors and having regard to the very considerable degree of Christie's residual mental responsibility and the justifiable concern of society that the courts should uphold and emphasise the sanctity of human life, I am of opinion that the range of sentences appropriate for the offence committed by Christie was a range of between 7 to 10 years, and that a sentence below this could not reasonably be considered appropriate. Therefore I consider that the sentence of 5 years was unduly lenient.

Having decided that the sentence of 5 years was unduly lenient, section 36 directs this court to decide what sentence they think appropriate. Notwithstanding the previous unblemished record and character of Christie I consider that the appropriate sentence in the Crown Court would have been 10 years. However the authorities indicate that the Court of Appeal can take into account the strain and burden which the second hearing, constituted by the Attorney General's Reference, imposes on the offender. Therefore I would quash the sentence of 5 years' imprisonment and in place of it pass a sentence of 9 years' imprisonment.

MacDERMOTT LJ

Early on the afternoon of Wednesday 27 March 1991 2 young women were walking in Drumkeeragh Forest outside Ballynahinch in County Down. They were Penny McAllister aged 24 and Susan Christie aged 22. In a dark place in the forest Christie killed Mrs McAllister by cutting her throat with a sharpened boning knife. The attack must have been from behind and without warning, planned and premeditated in that Christie had obtained the knife and brought it with her on the walk. Beyond question it was a lethal weapon and the killing was rightly described

by the learned trial judge, Kelly LJ, in his charge to the jury as "vicious and gruesome".

The killing was immediately discovered because Christie herself described how they had been attacked by a man and the body was discovered and eventually the knife was also discovered some 250 yards away. Christie maintained her story of what happened for several days until the investigating police obtained an admission from Captain Duncan McAllister, the victim's husband, that he had been having a sexual relationship with Christie. Supported by forensic evidence the police became satisfied that Christie was the killer and that her story, elaborate in many details, of a male attacker was a lying fabrication.

Thus Christie was charged with the murder of Penny McAllister. It must have seemed to the police and the public, who had been fully informed by the press and media, to be a straightforward case of 'murder most foul'.

Early in June 1992 Christie appeared at the Crown Court in Downpatrick. On arraignment she pleaded not guilty to murder but guilty to manslaughter by reason of diminished responsibility. The Crown refused to accept this plea and the trial proceeded with the only issues being whether or not Christie was suffering (a) from mental abnormality and (b) substantially impaired responsibility.

Such issues are to be decided by the Jury on all the evidence. As Lord Keith of Kinkel said in Walton -v- R [1978] AC 788 at 793:

"These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality".

More recently Watkins LJ put it thus in R -v- Sanders [1991] 93 CAR 245 at 249:

"From these cases, in our opinion, 2 clear principles emerge where the issue is diminished responsibility. The first is that if there are no other circumstances to consider, unequivocal, uncontradicted medical evidence favourable to a defendant should be accepted by a jury and they should be so directed. The second is that where there are other circumstances to be considered the medical evidence, though it be unequivocal and uncontradicted, must be assessed in the light of the other circumstances".

After hearing all the evidence including that of Christie and 3 consultant psychiatrists - Dr Brown and Dr Lyons called by the defence and Dr Norris called by the Crown - the jury by a majority of 10 to 2 returned a verdict of "not guilty of

murder but guilty to manslaughter". Kelly LJ then imposed a sentence of 5 years' imprisonment. The trial had occupied 11 working days.

On 8 July 1992 the Attorney General sought leave to apply to the Court of Appeal pursuant to section 36 of the Criminal Justice Act 1988 claiming that the sentence of 5 years was unduly lenient. Leave was granted on 8 September and the reference came before this court on Monday 12 October 1992.

Section 36(1) reads:

"If it appears to the Attorney General -

(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and

(b) that the case is one to which this Part of this Act applies,

He may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may -

(i) quash any sentence passed on him in the proceeding; and

(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him".

