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IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM THE CROWN COURT AT NORTHAMPTON
His Honour Judge Rupert Mayo DL

AND ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
Her Honour Judge Montgomery QC

AND ON APPEAL FROM THE CROWN COURT AT ISLEWORTH
Her Honour Judge Duncan

AND ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
His Honour Judge Morgan

AND ON APPEAL FROM THE CROWN COURT AT MANCHESTER
His Honour Judge Cross QC

AND ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
His Honour Judge Wall QC

AND ON APPEAL FROM THE CROWN COURT AT LUTON
Her Honour Judge Herbert

AND ON APPEAL FROM THE CROWN COURT AT CAMBRIDGE
His Honour Judge Enright

AND ON APPEAL FROM THE CROWN COURT AT GUILDFORD
His Honour Judge Taylor

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25.02.2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE WILLIAM DAVIS
MR JUSTICE JOHNSON

- -

Between :

Regina	**Respondent**
- and -	
(1) Tristan Patel **(2) Sifean Ghilani** **(3) Levar Thomas** **(4) Atiyyah Viola Gidden** **(5) Jason Nicholas Thompson** **(6) Karl Lawrence** **(7) Kyron Blackley** **(8) DM** **(9) Sean John Sweeney** **(10) Ryan Michael Brady** **(11) Ulili Ramalho** **(12) Frank Allan Fisher** **(13) Shane Duke Roger Warburton**	**Appellants/ Applicants**

AND

Attorney General's Reference (Paul Fox)

- -

- -

Advocates for all Appellants/Applicants instructed by the Criminal Appeal Office
Duncan Atkinson QC and John Hallissey (instructed by the CPS) for the Respondent
John Cammegh QC for the Appellant Tristan Patel
James Smith-Wilds for the Appellant Sifean Ghilani
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Wafa Shah for the Applicant Frank Allan Fisher
Isobel McCarroll and Rebecca Erkan-Bax for the Applicant Shane Duke Roger Warburton
Julia Faure Walker (instructed by the Attorney General's Office) for the Attorney General
David James for the Offender Paul Fox

Hearing dates: 10 and 11 February 2021

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Approved Judgment

Dame Victoria Sharp P.:

1. The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 ("the 2020 Order") came into force on 1 April 2020. It changes, for certain offenders sentenced to a fixed-term custodial sentence, the point at which the offender is entitled to release. Before the 2020 Order came into force, such an offender was entitled to release once one half of the sentence had been served. The 2020 Order changes that to the two-thirds point. So, where the 2020 Order applies, an offender sentenced to a 12 year term is entitled to release at the 8 year point, rather than the 6 year point. The 2020 Order applies to sentences passed on or after 1 April 2020, even if the offence was committed before 1 April 2020, and even if the offender was convicted before that date. That means that the length of time that an offender spends in custody will depend on whether they happen to be sentenced before or after 1 April 2020.

2. The issue that arises in relation to each of these otherwise unconnected cases is whether the sentencing judge should have taken account of the impact of the 2020 Order when sentencing an offender after 1 April 2020, in circumstances where the conviction pre-dated the 2020 order. In each case the offence was committed before 1 April 2020 and the offender was convicted before that date. In each case, for reasons that were not of the offender's making, sentence was adjourned until after 1 April 2020. In each case (with the exception of DM) the 2020 Order applied to the sentence that was passed. On 23 March 2020, so a week before the 2020 Order came into force, widespread restrictions on movement were announced as result of the Covid-19 pandemic (and statutory restrictions on movement were imposed 3 days later). In most of the cases the adjournments were imposed, directly or indirectly, as a result of those restrictions.

3. We refer to the appellants and applicants (and the respondent in the Attorney General's Reference) compendiously as "the appellants." DM is under the age of 18. We direct, under s45(3) Youth Justice and Criminal Evidence Act 1999, that (until he reaches the age of 18 on 14 August 2021) no matter relating to him shall be included in any publication if it is likely to lead members of the public to identify him as the person concerned in these proceedings. The Sexual Offences (Amendment) Act 1992 applies to the offences committed by Paul Fox. No matter relating to the victims of his offences (who we refer to as A and T below) shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify those persons (or either of them) as a victim of those offences. This prohibition applies unless waived or lifted in accordance with s3 of the 1992 Act.

Statutory framework

Imposition of custodial sentence on an offender over age of 18 at date of conviction

4. On 1 December 2020 the Sentencing Act 2020 came into force. It consolidates into a single Sentencing Code many disparate enactments relating to sentencing. Although it was not in force at the time of the sentences imposed in each of these cases, the Sentencing Code does not make any change to the law that is material to these appeals, and nothing therefore turns on the change in the governing legislation. We have therefore set out the relevant sentencing provisions as they are now prescribed by the Sentencing Code, as well as the equivalent provision under the previous legislation.

5. Where a court sentences an offender who was over the age of 18 at the date of conviction (and where no mandatory sentence requirement applies), it must have regard to the purposes of sentencing (see s57(2) Sentencing Code; s142(1) Criminal Justice Act 2003). These are:

> "(a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and
>
> (e) the making of reparation by offenders to persons affected by their offences."

6. The court must follow any relevant definitive sentencing guidelines issued by the Sentencing Council for England and Wales unless it would be unjust to do so (s59 Sentencing Code; s125(6) Coroners and Justice Act 2009). The court may only pass a custodial sentence where the offence (together with any associated offences) is so serious that neither a fine alone nor a community sentence can be justified (s230(2) Sentencing Code; s152(2) Criminal Justice Act 2003). Where the court does pass a custodial sentence, it must be for the shortest term that is commensurate with the seriousness of the offence (together with any associated offence), taking account of any aggravating or mitigating factors (s231(2) and (7) Sentencing Code; s153 Criminal Justice Act 2003). When assessing the seriousness of an offence, the court must consider the offender's culpability in committing the offence, and any harm which the offence caused (or was intended to cause or which might foreseeably have been caused) (s63 Sentencing Code; s143(1) Criminal Justice Act 2003). The sentencing judge must explain the practical effect of the sentence (s52(3)(a) Sentencing Code; s174(3)(a) Criminal Justice Act 2003).

Early release provisions

7. It is for the sentencing court to determine whether a determinate custodial sentence should be imposed, and, if so, to determine the length of sentence, and to do so in accordance with the provisions identified in paragraphs 4-6 above.

8. It is no part of the sentencing court's function to set the point at which the offender will be released, or to calculate the sentence by reference to the date at which the offender will be released. The date at which the offender is entitled to release is a consequence of the sentence that is imposed, rather than an inherent part of the sentence. The determination of the release date is undertaken administratively in accordance with the statutory regime and (where appropriate) any decision of the Parole Board.

9. It follows that the sentencing court's role is limited to determining the sentence and explaining the effect of the sentence (which includes explaining the effect of the early release provisions) pursuant to its obligation under s52(3)(a) Sentencing Code. The judicial function of determining the length of sentence must be undertaken by reference to the statutory provisions and guidance without regard to the practical effect of the

early release provisions – see *R v Hardy* [2013] EWCA Crim 36 *per* Pitchford LJ at [12]: "assessment of sentence should follow principles and guidance without regard to the practical effect of the licensing regime in force at the time of commission of the offence…"

10. The fact that the early release provisions are not part of the sentencing process means that they have not been consolidated in the Sentencing Code.

11. S244 Criminal Justice Act 2003 provides (omitting exceptions that do not apply to these cases):

> "**244 Duty to release prisoners**
>
> (1) As soon as a fixed-term prisoner… has served the requisite custodial period for the purposes of this section, it is the duty of the Secretary of State to release him on licence under this section.
>
> …
> (3) For the purposes of this section "the requisite custodial period" means—
>
> (a) in relation to a prisoner serving one sentence, one-half of his sentence,
>
> …
> (d) in relation to a person serving two or more concurrent or consecutive sentences..., the period determined under sections 263(2) and 264(2).
>
> (4) This section is subject to paragraphs 5, 6, 8, 25 and 28 of Schedule 20B (transitional cases)."

12. The effect of s244(3)(d) is that where the offender is sentenced to two or more custodial sentences, the duty to release only arises once the offender has served one half of the aggregate of the custodial terms imposed.

13. Schedule 20B modifies these provisions in relation to certain transitional cases. These are cases where the sentence was imposed before the 2003 Act came into force, such that the offender was sentenced under the provisions of the Criminal Justice Act 1967 or the Criminal Justice Act 1991.

14. S267 of the 2003 Act provides that the Secretary of State may by order provide that any reference in s244(3)(a) to a particular proportion of a prisoner's sentence is to be read as a reference to such other proportion of a prisoner's sentence as may be specified in the order. In other words, it empowers the Secretary of State to change the proportion of the sentence that must be served before the prisoner is entitled to release. S330(2) of the 2003 Act provides that this power is exercisable by statutory instrument. By s330(4)(b) of the 2003 Act "transitory, transitional or saving provision" may be made when exercising this power to change the period of a sentence that must be served. By s330(5)(a) such a statutory instrument may only be made if a draft of the statutory

instrument has been laid before, and approved by a resolution of, each House of Parliament.

The 2020 Order

15. The 2020 Order was made under the power contained in s267 of the 2003 Act. It provides, in full:

> "**Citation and commencement**
>
> 1. This Order may be cited as the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 and shall come into force on 1st April 2020.
>
> **Interpretation**
>
> 2. (1) In this Order—
>
> "the 2003 Act" means the Criminal Justice Act 2003,
>
> "relevant violent or sexual offence" means an offence listed in Part 1 or 2 of Schedule 15 to the 2003 Act for which a sentence of life imprisonment may be imposed.
>
> (2) In this Order, a reference to a term of imprisonment is to be read as including a reference to a sentence falling within section 237(1)(b) of the 2003 Act.
>
> **Reference in section 244 of the 2003 Act**
>
> 3. In section 244 of the 2003 Act (duty to release prisoners), the reference to one-half in subsection (3)(a) is to be read, in relation to a prisoner sentenced to a term of imprisonment of 7 years or more for a relevant violent or sexual offence, as a reference to two-thirds.
>
> **Reference in section 264 of the 2003 Act**
>
> 4. In section 264 of the 2003 Act (consecutive terms), the reference to one-half in subsection (6)(d) is to be read, in relation to a sentence to a term of imprisonment of 7 years or more for a relevant violent or sexual offence, as a reference to two-thirds.
>
> **Application provisions**
>
> 5. Articles 3 and 4 do not apply—
>
> (a) in relation to any sentence imposed before the day on which this Order comes into force,

> (b) in relation to an offender who was aged under 18 at the time the sentence for the relevant violent or sexual offence was imposed, or
>
> (c) in relation to a sentence imposed under section 236A of the 2003 Act (special custodial sentence for offenders of particular concern) or section 265 or 278 of the Sentencing Code."

