Case No: 2006/00607 A5 & 2006/00608 A5

Neutral Citation Number: [2006] EWCA Crim 1335
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM ST ALBANS CROWN COURT
HHJ BAKER QC
2005 7241 & 2005 7308

Royal Courts of Justice
Strand, London, WC2A 2LL

8 June 2006

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE HENRIQUES
MR JUSTICE RODERICK EVANS
and
MR JUSTICE FULFORD

- -

Between :

ATTORNEY GENERAL'S REFERENCE (NO 14 AND NO 15 OF 2006) (TANYA FRENCH & ALAN WEBSTER)

- -

(Transcript of the Handed Down Judgment of
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- -

J Stone for the Respondent French
J Foy QC, F Ferguson & E MacLachland for the Respondent Webster
Attorney General (in person) & R Horwell

- -

Judgment
As Approved by the Court

Lord Phillips, CJ :

1. This is a consolidated reference by the Attorney General under section 36 of the Criminal Justice Act 1988. We granted permission to make the reference at the beginning of the hearing, for the reference raises important issues of principle. The Attorney General contends that sentences passed on two co-defendants should be increased on the ground that the sentences were unduly lenient. One is Alan Webster, a man of forty years of age. The other is Tanya French, a woman of 20 years of age, but who was 17 and 18 when the offences for which she was sentenced were committed. The sentences were imposed in the Crown Court at St Albans by His Honour Judge Baker QC on 10 January 2006.

2. Webster was charged on two indictments. French was charged with being party to a number of the counts on the principal indictment. Those counts related to a course of conduct of horrifying depravity in which the offenders used a baby girl, entrusted to the care of French as a baby sitter, as a sex toy. The evidence of, and an element of, this offending consisted of photographs taken by the offenders of their conduct, so that these could be used for further sexual gratification by Webster. The offenders were plainly recognisable in these photographs.

Webster's offences and sentences

3. In relation to offences involving this baby girl, Webster pleaded guilty to four counts of rape, contrary to section 1(1) of the Sexual Offences Act 1956, five counts of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 and three counts of either taking or permitting to be taken, indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978.

4. On the principal indictment Webster alone was charged with a serious indecent assault on a fourteen year old girl, L. He pleaded guilty to this charge.

5. On the second indictment, Webster pleaded guilty to each of seven counts of possession of an indecent photograph of a child contrary to section 160(1) and (3) of the Criminal Justice Act 1988.

6. On each of the counts of rape Webster was sentenced to imprisonment for life, with a minimum term of 6 years, less the 167 days already spent in custody. On each of the counts of indecent assault of the baby he was sentenced to six years imprisonment. On each of the indecent photography counts he was sentenced to four years imprisonment. On the count of indecent assault on the fourteen year old girl, he was sentenced to four years imprisonment. On two of the counts on the second indictment he was sentenced to two years imprisonment, with no separate penalty on the remaining counts. The sentences of imprisonment were ordered to run concurrently with each other and concurrently with the life sentence. Ancillary orders were made in relation to prohibiting working with children and forfeiture of photographs, cameras, computer equipment and other items.

French's offences and sentences

7. French pleaded guilty to one count of rape, four counts of indecent assault and three counts of either making or permitting to be taken indecent photographs of a child.

8. On the count of rape French was given an extended sentence of ten years with a custodial term of five years imprisonment and an extension period of five years. On the counts of indecent assault she was sentenced to three years imprisonment. On each of the counts of indecent photography she was sentenced to two years imprisonment. Each sentence of imprisonment was ordered to run concurrently with the others. The same ancillary orders were made as had been made in the case of Webster.

The facts

9. We will deal first with Webster's indecent assault of L. L was a long-standing friend of French. Through French she came to know Webster. When L was fourteen years old Webster began to kiss her and touch her inside her clothing. On one occasion in 2003 or 2004, when she visited Webster and French's home, she found Webster there, who told her that French was upstairs. They went upstairs to the bedroom, where he announced that he had made a mistake and French was at work. L sat down on the bed, whereupon Webster pulled down her knickers and removed her bra. He kissed her, then pulled her legs apart and licked her vagina, which he penetrated with his tongue and finger. He then suddenly stopped and returned to his computer.