For the Attorney General Mr Brian Kerr QC submitted that the accepted and correct approach to a consideration of this section is to be found in the judgment of Lord Lane CJ in Attorney General's Reference [No.4 of 1989] [1990] 1 WLR 41 at 45. I agree and in the several references heard by this court we have emphasised and sought to apply this statement as the correct legal approach: it reads:

"3. <u>The correct approach to section 36</u>

The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were <u>unduly</u> lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased - with all the anxiety that this naturally gives rise to - merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be

remembered that sentencing is an art rather then a science that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly basis in law as it is in literature.

The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance; where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.

Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence".

In Attorney General's Reference [No.13 of 1990] [1990] 12 CAR (S) 578 Lord Lane cited part of this passage and an earlier one in Attorney General's Reference [No.5 of 1989] [1989] 11 CAR (S) 489 at 491 describing them as "the tests, the benchmarks, to use the current jargon, by which the court has to regulate its views". That earlier passage reads:

"In our view there was an error of principle in this case. In our view this was not a case which could properly be met by a fine, and the only proper sentence in these circumstances was one of immediate custody. We think that public confidence in the judicial system would be damaged if this sentence remained as it was passed. As to the final submission, namely that the Court should grant leave in exceptional cases and not in borderline cases, we do not regard this as a borderline case".

These tests also underline another important principle: namely that applications of this nature are not determined by the members of the appellate court concluding that they would individually or collectively have imposed a significantly longer sentence. The appellate court has to consider the sentence imposed by the trial judge and ask if it was clearly inappropriate in relation to the circumstances of the case having regard to the range of sentences imposed in other cases of a similar nature: unless it was it cannot be described as unduly lenient.

Lord Lane made this point in Attorney General's Reference [Nos.19 and 20 of 1990] 12 CAR (S) 490 at 493 saying:

"But the fact remains that if members of this Court had been trying this case and had been charged with the job initially of sentencing them in the Crown Court, we should almost certainly have passed a longer sentence.

That does not mean that the sentences were unduly lenient. After a considerable amount of hesitation and doubt, we have come to the conclusion that in the particular and somewhat extraordinary circumstances which surround this case, this case does not fall outside the range of sentences which the judge, applying his mind to the relevant factors, could reasonably have considered appropriate. Consequently, although we gave leave for this application to be made, and it was an application properly made, we do not allow the appeal and consequently the sentences will remain as the learned judge imposed them".

Before turning to apply those principles to the facts of the present case I pause to remind myself of a number of elementary but important matters:

1. To use some words of Lord Hailsham of St Marylebone "Sentencing is the most difficult as well as the most responsible task which any court of criminal jurisdiction has to perform".

2. The offence of manslaughter confronts judges with the most difficult sentencing problems. In R -v- Walker [1992] 13 CAR (S) 474 at 476: Lord Lane said:

"It is a truism to say that of all crimes in the calendar, the crime of manslaughter faces the sentencing judge with the greatest problem, because manslaughter ranges in its gravity from the borders of murder right down to those of accidental death. It is never easy to strike exactly the right point at which to pitch the sentence. This case is a very good example. This experienced judge came to the conclusion that 6 years was the proper sentence".

3. In diminished responsibility cases the judge has a particularly difficult task. It was described thus in R -v- Chiu-Au-Yeung [1989] 11 CAR (S) 504 by Lord Lane:

"The problem which faces a judge in these circumstances is one of the most difficult which occurs in the always difficult problem of sentencing. There are two problems to which he has to address his mind: first of all, to what extent was the appellant's responsibility diminished? Secondly, to what extent does the public require protection from this man, as against the day when he is released from prison? Each of those questions presents grave problems for the sentencing judge. He must do the best he can on the evidence before him. The decision will inevitably be to some extent an informed guess in both respects, because these matters are not susceptible to arithmetical calculation for obvious reasons".

In this case there is no evidence that Christie is or will in the future be a danger to members of the public. The judge's task was therefore to determine the appropriate level of her responsibility having regard to the fact that Christie was at the time, which included not only the time of the actual killing but the period of preparation (whatever it may have been) and cover-up, suffering from mental abnormality and a substantial impairment of responsibility. In argument that was conveniently

referred to as her "residual responsibility" but residual responsibility as a concept is not something which can be calculated scientifically or measured by percentages or fractions. It has to be assessed sensibly and realistically in the light of all the evidence remembering what mental abnormality means and that the impaired responsibility must have been substantial.