16. A draft of the order was laid before the House of Commons and the House of Lords on 14 October 2019. A press release explaining the effect of the order was published by the Government on 22 January 2020. The order was approved by resolutions of the House of Lords and House of Commons made on 22 January and 28 January 2020 respectively. The order was made on 6 February 2020. It came into force on 1 April 2020. No transitional or saving provisions were made, notwithstanding the power to do so (see s330(4)(b) of the 2003 Act).

17. An explanatory memorandum accompanying the 2020 Order identifies the policy reasons for the change:

> "**7. Policy background**
>
> ***What is being done and why?***
>
> 7.1 Offenders serving standard determinate sentences are automatically released half-way through their custodial sentence, including those convicted of very serious offences. The objective of this change is to ensure the most serious of these offenders serving long sentences spend two-thirds of their sentence in custody, bringing their point of release into line with the release provisions for those serving extended determinate sentences (whose earliest point of release, at the discretion of the Parole Board, is the two-thirds point in their custodial term).
>
> …
>
> 7.8 These robust sentences for dangerous and serious offenders ensure that the time they spend in custody reflects the severity of their crimes and takes account of the risk they pose to the public. The additional extension and 12-month licence periods also ensure the sentence remains in force for a 'longer than normal' period for a fixed term sentence – in recognition of the need for ongoing public protection measures following release. While the public can have confidence in the sentences available for these offenders assessed by the courts to be dangerous or of particular concern, automatically releasing other serious sexual and violent offenders at the half-way point does not align with this more robust approach following the introduction of the EDS and SOPC.

> 7.9 Offenders not deemed dangerous may be convicted of a serious offence, but still be sentenced to a standard determinate sentence. This means that an offender could be convicted of an offence for which the maximum penalty is life, and receive a lengthy sentence, but because the court has determined that they have not met the threshold for 'dangerousness' and to whom the SOPC does not apply, they will automatically be released half-way through their sentence.
>
> 7.10 This may be affecting public confidence in sentencing. A recent report by the Sentencing Council found that that nearly three quarters of the public (70%) surveyed thought sentences are too lenient, and almost half of victims did not have confidence in the fairness of the criminal justice system (49%). The report can be found here: https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-andConfidence-in-the-Criminal-Justice-System-and-Sentencing.pdf
>
> 7.11 For the sake of public confidence in the administration of justice, this Order will extend the period that the most serious offenders sentenced to standard determinate sentences will serve in custody."

Ambit of 2020 Order

18. The 2020 Order only applies to those sentenced to a term of 7 years or more for a violent or sexual offence specified in parts 1 or 2 of schedule 15 of the 2003 Act for which a life sentence may be imposed ("a relevant offence") – see articles 3 and 4, read with article 2.

19. The 2020 Order does not apply to:

    (1) Offenders sentenced to a term of less than 7 years;

    (2) offenders sentenced for an offence that is not a relevant offence;

    (3) offenders who are under the age of 18 when they are sentenced – see article 5(b);

    (4) offenders who are sentenced before 1 April 2020 – see article 5(a);

    (5) offenders who are sentenced under ss267 or 278 of the Sentencing Code as offenders of particular concern – see article 5(c).

20. The 2020 Order applies to those who are convicted before 1 April 2020 but sentenced on or after 1 April 2020. It follows that such an offender who otherwise comes within the ambit of the 2020 Order will only be entitled to release at the two-thirds point, even though, at the time of the conviction (and the underlying offence) the provisions which were then in force would have imposed a duty to release at the one-half point.

21. As a result, the consequence of an adjournment of the sentencing decision from a date before 1 April 2020 until a date on or after 1 April 2020 has a significant impact on the practical effect of a sentence to which the 2020 Order applies.

The impact of early release provisions on sentencing decisions

22. We have set out above, at paragraphs 4-6, the approach that a sentencing court must take when deciding whether to impose a custodial sentence and when determining the length of a fixed-term custodial sentence. Nothing in the legislative framework, or the definitive guidelines of the Sentencing Council, requires, or explicitly permits, a sentencing court to take account of the impact of the early release provisions on these decisions.

23. It would defeat the statutory purpose of the early release provisions if their effect were ordinarily to be taken into account when passing sentence. The clear intention underpinning the 2020 Order (as is clear from the text of the Order itself, and is spelt out in the Explanatory Memorandum) is that, where it applies, the offender should, before being entitled to release, serve a further one sixth of the sentence than was previously the case. If the sentencing judge reduced the length of sentence to reflect the harsher effect of the early release provisions then that would directly undermine the legislative purpose.

24. Accordingly, the courts have consistently made it clear that a sentencing judge should not ordinarily take account of early release provisions when deciding the length of a determinate custodial sentence:

    (1) In *R v Bright* [2008] EWCA Crim 462 [2008] 2 Cr App R (S) 102 the sentencing judge imposed a 7 year sentence. In his sentencing remarks he told the defendant that he would serve half that period in custody. In fact, the statutory framework that applied in that case meant that the offender would not automatically be entitled to release at the halfway point. He submitted on appeal that the judge had intended to impose a sentence that would achieve a custodial term of 3½ years, and the sentence should be adjusted accordingly. The submission was rejected – see *per* Sir Igor Judge PQBD at [41]:

> "The submission is based on a fallacy. The actual sentence was 7 years imprisonment. The release provisions did not and should not have affected the judge's sentencing decision. What he was required to do was to explain the effect of the sentence in the context of the applicable statutory provisions relating to release. He did not "intend" that the appellant should be released after 3½ years: that would simply have been the consequence if the 2003 Act had applied to the sentence, and he was required to state that consequence in open court."

    (2) In *R v Giga* [2008] EWCA Crim 703 [2008] 2 Cr App R (S) 112 *Bright* was followed on similar facts – see *per* Moore-Bick LJ at [17]:

> "the fundamental principle [is] that the judge's task is to determine the overall length of sentence, not how long the defendant will actually spend in custody."

(3) In *R v Round* [2009] EWCA Crim 2667 [2010] 2 Cr App R (S) 45 an application for leave to appeal against sentence based on discrepancies as to the impact of the Home Detention Curfew provisions on the offender's release date was dismissed. Hughes LJ VP said at [44]-[45] and [49]:

> "the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is, as it seems to us, a matter of principle of some importance.
>
> The wide possible range of regimes for early release and licence strongly reinforces the undesirability, never mind the impracticability, of courts being required to reflect the differences in their sentences.
> …
> Our clear conclusion is that it is not wrong in principle for a judge to refuse to consider early release possibilities when calculating his sentence or framing the manner or order in which they are expressed to be imposed. We are quite satisfied that it is neither necessary, nor right, nor indeed practicable, for a sentencing court to undertake such examinations. Ordinarily, indeed, it will be wrong to do so, although there may be particular cases in which an unusual course is justified."

(4) In *R (Robinson) v Secretary of State for Justice* [2010] EWCA Civ 848 [2010] 1 WLR 2380 the Court of Appeal explained that the statutory early release provisions regulate the way in which a determinate custodial sentence takes effect – they are not part of the sentence itself. It considered that the observations of Hughes LJ VP in *Round* amounted to "binding principle" – see *per* Moses LJ at [20] and [25]:

> "That distinction between the sentence passed by the court and the administrative arrangements for early or conditional release is recognised in a firm and up-to-date admonition by the Vice-President of the Court of Appeal Criminal Division, Hughes LJ, namely that the early release and licence provisions should be left out of account as a matter of principle: see *Round and Dunn v R* [2009] EWCA Crim 2667 , paragraphs 44 and 45. It is worth quoting from that judgment since it makes it clear that it was intended to be a deliberate exposition of a binding principle.
>
> [The Court then set out paragraphs 44 and 45 of *Round*].
> …
> For the purposes of the issue in the instant appeal article 6 requires an answer to the question: what was the sentence passed by the court with which it is said the legislature has interfered? The answer under English jurisprudence is that it was a sentence of five years. The legislative changes have not affected or increased the level of that sentence."

(5) In *R v Tony Dunn* [2012] EWCA Crim 419 the appellant had committed a series of similar offences which straddled the date on which the early release provisions in 2003 Act came into force. He was sentenced to 15 years' imprisonment on all

offences. For those offences committed after the 2003 Act came into force he was entitled to be released after serving 7½ years. For those offences committed earlier he was not entitled to be released until he had served 10 years. The latter point was overlooked by counsel and by the sentencing judge. The judge told the appellant that he would be released at the 7½ year point. The case was referred back to the judge, but outside the 56 day period in which the sentence could have been amended (s385 Sentencing Code; s155 Powers of Criminal Courts (Sentencing) Act 2000). But for the expiry of the time limit there was no doubt that the judge would have amended the sentence so as to secure that the release date would be at the 7½ year point. Instead, the judge encouraged the appellant to appeal and indicated that it was his wish that this court should reduce the sentence on the earlier offences so as to ensure that he was released at the end of 7½ years:

> "There you are, Mr Dunn. This is highly procedural, but we do not want you being disadvantaged many years down the line. We want you to be able to be released at the earliest possible opportunity, subject to your progress in custody. This is a procedural anomaly. It is going to be resolved."

Contrary to the judge's expressed wish, this court dismissed the appeal – see *per* Saunders J at [11]-[13]:

> "11. It is clear, in our judgment, that in passing sentence a court should not take into account the effect of the different regimes for early release. The question for us remains whether the appeal should nevertheless be allowed as the appellant's expectation had been raised by the judge that the result of the appeal would be that this court would correct what the judge believed had been an error on his part.
>
> 12. We have had the benefit of full argument that the judge did not. Indeed, the stance of the prosecution at the time the matter was referred back to him was to encourage the judge to express himself in the way that he did. We do not think we should give effect to the error made by the judge. Indeed we do not think that it does create the sort of injustice suggested on behalf of the appellant. While on the sentences for the offences committed before April 2005 he will not be entitled to automatic release after seven-and-a-half years, he will be eligible for parole. The Parole Board will release him after 7½ years if satisfied that he is no longer a danger to young girls with whom he may come into contact. We do not think that creates an injustice. We are aware that there are sometimes delays in the consideration of applications by the Parole Board. We would strongly urge the Parole Board to consider the appellant's case immediately after the period of seven-and-a-half years of the sentence has been completed. When reaching its decision it will no doubt take into account the clearly expressed wishes of the trial judge.
>
> 13. Further, it has been pointed out to us on behalf of the prosecution that, had the judge had the power to amend the

> sentence and had he done so as he would have wished, it would have been open to the prosecution to seek to refer the matter to the Court of Appeal via an Attorney General's Reference because it would have meant that sentences substantially reduced from fifteen years would have been imposed for offences which were in many ways more serious than those for which sentences of fifteen years' imprisonment were imposed."

