APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 6
HCA/2024/23/XC and
HCA/2024/220/XC

Lord Justice General
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION AND SENTENCE

by

(First) ANDREW KELLY and (Second) DONNA BRAND

Appellants

against

HIS MAJESTY'S ADVOCATE

Respondent

First Appellant: Jackson KC, Henry; Paterson Bell (for Clyde Defence Lawyers Ltd, Dumbarton)
Second Appellant: A Ogg (sol adv); Paterson Bell (for Adairs, Dumbarton)
Respondent: A Prentice KC (sol adv) AD, Irvine AD (sol adv); the Crown Agent

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15 January 2025

Introduction

[1] On 14 December 2023, in the High Court at Glasgow, Robert O'Brien, Andrew Kelly and Donna Brand were convicted of the murder of Caroline Glachan on 25 August 1996. The deceased was attacked near a bridge over the River Leven between Bonhill and Renton. She

suffered multiple injuries, lost consciousness, fell into the river and drowned. The convictions of Mr O'Brien and the appellant Brand were aggravated by previously evincing malice and ill will toward the deceased. All three were sentenced to life imprisonment. As the principal actor, Mr O'Brien received a punishment part of 22 years. The appellants Kelly and Brand received ones of 18 years and 17 years respectively.

[2] An application by Mr O'Brien for leave to appeal was refused. The appellant Kelly appeals against conviction only. The appellant Brand appeals against both conviction and sentence. The appeals against conviction, in essence, found upon there being insufficient evidence for convictions on the basis of art and part liability (concert).

The evidence

The events before the murder

[3] At the time of her death, the deceased was only 14 years old. Despite her age, she was having a sexual relationship with Mr O'Brien, who was aged 18. He was, at the same time, in a relationship with the appellant Brand. Joanne Menzies spoke to the deceased, her best friend, reporting that Mr O'Brien had told her he would kill her if she kissed someone else. Ms Menzies also described stopping Mr O'Brien from attacking the deceased on numerous occasions.

[4] Two weeks prior to her death, the deceased had a positive pregnancy test, although no pregnancy was reported on post mortem examination. The deceased told a friend, Tracey McFetridge, that she thought that Mr O'Brien was the father. The appellant Brand was aware that the deceased had been seeing Mr O'Brien. She was unhappy about this. She told Ms McFetridge and the appellant Kelly's girlfriend, Sarah Jayne O'Neill, that she was "going to batter" the deceased. Ms O'Neill died in 2019, long before the trial.

[5] On Friday, 23 August 1996, the deceased told her cousin, Derek Hunter, that she had written a letter to Mr O'Brien asking him to stay overnight at her house on the Saturday. Her mother, Margaret McKeitch, had earlier found a similar letter. Mrs McKeitch was concerned about the relationship between her daughter and Mr O'Brien, having been told by her daughter that Mr O'Brien had assaulted her. The deceased had been infatuated with Mr O'Brien. She had also been introduced to heroin.

[6] On the Saturday, Joanne Menzies, had been invited to stay overnight at the deceased's house. Ms Menzies was aware that the deceased wanted to meet Mr O'Brien that night. According to Ms Menzies, the deceased set off to do so at about 11.30pm. The deceased was seen by Alison Curley at the Ladyton Shopping Centre in Bonhill, on her way to meet Mr O'Neil at the Dillichip (known as the Black) Bridge. She timed this at around 10.30pm. Ms Curley and James Doherty met the deceased a short time later and walked with her on the Bonhill side of the Bridge. They turned right across the Bridge and the deceased turned left down to the towpath which runs alongside the river. Ms Curley had seen a figure on the towpath. Mr Doherty offered to accompany the deceased along the towpath, but she declined, saying that she would be fine "because he's there". They passed a taxi. William Gardiner, the taxi driver, saw the deceased in the beam of his headlights. She was walking towards the Bridge shortly after midnight.