In many cases of this nature a manslaughter plea is accepted by the Crown because the doctors are in agreement and the surrounding facts all indicate that that is the appropriate plea. Some cases obviously point to a hospital order and others because of the obvious minimal residual responsibility of the accused to a non-custodial sentence. But many, perhaps the bulk of, diminished responsibility cases require a determinative sentence. Where he has not heard and observed the accused and the doctors as they give evidence the judge has to rely on the cold print of depositions and reports. In my experience this is certainly a daunting task. Where however a case is fought out - especially where it is closely contested and everything challenged and analysed the trial judge is in a much more advantageous position: he is fully able to get the true 'feel' of all aspects the case (including the offender's residual responsibility) especially if he is experienced - as Kelly LJ undoubtedly is. Nevertheless the sentencing task remains extremely difficult and I am certain that in this case as he awaited the return of the jury, and indeed earlier, Kelly LJ will have pondered deeply to discern the appropriate custodial sentence if manslaughter were the verdict because, as is recognized and accepted by Mr Peter Smith QC, who appeared for the offender, the case required a substantial sentence of immediate custody. To use the words of Lord Taylor of Gosforth CJ in Attorney General's Reference [No.8 of 1992] (unreported judgment delivered on 11 June 1992):

"That is because the sentence should reflect the gravity of the offence, the need for the offender to expiate his crime, the need to impose punishment on people who commit offences of this sort, and in particular the need to deter others from the dangerous but all too prevalent, practice of carrying knives by reminding them of the dangers of doing so and the consequences to them of using a knife".

Before proceeding further I would comment that there is little learning as to what exactly is embraced by expressions or concepts such as "mental abnormality", "substantial impairment" or "residual responsibility". This, of course, is understandable because redefinition can itself lead to confusion. We are here in an area involving the human mind and cases where the facts will almost invariably differ. The effect of those facts on the offender's mind and behaviour must be considered entirely personally and not according to some generalised formulation. That said I have found it helpful to remind myself of what Lord Parker CJ said in R -v- Byrne [1960] 2 QB 396 at 403:

"Abnormality of mind, which has to be contrasted with the time-honoured expression in the M'Naughten Rules 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it

abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise willpower to control his physical acts".

Against these rather generalised observations I ask myself again: what did Kelly LJ have to do when passing sentence in this difficult case? To say it is a difficult case is in fact an over-simplification. To assess residual responsibility is always difficult but to do so dispassionately and objectively is especially difficult when the cold blooded awfulness of the killing of an attractive woman by a jealous woman overshadows the case.

I answer in the words of Mustill LJ (as he then was) in R -v- Woollaston [1986] 8 CAR (S) 360, 364:

"What the learned judge had to do was decide the appropriate level of culpability given the hypothesis that, at the time of the act, the appellant was suffering from an abnormality of mind which had impaired his responsibility for his acts, and given also the common ground between the doctors that this particular state of abnormality no longer existed. Where in the entire length of possible sentences (the sentence of life imprisonment being at the far end) should this particular sentence be pitched?"

In discharging that duty he had to fix a sentence which reflected the interests of the offender, of the deceased and of society as a whole. It is quite clear from his remarks when passing sentence that the learned trial judge was fully aware of the existence of these three parties and bore them in mind. Exercising his experience, judgment and that fundamental duty "to do justly" Lord Justice Kelly passed a sentence of 5 years' imprisonment. For the Attorney General Mr Kerr claims that that sentence was "unduly lenient" and should have been one of "at least 10 years". I do not agree.

