IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/00175/A2
[2021] EWCA Crim 1683

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 9 November 2021

THE VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(Lord Justice Fulford)

MR JUSTICE JAY

MR JUSTICE JULIAN KNOWLES

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v –

WILLIAM JOHNSTONE

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr J Polnay appeared on behalf of the Attorney General

Miss S Przybylska appeared as an Advocate to the Court
The Offender was present but unrepresented

J U D G M E N T

Tuesday 9 November 2021

LORD JUSTICE FULFORD:

Background

1. This is an application by the Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which is said to be unduly lenient.

2. The offender, William Johnstone, is 41 years old. For convenience, we have referred to him as the defendant in this judgment. His first appearance in relation to the present matter was before the County Durham and Darlington Magistrates' Court on 24 November 2020. At his own choice he has been unrepresented at the Magistrates' Court, at the Crown Court, and again on this application.

3. On 22 December 2020, at the pre-trial and preparation hearing at Durham Crown Court, the defendant pleaded guilty to attempting to cause grievous bodily harm with intent, contrary to section 1(1) of the Criminal Attempts Act 1981. Having pleaded guilty in the Crown Court, the judge proceeded directly to sentence. We note that on the Better Case Management Form it was set out that the real issue in the case was "likely guilty plea". We will return to that issue later in this judgment. The defendant was sentenced to three years' imprisonment, which was ordered to run concurrently with the two terms of life imprisonment that he is presently serving, the circumstances of which we also consider later in this judgment.

4. The judge passed sentence without a report and without addressing the question of whether one was necessary. The judge considered that the case fell within category 2 of the Sentencing Council's definitive guideline for this offence, with a starting point of six years' imprisonment. He indicated that since the offence was an attempt, as opposed to the full offence, he would reduce the sentence to four years' imprisonment. Then, without explaining his approach, he allowed credit for the defendant's guilty plea by further reducing the sentence to three years' imprisonment. He did not set out why the reduction was a quarter rather than a third.

5. This application was previously before the full court for hearing on 20 April 2021, but the case was adjourned for an up-to-date medical report to be prepared to assist as to the mental health of the defendant. On the basis that the court decided that it had the discretion to order such a report, it was considered unnecessary to determine whether a reference by either the Attorney General or the Solicitor General falls within the meaning of the expression "an appeal against sentence" in section 232(5) of the Sentencing Act 2020 ("the 2020 Act") (this provision governs when medical reports are to be obtained on an appeal against sentence for individuals with a mental disorder, and is set out in full below.)

6. At least one consequential issue would potentially have arisen if this had been addressed, namely whether section 232(5) is absolute in its terms, in the sense that a report must be obtained, even if the court considers this to be an unnecessary step.

7. The Registrar was directed, therefore, to secure a report from Dr Shenoy, who is qualified under section 12 of the Mental Health Act 1983, and who was asked to address the following issues and questions:

> "The specific issues on which the court requires the assistance of Dr Shenoy are as follows:
>
> (1) An up-to-date assessment of the defendant's mental health, both now and at the time of the offence for which he was sentenced on 22 December 2020.

(2) The extent to which any mental disorder from which he was suffering had a material impact on the offender's responsibility for his conduct at the time of the offence concerned.

(3) The risk which he poses to others around him, in particular prison officers."

8. The court also requested that the Attorney General, acting in a separate and independent capacity, appoint an advocate to the court to assist on the issues which may arise on this application, for example: (1) the circumstances in which the 2020 Act requires a court (both the sentencing court and this court) to obtain a medical report; and (2) the appropriate sentencing principles which apply to a case such as this, where an offender is already serving a life sentence of imprisonment and commits an offence of violence against a prison officer. We are grateful to the Attorney General that Sarah Przybylska was instructed in this capacity, and to Miss Przybylska for her able written submissions as endorsed by her during the hearing.

The Facts

9. The facts may be shortly stated. On 12 April 2020, at around 11.30am, at Her Majesty's Prison Durham ("HMP Durham"), Senior Officer Gemma Ferguson unlocked the defendant's cell on C Wing to collect his lunch. As she swung the door open, the defendant, who was standing in front of the door holding a kettle, threw the contents – boiling water – at the officer. The latter, fortunately, turned away. The water hit her back, causing a searing pain. Some of it also caught Prison Officer Lee Taylor, causing a minor burn that did not require treatment.