[7] Meantime, at about 6pm on the Saturday, Mr Kelly and his girlfriend, Ms O'Neill, were babysitting for Elizabeth (Betty) Wilson at a flat in Allan Crescent, Renton. The two children were Archie, aged 4½, and James, who was still an infant. Mrs Wilson left shortly after the babysitters arrived. The appellant Brand and Mr O'Brien visited the flat. An upstairs neighbour, Linda Dorrian, saw the four adults leaving the house together with the two children sometime before midnight. At about 12.30am Sharon Gorman went to Mrs

Wilson's door, ostensibly to collect a music tape. The lights were on, but nobody answered. In due course, when the three accused were interviewed by the police, they accepted that they had been at the house but denied that they had left. Mr O'Brien gave evidence to the same effect. These accounts were clearly rejected by the jury. It meant that none of the accused was able to describe what happened and, in particular, what part each of them played shortly thereafter when the deceased was attacked.

The murder

[8] The only eye-witness who spoke to the attack on the deceased was the then 4½ year old Archie Wilson. He was deemed unfit to give evidence at the trial. He suffered from low intellectual functioning, several mental disorders and memory loss as a result of alcohol abuse. His statements were admitted as hearsay under section 259 of the Criminal Procedure (Scotland) Act 1995.

[9] At about 10 or 11am on the Sunday after the attack, Mrs Wilson returned home. Archie told her that he had been "down at the Leven" on the previous night and that Mr O'Brien, Ms O'Neill and both appellants had been fighting a lassie who ended up falling into the river. However, the trial judge directed the jury to ignore this evidence insofar as it related to the appellant Brand, on the basis that it was not in the section 259 application. The deceased had been wearing the same jumper as his mother wore (a Chipie). Mrs Wilson's sister, Daisy, arrived at the house. Archie repeated his account to her, adding that the lassie had been hit on the back of the head. Later, at Daisy Wilson's house, with others present, Archie retold the story. Mr O'Brien had been wet, had been fighting a girl and had pushed her into the nettles. Archie's accounts were given before the deceased's body had been found. They largely reflected accurately what must have happened to the deceased. On the

Monday (26 August), Archie was interviewed by the police. He said that somebody had died in the water. He had seen the appellant Kelly ("Andy") flinging boulders at the girl. The girl had fallen into the water. The appellant Kelly also fell into the river. He had later sat on the carpet back at the flat and made the carpet wet.

[10] A police interview on the Tuesday (27 August) had to be terminated because Archie had been too upset. He was interviewed again on 25 September. He said that, when the deceased was in the water, Mr O'Brien, Ms O'Neill and the appellant Kelly had been there. This was down at the Leven just after the deceased had been hurt. He had seen Mr O'Brien hitting the deceased. She was hit with a stick and a metal pole. Mr O'Brien pushed her into the water. Although the stick had been found in the water, the pole had been in the house ("up in ma bit"). No-one else had hit the deceased.

The Aftermath

[11] Ms Dorrian saw the four adults and the children returning to Mrs Wilson's house some time after midnight. Ms O'Neil was very upset. She was shouting "you're a pr..k, you're a dick". Another female, presumably the appellant Brand, was also very upset and wailing. Ms O'Neil shouted "that wasn't meant to happen, that was out of order, that was a set-up".

[12] Upon returning to the house on the Sunday, Mrs Wilson discovered that the carpet in her flat was wet. Trousers belonging to the appellant Kelly were hanging on the fireguard. She was told by the appellant Kelly that Archie had urinated on the carpet and on his (Kelly's) clothes. Archie denied this when asked. No smell of urine came from the carpet.

The deceased's body

[13] On the afternoon of Sunday, 25 August, the deceased's body was found face down in

the river. Dr Marjorie Turner, forensic pathologist, conducted the post mortem examination. The injuries included obvious and serious blunt force trauma to the deceased's face and head. These included a fractured skull, which was almost certainly caused by multiple blows and probably inflicted with a blunt weapon; although there could also have been punches or kicks. One injury, above the ear, had a curved laceration, suggesting that it had been caused by a weapon with a curved area to it, such as a hammer. There was minor brain-bruising. The cause of death was drowning; it being most likely that the injuries had caused the deceased to lose consciousness, with subsequent immersion in the water resulting in drowning. There were no defensive injuries; suggesting that the deceased had lost consciousness fairly quickly. The blows would have required considerable force. The linear feature of some of the injuries could have been caused by anything from the edge of a rock to a pole.

[14] Dr Kirsty Scott, a forensic biologist, had been unable to find any positive evidence, through analysis of diatoms (unicellular organisms), that water from the river Leven was present on Mrs Wilson's carpet or on the footwear of the appellant Brand. There had been little research done on the secondary transfer of diatoms from clothing to another surface. The number of diatoms transferred through immersion would depend on the period of immersion and the type of clothing. If a person's footwear had been in contact only with the soil on the river bank, it was possible that there would have been no transfer of diatoms.