At the heart of Mr Kerr's submission was the proposition that the level of Christie's residual responsibility or culpability was extremely high, higher he would argue than that of the numerous accused in the reported cases which he cited to us. In his closely woven argument he referred us to many portions of the transcript dealing with the evidence of Christie and the doctors. Listening to his argument in relation to the acts of preparation, the violence of the killing, the innocence of the deceased and the detailed and admittedly lying attempt to cover-up her awful act, I wondered how this jury failed to convict Christie of murder. But that is what this jury did do after listening to the entirety of the evidence and so all those facts so carefully assembled by Mr Kerr were capable of satisfying the jury that rather than being

guilty of murder Christie was a person who when she did those acts was suffering from both an abnormality of mind and a substantially impaired sense of responsibility. When it came to Mr Smith's turn to analyse the evidence he did so with equal skill and I can understand how the jury reached the verdict which it did. Nothing daunted Mr Kerr however argues that Christie's culpability or residual responsibility must have been very high - indeed so high as to deserve, indeed require, a sentence of at least 10 years' imprisonment. Clearly all the aspects of the evidence can be looked at in varying lights - as strongly against Christie or much less so. Mr Smith's cogent arguments emphasised time and again how one can look at the same portions of transcript relied upon by Mr Kerr and reach different impressions or conclusions. I mention but 2 matters. Firstly premeditation as such does not of itself indicate a level of the offender's responsibility because in this type of killing it is accepted that the offender intended to kill. To use the words of Lord Goddard in Matheson 42 CAR 145:

"Here it is said there was evidence of premeditation and undoubtedly there was, but an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do. A desire to kill is quite common in cases of insanity".

Secondly, the lying cover-up: this was detailed and sustained, but it must be remembered that the doctors accept that Christie has been suffering from amnesia in relation to the events surrounding the killing. Amnesia is the mind blocking out some incident so that it is forgotten. Against that background is a lying cover-up necessarily indicative of a high level of culpability, as Mr Kerr would claim, or is it the natural response of a person who realises the awfulness of what she had done and, irrationally, hopes that by lying she will avoid detection? Mr Kerr might be right but without having heard all the evidence as it emerged at the trial I would not say that his view was necessarily that which the trial judge should have reached.

Kelly LJ did hear all the evidence. He accepted that there was a significant level of responsibility. He imposed a custodial sentence. In so doing he was right in principle - his sentence cannot be condemned as wrong in principle in that he failed to impose a custodial sentence. For my part I who have only heard Counsel and read the transcript would not discard the conclusion of an experienced judge who heard all the evidence unfold. I would not accept that the cold transcript shows that Christie was twice as culpable as the judge considered to be the case and that this Court is obliged to double her sentence. As I said at the outset of this judgment, sentencing in manslaughter cases is notoriously difficult especially in diminished responsibility cases. Judges readily accept that they are not infallible and it is right that sentences should be open to review if manifestly excessive or unduly lenient. But in this type of case where he has imposed the right type of sentence - a custodial sentence - an appellate court should trust the trial judge and should not interfere unless the sentence is clearly shown to be unduly lenient and so wrong in principle.

I turn therefore to consider this phrase "unduly lenient". I start by observing that Parliament has not given the appellate Court power to substitute its own view of the appropriate sentence. It has introduced the concept of the "unduly lenient" sentence and it is important to remember that Lord Lane emphasised 2 points which flow from the word "unduly".

Firstly, a sentence is not unduly lenient simply because the sentence is less than the appellate court would have imposed. Secondly, undue leniency is not an undefined and meaningless concept - a sentence is unduly lenient where it falls outside the range of sentences which the judge applying his mind to all the relevant factors could reasonably consider appropriate.

What then is the appropriate range of sentences in diminished responsibility cases? Unlike cases such as rape, other sexual offences, armed robberies or some assaults (such as "glassing") where the basic facts are similar, where one is not dealing with mental abnormality, and where there are often positive guideline decisions it is possible to define a range of sentence for a type of offence (sometimes termed the "tariff") with reasonable precision. But manslaughter cases do present, quite peculiarly individual sentencing problems. That said in provocation cases a "tariff" of between 3 and 7 years seems to be accepted (R -v- Peddie 12 CAR (S) 176 at 179). In diminished responsibility cases I know of no such generalised statement but a consistent range of sentences does emerge from a consideration of decided cases and has guided sentencers in recent years. What a sentencing judge will inevitably do is assess all that he has heard objectively and reach a tentative view which he will then cross-check by reference to some standard work such as Current Sentencing Practice, and the reported cases of diminished responsibility to which his researches have led him. His final sentence will be that which he considers just in all the circumstances and in keeping with the established pattern of sentences in this type of case.