10. Miss Ferguson's Prison Service issue jacket and her shirt were penetrated. Her back was burnt over a six inch area, causing blisters, which were followed by weeping wounds. In addition, she received superficial burns to her right hand and the top right side of her head.

11. Miss Ferguson may be left with some permanent scarring and discolouration to the skin. She has, unsurprisingly, experienced distress, anxiety and a loss of confidence since returning to work.

12. In interview the defendant claimed that he was defending himself from an anticipated attack by another inmate. He claimed that his intended target was not a prison officer, although he accepted that it was always prison officers who opened the cell doors. Nonetheless, he said that he intended to plead guilty if the matter went to court.

13. The defendant has 11 convictions for 22 offences. Those of particular note are the following:

(1) On 12 January 1996 for an offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861 ("the 1861 Act"), he was sentenced to six months' detention in a young offender institution. He smashed a large bottle against a wall, causing it to break, and used it to try to stab his victim several times.

(2) In a similar vein, on 23 June 1997, for an offence of causing grievous bodily harm with intent, contrary to section 18 of the 1861 Act, he was sentenced to a two-year supervision order. He assaulted his victim with a rolling pin causing fractures to his left knee-cap, left elbow and left shoulder blade.

(3) On 3 October 2000, for two offences of assault occasioning bodily harm, for affray, false imprisonment, and possession of an offensive weapon, he was sentenced to a total of three years' imprisonment. He assaulted his partner, threatened her with a knife and used force to prevent her from leaving her home address.

(4) On 16 August 2001, for an offence of assault occasioning actual bodily harm, he was sentenced to 28 days' imprisonment, which was ordered to run concurrently with the sentence he was then already serving. Whilst in prison, he entered another prisoner's cell and threw boiling water over him.

(5) On 4 November 2002, for an offence of murder, he was sentenced to life imprisonment. He murdered his mother's female partner, and then dismembered her body. In 2007, Langstaff J fixed the minimum term at 14 years' imprisonment.

(6) On 7 April 2006, for an offence of wounding with intent, contrary to section 18 of the 1861 Act, to which he pleaded guilty, he was sentenced to an automatic life term of imprisonment, pursuant to section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. The minimum term was specified to be three years, based upon a notional determinate sentence of 6 years' imprisonment. The defendant slashed the neck of another prisoner with an improvised knife.

14. The defendant has now served the two minimum terms, and his first parole review has taken place. He had been transferred from the Bamburgh Clinic Medium Secure Hospital to HMP Durham shortly before the present incident.

15. We note that at the Crown Court both the prosecution and the judge were unaware of the length of the minimum terms imposed on the sentences of life imprisonment.

Reports

16. The relevant parts of the regime governing pre-sentence reports, as set out in the 2020 Act, are first as regards pre-sentence reports:

> "**30 Pre-sentence reports**
>
> (1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion.
>
> (2) If the offender is aged 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report.
>
> (3) If the offender is aged under 18, the court must obtain and consider a pre-sentence report before forming the opinion unless —
>
> (a) there exists a previous pre-sentence report obtained in respect of the offender, and

(b) the court considers —

(i) in the circumstances of the case, and

(ii) having had regard to the information contained in that report or, if there is more than one, the most recent report,

that it is unnecessary to obtain a pre-sentence report.

(4) Where a court does not obtain and consider a pre-sentence report before forming an opinion in relation to which the pre-sentence report requirements apply, no custodial sentence or community sentence is invalidated by the fact that it did not do so.

…

33 Appeals: requirements relating to pre-sentence reports

(1) Any court, on an appeal against a custodial sentence or a community sentence, must —

(a) subject to subsection (2) or (3), obtain a pre-sentence report if none was obtained by the court below, and

(b) consider any such report obtained by it or by the court below.

(2) If the offender is aged 18 or over, the court need not obtain a pre-sentence report if it considers —

(a) that the court below was justified in not obtaining a pre-sentence report, or

(b) that, in the circumstances of the case at the time it is before the court, it is unnecessary to obtain a pre-sentence report.