10. In a witness impact statement L said that before the offence she had boyfriends but that since them she could not even be in the same room as her brother. She felt that she could not trust anyone any more. She had difficulty sleeping and experienced nightmares. For nine months she had been on anti-depressants.

11. Next we turn to the second indictment. This consisted of seven counts of offences committed on 25 July 2005. Six related to still images and the seventh to moving images. Webster had some 225,000 images on his computer. 9000 of these were examined by the police. Of these 7,376 were indecent and the subject matter of the seven counts. 918 of these involved penetrative sexual activity between children and adults and 523 involved non penetrative sexual activity between children and adults.

12. Finally, we turn to the joint offending in relation to the baby. The offences came to light when the police raided Webster's home because they had received information that indicated that he had been downloading on his computer indecent images of children. An album of photographs was found that showed acts of abuse being carried out by Webster and French on the baby. Each had taken photographs of the acts of the other. As the photographs recorded, abuse of the baby took place on five separate occasions between 5 February and 8 March 2004.

13. Webster first met French when she was fourteen, but their close relationship began when she was seventeen. She moved into his home. It is clear that he corrupted her, so that she was fully complicit in the offences with which we are concerned, a fact reflected by some of the photographs in which she featured, which gave the impression that she was enjoying the activities in which she was participating.

14. At the time of the offences French was 17 or 18 years old. She had become friendly with the baby's mother, who lived by herself with the baby and a seven year old son. French used to baby sit and on occasions the mother permitted French to take the baby to Webster's home to look after her there. This enabled Webster and French to plan the offences that they carried out on the baby.

15. On the first four of the five occasions that were photographed, Webster was shown in the act of raping the baby. This involved the insertion of the end of Webster's erect penis in the baby's vagina. One photograph showed almost the entire head or glans inserted in the baby's vagina, clearly stretching it. A subsequent medical examination of the baby revealed that her fourchette was scarred and thickened, which was consistent with this abuse. The depth of penetration was not such as to cause internal injury and, although some of the photographs showed that the baby was distressed, no injuries were noticed by her mother. Apart from raping the baby on four occasions, Webster was also shown inserting his penis in the baby's mouth, or placing it in the vicinity of the mouth. One photograph depicted semen around the baby's mouth. Webster was also shown licking the baby's vagina, inserting his tongue in the vagina, kissing the baby's mouth and inserting his tongue into her mouth and licking and kissing the baby's nipples.

16. Apart from taking photographs of Webster's activities, French assisted with them, as demonstrated by photographs taken by Webster. On one occasion when Webster was raping the baby, she was holding a feeding bottle to her mouth. Another image showed her holding Webster's penis as it penetrated the baby's vagina. Webster photographed her licking the baby's vagina, or inserting her tongue into the vagina, touching the vagina, kissing the baby's mouth and holding the baby for the purpose of having indecent photographs taken.

17. Evidence of Mr Dominic Croft, a consultant community paediatrician was adduced in relation to whether, and if so what, long term psychiatric effect the offenders' treatment was likely to have on the baby. Mr Croft was unable to speak about this from his own experience. He stated that while some of his colleagues considered that the baby would not suffer any lasting ill effects as the result of her treatment, he had been informed by another consultant paediatrician that there was 'a general belief' that babies who are abused very early in life acquire a sort of 'bodily memory' of the abuse. This evidence did not establish more than a possibility that the baby's treatment will result in long term psychiatric damage, but there is a risk of this and it should have been apparent to the offenders that there was a risk that they might cause the baby long lasting psychiatric injury.

18. There is an obvious possibility that, when she grows up, the baby will discover from someone what was done to her in the early months of her life and that this may cause her psychiatric harm.