(6) In *R v R* [2012] EWCA Crim 709 this court dismissed an appeal where the sentencing judge had erroneously indicated that the appellant would be released earlier than would in fact be the case – see *per* Calvert-Smith J at [7]:

> "It is not for judges to try to work out dates of release in advance. Although this is a case where such workings out would probably have resulted in a lower sentence, there may be many cases in which the exact opposite would be the case if judges were to concern themselves with release dates, rather than the appropriate sentence according to the guidelines and decided cases which help to set the appropriate sentence in any given case".

(7) In *R v Francis* [2014] EWCA Crim 631 the trial had been adjourned through no fault of the appellant. As a result, he was sentenced after a change in the early release provisions came into effect. He appealed against sentence and contended that the guidelines of the Sentencing Council (which pre-dated the change) should be adjusted to take account of the change to the early release provisions. The appeal was dismissed – see *per* Treacy LJ at [39]-[42]:

> "39. The suggestion that the sentencing guideline should be adjusted in some way, to reflect the fact that under the previous dangerousness provisions a person sentenced to an IPP would be eligible for release, subject to a favourable review by the Parole Board, at the halfway point in his sentence, is misconceived. The guidelines apply to sentences imposed by courts at any time after the guidelines come into effect. They are unaffected by legislation which governs early release possibilities. If those possibilities change from time to time as a result of later legislation, that is not a matter for the court.
>
> 40. In *R v Round ; R v Dunn* [2010] 2 Cr App R (S) 45, this court noted that there were at least five different regimes for early release on licence. The court stated that the general principle was that early release, licence and the various ramifications should be left out of account when sentencing. This court's clear conclusion was that it was not wrong in principle for a judge to refuse to consider early release possibilities when calculating the sentence. The court was satisfied that it was neither necessary, nor right or practical for a sentencing court to undertake such examinations. Ordinarily, it would be wrong to do so. The court's responsibility is to pronounce the correct sentence and to leave other matters out of account.

> 41. That very clear statement of principle by Hughes LJ (as he then was) applies firstly to the submission made in relation to the sentencing guidelines. It also applies to a further submission made which was to the effect that since these offenders were sentenced some two days after LASPO came into effect, and since the trial in their case had been postponed through no fault of theirs when the pre-LASPO regime was in place, the judge should have adjusted the length of their sentences accordingly.
>
> 42. The observations in *R v Round ; R v Dunn* seem to us to apply with equal force to this argument. With the introduction of the new legislation, the applicants could no longer be sentenced to a term of imprisonment for public protection or to an old style extended sentence. If found to be dangerous, the new extended sentence regime applied to them. The task of the judge was limited to fixing the correct custodial term. He was not obliged to indulge in calculations reflecting licence provisions. We are therefore unpersuaded by arguments relating to the length of the custodial term."

(8) In *R v Burinskas* [2014] EWCA Crim 334 [2014] 1 WLR 4209 the court was concerned with the effect of amendments to the dangerous offender provisions in the 2003 Act which were introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012. The court rejected the submission that suggested anomalies in the resultant release date should be taken into account when sentencing. Lord Thomas CJ said, at [38], "a sentencing judge may not, when sentencing [to a fixed-term custodial sentence], take account of the early release provisions." After referring to paragraph [44] of the judgment of Hughes LJ in *Round* Lord Thomas CJ added:

> "We agree. It is not for the court to correct the anomaly, if anomaly it be, by reducing the appropriate term to take account of the early release provisions. That would, in our judgment offend the general principle and undermine the purpose of s.246A which is to ensure that those subject to the new extended sentences serve one third more of the appropriate custodial term than those sentenced under the old regime."

(9) In *R (Abedin) v Secretary of State for Justice* [2015] EWHC 782 (Admin) the claimant contended that early release provisions amounted to a retrospective increase in the penalty imposed by the court, such that they were incompatible with article 7 ECHR. The claim was dismissed. Laws LJ referred to *Robinson* as well as "a long line of Strasbourg authority which draws a distinction between the penalty imposed and the means of its enforcement or execution." William Davis J agreed with Laws LJ – see at [24]:

> "I agree. I propose to add only this in view of my own personal experience of criminal jurisdiction. In the course of his submissions Mr Southey QC put this proposition: namely that judges in criminal courts when sentencing do to some extent take account of release provisions. That was the submission made. It

> is, with respect, plainly wrong. It flies in the face of what is set out at paragraph 20 in the judgment of Moses LJ in the case of *Robinson* already cited by my Lord. It also is contrary to any number of decisions of the Court of Appeal Criminal Division where even in cases where a judge has misapplied the release provisions in his explanation of the sentence, the sentence has not been interfered with (see for instance *R v Bright* [2008] EWCA Crim 419). The penalty imposed by a sentencing judge is the sentence he announces in court. Were we to attempt to reflect the release provisions in his sentence at any given time confusion and chaos would reign."

(10) In *R (Stott) v Secretary of State for Justice* [2018] UKSC 59 [2019] 1 Cr App R (S) 47 the Supreme Court held that the early release provisions for extended determinate sentences were not incompatible with article 14 ECHR. In doing so, it rejected the claimant's submission that a determinate sentence can be divided into one part (up to the point of early release) that takes effect for the purpose of punishment and deterrence, and a separate part (after that point) that takes effect for the purpose of avoidance of risk (see *per* Lady Black JSC at [124] and Lord Hodge JSC at [186]). In that context Lord Hodge drew attention to the *Round* line of authority – see at [188]:

> "In fixing the appropriate sentence of imprisonment of a convicted person, the judge does not take account of the statutory provisions for early release. In *R v Round* [2010] 2 Crim App R(S) 45, para 44, Hughes LJ described this requirement to disregard early release in fixing a sentence of imprisonment was "a matter of principle of some importance". The Court of Appeal in *R v Burinskas (Attorney General's Reference (No 27 of 2013)) (Practice Note)* [2014] 1 WLR 4209, paras 38-39 endorsed his statement. This disregard is unsurprising as the purposes of the early release regimes include matters such as economy and the relief of over-crowding in prisons, as well as the public interest in re-integrating a prisoner into society with the benefit of supervision. As a result, each of the four purposes of imprisonment in section 142(1) of the 2003 Act may be relevant justifications of the prisoner's continued detention throughout the custodial sentence which the judge has imposed. It follows that a determinate sentence of imprisonment is not to be divided by reference to its relevant early release provisions into a period for punishment, deterrence and rehabilitation on the one hand and a period when the only purpose is the protection of the public. There is no "punitive part" and "preventive part" in a determinate sentence of imprisonment. As Lady Black has shown (paras 124-125 of her judgment), judgments of the ECtHR, which address the requirement allowing the detained person access to judicial determination of the lawfulness of his detention in article 5(4) of the ECHR, have repeatedly recognised this characteristic of the determinate sentence."

(11) In *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) [2020] 1 WLR 3932 the claimant sought judicial review of the early release regime introduced by the Terrorist Offenders (Restriction of Early Release) Act 2020, contending that it was incompatible with articles 5, 7 and 14 of the European Convention on Human Rights. The claim was dismissed. At [121] Garnham J, giving the judgment of the court (Fulford LJ VP and Garnham J) distilled the following principles from the decisions in *Bright* and *Round*:

> "(i) The early release arrangements do not affect the judge's sentencing decision.
>
> (ii) Article 5 of the Convention does not guarantee a prisoner's right to early release.
>
> (iii) The lawfulness of a prisoner's detention is decided, for the duration of the whole sentence, by the court which sentenced him to the term of imprisonment.
>
> (iv) The sentence of the trial court satisfies article 5.1 throughout the term imposed, not only in relation to the initial period of detention but also in relation to revocation and recall.
>
> (v) The fact that a prisoner may expect to be released on licence before the end of the sentence does not affect the analysis that the original sentence provides legal authority for detention throughout the term."

25. This represents an extensive, consistent and binding body of authority, rooted in principle, that has been considered and endorsed by the Supreme Court. It is based on the different roles played by the judiciary and the executive. It recognises the different considerations that influence, on the one hand, individualised sentencing decisions, and, on the other hand, generally applicable statutory early release provisions that reflect broad government policy. The approach of leaving release provisions out of account when setting the sentence has been applied even where that might be said to cause a harsh effect in an individual case. It has been applied where the results are anomalous, and where (as in *Tony Dunn*) that is directly contrary to the intention of the sentencing judge and contrary to an expectation raised in the offender by the sentencing judge, and where (as in *Francis*) a delay to the sentencing hearing beyond the control of the appellant has resulted in a change to the applicable provisions.

26. It follows that there is ordinarily no scope for sentencing judges to take account of the early release provisions when assessing the appropriate sentence.

27. The issue on these appeals is whether exceptions to that general principle should be made in these particular cases.

The parties' submissions

28. We did not understand there to be any dispute as to the principles identified in the authorities we set out at paragraph 24 above.

29. The appellants each argue that through no fault of their own, or the defence generally, they will serve substantially more time in custody prior to release than would otherwise have been the case if the matter had proceeded to sentence as originally intended. They say that this is manifestly unfair and that it is wrong in principle that an appellant, through no fault of his own, should suffer the detrimental effect of the 2020 Order when the court's intention had been that they should be sentenced before those provisions came into effect. The net result is that the appellants have to serve an extra one sixth of their sentence in custody (which in the case of Karl Lawrence amounts to 2 years and 4 months). This, they say, is arbitrary and unfair. In addition, they argue that it is a breach of a legitimate expectation that that they were each given that they would be sentenced before 1 April 2020 and that they would therefore be entitled to release at the halfway point of their sentences. Although they accept the principles set out in the authorities, they draw attention to the fact that no court has ever said that those principles are absolute, immutable and incapable of flexibility so as to yield to the justice of a particular case and so as to ameliorate unfairness or a breach of legitimate expectation that would otherwise be occasioned. Thus, in *Round*, the admonition against taking account of early release provisions was qualified by the adverb "ordinarily" (see at [47]), thus implying that there may be extraordinary cases where such an approach may be permitted. Moreover, Hughes LJ expressly said that there may be "particular cases" where an "unusual course" (meaning, in context, a course which involved taking account of early release provisions) could be justified.

30. Different routes were suggested by which the early release provisions could legitimately be taken into account in these cases when imposing sentence. It was pointed out that:

    (1) There is no requirement to follow a definitive guideline of the Sentencing Council where the court is satisfied that it would be contrary to the interests of justice to do so (s59(1) Sentencing Code; s125(6) Coroners and Justice Act 2009).