(3) If the offender is aged under 18, the court need not obtain a pre-sentence report if —

(a) there exists a previous pre-sentence report obtained in respect of the offender, and

(b) the court considers, having had regard to the information contained in that report or, if there is more than one, the most recent report —

(i) that the court below was justified in not obtaining a pre-sentence report, or

(ii) that, in the circumstances of the case at the time it is before the court, it is unnecessary to obtain a pre-sentence report."

17. For those suffering from a mental disorder, section 232 of the 2020 Act, so far as material, provides:

"**232 Additional requirements in case of offender suffering from mental disorder**

(1) This section applies where –

(a) the defendant is or appears to be suffering from a mental disorder, and

(b) the court passes a custodial sentence other than one fixed by law ("the sentence").

(2) Before passing the sentence, the court must obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary to obtain a medical report.

(3) Before passing the sentence, the court must consider —

(a) any information before it which relates to the offender's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and

(b) the likely effect of such a sentence on that condition and on any treatment which may be available for it.

(4) If the court did not obtain a medical report where required to do so by this section, the sentence is not invalidated by the fact that it did not do so.

(5) Any court, on an appeal against the sentence, must —

(a) obtain a medical report if none was obtained by the court below, and

(b) consider any such report obtained by it or by that court."

18. We regret to note that missing entirely from the prosecution's opening of the facts was any reference to the defendant's potentially serious mental condition. Although no report had been

ordered, the following important circumstances were included in the statements from the prison officers on the Digital Case System. The defendant suffers from paranoid schizophrenia and psychotic episodes. He had been placed in a cell on his own in HMP Durham because he was deemed to constitute a high risk due to his previous offending. He had refused to engage with the mental health team, and on the day before the present offence he informed one of the mental health workers that he was hearing voices that were telling him to hurt himself and others, albeit he suggested that he did not intend to act on this encouragement. He had previously been kept in segregation, having assaulted another prisoner with a flask. These maters should have formed part of the opening and, particularly given that the defendant was unrepresented, the judge should have been reminded that it was open to him to order a medical report. We are confident that if he had been alerted to these matters, the judge would inevitably have adopted this course. It is critical that the sentencing judge should, *inter alia*, be in a position to make a careful evaluation of the extent to which a defendant is dangerous, and equally the extent to which his or her mental state provides mitigation, if that is the case. These factors were incapable of proper evaluation in the present case, given, as we have just indicated, the judge was not alerted to the relevant material.

19. Dr Shenoy, in a careful and helpful report, dated 8th June 2021, indicates that the defendant has an established diagnosis of paranoid schizophrenia and mixed personality disorder, with traits of antisocial and avoidant personality subtypes. In addition, he suffers from obsessive compulsive disorder. The mixed personality disorder leads him to focus on negatives, which are perpetuated by auditory hallucinations telling him, almost constantly when he is alone, that he is at risk from others. This has led him to assault prisoners and prison officers when in custody, although to a significant extent he has managed to avoid such incidents whilst at Rampton High Security Hospital and the Bamburgh Clinic. His risk of violence is linked directly to his mental disorders. He appears to feel most secure when in the prison segregation unit. His violent behaviour can be understood as a method of securing a return to that unit.

20. As matters stand, when at large the defendant clearly poses a risk to prison officers, other inmates and members of the public. He refuses to co-operate by taking a different psychotic medication that has been prescribed.

21. Dr Shenoy has recently referred the defendant back to the Bamburgh Clinic where he was resident, as we have observed, until his transfer to HMP Durham.

22. For the avoidance of doubt, we consider that this case is paradigmatic of the circumstances in which a report into the defendant's mental condition should have been sought prior to sentence. A combination of the seriousness of the present offence, the defendant's grave offending history, and the strong indications that he was experiencing severe mental difficulties when he attacked the prison officer rendered this a necessary course.

23. In circumstances such as these, prosecuting counsel should ensure that relevant mental health issues relating to the defendant are brought to the judge's attention at the latest when the case is opened and, if possible, significantly in advance in order for a decision to be made on whether to order a report, thereby reducing the risk of an adjourned hearing.

24. A "medical report" is defined in section 232(6) of the 2020 Act as a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of section 12 of the Mental Health Act 1983. "Mental disorder", by the same subsection, has the meaning provided in section 1(2) of the Mental Health Act 1983, namely, any disorder or disability of the mind.