19. In a witness impact statement the baby's mother spoke of the acute distress that she experienced as a result of being told by the police what had been done to her baby daughter. She described the occasion when she learnt this as the worst night of her life, worse even than an occasion some years earlier when she was the victim of rape. We have well in mind the effect on the mother of learning of the offences.

Guilty pleas

20. When interviewed by the police, Webster frankly admitted all his offences subject to the fact that he would not accept that he penetrated the baby. Mr Ferguson, his counsel, submitted to the judge that he was only intending to deny that full penetration had occurred. The judge appears to have accepted this, for he indicated that he did not consider that this denial significantly detracted from Webster's

frankness at interview. He entered pleas of guilty at the first opportunity when brought before the court for a preliminary hearing.

21. French was less frank. She remained silent at interview but read out a written statement, parts of which were demonstrably untrue. She did, however, plead guilty to the offences for which she was sentenced when brought before the court for a preliminary hearing.

The judge's sentencing remarks

22. In addressing Webster, the judge started by shortly, but accurately, summarising the offences that related to the baby, commenting that there were no words to express the horror that such offending generates, but that expressions of horror and disgust were not necessary, for the acts spoke for themselves. He said that the corruption of French was an aggravating factor. He then shortly summarised the other offences for which he had to sentence Webster. He found that there was a risk, but no certainty, that the baby would suffer long term psychiatric consequences and referred to the distress of the baby's family and of the fourteen year old girl whom Webster had assaulted. He held that Webster would remain a serious danger to the public for a period that could not be reliably estimated and that, so far as the rape offences were concerned, the criteria for passing a life sentence were justified.

23. When considering the minimum term which Webster should serve before being considered for parole, the judge had regard to all the offences to which Webster had pleaded guilty. He commented that the offending was in some respects beyond any envisaged by the guideline authorities, and that the rape offences were greatly aggravated by the assault on the 14 year old and the photography offences which, given the life sentence, all attracted concurrent sentences. The judge adopted the appropriate approach to determining the minimum term, namely to state the determinate sentence that he would have passed if not imposing a life sentence, and then to halve this. He stated that he would have imposed a determinate sentence of 18 years imprisonment. He commented, however, that the Sentencing Guidelines produced by the Sentencing Guidelines Council "effectively require me to deduct one third from the 18 years", so that the 18 years fell to be reduced to 12 years. The judge accordingly directed that Webster should serve a minimum term of half this figure, that is six years, less 167 days already spent in custody, before his case would be referred to the parole board for consideration of early release.

24. The judge imposed the concurrent sentences that we set out at the start of this judgment.

25. Turning to French, the judge observed that her counsel accepted that, far from being an unwilling participant in the offences, French had keenly looked forward to them. Her offences were particularly aggravated by breach of trust. There was, however, a real difference between her case and Webster's in that she had been corrupted by Webster and was only aged 17 or 18 when the offences were committed. An extended sentence was necessary to prevent re-offending and secure rehabilitation. Five years detention was imposed, with an extended licence period of five years to follow, extending the total sentence period to ten years. The judge made it plain that this sentence gave a full discount for French's pleas of guilty. Concurrent sentences were passed as set out in the start of this judgment.

The challenge to the sentences

26. The Attorney General advanced two submissions in relation to each of the offenders: (1) the starting point in the case of each sentence was too low; (2) a discount of one third for the guilty plea in each case was excessive. We shall deal with each point in turn.

The starting points

27. The Attorney General submitted that the horrific nature of the depravity demonstrated in this case was virtually without precedent. There had been an outcry against the sentences in the media. While it was not right that sentences should be influenced by media pressure, in this case that pressure reflected public outrage at the sentences. Sentences should properly reflect public feeling and the public feeling in this case called for significantly heavier sentences than those imposed. It was unacceptable that Webster might be out of prison after only six years. The judge had not reflected in his sentence the serious nature of the other offences for which he had been convicted.

28. French's starting point before the reduction for the guilty plea must have been 8 years. That starting point was also unduly lenient, having regard to the depraved nature of her offending.