    (2) A court must, when imposing a fixed term custodial sentence, take account of mitigating factors (s231(2) and (7) Sentencing Code; s153 Criminal Justice Act 2003)).

    (3) Mitigating factors can include the consequences of a particular sentence having regard to the impact of the Covid-19 pandemic - *R v Manning* [2020] EWCA Crim 592. Other factors which are completely extraneous to the offence may also be taken into account in mitigation, including the fact that the offender has provided assistance to the police.

    (4) A sentencing judge should not, without good reason, impose a sentence that is incompatible with a legitimate expectation that has been created by an indication given by the court – see *R v Gillam* (1980) 2 Cr App R (S) 267 *per* Watkins LJ at 269.

31. The broad theme was that a judge can and should adjust a sentence to take account of a change in the early release provisions where that is necessary to cure what would otherwise be an unfairness or a breach of a legitimate expectation on what were said to be the highly unusual and exceptional facts of each of the 13 individual cases (including the Attorney General's Reference, but not DM) that are before the Court.

32. On behalf of Levar Thomas, Mr Sidhu QC invites us to answer the following four questions in the affirmative, and hence to allow the appeal in his client's case: (1) Has an unfairness arisen because of the delay? (2) Has the unfairness arisen in consequence of a legitimate expectation that has not been met? (3) Does a judge have the authority to remedy the failure to meet the legitimate expectation? (4) Is there a precedent for judges to remedy such a frustrated legitimate expectation? He argued that these cases "fall outside the ordinary run of cases" that were contemplated in *Round* and *Dunn* and that those authorities explicitly recognised that a different approach could be taken in such "extraordinary" cases.

33. On behalf of Ryan Brady, Mr Evans invites us to read the words "sentencing hearing fixed" into article 5(a) of the 2020 Order (so that the Order would not apply to any case where the sentencing hearing was first fixed before 1 April 2020, instead of it not applying to sentences imposed before 1 April 2020). This was said to be justified on the grounds that Parliament cannot have intended to legislate on the grounds of "bad luck" and "uncertainty" and that the proposed re-wording would increase certainty.

34. Mr Atkinson QC on behalf of the respondent to each of the appeals and applications, and Ms Walker on behalf of the Attorney General, each argue that the authorities establish that the sentencing judge should not be influenced by the release regime, even where this may lead to anomalies, and even where (as in *Francis*) an adjournment results in the imposition of a less favourable release regime or where (as in *Dunn*) the sentencing judge has raised an expectation that a particular release regime will be applied.

35. It follows, says Mr Atkinson, that the sentences imposed in each case were not manifestly excessive, or wrong in principle, because the sentencing judge did not take account of the effect of the 2020 Order. Conversely, Ms Walker argues that the sentencing recorder in Paul Fox's case (who reduced the sentence by a quarter to take account of the change to the early release provisions), imposed a sentence that was unduly lenient.

36. They both recognise that Hughes LJ stopped short of laying down an absolute rule and instead contemplated the possibility that there might be exceptions. However, they each submit that this was simply a case of a judge taking the precaution of "never saying never" and that, on analysis of the authorities at paragraph 24 above, there is no scope for recognising these cases as exceptional so as to merit a different treatment.

Discussion

37. Nothing in the authorities explicitly rules out the possibility that there may be exceptional cases where it is appropriate to take account of the impact of early release provisions.

38. A court must take account of mitigating features when setting the length of a fixed-term custodial sentence (s231(2) and (7) Sentencing Code; s153 Criminal Justice Act 2003). There is no closed exhaustive list of mitigating factors. Depending on the case, they may include the fact that custody will have a particularly harsh impact on the individual offender. Moreover, a court may depart from the approach required by an applicable definitive Sentencing Council guideline where it would be unjust to follow that approach.

39. This court has recognised the exceptional impact that the Covid-19 pandemic may have on sentencing decisions. Thus, in *R v Manning* [2020] EWCA Crim 592 this court indicated that the restrictions on a prisoner's residual liberty, as a result of the Covid-19 pandemic, should be taken into account when determining the length of a custodial sentence – see *per* Lord Burnett CJ at [41]-[42]:

> "We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.
>
> Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a Magistrates' Court to retain jurisdiction, rather than committing for sentence."

40. The Covid-19 pandemic's effect on the criminal justice system is not limited to the conditions in prisons. As is well known, and as these cases illustrate, it also had a significant effect on the progress of cases through the criminal courts. The effect was at its most marked between late March 2020 and May 2020. On 26 March 2020 the Government introduced significant legislative restrictions on movements (having announced the need to impose such restrictions 3 days earlier) – see The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. There were exemptions from the restrictions for the purpose of attending court or participating in legal proceedings (see regulation 6(1)(h)). However, it was necessary for Her Majesty's Court Service to take measures to ensure the safety of those attending court. By May 2020 the courts had begun to introduce measures to enable hearings safely to take place, either by the use of technology to facilitate remote hearings, or by the introduction of protocols and physical features to enable social distancing within the courtroom. That period, between late March 2020 and May 2020, straddled the date on which the 2020

Order came into force. So it is that the Covid-19 pandemic caused a delay in a large number of court hearings, including sentencing hearings, from late March 2020 until May 2020 or later. This had the effect that sentences that would otherwise have been imposed in late March 2020 were not imposed until after 1 April 2020. Where those sentences came within the scope of the 2020 Order, the effect is that the defendant would be required to serve two thirds, rather than one half, of the sentence in custody before being entitled to release.

41. We do not, however, accept that an analogy can properly be drawn, for the purpose of sentencing, between the effect of the pandemic on prison conditions, and the effect on the date of sentence (with the resulting impact of the 2020 Order). There is a principled difference between prison conditions and the effect of a change in the early release regime. The former may be taken account by the application of ordinary sentencing principles, which include recognising as a mitigating factor (when applying s231(7) Sentencing Code; s153 Criminal Justice Act 2003) the impact that custody will have on the particular offender. Likewise, assistance provided by an offender to the prosecuting authorities may, on conventional principles, be recognised as a mitigating factor both at common law (see *R v X (Sentencing: Confidential Information)* [1999] 2 Cr App R (S) 294) and under statute (s74 Sentencing Code; s73 Serious Organised Crime and Police Act 2005).

42. A change in the early release regime is different. It is a legislative change that is introduced by Parliament (or by a Secretary of State with Parliament's authority). The authorities we identify at paragraph 24 above show that the early release provisions may not ordinarily be taken into account by a sentencing judge – they do not amount to a mitigating factor for the purposes of sentencing. That is for the principled reason identified at paragraph 23 above. Mr Evans' invitation to re-write article 5 of the 2020 Order so that it does not apply if the sentence hearing was (or perhaps should have been) first listed for hearing before 1 April 2020 (or to pass adjusted sentences that would have that effect) is directly contrary to that principle. The broader approach adopted by the advocates for all the appellants is no different in effect to the exercise in legislating that Mr Evans asks us to undertake. That is because if the courts were to adjust the sentences imposed on offenders whose hearings were adjourned from before 1 April 2020 until after that date, then the courts would thereby change the intended impact of article 5 of the 2020 Order. The Secretary of State could have legislated to achieve the result that the appellants seek. He chose not to do so (although he could still do so with retroactive effect). It is not open to the courts to thwart that legislative choice.

43. If there is any exception to the principle that Hughes LJ identified in *Round* then the exception must, itself, be rooted in principle and consistent with the legislative framework that governs sentencing. The mere fact that the sentencing process has been delayed is not sufficient, as the authorities show. Nor is it sufficient that the process has been delayed for reasons that are beyond the control of the individual appellant, as *Francis* shows. Nor is it sufficient that the reason for the delay was unforeseen or unforeseeable. At the time the 2020 Order was laid before Parliament, the Covid-19 pandemic was unforeseen and unforeseeable. However, as the rich factual variety of the cases before the court demonstrates, sentencing can be delayed for many reasons that are beyond the control of an offender quite apart from a pandemic (reports not being ready on time, a co-defendant's trial overrunning, court equipment malfunctioning, ill-health of counsel, failings in communication). In choosing to set the

operative date as the date of sentence rather than the date of conviction or the date of the offence, it was inevitable that offenders whose hearings in late March were delayed for any reason (foreseeable or otherwise) would be adversely impacted by the change. There does not seem to us to be any justified reason to seek to distinguish between delay caused by the pandemic, and delay caused by factors such as the provision of reports.

44. Nor does the fact that the offender has been given an expectation that he will be sentenced before 1 April 2020, or otherwise sentenced in a way that defeats the change introduced by the 2020 Order, amount to a justification for departing from the principle identified in *Round* if, in the event, sentencing takes place after 1 April 2020. That is vividly shown by the decision in *Tony Dunn* (see paragraph 24(5) above) as well as the other cases where an offender has been given erroneous information (whether by the judge or a legal representative) as to the impact of the release provisions. In these cases there is no "legitimate expectation" because any expectation engendered is contrary to the legislative framework and the principle identified in *Round*. This is not capable of founding an enforceable right based on the principle of legitimate expectation – see *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 *per* Sedley J at 731. Thus, a sentence indication under the principles identified in *R v Goodyear* [2004] EWCA Crim 888 [2006] 1 Cr App R (S) 6 does not prevent the sentence from being increased if the sentence is unduly lenient (see at [65]).

45. For these reasons we reject the submissions of the appellants on the common issue in these appeals.

The individual appeals

(1) Tristan Patel, (2) Sifean Ghilani, (3) Levar Thomas

46. On 21 June 2019 Tristan Patel, Sifean Ghilani and Levar Thomas met Stevie Pentelow on the pretext of purchasing drugs, but with the intention of robbing him. In the course of the robbery Sifean Ghilani stabbed Stevie Pentelow to the chest. The blade penetrated the lung and the left ventricle of the heart. Stevie Pentelow died from his injuries.

47. The three appellants were convicted following trial of conspiracy to rob and manslaughter. They were due to be sentenced at the Crown Court at Northampton on 20 March 2020. Sentence was adjourned to 23 April 2020 because counsel for the Crown had been required to self-isolate. Submissions on the question of an adjournment were not invited. None of the appellants asked for the hearing to remain in the list for 20 March 2020 or for the hearing to take place before 1 April 2020. The appellants were, respectively, sentenced to terms of detention in a Young Offender Institution of 11 years and 6 months, 12 years and 4 months, and 11 years and 3 months. In his sentencing remarks the judge indicated that it was not clear whether the 2020 Order applied (and he plainly did not take it into account in setting the sentence) – he said:

> "You will serve up to two thirds of the sentence in custody on the assumption that the [2020 Order] has come into force. I have been unable to locate the relevant commencement order… If the order is not yet in force, you will serve one half."