Submissions

The appellant Kelly

[15] The only ground of appeal for which leave was granted was ground 2; the trial judge erred in refusing the appellant Kelly's no case to answer submission that there was

insufficient evidence. Ground 3 was that the judge misdirected the jury by telling them that there was sufficient evidence for the reasons given in ground 2. Ground 3 does not materially add to ground 2. It is not clear what the sift judges made of this, but that is of no moment.

[16] The primary evidence came from Archie Wilson. The main source of his evidence was contained in the two interviews and the various statements given in the days following the offence, including to his mother, Mrs Wilson. The first question was whether there was any evidence capable of corroborating Archie's statements that the appellant Kelly was at the *locus* at the time of the assault. The second was whether, if there was such evidence, it was capable of corroborating Archie's evidence that the appellant Kelly had taken part in the assault.

[17] It was not enough to show or infer that the appellant Kelly had been at the *locus* at the time of the assault. There had to be evidence capable of indicating that the appellant Kelly was somehow involved in the attack. There was no such evidence, either direct or indirect, capable of providing the necessary corroboration that he took part, in whatever form, in the attack. The appellant Kelly could be distinguished from Mr O'Brien and the appellant Brand because, in contrast to them, there was no evidence of bad feeling between him and the deceased. There was no evidence capable of inferring prior concert. Any concert would have to have been spontaneous.

[18] In oral submissions, the appellant attempted to introduce an argument that the trial judge had misdirected the jury by saying that they could convict on the basis of spontaneous concert if they accepted the evidence of Archie that the appellant Kelly had thrown "rocks" and they found corroboration in the evidence of the pathologist. This contention was not in the Note of Appeal and thus had not featured in the trial judge's report. It was not in the

written Case and Argument, which constitutes the principal submission (Act of Adjournal) (Criminal Procedure Rules) 1996, rule 15.15B(2)(a)). Given the court's view on concert *(infra)* it is not a point with any apparent substantial merit. For these reasons, the court declines to entertain it.

The appellant Brand

Conviction

[19] The second appellant appealed against conviction on two grounds. First, the judge erred in directing the jury that there was sufficient evidence for a conviction. Secondly, no reasonable jury properly directed could have determined that the appellant Brand was part of a pre- conceived plan to confront, assault or murder the deceased or that she participated in the attack in some way.

[20] The fact the appellant Brand made a remark that she was going to batter the deceased two weeks earlier and that the group of four left the house with one carrying a stick was not sufficient to prove a preconceived plan to confront the deceased. A threat made on the night of the attack might have been enough, but the time gap of two weeks was too great. Even if there was sufficient evidence of a preconceived plan, it was not foreseeable that the deceased would lose her life. Emphasis required to be placed on what was foreseeable given the nature and scope of the criminal purpose *(McKinnon* v *HM Advocate (No 2)* 2003 JC 29; *Kelbie* v *HM Advocate* [2008] HCJAC 45 at para [40]). The murderous attack by Mr O'Brien went beyond any common criminal purpose to confront the deceased, as did leaving the deceased in the water. Any preconceived plan to confront the deceased did not provide sufficient evidence that the appellant Brand had actively associated herself with a common criminal purpose which included taking human life. That purpose could not be established by the

evidence that the appellant Brand may have known what Mr O'Brien might have been doing at the time *(Khalid* v *HM Advocate* 1990 JC 37 at 39).

[21] Even if there was a common criminal purpose, which included the taking of human life, it could not be said that the appellant Brand, by providing voluntary and intentional or reckless assistance, identified herself with the conduct of her co-accused. She would have had to have been aware of what the others were doing and, in that knowledge, must have assisted the others to some extent. There was no evidence of what she had done at the *locus.* Evidence of such conduct was required (*Jamieson* v *Guild* 1989 SCCR 583; *McKinnon* v *HM Advocate* 2003 SCCR 224; *Kelbie* v *HM Advocate).* All that could be proved was mere presence at the *locus.* That was not enough *(Quinn* v *HM Advocate* 1990 SCCR 254 at 260; *Mowat* v *HM Advocate* 1999 SCCR 688; *Douglas* v *HM Advocate* 2020 JC 23 at para [34]). The case was no different from *HM Advocate* v *Kerr* (1871) 2 Coup 334 (see also *Mowat* v *HM Advocate* 1999 SCCR 688). The appellant Brand's failure to prevent the commission of the crime did not impose art and part guilt upon her.