29. Counsel for the offenders urged that there were mitigating factors other than the guilty pleas. The physical injury to the baby had not been significant. There was a good prospect that she would suffer no lasting psychiatric injury. The offenders had desisted from their abuse of their own accord well before they were apprehended. Mr Stone on behalf of French urged that she had been corrupted by an older man and had shown remorse for her offending.

30. We shall deal first with Webster. We should say at the outset that the suggestion, widely made by the media, that Webster would, as a result of the judge's sentence, 'walk free' after six years was a distortion of reality. Webster was given a life sentence. That sentence means that he will remain in prison unless and until the Parole Board is satisfied that he no longer poses a danger to the public. The evidence in this case shows that he is so deeply steeped in sexual depravity that it is questionable whether that day will ever be reached. The law required, however, that the judge should state the minimum period to be served by Webster before the question of his release could even be considered by the Parole Board. The length of that term was required to reflect the requirements of punishment and deterrence. It is the length of that term which the Attorney General challenges. It is not to be inferred from that challenge that Webster will be released at the end of that minimum term.

31. The first issue raised by the Attorney General is whether the notional starting point adopted by the judge of a term of imprisonment of 18 years was unduly lenient. This submission falls to be considered in the light of the guidance given by the decision of this court in *R v Millberry* [2002] EWCA Crim 2891; [2003] 1 Cr App R 396. The court there considered three appeals by defendants convicted of rape and, in so doing, gave general guidance based on the advice given by the Sentencing Advisory Panel on May 24 2002. Guidelines in relation to sexual offences are currently in the course of preparation by the Sentencing Guidelines Council but, until they are published,

Millberry is the authority to which one must look for assistance when sentencing for rape.

32. The court accepted the following recommendations as to the starting point for sentencing for convictions for rape after a contested trial:

    a) five years for a single offence of rape on an adult victim without any aggravating features;

    b) eight years for rape accompanied by specified aggravating factors, which include rape in breach of trust and rape of a child or a person especially vulnerable;

    c) fifteen years and upwards for a 'campaign of rape', whether involving multiple victims of repeated rape of the same victim over a period of time.

    d) life imprisonment where the defendant has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time.

33. The court emphasised that the guidelines should not be applied mechanistically. The court had to stand back and look at the circumstances as whole and impose the appropriate sentence having regard to these. That emphasis is particularly appropriate in the present case. As the judge remarked, and the Attorney General submitted, the offending in this case goes beyond that envisaged by the guideline authorities. It combines the aggravating features of repeated rape of a victim over a period of time, breach of trust, and rape of the most vulnerable victim possible – a tiny baby. It was this last feature which produced the understandable and justifiable public revulsion. We agree with the Attorney General that it is right to treat this last feature as an additional aggravating factor.

34. In our judgment, the extraordinary and abhorrent features of the treatment of this victim called, in the case of Webster, for a starting point longer than eighteen years. Further aggravating features affecting the starting point were those giving rise to the concurrent sentences for the indecent assault on a fourteen year old girl and the downloading and storing indecent photographs, many of which had involved rape or serious sexual abuse of children. These were very serious offences in their own right.

35. Having regard to all these matters, we consider that the appropriate starting point that should have been adopted in the case of Webster was 24 years. The adoption of a starting point of only 18 years had the effect that the sentence in the case of Webster was unduly lenient.

36. Does it follow that the starting point in the case of French was also too low to the extent that her sentence also was unduly lenient? That starting point was eight years. Mr Stone drew our attention to a precedent that involved offences similar to those with which we are concerned. There seems to be only one such precedent. *Attorney General's Reference No 12 of 2001(Joyce)* [2002] EWCA Crim 2332; [2002] 2 Cr App R (S) 84 involved a 49 year old woman who had been convicted, the jury having rejected her plea of duress, of being party to the rape by her partner of a five month

old baby girl who had been entrusted to her as a baby sitter. She had pleaded guilty to being party to taking indecent photographs of this activity. One of these photographs showed her with her tongue extended towards the baby's vagina. She was sentenced to 4 years imprisonment. Her partner had been given a life sentence with a minimum term of 5 ½ years, which had not been challenged by the Attorney General. This court held that the sentence imposed on the offender had been lenient. Five, or even six, years imprisonment might have been expected, but having regard to double jeopardy and to the fact that the offender had been doing extremely well in prison, the court decided not to interfere. Thus in that case this court thought it appropriate that the offender's sentence should be about half that of her partner, who actually committed the rape.