48. When it became clear that the 2020 Order had come into force the judge was invited to review the sentence under the slip rule. He declined to do so, saying:

> "…there is no slip to correct. In calculating the total sentence for each defendant, I set the lengths thereof as those which I considered to be just and proportionate to the offending, and the date of release is a matter for the executive not the courts. The courts conventionally take no account of release provisions when deciding the appropriate sentence."

49. This was entirely the correct approach. The sole ground of appeal is that the judge should have taken account of the impact of the 2020 Order. For the reasons we have given we dismiss the appeal.

(4) Atiyyah Viola Gidden

50. On 1 May 2019 Atiyyah Gidden committed an offence of causing grievous bodily harm with intent. She and another woman attacked a Ms Hassan following an altercation in the street. The appellant ran at Ms Hassan and delivered a flying kick which landed on the top part of Ms Hassan's torso. The other woman punched Ms Hassan to the head, and continued to punch and stamp on her after she fell to the ground. The appellant remained at the scene and supported and encouraged this continued attack. Ms Hassan suffered traumatic brain injury and was in a coma under sedation for two weeks. Her injuries have had lasting effects, including mental slowing and loss of full control of the left side of her body.

51. The appellant was due to be sentenced on 12 March 2020. A pre-sentence report was not ready by that date. Sentence was adjourned until 8 April 2020, which was the earliest date that the court could accommodate. The judge adopted the guideline starting point of 12 years' imprisonment for both the appellant and her co-defendant. After taking account of the fact that the offence was committed on bail, and the available mitigation, the judge imposed a sentence of 11 years' imprisonment. In the course of her sentencing remarks she said that the appellant would serve half of the sentence in custody before being automatically released on licence. Later the same day, counsel for the Crown wrote to the judge to draw her attention to the 2020 Order. The judge responded to say that she had overlooked the 2020 Order, that she agreed that her explanation of the sentencing regime was inaccurate, but this was not a matter that needed rectifying under the "slip rule". For the reasons we have given the judge was right not to adjust the sentence.

52. Aside from the complaint about the impact of the 2020 Order, the appellant contends that the starting point of 12 years was too high and that a lesser starting point should have been applied than that adopted for the co-defendant. We disagree. This was a case of joint enterprise. The appellant had encouraged and supported the co-defendant and had, herself, initiated the use of physical force. No complaint is made as to the factual description of the assault given by the sentencing judge in her sentencing remarks. The judge was entitled to conclude that it was not appropriate to draw any distinction between the appellant and the co-defendant on the basis of participation.

53. The appellant further contends that the court placed insignificant weight on the appellant's expressed contrition, reducing the sentence by just 8% from 12 years to 11

years. Again, we disagree. The adjustment from 12 years to 11 years reflected both an increase to take account of the fact that the offence was committed on bail, and a decrease to take account of the mitigation. The judge therefore considered that not only did the mitigation offset the aggravating effect of the offence being committed on bail, but that a significant further reduction should be made. Moreover, the weight that could properly be attached to the appellant's expressed contrition is attenuated by reason of the fact that she did not fully accept her role in the events, and her account was not accepted by the jury.

54. Subject to one correction, therefore, we consider that the sentence imposed was neither wrong in principle nor manifestly excessive.

55. The correction is that the sentence was expressed as imprisonment. The appellant was under the age of 21 at the date of conviction and the sentence should have been pronounced as detention in a Young Offender Institution. We direct that the record be amended accordingly.

(5) Jason Nicholas Thompson

56. Jason Thompson was at the Notting Hill Carnival on 24 August 2019 when he came across Ms Daumann. She was taking photographs to send to her family in Brazil. The applicant took exception to this. He pushed her in an angry and fierce manner. He said "I am the Devil" in an evil sounding voice, and headbutted her in the area of her nose and left eye. He bit her, and then pulled his head away with her top lip still in his closed mouth. He remarked that he could still taste Ms Daumann's lip in his mouth. He left the scene, stopping for a meal at Nando's on the way home.

57. An officer who saw Ms Daumann shortly afterwards said that this was one of the worst attacks on a person he had ever seen. There was very significant bleeding, and a large area of tissue missing from Ms Daumann's upper lip. She underwent reconstructive surgery. This resulted in extensive surgical emphysema (air under the skin) all over the left side of her face, and spreading to the right side. Further procedures were undertaken to attempt to correct the injury in October 2019 and January and February 2020. She has been left permanently disfigured and has been affected emotionally as a result of the attack. Her business and income have been seriously affected. She had to move away from London.

58. The applicant told the probation officer that Ms Daumann had antagonised him. He claimed that she would have minimal scarring, and that the incident was "accidental" (which he later explained meant that it was not pre-meditated).

59. The applicant pleaded guilty on the day of trial to causing grievous bodily harm with intent. The case had been listed, at the appellant's request, for the appellant to be arraigned 5 days earlier (with the anticipation that a guilty plea would be entered), but the appellant had been unwell and had not attended court on that occasion. Ms Daumann had not been warned to attend trial because of the anticipated plea. The appellant had not previously been arraigned because of the need to assess his fitness to plead.

60. The sentencing judge described the photographs of Ms Daumann's injuries as "sickening." She described the offence as "an astonishing act of extreme violence in an irrational, unprovoked and brutal manner to a complete stranger." The judge considered

that the offence came within category 1 of the Sentencing Council guidelines, with a starting point of 12 years. She considered that the offence was aggravated by the fact that there were many others present who were clearly affected by what they saw, by the ongoing effect on Ms Daumann (and the fact she had to move), and by the fact that the offence was committed under the influence of alcohol. The sentence following trial would have been 14 years' imprisonment. Allowing credit for the guilty plea the judge imposed a sentence of 12 years' imprisonment. The judge was aware of, and correctly made reference to, the effect of the 2020 Order.

61. On 10 July 2020 the case was re-listed before the same judge to review the sentence, it being submitted that it should be adjusted to take into account the consequences of the 2020 Order. The judge declined to adjust the sentence. She said:

> "To make an adjustment, as I am invited to do now, so that he serves effectively only six years would be to [frustrate] in my judgment the intention of Parliament and it would be wrong for me to do so. I, therefore, am not going to revise the sentence that I have imposed. Parliament had a very clear intention when they put into place and put into force [orders regulating the release of prisoners] and it is not my place to interfere with that. I arrived at the appropriate sentence taking into account everything and I have no reason today, in my judgment, to vary that."

62. It will be apparent from what we have already said that we consider that this was entirely the correct response to the application to adjust the sentence.

63. Aside from the complaint about the impact of the 2020 Order, the applicant argues that a sentence after trial of 14 years' imprisonment was manifestly excessive, and that insufficient credit was given for a guilty plea.

64. We do not agree that a sentence after trial of 14 years' imprisonment was manifestly excessive. The judge was justified in increasing the 12 year starting point by 2 years in the light of the aggravating features that she identified. Nor was insufficient credit given for the plea. The plea was entered on the first day of trial. The Sentencing Council's guideline, which the judge was required to follow unless that would be unjust, indicates that the maximum credit at that stage is 10%. The judge in fact applied a discount of just over 14%, or nearly half as much again as the maximum discount intimated by the guideline. In doing so she more than amply reflected the circumstances that resulted in the late plea, and the fact that it had been indicated at an earlier stage that the applicant would plead guilty.

(6) Karl Lawrence

65. On 18 January 2017 Karl Lawrence, with his co-defendant, committed an attempted robbery of two men who were delivering cash to a Tesco ATM machine. This was a professionally planned commercial robbery, involving the obtaining of stolen vehicles, a number of fake number plates, and the use of a number of "burner" mobile phones. A sawn-off shotgun was used, and a blank cartridge was discharged by the appellant's co-defendant. The two men who were delivering the cash realised at that point that it was a blank round, and were able to thwart the robbery.

66. The appellant was convicted on 19 February 2020 of attempted robbery following a trial at the Crown Court at Chelmsford. Reports addressing the question of dangerousness were required. Sentence was adjourned to 30 April, and then (due to the need for more time for the reports) to 18 May 2020. The appellant was sentenced to 14 years' imprisonment. The judge indicated that the appellant would serve half of that sentence before his release.

67. The sole ground of appeal is that the judge should have taken account of the impact of the 2020 Order. For the reasons we have given we dismiss the appeal.

(7) Kyron Blackley and (8) DM

68. In June 2019 DM was aged 15 and Kyron Blackley was aged 17.

69. The offences: On 22 June 2019 the appellants committed an offence of robbery. They were with a third person when they saw Mr Briggs riding home on his moped. They followed him in a car driven by DM. The three men got out of the car and confronted Mr Briggs. One of the men had a nine inch knife which he brandished, and said "give me your fucking keys". Mr Briggs ran through his back gate. He returned shortly afterwards. The men were no longer there. They had taken the moped but had dumped it further down the road. It had sustained some damage to the ignition mechanism.

70. On 11 July 2019 the appellants committed a second offence of robbery. At about midnight Mr Lawson and Ms Winters went to withdraw money from a cash machine. They were both elderly and Mr Lawson was disabled and walked with a stick. They were approached by the appellants and another man. Kyron Blackley produced a four inch knife. He pushed Mr Lawson against a wall and then kicked his stick. Ms Winters approached, and DM was standing by the car holding bolt croppers. He raised them above his head and said "I'll whack you with this if you don't give me the rest of the money." Ms Winters told them to leave them alone. DM swung the bolt croppers at Mr Lawson, stopping near his arm, and said to Ms Winters "if you don't give us the rest of the money I'll stab you." Ms Winters took £190 from her pocket and gave it to the third man. The men also took £20 and a mobile phone from Mr Lawson.

71. On 20 July 2019 the appellants committed an offence of attempt robbery. They were part of a large group riding motorcycles. Mr Matthews was with friends riding mopeds. As Mr Matthews passed Kyron Blackley he, Kyron Blackley, attempted to ram his bike into Mr Matthew's to knock him off. Mr Matthews managed to stay on. He and his friends drove off. Kyron Blackley, DM, and others followed. At a junction they attacked them. They tried to take a key to one of the bikes. Mr Matthews intervened, and was attacked by two of the men. One of the men grabbed the chin strap of his helmet, and another man hit him from behind. A third man used a hammer to hit him over the head of his helmet, causing Mr Matthews to drop to the floor. Fire officers came to assist, and the offenders made off. Mr Matthews was taken to hospital and treated for concussion.

72. Kyron Blackley was remanded into custody on 2 August 2019. He was released on bail on 8 August 2019 subject to an intensive supervision and surveillance package.

73. On 16 August 2019 Kyron Blackley committed a further offence of robbery. He was the passenger in a car that pulled up alongside Mr Solomon, who was riding a moped.