In his application for review the Attorney General referred us to 15 diminished responsibility cases within the decade 1979 to 1989. Counsel helpfully made their points by referring to most of them and I have read them all and others. They show that sentences varying between 2 and 8 years' imprisonment have been passed: some being sentences affirmed on appeal, others being cases where a heavier sentence was reduced on appeal. I do not propose to seek to analyse those cases as that would not, I believe, be a profitable task. I share the view of Lord Lane in R -v- Chiu-Au-Yeung [1989] 11 CAR (S) 504 at 505 when he said:

> "We do not altogether find it helpful to refer to other cases in this area, because the range of circumstances, both mental circumstances and physical circumstances, giving rise to the offence are so widely distributed".

There is however in the judgment of Watkins LJ in R -v- Secretary of State for Home Department, Ex Parte Handscomb 86 CAR 59 an interesting paragraph of statistical information. It reads (p.76):

"Records of sentences passed for manslaughter with diminished responsibility from 1971 to 1985 reveal that no determinate sentence in excess of 10 years' imprisonment has been imposed since 1978. Sentences in excess of 10 years were passed in only 8 cases between 1971 and 1978. They represent 0.6 per cent of all sentences, a total of 1,287, passed for this class of crime during the whole period I have referred to".

I am satisfied that today a judge faced with sentencing in a diminished responsibility case would conclude that if a custodial sentence were necessary the range would cover a period of 2 to 8 years with 2 and 3 years being reserved for a few exceptional cases. Just where within that bracket the ultimate sentence would be is very much for the sentencer who has heard the case and is well able to evaluate mitigating factors. As Mr Smith reminded us there were real mitigating factors in this case - namely, the youth of Christie, her general inexperience of life, her previous exemplary character, her service to the country as a member of the UDR over a number of years, her lost career, her genuine remorse, her plea of guilty and the fact that despite her making it at the outset the refusal of the Crown to accept it meant that she had to relive this awful event and have her thoughts and actions minutely examined and criticised.

A component in any consideration of whether a sentence, as also with damages, is too much or too little will always include one's own tentative view of what is appropriate. My own view was that about 7 years was right because there was premeditation, it was an awful killing and there was a cover-up but I accept that the mitigating factors could if I had been trying the case have led to a lesser figure. That said I accept that my view does not determine that the judge's sentence was lenient let alone unduly lenient. I have no doubt that having regard to the existing and known range of cases, the "benchmarks", he could quite justly have decided that 5 years was a proper sentence. That being so it is not for this Court to interfere.

Mr Kerr however seeks to escape from the fact that the sentence does fall within the range of sentences revealed by the authorities to which he referred us by claiming that this case is "unique and exceptional". In answer I would say firstly that every diminished responsibility case is "unique". Secondly, if he is claiming that this case is worse than any reported case I would say that I do not know. I do know what 10 days of evidence revealed about this case. The facts in all the reported cases are compressed into several pages of reports: one cannot get the full flavour of such cases simply by reading the reports. I do not know about the facts of the many cases of diminished responsibility which were neither appealed nor reported. As the judge said at the outset of his charge this was a "vicious and gruesome killing" which could be said about most of the reported cases but to suggest that it is worse than any other case is to make an assumption that I am not prepared to make especially when such an argument only serves to conceal the real issue in the case. That issue is not whether this was a worse killing than other killings but an assessment of the level of residual responsibility of <u>this</u> accused.

In claiming that the true sentence was at least one of 10 years, Mr Kerr is in effect re-writing Lord Lane's approach. He is arguing that even if a sentence falls within an established range of sentences for this type of offence the sentence can be declared unduly lenient if the Attorney General can persuade the Court that the sentence should lie outside the existing range. I cannot accept that proposition. The procedure devised by the 1988 Act, explained and applied in many cases since 1988, does not allow the Court a free hand in reviewing sentences and this is so for the reasons outlined by Lord Lane and applied ever since. To embark on such a course would be unfair to offenders and introduce a novel and in my judgment quite undesirable uncertainty into the sentencing process.