[22] No reasonable jury properly directed could have returned the guilty verdict; that the appellant Brand was part of a pre-conceived plan to confront, assault or murder the deceased or that she participated in the attack in some way. The issue of reasonable doubt was not within the exclusive preserve of the jury *(AJE* v *HM Advocate* 2002 JC 215). There were significant flaws and contradictions in the evidence. A number of issues called into question the reasonableness of the verdict. These included the credibility and reliability of Archie's evidence. He did not state in his police interviews that the appellant Brand had taken any part on the attack. Despite the alleged presence of the appellant Brand and her co-accused at the *locus,* no riverside material was recovered from her footwear. A wet patch was found on Mrs Wilson's carpet. The forensic scientist spoke to an absence of diatoms which would be

found in river water. Ms Curley said that she saw the deceased go down the path towards the river and a man who was there. The statements by Ms O'Neill could not establish the existence of a preconceived plan to attack the deceased, the knowledge of the appellant Brand of such a plan or any participation by her in any attack. The appellant Brand's denials to the police of having left the flat, of any remarks being made by Ms O'Neill and of having previously threatened the deceased, could not establish the extent of any plan to confront, assault or murder the deceased or any participation in the offence.

Sentence

[23] The trial judge said that he imposed a punishment part of 22 years on Mr O'Brien and 18 years on the appellant Kelly, both of whom bore more responsibility for the murder than the appellant Brand. However, he said that she had previously threatened to harm the deceased and had to share equal responsibility with the others; having walked away and left the deceased for dead. The punishment part imposed was excessive.

[24] The appellant Brand was convicted on an art and part basis. The judge erred in determining the level of the appellant Brand's culpability. He took no account of the lack of evidence of a pre-existing plan and the absence of any evidence of actual participation. At the time of the offence the appellant Brand was aged 17. Her lack of maturity at the time and the possibility of negative influences from older peers were relevant factors. She had been a heroin user and also abused alcohol. The criminal justice social work report suggested that there may have been elements of control in her relationship with the Mr O'Brien, with whom she had been in a relationship intermittently for 20 years. She had no previous convictions and no cases outstanding.

[25] At the time of sentence, the appellant Brand was aged 44. Following rehabilitation, she no longer abused drugs. She had been drug free by the time her son was born in 2003. She suffered from a number of complex medical conditions, including a blood disorder, Peripheral Neuropathy, Epilepsy, Chronic Obstructive Pulmonary Disease and Postural Hypotension. She suffered from chronic depression. She was physically frail and used a wheelchair. The judge gave insufficient weight to the impact that the punishment part would have on her within the prison environment. She was assessed as being at moderate risk of reoffending although that was further reduced by her health problems.

[26] The length of the punishment part was excessive having regard to the comparative principle in relation to the punishment parts imposed on the co-accused. Mr O'Brien was described as the principal actor. He had a previous conviction for attempted murder for which he received a sentence of 10 years imprisonment in 2007. He had previously served other custodial sentences. The appellant Kelly was described as throwing rocks at the deceased. He had previously served custodial sentences. The punishment part imposed on the second appellant did not adequately reflect her limited role and her lack of previous convictions.

Crown

The appellant Kelly

[27] Although there may not have been a plan to murder the deceased, there was a plot to confront her, and an expectation that violence would be used. There was evidence that the three accused left for the river and of a weapon being carried. There was evidence that the appellant Kelly had been in the water (his wet trousers) and that the deceased had been found face down in the water.

[28] Even if it was not accepted that the appellant Kelly was an actor in the assault, it could be inferred that he was a participant in the common purpose to assault the deceased. The primary evidence came from Archie. All that was required was evidence that supported or confirmed his evidence. Dr Turner's evidence was capable of corroborating the evidence of Archie that the appellant Kelly threw rocks or boulders at the deceased.