37. In *Millberry*, this court endorsed the advice of the panel that sentences should be significantly shorter for young offenders. French was 17 or 18 when the offences to which she was party were committed. She had been corrupted by Webster. Mr Stone was able to advance some personal mitigation in that psychiatric evidence showed that she was well below the average range of mental ability and had a high propensity toward suggestibility, so that she was particularly susceptible to Webster's malign influence. Furthermore, she was having a very hard time in prison as a consequence of her treatment by other inmates. Finally, of course, she was not party to the indecent assault on the 14 year old, or the downloading of pornography, which aggravated Webster's offending.

38. Our conclusion is that the judge was justified in imposing a very much lower sentence in the case of French than the notional determinate sentence that formed the basis for Webster's minimum term. We have found the latter significantly too lenient, but we do not consider that an eight year starting point in the case of French fell outside the range that was properly open to the judge.

The reductions for guilty pleas

39. The practice of making a reduction in sentence where a defendant has entered a plea of guilty is judge made. It has received, however, statutory recognition. Thus section 144 of the Criminal Justice Act 2003 provides:

> "Reduction in sentences for guilty pleas
>
> 144. (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account –
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given."

40. On 10 January 2005 the Sentencing Guidelines Council issued a definitive guideline in relation to 'Reduction in Sentence for a Guilty Plea'. The foreword to the guideline states that it will apply to all criminal cases where a determinate sentence is imposed or a minimum term fixed after imposing life imprisonment for an offence other than murder. Special guidance is provided in respect of the offence of murder.

41. The guideline gives the following guidance in relation to the purpose of the reduction:

> "2.1 A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence.
>
> 2.2 It is a separate issue from aggravation and mitigation generally.
>
> 2.3 The sentencer should address the issue of remorse, together with any other mitigating features present, such as admissions to the police in interview, separately, when deciding the most appropriate length of sentence *before* calculating the reduction for the guilty plea."

42. The guideline gives the following guidance in relation to determining the level of reduction:

> "**D. Determining the Level of Reduction**
>
> 4.1 The level of reduction should be a proportion of the total sentence imposed, with the proportion based upon the stage in the proceedings at which the guilty plea was entered.
>
> 4.2 Save where section 152(3) of the 2000 Act (section 144(2) of the 2003 Act) applies, the level of the reduction will be gauged on a sliding scale ranging from a maximum of one third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which sentence is being imposed), reducing to a maximum of one quarter (where a trial date has been set) and to a maximum of one tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).
>
> 4.3 The level of reduction should reflect the stage at which the offender indicated a willingness to admit guilt to the offence for which he is eventually sentenced.
>
> (i) The maximum reduction will be given only where the offender indicated willingness to admit guilt at the **first reasonable opportunity**. When this occurs will vary from case to case. *See Annex 2 for illustrative examples*.
>
> (ii) Where the admission of guilt comes later than the first reasonable opportunity, the reduction for guilty plea will be less than one third.
>
> (iii) Where the plea of guilty comes very late, it is still appropriate to give some reduction.

(iv) If after pleading guilty there is a Newton hearing and the offender's version of the circumstances of the offence is rejected, this should be taken into account in determining the level of reduction.

(v) If the not guilty plea was entered and maintained for tactical reasons (such as to retain privileges whilst on remand), a late guilty plea should attract very little, if any, discount."

43. The following provision of the guideline is of particular relevance in the circumstances of this case :

"**Where an offender is caught 'red-handed'**

5.2 Since the purpose of giving credit is to encourage those who are guilty to plead at the earliest opportunity, there is no reason why credit should be withheld or reduced on these grounds alone. The normal sliding scale should apply."