25. Consideration was given to some of the issues that arise in the present case as regards

obtaining reports in the recent decision of *Attorney General's Reference (R v Valants v Martin)* [2021] EWCA Crim 1233, a case which involved charges of aggravated burglary and robbery. The offences were sophisticated, planned and extremely serious. The offenders targeted a vulnerable 71-year-old woman who lived alone. Her house was invaded at night. She was physically restrained, and property of high economic and sentimental value was stolen. She suffered severe psychological harm as a result. No report was obtained addressing the issue of dangerousness. The court dealt with this failure as follows:

> "41. We do not know what the pre-sentence report would have shown. We have to review this sentence on the basis of the material which was before the Recorder. In argument we canvassed, at the invitation of Miss Heer on behalf of the Solicitor General, the impact of section 33 of the Sentencing Act 2020. That provision allows the Court of Appeal Criminal Division, when hearing an appeal against sentence, to obtain a pre-appeal report if no pre-sentence report had been obtained by the court below. That is an express statutory warrant for the court on hearing an appeal against sentence to take into account material which the court below did not have. That provision does not apply, on its terms, to an Attorney General's Reference, which is not an appeal. Our obligation is to consider the case on the material that the Recorder had. That material was limited to the facts of the case and the antecedents of the offenders.
>
> 42. Miss Heer submits, and we accept, that if a submission had been made to the Recorder that she should have a pre-sentence report and that she should find the offenders dangerous, then it would have been open to this court to say that in wrongly rejecting that submission, the Recorder demonstrated undue leniency. In those circumstances it may have been appropriate to quash the sentences and then, when deciding what sentences to substitute for the original sentences, to have regard to additional material, including a pre-sentence report dealing with dangerousness. None of that happened.
>
> 43. We consider that if it was to be submitted that in this case a finding of dangerousness was effectively mandatory, that was a submission that should have been made before the Recorder. This is a relevant factor to our determination on this Reference but not, on its own, decisive.
>
> 44. There is no doubt that there are cases where dangerousness is so obvious that this court would, on a Reference, make a finding of dangerousness, even if the prosecution had not sought one below, and even if there was no pre-sentence report. There are many cases which speak for themselves.
>
> 45. This in our judgment, is not quite such a case. It is a case where dangerousness may very well have been the appropriate finding, had the matter been fully explored. But it was not. It is now, in our judgment, too late for the Solicitor General to come to this court to say that on the facts of this particular case a finding of dangerousness should have been made. This is, in

> essence, because of the judge's approach to the level of actual physical violence used or threatened in this case."

26. As regards the consideration of new material by this court, this is essentially a two-stage process. As to the first stage, it has been long-established that the Reference is to be advanced by the Law Officers on the facts which were opened before the sentencing judge, and this court will not determine whether the sentence was unduly lenient on the basis of new material. In *Attorney General's Reference No 19 of 2005* [2006] EWCA Crim 785, Rose LJ VP put the matter as follows:

> "10. ... As we have indicated, the material which is now before this Court points strongly in the direction of an indeterminate sentence being appropriate. But it is not this Court's function, under section 36 of the Criminal Justice Act 1988, to substitute, in the light of new material, our view as to what the sentence ought now to be. Our task, under section 36, is to decide whether the judge's sentence, in the light of the material before him, can properly be characterised as having been unduly lenient. …"

27. Turning to the second stage, if the court concludes that the sentence was unduly lenient, it may receive fresh material, either favourable or adverse to the offender, in reaching its conclusions as to the correct new sentence. In *Attorney General's Reference No 74 of 2010* [2011] EWCA Crim 873, Hooper LJ expressed the view at [21]:

> "… that we do have the power to take into account matters adverse to the offender when deciding what is the appropriate sentence. We note, however, that the point has not been fully argued before us."

As we have just set out, Edis LJ in the judgment in *Valants and Martin* has now confirmed that approach to be correct.

28. We endorse entirely, with respect, the approach adopted in *Valants and Martin*. References by the Attorney or Solicitor General are not "appeals against sentence", given that an entirely different statutory regime applies to the latter (see sections 35 and 36 of the Criminal Justice Act 1988). Furthermore, it would be objectionable for the prosecution to fail to ask for a pre-sentence report in the Crown Court in order to address the issue of dangerousness, only later to suggest that the Court of Appeal should commission and consider such a report to make good this earlier omission.