Since coming to a conclusion about the proper outcome of this reference my attention has been drawn to a decision in the Supreme Court for the Northern Territory of Australia - R -v- Jabaltjari [1990] SC (NT) 1. In that jurisdiction the Crown may appeal on the basis that a sentence is "manifestly inadequate". I would conclude this judgment by adopting a passage in the judgment of Asche CJ which is in my opinion equally applicable to a proper exercise of this Court's powers under the 1988 Act. At pages 16 and 17 he said:

"In fixing maximum rather than minimum penalties for various offences the legislature properly recognizes the vast range of criminality involved, extending from the most extenuating circumstances to the most callous and reprehensible actions; and leaves it to the courts to find the punishment to fit the crime. It is not for appeal courts, therefore, to indulge in self-denying ordinances which overly inhibit the broad discretion given by the legislature. That is not to say that appeal courts will not adjust sentences which are out of phase with sentences normally given in similar circumstances. That is to prevent injustice either to the accused or the community caused by a misapplication of the discretion invested in an individual judge or magistrate".

I am aware that I have the misfortune to be of a different mind from my brethren. For my part however I am quite unable to say that the views of the learned and experienced trial judge were so far a deviation from an appropriate sentence that an error in his sentencing discretion has occurred. I am satisfied that the sentence imposed by the learned trial judge cannot be impugned as unduly lenient - he properly imposed a lengthy custodial sentence and that sentence was within that established range of appropriate sentences for cases of diminished responsibility by which this Court has to regulate its views. He may have been lenient: he may have been merciful: but of themselves neither leniency nor mercy is a fault.

Accordingly I would refuse the Attorney General the order which he seeks.

MURRAY LJ

In his judgment the Lord Chief Justice has dealt fully with the facts of this case and with the circumstances in which the sentence of 5 years' imprisonment imposed by the learned trial judge, Kelly LJ, on the defendant, Susan Christie, falls to be reviewed by this Court.

It seems to me that the questions to be considered by the trial judge after a verdict of manslaughter by reason of diminished responsibility are now well established by judicial decision however difficult may be the judge's task in answering them. We are dealing with a case in which the defendant Susan Christie undoubtedly killed young Mrs Penny McAllister when - as the two women were out together for a walk - the defendant attacked Mrs McAllister from behind with a sharpened boning knife and cut her throat. Although this was what the learned trial judge described as a "cruel and vicious killing that has revolted and bewildered the community" Christie succeeded in satisfying a majority of the jurors, on the balance of probabilities, that when she did the ghastly deed she was -

"suffering from mental abnormality induced by disease which substantially impaired her mental responsibility for her acts ... in doing the killing" (see the Criminal Justice Act (Northern Ireland) 1966 ss. 1 and 5).

Dr Brown, one of the two consultant psychiatrists called by the defence, named the disease which at the time afflicted Christie as a "major depressive episode" while the other consultant, Dr Alec Lyons, called it an "acute reaction to stress".

As I read the decided cases the questions which the trial judge must ask himself are these:- (1) Is the defendant's abnormality of mind continuing and is it of such a kind that a hospital order is the appropriate way of dealing with the case. (Under such an order the defendant may, for example, be detained in secure accommodation in a psychiatric institution without limit of time). (2) If a hospital order is not appropriate, will the defendant constitute a danger to the public for an unpredictable time? If so, a sentence of life imprisonment will in all probability be the appropriate sentence. (3) If the case falls neither in category (1) nor category (2) above, was the defendant's responsibility for his acts at the relevant time so grossly impaired that his responsibility for them was minimal? If so, and if there is no danger of a repetition of violence, it is probable that a suitable order will allow the defendant his freedom with, possibly, some supervision. (4) If the case does not fall within any of the above categories was the responsibility of the defendant for his acts at the relevant time more than minimal? If so, the judge should pass a determinate sentence of imprisonment. In this case the learned trial judge, Kelly LJ, (as I have said) passed such a sentence on the defendant viz. 5 years' imprisonment, and neither Counsel for the Attorney General nor for the defence sought in this Court to argue that that course was not the appropriate one. The only question before us is whether the sentence was, as the Attorney General's Counsel argued "unduly lenient" within the meaning of that expression as used in s.36(1) of the Criminal Justice Act, 1988. If it is, then we are empowered by Parliament (but not bound) to

quash it and in its place to pass such sentence as we consider appropriate - being a sentence which the trial judge had power to pass. I note that the Shorter Oxford Dictionary defines "unduly" as follows:

> "Without due cause or justification: unrightfully, undeservedly".