44. Annex 2 to the guideline gives guidance on the question of when a defendant has the first reasonable opportunity to plead guilty:

"1. The critical time for determining the maximum reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity will vary with a wide range of factors and the Court will need to make a judgment on the particular facts of the case before it.

2. The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea both for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases.

3. This Annex seeks to help the Courts to adopt a consistent approach by giving examples of circumstances where a determination will have to be made.

a) the first reasonable opportunity may be the first time that a defendant appears before the court and has the opportunity to plead guilty.

b) but the court may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps whilst under interview.

***Note**: For a) and b) to apply, the Court will need to be satisfied that the defendant (and any legal adviser) would have had sufficient information about the allegations."*

45. Section 172 of the Criminal Justice Act requires the court in sentencing an offender to 'have regard to' any definitive guidelines which are relevant to the offender's case. The judge considered that this duty required him, on the facts of this case, to accord to each offender a reduction in sentence of one third to reflect the entry of a guilty plea. In the case of Webster the reduction fell to be applied to the minimum term.

46. The Attorney General submitted that the judge should not have made as great a reduction as one third. He made no attack upon the guideline itself, but submitted that application of the guideline to the facts of this case should have resulted in a lesser reduction than one third. His submissions on this point can be summarised as follows:

    i) The offenders had no alternative but to plead guilty on the facts of this case. It follows that the maximum reduction of one third should not have been given.

    ii) Each offender should have intimated a guilty plea when interviewed by the police and before appearing before the court. This was a further reason for not according the maximum reduction of one third.

    iii) The special provisions of the guideline in respect of murder indicate, inferentially, that in respect of other serious offences the sentencing judge should not permit the reduction to be disproportionate to the circumstances.

    We will deal with each submission in turn.

47. There is a degree of conflict between paragraph 2.3 of the guideline and 3 (b) of Annex 2. What is clear, however, is that it is for the judge to determine when, having regard to the circumstances of the particular case, the first reasonable opportunity for pleading guilty arose. The judge decided that each offender had pleaded guilty at the first reasonable opportunity. The Attorney General has not demonstrated that he erred in so holding.

48. The Attorney General sought to draw a distinction between the facts of this case and the situation in which a defendant is 'caught red-handed'. He submitted that the photographs that the offenders had taken of their abuse of the baby proved their guilt so conclusively that they had no alternative but to plead guilty. In such circumstances it was inappropriate to grant them a reduction in penalty of a full third.

49. We were not persuaded by this argument. The guideline expressly states that credit should not be withheld *or reduced* where the offender is caught 'red-handed' because the purpose of giving credit is to encourage those who are guilty to plead at the earliest opportunity. We consider that the principle expressed by this provision applies to any situation in which the case against a defendant is so strong that acquittal is virtually inconceivable. In the present case the offenders might have chosen to decline to plead guilty until the eve of their trial in order to serve as much of their inevitable sentences under the conditions of remand prisoners. Indeed, despite the evidence that suggested that she was a willing participant, French might have run the defence of duress. A probation report prepared for this court states that she has claimed that Webster would threaten her with a knife, coercing her to perform certain acts on the baby.

50. The guidelines clearly indicate that the credit for a guilty plea should not be reduced simply on account of the strength of the case against a defendant. In *R v Oosthuizen* [2005] EWCA Crim 1978 a robber who had been caught red-handed by a police officer, running away from the victim from whom he had snatched a hand-bag. He admitted his guilt in interview and pleaded guilty at the first opportunity. The sentencing judge declined to give him full credit for his plea, citing the decision of this court in *R v Greenland*[2002] EWCA Crim 1748 where the court held:

> "…he is not entitled to the full credit that he would have had had the evidence against him not been so overwhelming and had he not been caught red-handed."