[29] The appellant Kelly actively associated himself with a common criminal purpose which was or included the taking of human life *(McKinnon* v *HM Advocate (No.2)* 2003 JC 29). The assessment of an accused's guilt in such a case depended upon the jury's view of the evidence (*ibid* paras [30] - [31]). The jury were entitled to infer that the weapon that Mr O'Brien was carrying would have been visible to the appellant Kelly, as it had been to Archie *(Docherty* v *HM Advocate* 2021 SCCR 217 at para [11]). It was immaterial that more significant violence may have been inflicted by another accused *(Kelbie* v *HM Advocate* at paras [38] and [39]). The appellant Kelly was not a "mere bystander". His position at interview, as maintained in his defence of alibi, was that he was not present at all. The jury clearly rejected that. When the evidence was considered as a whole, and not in isolated parts, a reasonable inference was that he was participant in the murder. His presence added to the terror of the situation (Hume: *Commentaries* i, 264).

The appellant Brand

[30] The appellant Brand could only be convicted of murder on an art and part basis; only if she had actively associated herself with a common criminal purpose which carried the obvious risk that human life would be taken *(McKinnon* v *HM Advocate).* The jury was entitled to draw the inference that she was one of the party that left Allan Crescent with the intention to confront the deceased, whom she had recently threatened to "batter". Archie's

evidence was that one of the party was carrying a stick. The jury was entitled to draw the inference that this would have been apparent to the appellant Brand *(Docherty* v *HM Advocate* at para [11]). The party all returned to Allan Crescent together.

[31] The appellant Brand's position was not that she was an innocent bystander. Her position at interview, and maintained in her defence of alibi, was that she was not present at all. Her presence added to the terror of the situation (cf *Hume, Commentaries* i, 264; *Kelbie* v *HM Advocate* at para [39]). The actions of the appellant Brand and her co-accused, in leaving Caroline face down in the river, were available to cast light on the attitude of the group in confronting the deceased and to support the inference that there was a pre- conceived plan to do her harm *(Halliday* v *HM Advocate* 1998 SCCR 509 at 513). When a victim was attacked as part of a common plan among a number of persons, it was not necessary for it to be proved that someone who was party to that common plan actually struck the victim *(Douglas* v *HM Advocate* at para [34]).

[32] The test in an appeal under section 106(3)(b) of the 1995 Act was a high one *(Al Megrahi* v *HM Advocate (No.3)* 2021 SCCR 64; *Cowan* v *HM Advocate* 2024 SCCR 328). The fact that there was evidence that Archie's first disclosures were made prior to the discovery of the deceased's body added credibility to his account, as did the forensic evidence. The lack of riverside material on the appellant Brand's footwear was not a matter of such great import that it would make the verdict unreasonable. The same could be said for the forensic evidence about the carpet. The evidence of Ms O'Neill's comment was capable of being interpreted as evidence of a pre-conceived plan, despite there being alternative explanations. The appellant Brand's presence at the *locus* and her prior threat against the deceased were evidence of a prior plan. The jury clearly gave their verdict careful consideration having initially been secluded on 12 December and delivering a verdict on the 14 December 2023.

Decision

Convictions

[33] A person can only be found guilty of a criminal act if he or she has participated in that act. A person who happens to be at the scene of a crime but has played no part in it will be a "mere bystander", who is innocent of any involvement. In order to participate in an assault, it is not necessary for a person to deliver a blow to the victim. Where there is a prior agreement to commit the assault and the person was a party to that agreement then, as was said in *Douglas* v *HM Advocate* 2020 JC 23 (Lord Brodie, delivering the opinion of the court, at para [34]) and citing Hume *Commentaries* i 264):

> "any degree of participation is sufficient to make the accused responsible for what the other party or parties do, provided that it does not go beyond the extent of what was agreed. Where what has been planned is an act of violence, simple presence while others actually inflict the violence can readily be inferred to be participation in the assault, whether providing moral support to the actual assailants, by being available to provide more active support should it be required, and by intimidating the victim".

[34] The scope of the prior agreement will often have to be inferred objectively from all the circumstances, including any previous threats of violence, evidence of association, the visible presence of weapons, what in fact happened and the actings of the group after the attack. For a conviction of murder to attach to a member of the group, the scope does not require to be that the victim would be killed. It is sufficient if, for example, weapons were to be used to cause serious injury (*Gardiner* v *HM Advocate* 2024 SCCR 384, LJG (Carloway), delivering the opinion of the court, at para [36]).