I have said above that the questions which the trial judge must consider in this type of case are well established by judicial decision. Another matter which (it seems to me) is also so established is that where the appropriate sentence is a determinate term of imprisonment, the judge's main task is to consider the extent of the defendant's residual responsibility for his or her crime ie "residual" after there has been taken into account the jury's finding that the defendant's responsibility for that crime was substantially impaired by mental abnormality. Of necessity the judge has to make his own assessment of the extent of that residual responsibility and, in the nature of things, he cannot know in any precise or mathematical way what extent of impairment the jury found to be present and regarded as "substantial". The trial judge must however (as I see it) assume that the impairment found by the jury was not, on the one hand, trivial or minimal or, on the other, total; he must assume it was something in between: see R -v- Lloyd[1967] 1 QB 175.

In reviewing the 5 year sentence under review I refer first of all to the guidance given by the English Court of Appeal in Attorney General's Reference [No.2 of 1989] which has been approved and adopted by this Court. The most relevant passage in the judgment by Lord Lane CJ seems to me to be this:

> "A sentence was unduly lenient, their Lordships would hold, when it fell outside the range of sentencing which the judge applying his mind to all the relevant factors, could reasonably consider appropriate. In this connection, regard had of course to be had to reported cases and in particular to the guidance given by the Court of Appeal from time to time in the so-called 'guideline' cases".

For the defendant in the present case Mr Smith QC argued, inter alia, that in diminished responsibility cases the decided cases indicate a range of sentences from 2 to 8 years, and since the trial judge in this case imposed a sentence of 5 years it could not be said that that sentence fell outside the appropriate range. In my view this argument contains two fallacies viz. (i) that there is the 2 to 8 year range to which Mr Smith referred and (ii) that the lowest and highest recorded sentences provide an acceptable range for testing the sentence in question by the use of Lord Lane's test. It is true that the actual decisions in the United Kingdom within recent years do happen to fall within the period of 2 to 8 years but this is a very different situation from one in which the Court of Appeal has, for example, laid down "guidelines" or a tariff in relation to the particular offence with which the trial judge is dealing. In my view it is not correct to say that for diminished responsibility manslaughter there is an accepted range of 2 to 8 years. In the first place, manslaughter "ranges in its gravity from the borders of murder right down to those

of accidental death" - see R -v- Walker [1992] 13 CAR (S) 474 at 476 - and, accordingly, the possible sentence for any particular manslaughter varies from a life sentence at one extreme to a non-custodial sentence at the other. Secondly, even in the limited sphere of diminished responsibility manslaughter the English Court of Appeal in R -v- Woolleston [1986] 8 CAR (S) 360 at 364, contemplated that a life sentence might be the appropriate sentence. Again, I note that in R -v- Chambers [1983] 5 CAR (S) 190 at p.195 the English Court of Appeal expressly rejected the submission that a sentence of 10 years' imprisonment was more than the "accepted maximum" in a case of diminished responsibility. Finally, I note from the statistics produced in the judgment of Watkins LJ in R -v- Secretary of State for the Home Department, Ex Parte. Handscomb 86 CAR S9 (cited by MacDermott LJ in his dissenting judgment in this case) sentences in excess of 10 years were imposed in 8 pre-1979 cases, though such cases were a small proportion of the total number of relevant cases. It therefore seems to me to be correct to say that at the present time a sentence for the offence can certainly run from 2 to 10 years. However, such a wide range does not seem to me to be a useful or workable guide for a trial judge in deciding upon the appropriate sentence in a particular case. My view is that there could reasonably be said to be two possible ranges, viz. a lower range of up to 5 years and a higher range of 6 to 10 years. Of course whatever the test proposed or applied one must always go back to the crucial statutory words and ask the question -

"Is the sentence of 5 years unduly lenient?"

ie without due cause, or undeservedly lenient.