On appeal the Vice President, Rose LJ, when giving the judgment of the court, drew attention to the provision of the guideline as to the effect of being caught red-handed and to section 172 of the 2003 Act. He also drew attention to dicta which state that the guidelines do not have to be followed; they are guidelines, no more, no less. He then remarked that, had the guideline been drawn to the attention of the judge, he would probably not have reduced the defendant's discount because he was caught red-handed and that *Greenland* should no longer be regarded as authoritative.

51. This issue was considered by this court, again presided over by the Vice President, in *R v Gisbourne* [2005] EWCA Crim 2491. An animal rights activist had pleaded guilty to conspiracy to damage property but had not received full credit for her plea. The court held that she should have received full credit. Although the case against the defendant was 'utterly overwhelming' the court held that 'the strength of the prosecution case should not, in itself, be regarded as a reason for reducing the discount otherwise appropriate for a prompt plea of guilty'.

52. Guidelines do no more than provide guidance. There may well be circumstances which justify awarding less than a discount of one third where a plea of guilty has been made at the first opportunity. The guideline itself, in 4.3, spells out some such circumstances. We have difficulty, however, in seeing how section 172 of the 2003 Act can be said to be complied with if a judge deliberately or inadvertently flouts the guideline by granting less than a full discount *on the sole ground* of the strength of the case against a defendant. Accordingly we do not consider that this criticism by the Attorney General of the sentences imposed is justified.

53. We turn to the third point made by the Attorney General, namely that the provisions of the guideline in relation to murder exemplify a principle that, where a heavy sentence is imposed for a serious offence, a discount of the full third should not be granted because this would be disproportionate. The guideline indicates that, in the case of murder, a discount should never exceed one sixth of the minimum term or five years, whichever is the longer. The guideline states, however, that this guidance applies only to murder because of 'the special characteristic of the offence of murder and the unique statutory provision of starting points' under schedule 21 of the 2003 Act. The guideline further states that its general provisions are to apply to all offences where a minimum term is fixed after imposing life imprisonment for an offence other than murder. For these reasons we cannot accept that the special provisions for murder exemplify the principle for which the Attorney General contends.

54. There is a further reason why it would not be just to reduce Webster's discount in order to reflect the strength of the case against him. When being interviewed by the Hertfordshire constabulary, according to the practice then prevailing in that district, he was shown a notice that stated that if he admitted guilt at that interview, which was the first reasonable opportunity, he would receive a maximum reduction of sentence of one third. He confirmed in answer to questions that he understood this to be the position and then went on to admit his participation in the offences. In such circumstances, it is at least arguable that to refuse him the discount would be unfair because of a conflict with his legitimate expectation and would conflict with his right to a fair trial.

55. For these reasons we have concluded that it would not be right to reduce the discount that Webster and French should receive for their guilty pleas below one third.

56. This conclusion should not be taken as rejection of the suggestion that it is not satisfactory to award a discount of as much as one third where the case against a defendant is overwhelming or where the sentence is so long that the effect of such a discount might appear disproportionate. We believe, however, that these arguments of principle received detailed consideration by the Panel and the Council when the guideline was formulated. We are aware that many judges are not happy with aspects of the guideline and that it is one that the Council is likely to reconsider. The Council should treat this as a matter of urgency.

Double jeopardy

57. Our conclusions thus far would lead us to increase Webster's minimum term to one of eight years, being half of a notional determinative sentence of 24 years, discounted to 16 years for his guilty plea. The question then arises of whether we should make a further reduction of this minimum term to reflect the fact that he has been subject to 'double jeopardy'. The procedure whereby the Attorney General can seek to refer a sentence for reconsideration by the Court of Appeal on the ground that it is unduly lenient was introduced by section 36 of the Criminal Justice Act 1988. Almost from the start it has been the practice of the court, when considering whether to substitute a heavier sentence and, if so, the length of such sentence, to have regard to the fact that the procedure subjects the defendant to anxiety which should normally be reflected by some discount in the sentence which would otherwise be imposed. This consideration has been described as 'double jeopardy'. In rare cases double jeopardy has been instrumental in leading the court to decide not to alter the sentence. Thus in *Joyce* the court had regard to double jeopardy in deciding not to interfere with the sentence 'even on the assumption that it can properly be described as unduly lenient'.