Kyron Blackley reached out and pushed Mr Solomon off his moped. Another man got out of the car and grabbed the moped. There was a struggle, during which Mr Solomon was hit over the head with a large machete, causing a dent in his helmet. Kyron Blackley rode off on Mr Solomon's moped.

74. The criminal proceedings: Kyron Blackley and DM were each charged with these and many other offences. They pleaded not guilty to the offence committed on 11 July 2019, but were convicted following a summary trial before the Youth Court. They pleaded guilty to the remaining offences. On 28 October 2019 they were committed to the Crown Court at Manchester for sentence for these, and other, offences (a total of 31 offences in the case of Kyron Blackley, and 19 offences in the case of DM).

75. They were due to be sentenced on 24 January 2020. Kyron Blackley's psychological report was not available by that date and sentence was adjourned to 30 March 2020. Following the Covid-19 lockdown, sentence was further adjourned to 9 July 2020.

76. The sentencing judge summarised the overall effect of the offending as follows:

> "In summary, from January of 2019 to September of 2019, individually and collectively, you two, and a significant number of other young men, were responsible for what at times gave the appearance of an almost complete breakdown in law and order in North and East Manchester. Your crimes of dishonesty, serious armed violence and complete disrespect for the police and communities in which you lived, have resulted in serious harm to the communities from which you came, and harm to the very many law-abiding people who live in them. Amongst the crimes you committed were robberies and an attempted robbery…
>
> It is, though, of vital importance to recognise that this case is not simply a case involving serious robberies and attempt so to do. It is about much more than that. Because such an approach would fail to recognise the impact upon the victims of both of you, but victims who were not the subject of attack by machete, knife or bolt croppers, but others whose lives have been so badly affected by you. They are the skilled men and women who lost their tools in Blossom Street, in Ancoats. The people who lived in the block of flats whose motorbikes were stolen in the dead of night by armed men. Or Thomas Livingstone who not only had to suffer the indignity of having his bike stolen from him, but when he had the audacity to complain he was met with intimidation and threats of serious violence. And poor Mr Amjad Zuba. A trapped taxi driver, himself subject to intimidation, witnessing another taxi driver subject to similar horrific intimidation on the streets of this city. And it is about the public at large who would have seen much of the lawlessness, seeing you driving through the streets of Manchester without helmets and at speed. They would feel that all law and order had broken down."

77. The judge recorded that counsel for the applicants accepted that "these were serious, disgusting, appalling and feral events" which, in principle, justified sentences under s91 of the 2000 Act. The sentencing judge paid close attention to the overarching guideline "Sentencing Children and Young People" as well as the need to have regard to the welfare of the appellants. He considered that recommendations for non-custodial disposals were wholly unrealistic, and that the seriousness of the offending could only be met by detention under s91 of the 2000 Act. In respect of the offence on Mr Briggs he considered that the case came within category 2 of the adult guideline, indicating a starting point of 5 years with a range of 4-8 years. He observed that there were aggravating features, particularly significant planning, the targeting of Mr Briggs, the lengthy period following him home, the commission of the offence at his home, the fact that it was group activity and that MD was on bail. The judge considered the starting point would be a custodial sentence of between 5 and 8 years. In respect of the offences against Mr Lawson, Ms Winters and Mr Matthews, the judge considered that the offences came within category 1A with a starting point of 8 years and a range of 7-12 years. In respect of the offence against Mr Solomon the judge considered that the starting point should be higher than 5 years.

78. In Kyron Blackley's case the judge considered that the appropriate sentence to reflect the totality of the offending, if he had been an adult, would have been 16 years' imprisonment. He applied a one third reduction to reflect Kyron Blackley's age. He (erroneously) suggested that this would result in a 12 year term. He then considered that the impact of delay and the consequences of serving a sentence during the Covid-19 pandemic merited a further considerable reduction. After taking account of that, he imposed sentences of 9 years' detention for the robberies and the attempted robbery. He recognised that Kyron Blackley would have to serve two thirds of the sentence.

79. In DM's case the judge took into account his younger age, and the fact that he had been involved in fewer offences. If he had been an adult, the judge would have imposed a sentence of 12 years. He applied a 50% reduction on account of DM's age, to reach 6 years. He made a further reduction of 1 year to reflect the delay in the case coming to court, and the consequences of serving a sentence during the Covid-19 pandemic. The resulting sentence for the robberies and attempted robbery was 5 years' detention under s91 of the 2000 Act. The judge imposed no separate penalty for the other offences, save that his driving licence was endorsed and he was disqualified from driving for 7 years. A Criminal Behaviour Order was imposed for a period of 10 years.

80. On 21 August 2020 a further hearing took place where the sentence was reviewed under s155 of the 2000 Act. The sentencing judge acknowledged, and took full responsibility for, the arithmetical error. He (correctly) observed that the case had involved a complex sentencing exercise and that after undertaking the step by step approach required by the guidelines it was incumbent on the sentencing judge to consider whether the total sentence is just and appropriate to the overall offending. He said "[t]he exercise required *inter alia* the application of the guidelines, adjustments to be made for age, the Covid emergency and the release of Prisoners Order of 2020. I am satisfied that despite the error made that the overall sentence of nine years' detention is the right sentence. I therefore decline the invitation to adjust the sentence passed."

81. Kyron Blackey's application for permission to appeal: For the reasons we have given, the judge was wrong to suggest that it was necessary to adjust the sentence to take

account of the 2020 Order. It follows that the sentence was not manifestly excessive by reason of a failure to apply an even greater adjustment to reflect the 2020 Order.

82. Kyron Blackley further seeks permission to appeal on the grounds that the starting point was too high. We do not agree. The judge's proposed starting point for an adult of a 16 year term would have been manifestly excessive for any of the single offences of robbery. But the judge was dealing with three offences of robbery and one of attempted robbery committed in the context of many other offences, accepted by counsel as being "serious, disgusting, appalling and feral." Consecutive sentences (with appropriate adjustment for totality) would have been justified. In imposing concurrent sentences it was necessary to ensure that the overall sentence reflected the totality of the offending. That meant that it was inevitable that the sentence would be significantly in excess of that which would have been justified for a single offence. We do not consider that there is any basis to conclude that the 16 year starting point for an adult was manifestly excessive.

83. The sentence that was imposed of 9 years involved a more than 40% reduction. That was sufficient to reflect the appellant's age, and all the other mitigating factors (aside from the 2020 Order) that the judge mentioned.

84. Kyron Blackley further contends that the judge failed to give credit for the guilty pleas. This was not a factor that was pressed in oral submissions, no doubt because it is not capable of affecting the overall sentence (because concurrent terms were imposed, and guilty pleas were not entered for all of the offences). Nonetheless, it does not appear that any credit was afforded for those offences where guilty pleas were tendered. To that extent we grant leave to appeal, allow the appeal, and quash the sentences for offence 1 on memorandum S20190750, and offences 25 and 27 on memorandum S20190752 (the robberies on 16 August 2019 and 22 June 2019, and the attempted robbery on 20 July 2019) and, for those offences, substitute sentences of 6 years' detention, concurrent to the 9 years' detention for the other two robbery offences (offences 13 and 14 on memorandum S20190750).

85. DM's application for permission to appeal: DM was sentenced to 5 years' detention under s91 of the 2000 Act. DM's case does not fall within the scope of the 2020 Order because he was under the age of 18 at the date of sentence, and also because he was sentenced to a custodial term of less than 7 years. Nevertheless, it is contended that the sentencing judge failed to attach sufficient weight to the 9 month delay in the matter coming before the court for sentence, and for the other personal mitigating factors. In addition, it is said that the judge attached disproportionate weight to the victim personal statements when finding that there was severe psychological harm, so as to merit a starting point (for an adult) of 12 years.

86. We do not agree. The judge reduced the 6 year term to 5 years (so a reduction of 1 year, or almost 17%) to take account of the delay in the sentencing hearing and the other personal mitigation. This was a substantial reduction that amply (and, arguably, generously) reflected these features. The suggestion that the judge was not entitled to find that the appellant's offending had caused severe psychological harm is without merit. The robberies were marked by threats of considerable violence which were designed to terrorise the victims into handing over their belongings: Mr Briggs was threatened with a 9 inch knife, Mr Lawson was threatened with a 4 inch knife, Ms Winters was threatened (by DM directly) with bolt croppers, Mr Matthews was struck

with a hammer. The judge was entitled to accept the accounts given in the victim impact statements – see *R v Chall* [2019] EWCA Crim 865 *per* Holroyde LJ at [21]-[22]:

> "in making the assessment of whether the psychological harm in a particular case can properly be described as severe, or serious (if a different guideline is being considered), the judge will act on the basis of evidence and will be required in the usual way to give reasons for his or her decision in the sentencing remarks. If the evidence was not such as could provide a sufficient foundation for the judge's assessment, the point can be raised on appeal.
>
> Save where there is an obvious inference to be drawn from the nature and circumstances of the offence, a judge should not make assumptions as to the effect of the offence on the victim. The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanour of the victim when giving evidence may be an important factor in the judge's assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because it comes from a VPS."

87. Here, the evidence amply supported the findings made by the judge.

88. As with Kyron Blackley, the judge did not afford credit for guilty pleas. Although this was not explicitly raised as a ground of appeal (beyond the general complaint that there was insufficient reflection of the personal mitigation), and although it makes no difference to the overall sentence, we consider it appropriate that the sentences should be adjusted accordingly. We therefore quash the sentences of 5 years' detention on offences 4 and 13 on memorandum S20190748 (the robbery on 22 June 2019, and the attempted robbery on 20 July 2019) and substitute sentences of 3 years and 4 months' detention for each of those offences, concurrent with the 5 year term that was imposed for offences 6 and 18 on memorandum S20190748.

89. Driving disqualification: In both cases the judge disqualified the applicant from driving. There is no appeal against these ancillary orders which we consider were, in any event, justified having regard to the driving offences which were committed by each applicant. However, it is recorded that Kyron Blackley is required to pass an extended driving test before the disqualification is lifted (when this does not appear in the judge's sentencing remarks), and the disqualification period was not calculated in accordance with the guidance given in *R v Needham and others* [2016] EWCA Crim 455 [2016] 2 Cr App R (S) 26. We consider that this is best addressed by:

(1) amending the record of conviction to record that Kyron Blackley is disqualified from driving for a period of 4 years in respect of offence 37 on memorandum S20190752 (driving without due care and attention) pursuant to s34(2) Road Traffic Offenders Act 1988, together with an uplift of 6 years under s35B of the 1988 Act,

making a total period of disqualification of 10 years (with no requirement to sit an extended driving test), and

(2) amending the record of conviction to record that DM is disqualified from driving for a period of 4½ years in respect of offence 3 on memorandum S20190748 (driving without insurance) pursuant to s34(2) Road Traffic Offenders Act 1988, together with an uplift of 2½ years under s35B of the 1988 Act, making a total period of disqualification of 7 years (with no requirement to sit an extended driving test).