At this point I turn to some words used by Lord Lane in another diminished responsibility case, viz. R -v- Chiu-Au-Yeung [1989] 11 CAR (S) 502 at 504:

"The problem which faces a judge in these circumstances is one of the most difficult which occurs in the always difficult problem of sentencing. There are two problems to which he has to address his mind: first of all to what extent was the appellant's responsibility diminished? Secondly, to what extent does the public require protection from this man, as against the day when he is released from prison?"

In this case it is not suggested that the defendant is now or will in the future be a danger to the public. Accordingly one then asks oneself the question -

"Is 5 years an unduly lenient sentence regard being had to Christie's residual responsibility for her act in killing Mrs McAllister?"

It seems to me that the question must be approached upon the basis that Christie knew the nature of the act which she did when she killed Mrs McAllister and also knew that that act was morally wrong. I can see nothing in the evidence of Dr

Brown or Dr Lyons to suggest the contrary of either of these important propositions and, moreover, her actions in attempting to cover-up her crime point unmistakably to those propositions of fact being correct. I accept that because of the disease which caused her abnormality of mind her willpower to control her actions was impaired to what, I must assume, was a substantial extent.

In my judgment the following pointers are important in assessing her residual responsibility for her crime:-

(a) the extent of her preparation for and premeditation of the crime, including the acquisition and sharpening of the knife: most certainly this was no killing in a sudden explosion of uncontrollable feeling or emotion;

(b) the elaborate cover-up of her crime, including the knife wounds inflicted upon herself immediately after the cutting of her victim's throat and her lying story to the police about the non-existent attacker (whose face she would "never forget") - no question here of a rush of anguish or remorse following the terrible deed and an immediate confession;

(c) the obvious and (in her eyes) the great advantage to herself flowing from the crime, viz. The removal of her rival from Captain McAllister's affections - and moreover a rival who while alive meant the end of her own hopes;

(d) the complete absence from her history of any mental illness of any kind, and her level of intelligence which was such as to make her a possible candidate for commissioned rank;

(e) her clear admission that jealousy of Mrs McAllister's superior position in McAllister's affections played a part in her decision to kill Mrs McAllister.

I have great difficulty in accepting the defence submission, based upon some parts of a psychiatrist's evidence, that the scheme to remove Mrs McAllister was irrational in that it was doomed to failure, or, to put it another way, that the hope on her part of getting McAllister for herself if Mrs McAllister were killed was never a realistic one. I cannot agree. As we know from the consultants' evidence, she was intensely infatuated with McAllister and was admittedly jealous of his wife whom he had firmly declared he would never leave. I do not at all exclude as a reasonable possibility that that young woman in that situation had a real hope that in some way and at some time her desperate plan to kill Mrs McAllister would gain for her her heart's desire. At such a time would the skills of the forensic scientist and the attendant risks of her being found out have played much part in her thinking? In my judgment they would not.

To my mind the killing of young Mrs McAllister by Susan Christie was an indescribably wicked and evil deed prompted not by any grievance, real or

imaginary, which she felt against her victim, nor by any hatred towards or even dislike of her victim but by the jealousy which she allowed to find entrance to her heart and mind.

In the result I assess as really considerable her residual responsibility for her appalling crime, a crime which cut down in its prime a young, happy and vigorous life, caused deep and lasting pain to those who have been bereaved and (I believe) shocked to the core the whole community. In this situation the mitigating factors put forward on her behalf, including her age (23) and her clear record, cannot have any appreciable effect. It is my judgment, therefore, that Susan Christie must be severely punished and I turn now to that punishment .....

I agree with Mr Kerr's submission that the facts in the present case are worse than any of those outlined above. To my mind the appropriate range of sentence is what I have referred to as the higher range viz. 6-10 years. It follows that, in my judgment, the sentence of 5 years imposed by the learned trial judge fell outside the range which could reasonably have been considered appropriate and was unduly lenient. Moreover, in my judgment it is a case in which this Court should quash the unduly lenient sentence and in its place impose the sentence which it considers appropriate. My view is that that sentence is one of 10 years' imprisonment but since the defendant has had to face the ordeal of a second set of proceedings I would follow the merciful practice now often adopted of taking that fact into account and making some reduction for it. In the result I would substitute a sentence of 9 years' imprisonment.