58. The Attorney General has submitted that the principle of double jeopardy should have no application to a minimum term set within a life sentence and no, or very limited, application to significant sentences of imprisonment. He has further submitted that the principle of double jeopardy must not have the effect of requiring the Court of Appeal to substitute a sentence which is itself unduly lenient.

59. A revised skeleton argument on behalf of the Attorney General, prepared by Mr Richard Horwell, includes a most helpful analysis of the authorities dealing with double jeopardy. The principle is recognised not only in this jurisdiction but in a number of other common law jurisdictions where the prosecution enjoys a right to

appeal against sentence. In this jurisdiction the practice of giving a discount from what would otherwise be the appropriate sentence to reflect double jeopardy is well established where this court increases a sentence on a reference by the Attorney General. The range of discount is wide, generally lying between 12% and 30%.

60. Having regard to double jeopardy is but one aspect of the task of this court when considering, in the exercise of its discretion, whether and how to intervene where an unduly lenient sentence has been imposed. Where a defendant has had no responsibility for the fact that he has been given a sentence which is unduly lenient, we consider that it accords with justice that, when substituting a weightier sentence, this court should have some regard to the distress and anxiety experienced by the defendant as a consequence of having his sentence re-opened and increased. The degree of distress and anxiety and thus the size of the discount will depend on the facts of the particular case.

61. The distress and anxiety is likely to be particularly great where the decision of this court results in a defendant being placed in prison where originally no custodial sentence was employed, where a custodial sentence has been completed, where the defendant is young and immature or where the defendant was about to be discharged from prison. In all of these cases the distress and anxiety caused by the double jeopardy is likely to be significant when weighed against the original offending. The authorities show that in such circumstances discounts for double jeopardy tend to be granted that are near the upper end of the range.

62. Where a defendant's offence was so serious that he still has a lengthy period of imprisonment to serve at the time of the Attorney General's reference, any distress and anxiety at the prospect of the sentence being increased will be much less significant. We do not accept the Attorney General's extreme submission that there is no place for consideration of double jeopardy in such circumstances. So to hold would constitute an unwarranted interference with the discretion of the court when determining a sentence. We agree, however, that in such circumstances the principle is of limited application and that there will be occasions where a judge can properly decline to make any discount for double jeopardy.

63. The same is true where the Attorney General's reference relates to the length of a minimum term set within a discretionary life sentence. Section 272 of the 2003 Act expressly precludes the court from having regard to double jeopardy when reviewing the minimum term under a mandatory life sentence. Parliament left it open to the court to allow for double jeopardy when reviewing the minimum term under a discretionary life sentence. Whether or not an allowance should be made in those circumstances must depend upon the facts of the particular case. This court has said that in those circumstances some discount should be made for the element of double jeopardy but not as much as where the overall total sentence was affected by the decision of the court – *Att. Gen.'s Ref. No. 6 of 2001* [2001] 1 Cr App (S) 72 at 76. This should not, however, be read as saying that a discount must always be made, regardless of the particular facts.

64. On the facts of this case we have decided that it would not be appropriate to make a discount from Webster's minimum term to reflect double jeopardy. The one third discount that we have ruled should be made on account of his guilty plea does not reflect personal mitigation. It is made for pragmatic reasons in the overall interests of

the administration of criminal justice. Because the starting point was so high, it has drastically reduced his minimum term. That minimum term is no guide to the length of time that Webster will in fact remain in prison under his life sentence. In the circumstances of this case, we do not consider that double jeopardy carries any significant weight. The interests of justice would not be advanced by making any further reduction to Webster's minimum term.

65. For the reasons that we have given, French's sentence will stand but the minimum term to be served by Webster before any consideration for early release will be increased from six years to eight years, with allowance made, as directed by the judge, for the time served on remand. We would emphasise once again that this does not mean that Webster will be released at the expiry of this term.