(9) Sean John Sweeney

90. In the late evening of 21 September 2019 Sean Sweeney and Shannon Cronin decided to commit an offence of robbery so as to secure money to buy cigarettes and alcohol. They walked to a shopping centre. They saw Mr Lloyd. He was obviously inebriated and vulnerable. The applicant and Shannon Cronin followed him for about 10 minutes. The applicant gave his Puffa jacket to Shannon Cronin so that he could punch Mr Lloyd without being restricted by the jacket. When they reached a quiet residential part of the road the applicant ran and launched himself towards Mr Lloyd, punching him very hard from behind directly to Mr Lloyd's head. Mr Lloyd was then manhandled in such a way that his head struck the ground with considerable force. The applicant and Shannon Cronin took his bank card, phone, a vape device, a ring and a bracelet. Mr Lloyd was seriously injured from the punch. He died in hospital 8 days later from the injuries he sustained from the applicant's punch.

91. The applicant was initially charged with murder. He entered a plea to manslaughter in November 2019 and his trial on the outstanding count of murder was listed for 23 March 2020. Shortly before trial the Crown accepted his guilty plea to manslaughter. His case was adjourned to await the trial of Shannon Cronin. That trial was adjourned to September 2020 because of the Covid-19 restrictions. As a result, the applicant was sentenced at the Crown Court at Birmingham after that trial. The sentencing judge applied the Sentencing Council guidelines for unlawful act manslaughter. He considered there were two factors indicating high culpability: death had been caused by the applicant's unlawful act which carried a high risk of grievous bodily harm which was or ought to have been obvious to him, and it was caused in the course of committing a serious offence in which the applicant played more than a minor role. Although there were two factors, the judge considered that they were not sufficient to move the case into the very high culpability category, but that they warranted an upward adjustment from the 12 year category starting point. Moreover, the applicant had a previous conviction for violence, he had been on bail at the time of the offence, and it was premeditated. The judge considered that the appropriate sentence after trial would be 15 years' imprisonment. After giving full credit for plea, he imposed a sentence of 10 years' imprisonment. In respect of Shannon Cronin the judge considered that the medium culpability category applied, with a starting point of 6 years. She had not used the violence that felled Mr Lloyd and she had appeared shocked at the level of violence that had been used, and although she was a party to the robbery she did not play the leading role in it. After taking account of mitigating factors (previous good character, and some health issues) the judge imposed a 4 year sentence.

92. Aside from the 2020 Order, the applicant seeks permission to appeal on the grounds that the sentence was manifestly excessive, there was an unwarranted disparity in the

sentences imposed, and the judge should have reduced the sentenced for totality, given that the applicant had been on remand for this offence when he had been sentenced to 18 months' imprisonment for another offence.

93. We do not consider that the sentence was manifestly excessive or wrong in principle. The 10 year sentence was well within the Sentencing Council guideline bracket and was entirely appropriate for the reasons given by the judge. The difference in the sentences is readily explicable for the reasons given by the judge – Shannon Cronin's role in the offence was quite different from that of the applicant. That role meant she was within a different guideline category. She had previous good character. The applicant did not. It may well be that Shannon Cronin was fortunate to receive a sentence of 4 years, and that a lengthier term may well have been justified. That does not, however, mean that the applicant's sentence was manifestly excessive.

94. An additional ground of appeal that was advanced in writing, but not developed orally, was that the applicant had been sentenced to 18 months' imprisonment on 29 November 2019 for an unrelated offence. It is suggested that sentencing for that offence should have been adjourned so that all matters could have been dealt with at the same time, and that it is likely that the sentence would then have been adjusted for totality. That seems to us, however, a complaint about the approach taken in respect of the sentence imposed on 29 November 2019. It does not provide a ground for complaint about the sentence imposed for this offence of manslaughter.

(10) Ryan Michael Brady

95. In December 2019 Ryan Brady was in a relationship with Rebecca Juster. At 1.30pm he was driving a car in which she was a passenger, along with their 1 year old son. He punched Ms Juster to the cheek. After dropping off their son, he pulled her out of the car and punched her multiple times to the ribs. He took Ms Juster to her home, but she refused to go in. He drove off, and demanded that she hand over her phone. He threatened to kill her. He drove to a car park, where he grabbed her hair, pulled her across his lap, punched her in the back of the head, and used his knee to strike her in the ribs. He then took her back to her home. Once inside, he pushed her to the floor, kicked her, stamped on her multiple times, and grabbed her by the throat using both hands until she lost consciousness. He then punched her in the face saying she had scared him. He pushed her to the floor and continued to stamp on her and kick her. This went on for about 20 minutes. The following morning he jumped on top of her, strangled her, and put his knee into her ribs. He threw her to the floor and stamped on her ribs multiple times. He allowed her to use the toilet. She was able to send a message to her brother to call the police. She remained in the toilet until the police arrived. She was taken to hospital where she was found to have widespread injuries, in particular a head injury with bruising behind the left ear, neck pain, bilateral rib fractures, bilateral haemothorax, a pneumothorax, a very significant injury to the right kidney with more than 50% damage to the renal cortex, and blood around the kidney, suspected injuries to the liver capsule, and multiple bruising over both arms and legs.

96. The appellant was due to be sentenced for causing grievous bodily harm with intent at the Crown Court at Luton on 28 February 2020. His sentence was adjourned to 3 April 2020 because more time was needed to prepare a pre-sentence report. As a result of Covid-19 restrictions, sentence was further adjourned to 11 June 2020. He was sentenced to 9 years and 8 months' imprisonment. Although a finding of dangerousness

was made, the judge considered that the risk was sufficiently addressed by the term of the sentence.

97. The sole ground of appeal is that the judge should have taken account of the impact of the 2020 Order. For the reasons we have given we dismiss the appeal.

(11) Ulili Ramalho

98. At about 6pm on 24 April 2019 Ulili Ramalho with other men attacked Paul Gayle. They were armed with swords and knives. The applicant struck Mr Gayle's arm with a sword, and another man tried to strike him with a knife. Mr Gayle ran away and a member of the public came to his aid. He was taken to hospital where he was found to have sustained a 10cm slash to his left forearm.

99. The applicant was convicted on 27 January 2020, following a trial at the Crown Court at Cambridge, for causing grievous bodily harm with intent. He was due to be sentenced, with his co-accused, on 13 March 2020. Sentence was adjourned to 3 July 2020 because of the Covid-19 restrictions. He was sentenced to 7 years' imprisonment.

100. The sole ground of appeal is that the judge should have taken account of the impact of the 2020 Order. For the reasons we have given we dismiss the appeal.

(12) Frank Allan Fisher and (13) Shane Duke Roger Warburton

101. Frank Fisher was convicted on 27 September 2019 following a trial at the Crown Court at Guildford, for conspiracy to burgle dwellings, conspiracy to burgle non-dwellings, and conspiracy to commit aggravated burglary. The jury could not reach a decision in respect of Shane Warburton. Frank Fisher's sentence was therefore adjourned to await the outcome of Shane Warburton's re-trial. Shane Warburton was convicted on 6 March 2020, at the conclusion of his retrial. The sentence for both men was then adjourned to 21 April 2020, primarily to ensure their counsel were able to attend. Frank Fisher was sentenced to 12 years' imprisonment. Shane Warburton was sentenced to 10 years and 6 months' imprisonment. The sentencing judge indicated that the applicants would serve half of those sentences. On 24 April 2020 the judge reviewed the sentence under s155 of the 2000 Act. After considering the authorities, in particular *R v Round* the judge declined to adjust the sentence, saying "It seems to me following paragraphs 38 and 39 of *R v Burinskas* and the case of *R v Round and Dunn* that there is no reason why I should depart from the general principle that early release and their various ramifications should be left out of account upon sentence, which Lord Justice Hughes said was a matter of principle of some importance." We agree with the judge's approach.

102. In Frank Fisher's case, the sole ground of appeal is that the judge should have taken account of the impact of the 2020 Order. For the reasons we have given we dismiss the appeal.

103. In Shane Warburton's case, it is additionally said that the judge should have reduced the sentence by 3 years to take account of a 3 year sentence that had been imposed for a substantive burglary committed during the period covered by the conspiracy. We disagree. Although that substantive offence took place during the time period of the conspiracy, it did not fall within the ambit of the conspiracy. The applicant was

fortunate that the judge did reduce the sentence by 18 months to reflect the time that the applicant had already spent in custody for that other offence, which would otherwise have counted as time spent on remand.

Attorney General's Reference: Paul Fox

104. In 2004 and 2005 Paul Fox was 27-28 years old. He spent time driving around in his car and chatting to teenage girls. His aim, as the judge found, was to find "teenage girls [and in particular girls under the age of 16] to have sex with." He was acting as a "sexual predator". Two such girls, T and A, were aged 15 and 14 respectively. The offender offered T a lift home. Within a week of that meeting he had sexual intercourse with her in his car. There was a regular pattern of sexual activity, once or twice a week, for a period of 3-6 months. The offender did not use a condom, and he ejaculated. This activity was represented by a count of sexual activity with a child. On one occasion the offender took T to his parents' home. He attached clothes pegs to her nipples, some around the outside of her vagina, and one inside her vagina. She became upset and told him to remove the peg. He did, and replaced it with his penis. T told him to get off. He carried on for about 5 minutes. Her hands were tied behind her back. This incident was charged as a count of rape. The offender's relationship with T came to an end shortly afterwards.

105. Thereafter the offender followed A around in his car. There came a time when he persuaded her to get into his car, and he took her to his parents' house where he committed two sexual assaults. The first occurred in the garage at the house. The offender pulled down A's trousers and knickers and rubbed her vagina. That lasted for a couple of minutes. The offender then took A into the lounge at the house. He pushed her down on her back, lit candles, and poured hot molten wax on to her vaginal area. He told her that he wanted to see her in pain. Two weeks later he took her to a wooded area. He tied her hands to the branch of a tree. He ripped her pants down and started hitting her around her belly. He then had sexual intercourse with her. She was telling him to stop and that it was wrong. He laughed. This incident was charged as a count of rape.

106. Both T and A made victim personal statements. T spoke of suffering from depression which worsened when the legal process got under way. She said that she had started to get her life back together but still was wary and reluctant to trust anyone fully. A struggled emotionally after the offences. She drank heavily and became depressed. She felt paranoid about life and about other people.