[35] There was sufficient evidence for the jury to infer that, when the four adults left the house, they had a pre-conceived plan to inflict serious injury on the deceased, one obvious consequence of which would be that she would lose her life. This arises, first, from the

simple fact that all four left together at around midnight, accompanied by the children, to meet the deceased. A meeting between the deceased and Mr O'Brien had been prearranged. There would have been no reason to take the children with them, in the middle of the night, if each adult did not intend to become involved in whatever plan had been formulated. If all that was intended was a "confrontation", not involving violence, there would have been no reason for all four adults to go or to take the children.

[36] Secondly, what happened on the towpath was an extremely violent attack using weapons. That is clear from the post mortem results alone, as spoken to by Dr Turner. These corroborated Archie's account that a stick and pole had been used to strike the deceased and that boulders had been thrown at, and struck, the deceased. The deceased had been left to drown by all those at the scene. The jury would be entitled to infer from what actually happened that this was a pre-planned concerted attack. The death of the deceased may not have been in contemplation of all at the scene, but the murderous intent of those using weapons (the actors) with such force on a 14 year old girl is self-evident.

[37] Thirdly, all four adults returned to the house together. Their reactions were indicative of participation in the attack. None were "mere bystanders" who happened to be at the scene. They all went together to meet the deceased and they all returned together having done so. The reference by Ms O'Neill to a "set up" may be significant in suggesting that one or more of the adults knew what was in contemplation, even if Ms O'Neill may not have grasped the enormity of the situation in advance.

[38] In short there was evidence of a pre-planned attack in which serious injury was contemplated. Both of the appellants participated in that plan, whether or not they delivered any physical blows, by, at least, lending their support to those who did. Both are guilty at least art and part.

[39] In addition, there was sufficient evidence to convict the appellant Kelly as actor as well as art and part. He was described by Archie as throwing boulders at the deceased. The fact that this happened is corroborated by the evidence of the pathologist who spoke to some of the injuries having been caused in this manner. The crime is thus proved. On identity, there is Archie's evidence that "Andy" threw the boulders. His presence at the scene is corroborated by his wet trousers, capable of supporting that he had been in the river, being found by Mrs Wilson on the following day.

[40] In that state of the evidence, it cannot be said that the guilty verdict which was returned against the appellant Brand was unreasonable. As was said in *Cowan* v *HM Advocate* 2024 SCCR 328 (Lord Matthews, delivering the opinion of the court, at para [18]), it is only in exceptional circumstances that an appeal will succeed on this statutory ground (1995 Act, s 106(3)(b)). If, on the evidence, there was a rational basis for finding the person guilty, the statutory test is not met. There was evidence that the appellant Brand had threatened to "batter" the deceased. It was she who had the most obvious motive to harm her. She left the flat with her boyfriend and the others with a view not simply to confront the deceased but to cause her serious harm. That is what happened. Her participation in the common plan to do this is manifest on the evidence.

[41] For these reasons the appeals against conviction are refused.

Sentence

[42] This was a violent attack on a 14 year old girl whose only mistake was to be infatuated with Mr O'Brien and to decide to meet him in a secluded spot in the hours of darkness, not knowing of the plot which was being formulated in Allan Crescent. There is no basis upon which to contend that the trial judge failed to have regard to any relevant

factors in the sentencing equation. At the time of sentencing, the judge delivered a carefully phrased and detailed statement which referred to the appellant's age, lack of record and her personal circumstances, including that described in the criminal justice social work report.

[43] The question then becomes whether a miscarriage of justice has occurred on the basis of comparative justice (cf *Gardiner* v *HM Advocate* at para [43]). The trial judge expressly stated that he recognised that the appellant Brand had played a lesser role than Mr O'Brien and the appellant Kelly in that there was no evidence that she participated in the assault (leaving aside the evidence ruled inadmissible that Archie said to his mother that all four had been "fighting with a lassie" who ended up in the river). That may have merited a lower punishment part than the appellant Brand's co-accused (*Gardiner* at para [43] citing *Cosgrove* v *HM Advocate* 2008 JC 102 at para [9]), especially as they had, by the time of sentencing, substantial criminal records. The judge recognised this in differentiating between the three accused. Nevertheless he took into account the part played by the appellant Brand in threatening to "batter" the deceased and ultimately, like the others, leaving her to drown in the waters of the Leven. In these circumstances, it is not possible to categorise the punishment part as excessive for what was an evil concerted crime.