29. Different considerations, however, may be engaged if the judge refused to order a report for the reasons explained by Edis LJ in *Valants and Martin*. We would only add that if either of the parties anticipates that there is a real possibility that the court will require additional material in order to decide on the appropriate sentence, such as a pre-sentence or medical report (should the court determine that the sentence was unduly lenient), this must be raised with the Registrar in sufficient time before the hearing for a decision to be taken as to whether this additional material should be obtained. This is necessary to avoid an adjournment. It follows

that we agree that the court has an undoubted power to order a report or other additional material in order to determine, inter alia, the extent to which the sentence should be varied. It is, indeed, conceivable that the contents of any report may persuade the court not to adjust the sentence, given that the court "may" pass a different sentence, not "must" pass a different sentence (section 36(1)(b) of the Criminal Justice Act 1988), having determined that the sentence was unduly lenient.

30. It falls outside the remit of this decision to address whether the provisions of section 232(5) of the 2020 Act are mandatory in the context of an appeal against sentence, with the effect that a report must be obtained, even if the court considers this to be an unnecessary step. We would simply note in passing that such an interpretation would perhaps be a surprising and undesirable result; it would be inconsistent with the position in the Crown Court, which permits the court not to obtain a report if it is unnecessary (it would, thereby, give the Court of Appeal no discretion in the matter, in stark contrast with the Crown Court); and it is difficult to conceive that such an approach would accord with the intentions of the legislature.

The Sentence

31. The maximum sentence for attempting to commit an offence is the same as that for the substantive offence (section 4(1)(b) of the Criminal Attempts Act 1981). The maximum sentence for causing grievous bodily harm with intent is life imprisonment (section 18 of the 1861 Act).

32. There is no definitive guideline for offences of attempting to cause grievous bodily harm with intent but, pursuant to section 59(1) of the 2020 Act, the court should follow the substantive guideline for the offence whilst making any necessary reduction for the fact that it was an attempt (see in this regard *R v Hurst* [2019] EWCA Crim 917 at [15]). Although an attempt therefore usually carries a lesser sentence than that imposed for the full offence, the extent of the reduction will depend on the facts of the case (see *R v Joseph* [2001] 2 Cr App R(S) 88), bearing in mind such factors as the stage at which the attempt failed and the reasons for its non-completion (see Blackstone's 2022 at paragraph A5.75).

33. As to sentencing mentally disordered defendants, the Sentencing Council guideline establishes that the fact that a defendant has an impairment or disorder should always be considered by the court, but will not necessarily have an impact on sentencing. In assessing whether the impairment has any impact, the approach should be individualistic and focused on the issues in the case. Culpability will only be reduced if there is sufficient connection between the defendant's impairment or disorder and the offending behaviour. A careful analysis of all the circumstances of the case and all relevant materials is required. The court may wish to focus on the following question as a useful starting point: did the defendant's disorder impair their ability to exercise appropriate judgment, to make rational choices or to understand the nature and consequences of their actions?

34. As the Solicitor General has observed through Mr Polnay, for whose submissions we are grateful, the definitive guideline for section 18 offences applies to both offences of causing grievous bodily harm and wounding with intent to cause grievous bodily harm. Accordingly, the guideline is not based on the premise that grievous bodily harm has actually been caused.

35. It is accepted by the Solicitor General that there are no factors indicating greater harm, and there is a factor indicating lesser harm, namely that the injury was less serious in the context of the offence. Two factors indicated higher culpability, namely the use of boiling water as a weapon and an intention to cause more serious harm than actually resulted from the offence. The judge, therefore, correctly identified this as a category 2 case (lesser harm and higher culpability), with a starting point of six years' custody and a category range of five to nine

years' custody.

36. The offence was significantly aggravated by the defendant's previous and very serious convictions for offences of violence, including offences in a prison context, one of which involved throwing boiling water. The victim was a prison officer. We bear in mind that by section 67 of the 2020 Act, the court must treat the fact that an offence was committed against a prison officer acting in the exercise of those functions as an aggravating factor. It is also of note that it is necessary for the judge to state in open court that the offence is so aggravated. Furthermore, this offence was aggravated by the ongoing effect upon the victim.