107. On 17 February 2020 the offender pleaded guilty, in the Crown Court at Preston, to two offences of sexual activity with a child, in respect of T and A. He denied allegations of rape and sexual assault.

108. A trial commenced on the same day before Mr Recorder Reid QC on two counts of rape (one count relating to T and the other to A) and two counts of sexual assault against A. On 21 February 2020 the jury returned guilty verdicts on those counts. Sentence was adjourned until 24 March for the preparation of a pre-sentence report to deal with the issue of dangerousness. As a result of the Prime Minister's statement on 23 March about the need to impose restrictions on public gatherings, the hearing on 24 March was adjourned. The offender's counsel was concerned that he should be sentenced before 1 April 2020 because of the impact of the 2020 Order. Arrangements were therefore made

for the offender to be sentenced on 31 March 2020. He was due to attend by video link. Because of technical limitations that proved not to be possible. He gave instructions that he wished the hearing to proceed in his absence. The hearing started before Mr Recorder Reid. He heard submissions from both counsel, including mitigation advanced on behalf of the offender. He prepared written sentencing remarks. He was about to pass sentence when he was informed by the then Recorder of Preston that he had concerns about the lawfulness of the hearing because (1) the offender did not – as a result of the technical problems – truly have the freedom to choose whether to attend court, and (2) the hearing was not being properly recorded by the court equipment. As a result, Mr Recorder Reid said that he was not going to continue to pass sentence, and the sentence would be adjourned until about July. He indicated that, having consulted with the then Recorder of Preston, it would be his intention to pass a sentence that would have had the same effect in terms of release as if sentence had been passed before 1 April 2020. Counsel for the Crown indicated that he may wish to make submissions as to the propriety of that course.

109. On 9 September 2020 the case was listed for sentence. Counsel for the Crown submitted that ordinarily the court should not take into account the release provisions when passing sentence. The Recorder said:

> "I do not agree that I am necessarily restricted in the way [Counsel for the Crown] submits. Whilst I must follow binding authority if I am left with no alternative, I do not believe that anyone knowing the full circumstances of this case would feel that an injustice was occurring if I were to sentence the defendant to a term which when the 2020 Order is applied, means he will serve the same custodial term as if I had sentenced him on the 31st of March before the order came into force. On the contrary, the defendant may well feel a burning sense of injustice if I made no allowance for the circumstances that occurred in March.
>
> …I consider, having regard to the comments in *Hardy*, that these are rare and exceptional circumstances, and that I have a power or discretion – whichever is the appropriate word – to sentence a defendant in the way that I have indicated, and that I do now."

110. The Recorder was not referred to *Francis* and did not therefore provide any reasons for distinguishing that case. The Recorder indicated that if he had passed sentence on 31 March he would have imposed a sentence of 12 years' imprisonment. That would have resulted in the offender being released after serving 6 years. In order to achieve the same result (in terms of time spent in custody, but not, it might be said, time spent on licence), he imposed concurrent sentences of 9 years for the two offences of rape.

111. We can well understand why, in the circumstances we have outlined, the Recorder considered it appropriate to adjourn the proceedings. However, it is not clear to us that it was in fact necessary to do so. We do not understand the suggestion that the offender did not truly have the freedom to choose whether to attend court. He was represented, and he had given his consent for the proceedings to take place in his absence. That was a sufficient basis to proceed. The fact that there were problems with the recording equipment did not mandate an adjournment. It would have been open to the Recorder

to direct that it was not necessary for the proceedings to be recorded – see Criminal Procedure Rules Part 5.5(1)(a).

112. Be that as it may, on the very last day before the 2020 Order came into force, the Recorder was on the point of passing sentence when he decided to adjourn the proceedings for reasons that were well beyond the control of the offender, and in circumstances where the offender had expressed a wish for the case to proceed. Moreover, the Recorder indicated that he would adjust the sentence that he would otherwise have passed to take account of the 2020 Order.

113. The facts of this case throw into sharp focus the complaints of injustice that are advanced on behalf of all appellants. We do not, however, consider that there is any principled basis for treating this case any differently from that of the other appellants. The fact that the hearing was listed for the day before, rather than the week or month before, the order came into force does not provide a principled basis for taking a different approach. Nor does the fact that the hearing had started. Nor (in the light of *Tony Dunn*) does the indication that the Recorder gave. The fact is that sentence was passed after 1 April 2020, the 2020 Order applies, and it was not open to the Recorder to adjust the sentence to reflect the change to the statutory provisions.

114. The Recorder had considered that a 12 year sentence would otherwise have been justified. It follows that the Recorder considered that 12 years was the shortest period that was commensurate with the seriousness of the offence, taking into account the aggravating and mitigating features (s231(2) and (7) Sentencing Code; s153 Criminal Justice Act 2003). The offender, for his part, does not make any complaint about that assessment. Nor does he complain about the recorder's assessment that each of the offences of rape fell within category 2A of the definitive guidelines, giving a starting point of 10 years' custody, and a category range of 9-13 years' custody. Nor does he take issue with the fact that there were a number of aggravating features.

115. That being the case, the sentence of 9 years' imprisonment (at the bottom of the category range, in a case where there were two category 2A offences, each with aggravating features) was, on the Recorder's own approach, clearly unduly lenient. We therefore quash the sentences that were imposed.

116. Section 36(1)(b)(ii) of the Criminal Justice Act 1988 permits us in those circumstances to pass in place of the sentence we have quashed "such sentence as (we) think appropriate for the case…" On behalf of HM Attorney-General Ms Walker argues that the appropriate overall sentence would be 14 years' imprisonment. In relation to the individual offences of rape this would be beyond the category range as set out in the Sentencing Council Definitive Guideline for Sexual Offences. It is accepted that the offences of rape were Category 2A offences with a category range of 9 to 13 years. Mr James, on behalf of the offender, argues that it would be wrong in principle to increase the sentence to that extent. He relies on *R v Long* [2020] EWCA Crim 1729 [2021] 4 WLR 5. In that case the sentencing judge had imposed a sentence based on a sentence at trial at the top of the category range for the relevant offence, the offence in that case being manslaughter. Leave to refer that sentence was refused. This court concluded that no basis had been demonstrated to justify a sentence outside the category range.

117. We do not consider that the decision in *Long* assists Mr James at all. That was a case of a single sentence for a single offence where no reason had been identified by the

Attorney General for the suggestion that the judge should have departed from the statutory guidelines. Here, there were 2 separate offences against 2 separate complainants. The logic of *Long* does not apply in those circumstances.

118. It is argued on behalf of the Attorney-General that the appropriate overall sentence would be 14 years for these reasons:

- There were two separate offences of rape.
- There were multiple harm factors i.e. severe psychological harm, additional degradation, violence.
- There were multiple culpability factors i.e. planning, use of alcohol, previous violence (against A).
- There were additional aggravating factors i.e. specific targeting of a particularly vulnerable victim, ejaculation.
- The offences of rape were committed against the background of other sexual offending against T and A.

119. In the unusual circumstances of this case we know the sentence that the Recorder would have imposed had he not reduced the sentence to take account of the 2020 Regulations. His close analysis of each of the offences by reference to the Sentencing Council Definitive Guideline set out the appropriate starting point in each case. He noted the aggravating factors. He took account of the risk of double counting features of the offending both at Step One and Step Two of the sentencing process pursuant to the guideline. The overall sentence of 12 years' imprisonment that would have been imposed on 31 March 2020 was intended to reflect the totality of the offender's sexual activity. That sentence also took into account the mitigating effect, such as it was, of the offender's good behaviour and conduct in the 15 years since the offences.

120. The Recorder had heard the evidence in the trial. He had seen and heard T and A and the offender give evidence. He was in the best position to reach an assessment of the case as a whole. He set out all of the factors to which he had regard in reaching the final sentence of 12 years' imprisonment. It cannot be said that he failed to take account of any relevant matter. He did not give weight to any matter which was irrelevant to the sentencing process. In our view we must give considerable respect to the conclusion reached by this experienced trial judge as to the proper sentence. In determining whether we should accede to the submission made on behalf of the Attorney-General it is appropriate to ask whether the sentence the Recorder would have imposed fell outside the range of sentences which a judge in his position reasonably could consider to be appropriate. We do not consider that sentence would have fallen within that description. In those circumstances we substitute for the sentences of 9 years' imprisonment concurrent sentences of 12 years' imprisonment. That is the sentence we think is appropriate in the unusual circumstances of this case. Those circumstances may properly be described as unique. Whether another judge would have been justified in imposing a longer sentence is not for us to say.

121. We add one further point. One of the offences of sexual activity with a child to which the offender pleaded guilty was a lesser alternative to an offence of rape for which he

was subsequently convicted by the jury. In those circumstances, the offence to which he pleaded guilty should have been ordered to lie on the file (rather than an order being made that no separate penalty should be imposed for that offence) – see *Ismail* [2019] EWCA Crim 290 at [23]-[26]. Accordingly, we quash the decision to impose no separate penalty in respect of that offence and instead direct that it should lie on the court file.

Conclusion

122. In each case where the sentencing judge did not take account of the 2020 Order the judge was right not to do so. In no case was the resulting sentence wrong in principle or manifestly excessive for failure to take account of the 2020 Order. We have, moreover, dismissed the other discrete challenges that were advanced in each of the appeals and applications for permission to appeal.

123. It follows that:

(1) The appeals of Tristan Panel, Sifean Ghilani, Levar Thomas, Karl Lawrence and Ryan Brady are dismissed.

(2) The appeal of Atiyyah Gidden is dismissed, but we direct that the Crown Court record is amended to reflect that the sentence is detention in a Young Offender Institution rather than imprisonment.

(3) The application of Ulili Ramalho for an extension of time in which to seek leave to appeal is granted.

(4) The applications for permission to appeal made by Jason Thompson, Kyron Blackley, DM, Sean Sweeney, Ulili Ramalho, Frank Fisher and Shane Warburton are granted, but the appeals are dismissed save that:

(a) in respect of Kyron Blackley we quash the 9 year concurrent terms for 3 of the offences and substitute terms of 6 years (without thereby disturbing the overall 9 year term that was imposed), and we adjust the record of the driving disqualification in the way we have indicated at paragraph 89(1) above;

(b) in respect of DM we quash the 5 year concurrent terms for 2 of the offences and substitute terms of 3 years and 4 months (without thereby disturbing the overall 5 year term that was imposed), and we adjust the record of the driving disqualification in the way we have indicated at paragraph 89(2) above.

(5) We grant leave to the Attorney General to refer the sentence of Paul Fox, we quash the sentence of 9 years' imprisonment, and we substitute a sentence of 12 years' imprisonment concurrent for each of the offences of rape. We quash the decision to impose no separate penalty in respect of count 4 and instead direct that it should lie on the court file.