37. Dr Shenoy's report indicates that the defendant was harbouring persecutory beliefs which would have influenced his behaviour. Dr Shenoy expresses the view, however, that it is extremely difficult to ascertain how much of his behaviour can be attributed to his persecutory delusional beliefs, secondary to paranoid schizophrenia, and how much of it can be attributed to his attempts to manoeuvre a return to segregation. Additionally, it is necessary to reflect the fact that the offence was an attempt and that the injuries caused were at the lower end of the scale of this type of offence. However, as something of a countervailing factor, there was an intention to cause more serious harm than in fact was caused.

38. Finally, as regards mitigating factors, prior to sentence the defendant expressed remorse.

39. In all the circumstances, we consider that the defendant should have received full credit for his guilty plea. It is necessary to note that, as set out in *R v Plaku and Plaku; R v Bourdon; R v Smith* [2001] EWCA Crim 568, for a defendant to receive full credit for his or her plea of guilty in respect of an indictable only matter, his indication to plead guilty in the Magistrates' Court needs to be unequivocal and indicated on the Better Case Management Form. A "likely guilty plea", as indicated here, is insufficient. However, in this case the defendant was unrepresented. He had made it clear in interview that he intended to plead guilty, and it may well have been the case that he did not appreciate the significance of the word "likely", as seemingly communicated by him and entered on the form in the Magistrates' Court. There is no evidence of anything that might have been said to him by the clerk of the court or the justices in the Magistrates' Court by way of explanation, clarification or further enquiry. These factors, in our view, amount to exceptional circumstances which make it unreasonable to expect that the defendant would have realised and understood that he needed to express an unequivocal intention to plead guilty during the Magistrates' Court stage of this case. In all the circumstances, the indications given by the defendant should be treated as tantamount to a plea at the first stage of the proceedings. Accordingly, he was entitled to a reduction of one third.

40. The Solicitor General accepts that, although the offence is serious, it is not sufficiently serious to justify the imposition of a life sentence, pursuant to section 285 of the 2020 Act. The judge did not address the dangerousness provisions, even though the possibility of an extended sentence was raised by prosecuting counsel in his opening remarks. We have no doubt but that the defendant was clearly revealed to be dangerous on the materials before the Crown Court. In addition to his grave antecedent history, it was revealed that he suffers from paranoid schizophrenia and psychotic episodes. As rehearsed above and it is necessary to repeat, he had been placed in a cell on his own in HMP Durham because he was deemed to be a high risk due to his previous offending. He had refused to engage with the mental health team, and on the day before the present offence he informed one of the mental health workers that he was hearing voices that were telling him to hurt himself and others, albeit he suggested that he did not intend to act on this encouragement. He had previously been kept in segregation, having assaulted another prisoner with a flask. We consider that his dangerousness was obvious, assessing the risk on the basis of the defendant being at large (see *R v Baker* [2020] EWCA Crim 176; [2020] 2 Cr App R(S) 23).

41. The judge should have imposed an extended sentence, pursuant to sections 279 to 281 of the 2020 Act, albeit we accept that he was not assisted by prosecuting counsel to the extent that he should have been.

42. In all the circumstances, this sentence was unduly lenient. As set out above, the Guideline in force at the time stipulated that an offence fell into category 2 if there was lesser harm and higher culpability. This provided a starting point of six years' custody, and a category range of five to nine years' custody.

43. The starting point for this extremely dangerous offence in which defendant intended to cause very considerable harm was in our view six years' custody. The offence was then aggravated by his extremely serious previous convictions and the role of the victim as a prison officer, together with the ongoing effect upon her.

44. Balancing those factors against the mitigation provided by his mental disorder and the fact that the injuries were at the lower end of the scale, we consider that the sentence should have been seven years six months' custody.

45. From that, the defendant is entitled to a one third discount, making a sentence of five years' custody. We impose, therefore, an extended sentence of nine years, made up of five years' custody and an extended licence period of four years. The surcharge order is unaffected.

46. We give leave, therefore, to the Solicitor General to refer this sentence to the full court, we grant the application and we vary the sentence to the extent just indicated.

47. We are indebted to both counsel for their considerable assistance.
